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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

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

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Draft CDDH report on the effective processing and resolution of cases relating to inter-State disputes

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Note

This document is prepared by the Co-rapporteurs, under the supervision of the Chair and the Vice-Chair of the DH-SYSC-IV and with the support of the Secretariat, for discussion at the 3rd meeting of DH-SYSC-IV which will take place from 14 to 16 April 2021.

It consolidates the following amendments to the draft CDDH Report on the effective processing and resolution of cases relating to inter-State disputes (draft CDDH Report):

(i) the changes that were discussed and/or agreed at the 2nd meeting of DH-SYSC-IV (9-11 September 2020) in respect of paragraphs 8 to 80 of the draft CDDH Report;

(ii) the compromise proposals of the Co-rapporteurs, the Chair and the Vice-Chair, notably on paragraphs 1 to 7/1. and 81 to 168 of the draft CDDH Report (document *DH-SYSC-IV(2020)04REV*), as they were transmitted to the DH-SYSC-IV subsequently to the 2nd meeting for drafting proposals by 19 October 2020;

(iii) the amendments and drafting proposals submitted by member States by and after the deadline of 19 October 2020 (document *DH-SYSC-IV(2020)06REV)*. Wherever the member States' amendments contained alternative proposals to elements and/or issues discussed or proposed in steps (i) and (ii) above such alternative proposals are indicated as options;

(iv) updates introduced by the Co-rapporteurs, the Chair and the Vice-Chair taking into consideration the inter-State case-law pronounced by the Court after the 2nd meeting of DH-SYSC-IV. These updates complement or consolidate the analysis of issues which were already contained in the draft CDDH Report. In exceptional cases changes of structure are proposed to ensure the coherence of the document and to facilitate its discussions. The updates do not preempt the Drafting Group's discussion of and deliberation on other elements or issues relating to the recent case-law or any other issues.

List of acronyms used in this document

ACHR	American Convention on Human Rights
CERD	Committee on the Elimination of Racial Discrimination
CDDH	Steering Committee for Human Rights
DH-SYSC	Committee of Experts on the System of the European Convention on Human Rights
DH-SYSC-IV	Drafting Group on effective processing and resolution of cases relating to inter-State disputes
EU	European Union
HRC	Human Rights Committee
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	United Nations International Covenant on Civil and Political Rights
ICJ	International Court of Justice
OAS	Organisation of American States

Contents

I. EXECUTIVE SUMMARY

1. A growing number of cases linked to inter-State disputes which are pending before the European Court of Human Rights (the Court) have brought the question how to ensure their effective processing and resolution **including** to the forefront of last years' debates on tackling the caseload of the Court. The processing of inter-State cases and of the high number of individual applications, which relate to inter-State conflicts raises exceptional challenges for the Court **and State-parties to the dispute**, as these cases are particularly time-consuming ~~for Judges and Registry staff~~ and complex as a result of their nature and dimension. **Such cases also necessitate detailed and careful consideration by the Court of various aspects of the future judgement, including possible implications at the stage of its execution. States Parties experience difficulties due to lack of concrete procedural rules of the Court that would specifically address issues relating to the processing of inter-State cases, especially establishment of facts and burden of proof. Moreover, the Convention lacks provisions regarding the issues of correlations between an inter-State case and individual applications raising the same issues that had been raised in the inter-State case.**

2. It is widely recognised that the right of an individual application is a cornerstone of the system for protecting the rights and freedoms set forth in the European Convention on Human Rights (the Convention). The inter-State application, on the other hand, can be seen as embodying the system of collective guarantee enshrined in the Convention. The subject-matter of inter-State applications tend to be, albeit not exclusively, in relation to particularly serious situations, often where largescale violations of the Convention are alleged. Through its inter-State case-law the Court has played a prominent role in guaranteeing a peaceful public order in Europe and addressing the responsibility of States, from a Convention perspective, for injuries caused by their internationally wrongful acts. The Court's case-law in inter-State cases is notable for being more extensive than 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 viability of the system of the Convention.

3. In analysing the challenges that the processing in parallel of inter-State applications and individual applications related to inter-State cases or conflicts may create this [draft] report takes a close look at the differences in procedural requirements applicable to these two types of applications. The lower admissibility requirements applicable to the inter-State application reflect the distinct features of this application which are enshrined in the Convention and established by the Court in its case-law. These include notably the unqualified right of a State to bring any alleged breaches of the Convention to the Court as well as the particular quality of the inter-State procedure as an expression of the system of the collective guarantee of the Convention. Despite complexities of the parallel processing of inter-State applications and individual applications relating to inter-State conflicts, the Court's recent practice of prioritising inter-State applications without putting aside the examination of individual applications **seems to be aimed** ~~can help~~ **at** ensur**ing**~~e~~ the effective processing of these cases and avoide**ing** duplication or conflicting judgments. This part of the [draft] Report also highlights 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 cases or individual cases relating to conflicts in parallel by the Court and other international bodies may potentially result in contradictory results concerning

human rights obligations set forth in the Convention and other international human rights instruments, **as well as general international law on State responsibility**. Ultimately this would lead to uncertainty for States as to how they can fulfill 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. ~~Nevertheless,~~ a**A**n analysis of the relevant case-law of the Court as well as a comparative outlook over the case-law of other international bodies reveals that in ~~practice~~ **insofar** 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. **However, such risks exist in the future and should be mitigated.**

5. A significant part of the analysis in this [draft] report is dedicated to 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 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. **In accordance with the Convention, just satisfaction is afforded to the injured party.** According to the case-law of the Court, 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, the Court's principle is that just satisfaction in inter-State cases should always be awarded for the benefit of individual victims. Practical difficulties encountered by the Court relate to the identification of victims when **a large number of individuals is** ~~large-scale violations of human rights are~~ involved, which in turn increases the risk of awarding just satisfaction to individuals who may not be eligible for such an award. Hence, it is important that, as the Court has stated, the applicant State is, from the outset, (Opt 1) **at the just satisfaction stage** / (Opt 2) ~~at the just satisfaction stage~~, asked to submit a list of clearly identifiable individuals who are victims of the alleged human rights violations. Moreover, there is often a time gap between the judgment on the merits and the one on just satisfaction. In order to avoid undue delays, it is important that the parties exchange their observations on just satisfaction within the time that may be fixed to this end in the operative part of the judgment on the merits.

7. Lastly the [draft] report looks at friendly settlement as a possible mechanism for resolving inter-State cases. While the Court's practice in this respect is not extensive 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 in terms of protecting and promoting compliance with the Convention.

7/1.(*updated*) The~~ exchanges of views amongst independent experts and stakeholders at the High-level~~ Conference **"Interstate cases under the European Convention on Human Rights**

- Experiences and current challenges" to be organised by the German Chairmanship of the Committee of Ministers **on 12 and 13 April 2021 provide a welcome opportunity for DH-SYSC-IV to hear the views of independent experts and stakeholders on the issues and questions raised in this draft Report. The Conference discussions** may usefully bring more food for thought into the Council of Europe's intergovernmental processes aimed at making proposals for a more efficient processing and resolution of cases related to inter-State disputes.

II. THE MANDATE OF DH-SYSC-IV

8. 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 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]

9. 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* ~~topic~~[3] on the basis of a (i) document prepared by its Bureau[4] (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]

10. The Committee of Ministers adopted, at its 1361st meeting (19-21 November 2019) the terms of reference of the Committee of Experts on the System of the European Convention on Human Rights (DH-SYSC) which operates 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]

11. 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

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

questions regarding inter-State applications require a more in-depth examination. Therefore, the CDDH considered it useful that the CDDH/DH-SYSC conduct work facilitating proposals to ensure the effective processing and resolution of cases relating to inter-State disputes as well as individual applications arising from situations of conflict between States, without thereby limiting the jurisdiction of the Court, taking into account the specific features of these categories of cases, *inter alia* regarding the establishment of facts in the next biennium.[11]

12. Also, at its 92nd meeting the CDDH decided to set up the Drafting Group DH-SYSC-IV to operate under the authority of the DH-SYSC with a view to submitting to the Committee of Ministers, before the 31st of December 2021, its proposals on effective processing and resolution of cases relating to inter-State disputes. The CDDH gave to DH-SYSC-IV the following terms of reference:

"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[12]; (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,[13] 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 German Chairmanship of the Committee of Ministers 7 (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.[14] On 12 March 2020 the Rapporteur Group on Human Rights (GR-H) held an exchange of views on this report in the light of comments received from the Court.[15] A Committee of Ministers' decision on the report is awaited in due course.+

[11] Ibid, see §§ 124.
[12] See document CDDH(2019)R92Addendum2
[13] See document CDDH(2019)R92Addendum1.
[14] See Ministers' Deputies decision at the 1363rd meeting, 11 December 2019, document CM/Del/Dec(2019)1363/4.2b
[15] See document GR-H(2020)CB2.

III. INTRODUCTION

(Updated)*1. Statistics*[16]

14. Bearing in mind that several inter-State cases and a number of related individual applications have been dealt with by the Court and/or the European Commission of Human Rights in the first decades of the Convention, the focus of this report lies on the current challenges of the Court's caseload as they have been identified in the Interlaken process[17] and especially in the Copenhagen Declaration.[18] As regards cases that have been dealt with by the Court and/or the European Commission of Human Rights, retrospectively it can be said in a succinct manner that **S**starting from the 7th of May 1956 when the first inter-State application was introduced 15 **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);

- 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));

[16] This information has been provided by the Registry of the Court.

[17] See Contribution of the CDDH to the evaluation provided for by the Interlaken Declaration, CDDH(2019)R92Addendum2, paragraph 122.

[18] See paragraph 45 of the Copenhagen Declaration which acknowledges in the broader context of the caseload challenge, the challenges posed to the Convention system by situations of conflict and crisis in Europe. Also, the High Level Conference meeting in Copenhagen invited the Committee of Ministers, in consultation with the Court, and other stakeholders, to finalise its analysis, as envisaged in the Brighton Declaration, before the end of 2019, of the prospects of obtaining a balanced case-load, *inter alia*, by exploring ways to handle more effectively cases related to inter-State disputes, as well as individual applications arising out of situations of inter-State conflict, without thereby limiting the jurisdiction of the Court, taking into consideration the specific features of these categories of cases inter alia regarding the establishment of facts, see Copenhagen Declaration, paragraph 54 (c).

- 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));

- Demark 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 of 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).[19]

14/1. Thousands of individual applications relating to inter-State disputes have also been ~~resolved~~ **decided by the Court and/or the former Commission** throughout the years. The**ir** numbers**, as provided for by the Court's Registry,** ~~of terminated~~ ~~cases~~ are **included in the appendix to this [draft] report** ~~as follows: 2851 in relation to the conflict in Georgia; [2357 in relation to the conflict in Ukraine]; 1715 in relation to the Cyprus issue; [497 in relation to the Nagorno-Karabakh conflict] and [109 in relation to the conflict in the Transdniestrian region of the Republic of Moldova]~~.

15. ~~Nonetheless, the number of applications linked to situations of conflict between member States continues to be high in the recent years.~~ There are currently ~~eight~~ **10** inter-State **cases** ~~applications~~ pending before the Court with a great majority ~~of cases~~ linked to situations of conflict between member States**.**[20] ~~as well as~~ **There are also** numerous related pending individual applications **whose numbers, as provided for by the Court's Registry, are also included in the appendix to this [draft] report.**

~~16. As regards individual applications related to the conflict in Georgia, more than 3,300 individual applications against Georgia were lodged by persons affected by the hostilities in South Ossetia at the beginning of August 2008.[21] In the course of 2010, 5 communicated cases and 1,549 new applications belonging to that group were struck out of the Court's list as the Court concluded that the applicants no longer wish to pursue the application within the meaning of Article 37 § 1(a) of the Convention. The Court subsequently dismissed the requests made by the applicants' lawyers, asking the Court to reconsider its decision and to examine these cases pursuant to Article 37 § 2~~

~~[19] The full list of inter-State applications is available at https://echr.coe.int/Documents/InterState_applications_ENG.pdf~~
~~[20] See list of inter-State applications is available at https://echr.coe.int/Documents/InterState_applications_ENG.pdf~~
~~[21] The Court uses the terms "Abkhazia" and "South-Ossetia" to refer to the regions of Georgia which are beyond de facto control of the Georgian Government. See *Abayeva and Others v. Georgia* (applications nos. 52196/08, 52200/08, 49671/08, 46657/08 and 53894/08, decision of 23 March 2010, footnote 1), *Khetagurova and Others v. Georgia* (applications nos. 43253/08 43254/08 43255/08 and 1548 other applications, decision of 14 December 2010, footnote 1) and *Georgia v. Russia* (II) (application no. 38638/08, decision of 13 December 2011, footnote 3), *Kulumbegov v. Georgia* (application no. 15213/09, decision of 30 April 2020, footnote 1). The Russian Federation did not agree with the addition of this footnote at the 2nd meeting of DH-SYSC-IV (9-11 September 2020).~~

of the Convention. Furthermore, 6 leading cases were declared inadmissible by a Chamber in December 2018 and 900 cases were declared inadmissible by a Single Judge in June and July 2019.

17. As a result, 435 individual applications against Georgia are still pending. Ten of them were communicated, and the applicants and the third party (the Russian Federation where the applicants are Russian nationals) submitted their observations on the admissibility and merits. Furthermore, 21 of these applications were registered, as from 2010, against both Georgia and the Russian Federation in which the applicants (Georgian nationals) complain about breaches of their Convention rights resulting from the hostilities in August 2008 and the alleged absence of adequate investigations in both States.

18. As of February 2020, the Court has also received 176 applications involving applicants from Georgia complaining against the Russian Federation, out of which 170 applications involving 845 applicants were communicated to the Russian Government for information. The Georgian Government was informed about the communication as a third party.

19. As regards individual applications related to the conflict in Ukraine, according to the information provided by the Court as of February 2020, there were a total of 6,490 pending individual applications concerning the events in Eastern Ukraine and Crimea, of which 120 have been communicated.[22] The 6,490 applications are linked to the inter-State case *Ukraine v. Russia* (regarding Crimea), no. 20958/14 and to the inter-State case *Ukraine v. Russia* (regarding Eastern Ukraine) no. 8019/16.

- 5,590 of the 6,490 applications concerned Eastern Ukraine. 4,500 of those 5,590 applications were lodged against Ukraine and 40 of them were lodged against the Russian Federation. The remaining 1,050 applications were lodged against both countries. On 5 May 2020 the Court decided to strike out of the list 327 applications.[23]

- The remaining 900 of the 6,490 applications concerned Crimea. 770 of those 900 applications were lodged against the Russian Federation and 10 applications were lodged against Ukraine. 120 applications were lodged against both countries.

19.bis. [INSERT NUMBER AND OTHER RELEVANT SPECIFICS TO BE PROVIDED BY THE REGISTRY OF THE COURT] individual applications are pending before the Court in relation to the inter-State application the Netherlands v. Russia.

19.ter. [90 individual applications are pending before the Court in relation to the Cyprus issue. 50 individual applications are pending in relation to the events in the Transdniestrian region of the Republic of Moldova.][INSERT OTHER RELEVANT SPECIFICS TO BE PROVIDED BY THE REGISTRY OF THE COURT]

20. As regards individual applications related to the [Nagorno-Karabakh conflict], according to the information provided by the Court as of February 2020, there were 1,710 pending individual

[22] Five of the communicated applications had been introduced against the Russian Federation only and therefore they were communicated solely to Russia. The remaining applications had been directed against both Ukraine and the Russian Federation and they were thus communicated to both Ukraine and the Russian Federation.
[23] *Yuldashev and others v. Russia and Ukraine*, no. 35139/14, 5 May 2020

~~applications; 1054 of which against Armenia and 655 against Azerbaijan. Of the 1710 applications:~~

- ~~1110 pending applications concern issues of displaced persons' continued inability to return to their homes and property from which they fled in the years 1988-1993 involving complaints similar to those examined by the Court in the cases of *Chiragov and Others v. Armenia* (no. 13216/05) and *Sargsyan v. Azerbaijan* (no. 40167/06). 608 applications are against Armenia and 502 applications are against Azerbaijan.~~

- ~~562 pending applications concern complaints by civilians, predominantly regarding damage and destruction of property but a handful of cases also involve the killing of civilians (439 applications are against Armenia and 123 applications are against Azerbaijan). Of these, 5 applications were communicated in July and December 2019; two applications were communicated against Armenia and two against Azerbaijan.[24]~~

- ~~28 pending applications (5 against Armenia and 23 against Azerbaijan) concerning the mutilation of dead (mostly) soldiers' bodies. All these cases were communicated in November 2016.~~

- ~~11 pending applications (5 cases against Azerbaijan) concerning the detention and alleged torture/killing of Armenian citizens in Azerbaijan. All these cases were communicated.[25]~~

~~*2. Challenges*~~

21. Processing inter-State cases and the high number of related individual applications as ~~described above~~ **reflected in the appendix**, raises exceptional challenges for the Court **and the State Parties to the cases**, as these cases are particularly time-consuming for (Opt 1) Judges and Registry Staff / (Opt 2) ~~**for Judges and Registry Staff**~~ and complex as a result of their nature and dimension.[26] **The Convention does not specifically deal with the issue of the correlation between interstate cases and individual applications. Against this background the Court has developed its practice and established guiding principles. However, this is not sufficient due to the fact that States-Parties experience difficulties because of the lack of concrete procedural rules that would specifically address issues relating to the processing of inter-State cases and individual applications.** It should be recalled that the

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~~[24] The "four-day war" in [April] 2016, shelling along the line of contact [between Azerbaijan and the "Republic of Nagorno-Karabakh" "NKR"] has led to 1057 applications (695 against Armenia and 362 against Azerbaijan) with complaints by civilians on both sides, predominantly regarding damage and destruction of property but a handful of cases also involve the killing of civilians. One application from each side were rejected as inadmissible due to the applicants' failure to substantiate their claims by Chamber decisions in February 2019 and a total of 346 applications (108 against Armenia and 238 against Azerbaijan) were subsequently rejected by Single Judge decisions in November 2019 (on the basis of the Chamber decisions). 147 applications against Armenia were rejected by Single Judge decisions in March 2019 for having been lodged out of time. Consequently, there remain 562 applications in this category (439 against Armenia and 123 against Azerbaijan).~~

~~[25] One judgment was issued recently, namely *Saribekyan and Balyan v. Azerbaijan* (no. 35746/11, 30 January 2020, a request for referral to the Grand Chamber is pending). Amongst the 11 pending applications there are: 1 case against Armenia concerning the conviction for murder, espionage, etc in the "NKR" of two Azerbaijani nationals (communicated), 4 cases (1 against Armenia and 3 against Azerbaijan) relating to the killing of soldiers close to the line of contact [between Azerbaijan and the "NKR"] in November 2016 (all communicated) and 1 case against Armenia concerning shelling and resultant death close to the line of contact in July 2017.~~

[26] See document CDDH(2019)22 § 4.

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".[27]

21/1. 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. As 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.[28] This creates legal uncertainty *vis-à-vis* both general international law and the Court's own (inconsistent) practice.

22. 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 for lack of a prior examination of the cases by the national courts. [29] 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.[30]

23. Moreover, the processing in parallel of, on the one hand, inter-State cases relating to conflict situations and, on the other hand, a high number of individual applications relating to such situations raises questions regarding their prioritisation as well as in terms of avoiding inconsistencies and duplications. 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.

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

25. The Article 41 procedure is normally very complex. The absence of lists of clearly identifiable individuals by the applicant government from the outset (Opt 1)**, at the just satisfaction phase**, (Opt 2)~~, at the just satisfaction phase~~ has raised practical questions in terms of awarding just satisfaction in inter-State cases to individual victims.

26. This [draft] report approaches these issues from the perspective of the requirements of the Convention**, [together with** ~~and~~ the Rules of the Court ~~as well as~~ **and** the relevant principles established by the Court in its case-law**, as well as other relevant rules of 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

[27] See the Copenhagen Declaration, § 45.
[28] CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, document CDDH(2019)R92 Addendum 1, paragraph 167.
[29] See also document CDDH(2019)22, paragraph 20.
[30] See document CDDH-BU(2019)R101 Addendum, paragraph 87.

this analysis. A comparative outlook on specific aspects of proceedings of other international bodies draws on similarities of approaches and convergences between the Court and these bodies with regard to the identified challenges; it seeks to highlight elements for possible further reflection by DH-SYSC-IV with a view to making proposals regarding the effective processing and resolution of cases relating to inter-State disputes.

III-BIS. QUESTIONS REGARDING THE APPLICATION OF THE INTERNATIONAL LAW OF STATE RESPONSIBILITY

[THIS NEW SECTION SHOULD ADDRESS THIS IMPORTANT CHALLENGE THAT UNDERMINES THE EFFECTIVENESS OF THE COURT IN INTER-STATE CASES. INSPIRATION MAY BE DRAWN FROM THE CDDH REPORT ON THE ECHR'S PLACE IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER.]

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

27. As shown above a considerable number of individual applications relate to inter-State conflicts or inter-State applications pending before the Court. This [draft] report does not seek to elaborate how individual applications are linked to inter-State conflicts or applications as this would require a comparison and analysis of the parties in the respective proceedings, the relevant provisions of the Convention on which the parties rely, the scope of the applicants' complaints and the types of redress sought. Such an analysis is at the discretion of the Court which is exclusively competent to assess the similarity of cases, involving the comparisons, mentioned above and to determine whether its jurisdiction is to be asserted or excluded by virtue of Article 35 § 2(b) of the Convention. Therefore, whenever this [draft] report makes reference to related inter-State cases and individual applications, or to individual applications related to inter-State conflicts, it relies on the Court's concept of establishing a connection between individual and inter-State applications *(update)* **which is explained in the Appendix**.

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. [31] 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. [32] 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

[31] *Austria v. Italy*, no.788/60, decision of 11 January 1961, page 20.
[32] Ibid.

create subjective and reciprocal rights for the High Contracting Parties themselves.[33] 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.[34] 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 Convention[35] the inter-State application provides an additional pathway to ensure the protection of the rights of individuals.

29.*(update)* **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 Government and to put an end to them and prevent their recurrence. [36] 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.[37] 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.[38] Therefore, the Court is called upon to examine whether or not there existed administrative practices with the Articles of the Convention allegedly breached.[39]**

29/1. *(update)* **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.[40] While these criteria define a general framework they do not indicate the**

[33] Ibid., page 19.
[34] Ibid.
[35] 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.
[36] ***Ukraine v. Russia** (dec) [GC]*, **nos. 20958/14 and 38334/18, § 235, 16 December 2020.**
[37] ***Ukraine v. Russia** (dec) [GC]*, **nos. 20958/14 and 38334/18, § 238, 16 December 2020.**
[38] ***Georgia v. Russia** (II) (merits) [GC]* **no. 38263/08, § 100, 21 January 2021.**
[39] ***Georgia v. Russia** (II) (merits) [GC]* **no. 38263/08, § 101, 21 January 2021.**
[40] ***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**

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.[41]

29/2. *(update)* **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 exhaustions of domestic remedies under Article 35 § 1 of the Convention (procedural admissibility, see also paragraphs 36-36/2 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 37-37/3 below).**[42]

29/3. *(updated)* **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,** ~~T~~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.

29/4. 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.[43] In such cases the primary goal of the applicant Government is that of vindicating the public order of Europe [within the framework of collective responsibility]under the Convention even if the State's own nationals are not concerned. [44] (Opt 1) The Court's judgments with regard to such claims may – as in other cases decided by the Grand Chamber – have an indirect ***erga omnes*** effect given that they may serve to 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.[45] / (Opt 2) ~~The Court's judgments with regard to such claims may as in other cases decided by the Grand Chamber have an indirect ***erga omnes*** effect given that they may serve to 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.~~[46]

30. 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~~ **may be** ~~substantially~~ **somewhat** 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".[47] **However, application of rules**

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.

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

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

[43] See also *Austria v. Italy*, quoted above, page 19.

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

[45] *Ireland v. United Kingdom*, no. 5310/71, § 154, 18 January 1978.

[46] ~~*Ireland v. United Kingdom*, no. 5310/71, § 154, 18 January 1978.~~

[47] *Cyprus v. Turkey (just satisfaction) [GC]*, no. 25781/94, § 45, 12 May 2014.

of general international law concerning diplomatic protection, including those relating to compensation, may not contravene the norms of the Convention, which are to be considered *lex specialis*. Taking also into account the discrepancy between the Court's approach to State responsibility and rules of general international law on this matter, drawing parallels with diplomatic protection becomes difficult.

31. Moreover, applications relating to **situations of** **inter-State conflicts** (Opt 1) **and property protection disputes** have ~~emerged~~ **increased** ~~as a third category of inter-State applications~~ **[**in ~~the last ten~~ **recent** years**]** (see ~~section III/1 above on statistics~~ **Appendix**).

(Opt 2 failing acceptance of the proposed phrase "and property disputes") **31/2. Applications relating to breaches of property rights (or peaceful enjoyment of property) have emerged as a distinct category in recent years.**

32. The requirements regarding the **content** of an inter-State application are specified in Rule 46 of the Rules of the Court. 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 of the proceedings that translations of all the relevant documents to which the parties refer in their observations, in particular copies of any relevant documents and in particular the decisions, whether judicial or not, relating to the object of the application, be submitted in one of the two official languages of the Court. Overall, this would save both time and resources. 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.[48] The Court has started to implement these recommendations.

33. (Opt 1) **The issue of translating documents appended to the application in an inter-State case raises significant challenges for the Court as well as for the applicant and respondent States. Further reflection is needed to improve the current situation *inter alia* by considering the possibility of reviewing the Rules of Court as envisaged by the Court.** ~~From the applicant State's perspective it appears that it would be feasible to provide at the outset at least translated summaries of all documents it has submitted pursuant to Rule 46 (g) into one of the official languages of the Court rather than translations of all such documents. The Court would be better placed to determine on the basis of the summaries which documents are relevant to be translated in full and, thereafter, request the applicant State to provide such translations.~~

(Opt 2) ~~The issue of translating documents appended to the application in an inter-State case raises significant challenges for the Court as well as for the applicant and respondent States. Further reflection is needed to improve the current situation *inter alia* by considering the possibility of reviewing the Rules of Court as envisaged by the Court.~~ From the applicant State's perspective it appears that it would be feasible to provide at the outset at least translated summaries of all documents it has submitted pursuant to Rule 46 (g) into one of the official languages of the Court rather than translations of all such documents. The Court would be better placed to determine on the basis of the summaries which documents are relevant to be translated in full and, thereafter, request the applicant State to provide such translations.

(Opt3) **The issue of translating documents appended to the application in an inter-State case raises significant challenges for the Court as well as for the applicant and respondent States. Further reflection is needed to improve the current situation *inter alia* by considering the possibility of reviewing the Rules of Court as envisaged by the Court.** ~~From~~

[48] Ibid, §§ 9 and 10.

~~the applicant State's perspective it appears that it would be feasible to provide at the outset at least translated summaries of all documents it has submitted pursuant to Rule 46 (g) into one of the official languages of the Court rather than translations of all such documents. The Court would be better placed to determine on the basis of the summaries which documents are relevant to be translated in full and, thereafter, request the applicant State to provide such translations.~~ **A consensus approach may be that Rule 46 prescribes that the applicant State, *at a minimum*, has to submit at the outset the statement of facts, the statement of the alleged violation(s) of the Convention and a statement on compliance with the admissibility criteria in one of the official working languages of the Court. Furthermore, the applicant state has to make sure that any supporting / evidentiary materials are also submitted in one of the official working languages as soon as the inter-State application is communicated to the respondent state. For any other documents, the applicant state must provide the Court with translated summaries on the basis of which the Court can determine whether they have to be translated in full by the applicant State at a stage in the proceedings to be decided by the Court.**

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

34. 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 apply to individual applications only.

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

36. *(updated)* ~~Similarly, t~~The requirement of ***exhaustion of domestic remedies***, also established in Article 35 § 1 of the Convention, applies to ~~both the individual and the~~ 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.**[49] 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 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.[50]

36/1. *(updated)* **In principle,** ~~T~~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 29 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.**[51] **In any event the rule on the exhaustion of domestic remedies does not**

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[49] ***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.**

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

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

apply where an administrative practice has been shown to exist and is of such a nature as to make proceedings futile or ineffective.[52] ~~For example, in the case of *Ireland v. United Kingdom*, the Commission found that the employment of interrogation techniques in violation of Article 3 of Convention constituted administrative practice and that consequently the rule on the exhaustion of domestic remedies did not apply.[53] In the case of *Denmark, Norway, Sweden and the Netherlands v. Greece*[54] the requirement of exhaustion of domestic remedies, according to the generally recognised rules of international law did not apply taking into consideration that the object of that inter-State application was the determination of the compatibility with the Convention of legislative measures and administrative practices in Greece.[55]~~

36/2. 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.[56] In respect of individual applications, the Court has taken into account new remedies introduced after the date on which the application is lodged provided that individuals have reasonable time to familiarise themselves with the judicial decision.[57]

37. *(updated)* 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 ~~cannot~~ **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.[58] The Court can** establish~~ing~~ **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

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[52] ***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. ~~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.~~

~~[53] *Ireland v. United Kingdom*, no. 5310/71, § 159, 18 January 1978.~~

~~[54] *Denmark, Norway and Sweden and the Netherlands v. Greece* nos. 3321/67, 3322/67, 3323/67 and 3344/67, 5 November 1969.~~

~~[55] Ibid, § 8.~~

[56] *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.

[57] 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 Olympiaki 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 (Łatak v. Poland (dec.); Stella and Others v. Italy (dec.), §§ 42-45).

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

jurisdiction by international tribunals.[59] **The Court 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.[60] 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.[61] Such an approach is consistent with the principle of procedural economy.[62]**

37/1. *(update)* **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 Government even when they occur outside of her national territory[63] or whether they fall within the jurisdiction of the respondent Government.[64] 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.[65]**

37/2. *(update)* **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.[66] More recently the Court decided at the admissibility stage on the existence of *prima facie* evidence that there was an administrative practice in relation to each of the complaints made by the applicant Government.[67] 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).[68]**

37/3. *(update)* **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**

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[59] *Georgia v. Russia* (II) (dec), no. 38263/08, § 64, 13 December 2011; *(update)* ***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.

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

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

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

[63] *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.

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

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

[66] *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.

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

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

misused, on the assumption that such general principle existed. [69] In this context 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. [70] 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. [71] 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. [72]

37/4. *(updated)* ~~Similarly t~~The admissibility criteria of proving ***victim status*** is applicable only to individual applications not 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. [73] 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.[74]**

37/5. *(update)* **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.[75] 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.[76] The Court made this interpretation on the basis of the following considerations. First, the principle of internal coherence of the Convention which applies to the substantive rights enshrined in Section I of the Convention but equally to the jurisdictional and procedural provisions – in this case to Articles 1, 33 and 34. Secondly, only individuals, groups of individuals and legal entities which qualify as "non-governmental organisations" within the meaning of Article 34 can be bearers of rights under the Convention, but not a Contracting State or any legal entity which has to be regarded as a governmental organisation. Thirdly, just satisfaction in an inter-State case should always be for the benefit of individual victims not for the benefit of the State (if the Court found a violation of one or several Convention rights in a case brought by a State under Article 33 on behalf of an entity lacking sufficient institutional and operational independence from it, and awarded a sum of money as just**

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[69] *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;
[70] *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.
[71] *Ukraine v. Russia (dec) [GC]*, nos. 20958/14 and 38334/18, § 271, 16 December 2020.
[72] *Ukraine v. Russia (dec) [GC]*, nos. 20958/14 and 38334/18, § 272, 16 December 2020.
[73] *Slovenia v Croatia (dec)*, no. 54155/16, §§ 46-70, 18 November 2020.
[74] *Slovenia v Croatia (dec)*, no. 54155/16, § 43, 18 November 2020.
[75] *Slovenia v Croatia (dec)*, no. 54155/16, § 76, 18 November 2020.
[76] *Slovenia v Croatia (dec)*, no. 54155/16, § 70, 18 November 2020.

satisfaction, then the eventual final beneficiary of the Court's judgment would be that same State and no one else. [77]

37/6. Given the special nature of the mechanism under Article 33 of the Convention and with a view to considering different types of inter-State applications and their complex nature, it appears to be necessary to properly distinguish between the procedural right of a State under Article 33 to lodge an inter-State application for the violations of the substantive rights of the Convention of particular victim(s) (standing under Article 33 of the Convention) on the one hand and on the other hand the victim status of an applicant for the purposes of an individual application under Article 34 (standing under Article 34 of the Convention).

37/7. In this regard it is worth noting that the ambiguous determination of the protection of an individual victim of the violations of the Convention through the inter-State application procedure raises doubts concerning the question of whether the victims of the violations that fall outside of the categories of petitioners mentioned in Article 34 and, therefore, cannot lodge an individual application before the Court may enjoy substantive rights under the Convention.

3. Procedural questions

38. ~~Arguably, d~~**D**ifferences in admissibility criteria applicable to inter-State applications and individual applications which are lodged for the protection of the same individuals lead to **different conditions for the protection of the rights and freedoms of individual applicants before the Court, depending on whether the application is lodged by individuals or by a State** for their protection. This could raise a question in view of the objectives of the Convention which guarantees equal protection to all individuals.[78]

39. This question (Opt1) does not/(Opt 2) ~~does not~~ appear to have emerged in proceedings before the Court (Opt1) or to have been addressed in the case-law of the Court / (Opt2) ~~or to have been addressed in the case-law of the Court~~. **Essentially, the States, which have a whole range of means for collecting evidence and preparing a well-reasoned application, have been provided significant and baseless indulgencies, while individual applicants are forced to prove the feasibility of their claims while being deprived of such opportunities.** (Opt 1) However, reference could be made to the distinct inherent features of Article 33 of the Convention (see section IV/1 above), notably the fact that it is an expression of the system of collective guarantee of the Convention and that the right of State Parties to refer alleged breaches of the Convention to the Court is enshrined in this provision of the Convention in unqualified terms./ (Opt 2) ~~However, reference could be made to the distinct inherent features of Article 33 of the Convention (see section IV/1 above), notably the fact that it is an expression of the system of collective guarantee of the Convention and that the right of State Parties to refer alleged breaches of the Convention to the Court is enshrined in this provision of the Convention in unqualified terms.~~

40. 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

[77] ***Slovenia v Croatia*** ***(dec)*****, no. 54155/16, §§ 65-67, 18 November 2020.**

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

fundamental rights of individuals. On this view, 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).

41. Another set of procedural questions points to various aspects of the relationship between inter-State applications and individual applications. Firstly, a question is raised **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**.[79] **Given the special nature of inter-State applications, especially the significantly decreased requirements as to their admissibility in comparison to individual applications, as well as the timing budgets and other resources needed for examination of applications lodged under Article 33 of the Convention (including those due to the need to hold hearings on admissibility and on the merits), it appears appropriate to introduce a new condition and new admissibility criterion for inter-State applications.**

41/2. In particular, 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. Practical implementation of this condition may include a requirement for the applicant State to provide written statements from the affected persons containing a request to apply to the Court in their interests and an explanatory report as to why these persons cannot apply themselves.

41/3. As regards the new admissibility criterion, an inter-State application or a part thereof must be declared inadmissible if at least one similar application from a concrete affected person is pending before the Court. The mere fact that whichever person affected by a violation of the Convention has lodged an application with the Court evidences availability of this international remedy and means absence of any obstacle for resorting thereto, as well as to establishing all the necessary circumstances within individual proceedings. At the same time, one cannot exclude the fact that absence of individual applications with regard to whichever events often demonstrates absence of real victims or absence of their wish for protection of their rights and freedoms. In this connection, such "involuntary" protection on the part of the State lodging an application with the Court, generally, in respect of an indefinite number of persons (given that the State always has at its disposal all the necessary means for identification of victims) should not be encouraged by the Court that is called to protect concrete rights and freedoms of concrete victims rather than study some abstract submissions regarding alleged violations of the Convention in respect of unidentified persons. The Court has held that an inter-State application does not deprive individual applicants of the possibility of introducing or pursuing their own claims.[80] 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

[79] Ibid.
[80] *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.

the inter-State proceedings have been determined in the inter-State case.[81] 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 cases as well as individual applications relating to inter-State 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.[82] **Depending on the situation, the Court may deem that it is necessary to rule on preliminary questions that have a bearing on all cases first in order to make the best use of the available time.** Recently the Court also decided that any individual applications related to inter-State cases which were not declared inadmissible or struck out at the outset were to be communicated to the appropriate respondent Government or Governments for observations in parallel with the inter-State case.[83] **Meanwhile the parallel examination of such applications appears counterproductive as killing the timing budgets and the very possibility for optimisation in examination of such applications, due to the following reasons.**

41/4. Thus, now pending before the Court is the inter-State application *Ukraine v. Russia (re Eastern Ukraine)*, concerning the allegation that starting from 27 February 2014 the Russian Federation has been actually exerting "effective control" in the territory of South-Eastern Ukraine where regular violations of the rights guaranteed by the Convention take place. The proceedings on this application are in the active stage of exchange of stances. The Court is simultaneously communicating dozens of individual applications with regard to the same events and forces the parties to exchange their respective stances thereon before delivering a decision on admissibility and a judgment on the merits of the inter-State case. This approach is counterproductive.

41/5. First of all, the Court will have to decide on the principal issue of jurisdiction. Admissibility of all individual applications, namely whether they are in conformity with the *ratione personae* and *ratione loci* criteria, will depend on its decision. The Court's decision on admissibility of an inter-State application, and more often - its judgment on the merits of the case, can significantly influence the parties' position and widen or narrow the circle of respondent States in individual applications; consequently, there is no need to conduct the procedure of exchanging written stances on individual applications before the issue of admissibility of an inter-State case is resolved.

41/6. Second, the Court, at least in cases against Russia, suspends examination of individual applications before delivering a decision on admissibility and a judgment on the merits in an inter-State case, however it still requires an exchange of stances (that is, in fact, the suspension concerns only postponing the delivering of decisions and judgments on individual applications), consequently, during the period of examination of the inter-State case the individual situations of the concrete affected persons who have lodged applications under Article 34 of the Convention may change drastically. Thus, new

[81] See Copenhagen Declaration, § 45. See also *Berdzenishvili and Others v. Russia*, nos. 14594/07 and 6 others, § 4, 20 December 2016; and Press Release issued by the Registrar of the Court in respect of the case of *Ukraine v. Russia*, ECHR 432 (2018), 17 December 2018.
[82] *Lisnyy and others v. Ukraine and Russia* nos. 5355/15, 44913/15 and 50852/15, 5 July 2016.
[83] See Press Release quoted above, note 47.

domestic remedies can become available for them, or the existing remedies can be subjected to reform or can be declared effective by the Court in the course of examination of another case (for example, in a number of applications concerning the events in the South-Eastern Ukraine the Court found that the applicants had had to resort to the Ukrainian national remedies outside that Ukrainian region). Applicants can lose their victim status, they also can lose interest in proceedings before the Court or change their nationality (as was the case with the first Georgian application). Changing of an individual situation will require additional exchange of stances meaning additional time and other expenses that might be avoided if a stance on an individual application is prepared taking into account the valid changes after completion of proceedings on an inter-State application.

41/7. It is for this very reason that it is necessary not only to prioritize delivering of judgments in inter-State cases before individual applications but also to shift the stage of exchange of stances on individual applications for the period following the delivering of a judgment in an inter-State case.

42. A second 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] (Opt 1) Arguably, there/ (Opt 2) ~~Arguably, t~~**T**here would be "double jeopardy of [the respondent] State" when following a finding of violation of the rights of particular individuals in an inter-State application the Court finds violations of the Convention rights of the same persons under the same circumstances under proceedings instituted on an individual application.[85] The Court's recent practice is that 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 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"[86]. 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.[87] As regards the examination of the second limb of Article 35 § 2 (b) see section V/1 below.

43. The Court's prioritisation policy explained in the paragraph 41 above aims at avoiding potential duplication and inconsistencies as well as managing resources more efficiently.

44. 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 36 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

[84] See comments of the Russian Federation contained in document CDDH(2019)12, §§ 3.1. and 3.2.
[85] *Shioshvili and others v Russia* no. 19356/07, § 44, 20 December 2016.
[86] Ibid. §§ 46, 47.
[87] *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).

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.[88]

45. Another set of questions ~~arguably~~ stemming from the lower 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 **and has, therefore, led to certain comments.**[89]. (Opt 1) ~~Notably when lodging an inter-State application for the protection of the human rights of specific persons, the applicant State has the obligation to identify the alleged victims and to submit to the Court duly issued documents confirming the declaration of authority by those persons to be represented before the Court by the applicant State. The person who is represented before the Court must (i) be aware of the fact that he/she is represented by that State before the Court, (ii) regard him/herself as a victim of violation of the Convention and (iii) be willing for the State represents his/her interests before the Court.~~[90] / (Opt 2) **Notably when lodging an inter-State application for the protection of the human rights of specific persons, the applicant State has the obligation to identify the alleged victims and to submit to the Court duly issued documents confirming the declaration of authority by those persons to be represented before the Court by the applicant State. The person who is represented before the Court must (i) be aware of the fact that he/she is represented by that State before the Court, (ii) regard him/herself as a victim of violation of the Convention and (iii) for the State represents his/her interests before the Court.**[91] As it has been noted above (see paragraph 37) the admissibility criteria of proving ***victim status*** is, pursuant to Article 35 § 3 (b), applicable only to individual applications not inter- State applications. With a view to improving the efficiency of processing inter-State applications the Court has noted that in connection with the application of Article 41 of the Convention to inter-State cases, the applicant State should, (Opt 1) from the outset/ (Opt) ~~from the outset~~, (Opt 1) **at the just satisfaction stage,** / (Opt 2) ~~at the just satisfaction stage~~, be asked to submit (Opt 1) the / (Opt 2) ~~the~~ **a** list of clearly identifiable individuals. This will ensure that if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims.[92] (Opt 1) Whilst accepting that such information is necessary for the Court to have before it when dealing with just satisfaction, the requirement that it be lodged at the beginning of the application places a high threshold requirement on the applicant State. / (Opt 2) Whilst accepting that such information is necessary for the Court to have before it when dealing with just satisfaction, the ~~requirement~~ **suggestion** that it be lodged at the beginning of the application places a high threshold on the applicant State./ (Opt 3) ~~Whilst accepting that such information is necessary for the Court to have before it when dealing with just satisfaction, the requirement that it be lodged at the beginning of the application places a high threshold requirement on the applicant State.~~

4. Comparative elements

46. **This section looks at** ~~T~~**t**he Committee on the Elimination of Racial Discrimination (CERD) which monitors the implementation of the International Convention on the Elimination of All Forms

[88] *Berdzenishvili and Others v. Russia*, quoted above, § 49.
[89] **See comments of the Russian Federation contained in document CDDH(2019)12, § 3.2.**
[90] ~~See comments of the Russian Federation contained in document CDDH(2019)12, § 3.2.~~
[91] ~~See comments of the Russian Federation contained in document CDDH(2019)12, § 3.2.~~
[92] See document CDDH(2019)22, § 31.

of Racial Discrimination (ICERD) by its State Parties **as well as the inter-American system of human rights given that these two human rights bodies and systems have jurisdiction over and experience in dealing with both inter-State cases and individual applications considering alleged human rights violations.** The CERD examines both state-to-state complaints (Article 11 of the ICERD) as well as complaints filed by individuals or groups of individuals claiming to be victims of racial discrimination by their State (Article 14 of the ICERD). In 2018 the CERD received for the first time three communications under Article 11, namely *State of Qatar vs. Kingdom of Saudi Arabia; the State of Qatar vs. United Arab Emirates; and the State of Palestine vs. State of Israel.* On 27 August 2019, CERD decided that it has jurisdiction and declared the first two communications admissible. On 12 December 2019, the CERD decided that it has jurisdiction over the third communication. No applications relating to these are filed under Article 14 of the ICERD. Therefore, up until now parallel proceedings of individual and state-to-state complaints have not occurred before the CERD Committee.

47. In respect of the inter-American system of human rights, the Inter-American Commission on Human Rights (IACHR) is a principal and autonomous organ of the Organization of American States (OAS) whose mission is to promote and protect human rights in the North and South America. It is composed of seven independent members who serve in a personal capacity. The Charter of the OAS establishes the IACHR as one of its principal organs whose function is to promote the observance and protection of human rights and to serve as a consultative organ of the OAS in these matters. The IACHR examines individual and state petitions and monitors the human rights situation in the member States of the Organisation of American States. The Inter-American Court of Human Rights (IACtHR), constitutes the second main pillar of human rights protection in the inter-American system. The Court is composed of seven judges, nationals of OAS member States. The IACtHR has jurisdiction over all cases concerning the interpretation and application of the provisions of the American Convention on Human Rights (ACHR) that are submitted to it, provided that the State Parties have recognised such jurisdiction.[93] It also has a consultative role regarding the interpretation of the ACHR or of other treaties concerning the protection of human rights in the American states.[94]

48. Only State Parties to the ACHR and the IACHR are empowered to lodge cases with the IACtHR.[95] Individual petitioners seeking redress for human rights violations not dealt with at the domestic level are entitled to submit their complaint to the IACHR.[96] There are two complaints procedures before the IACHR. The ACHR provides for individual complaint in its Article 44 which states that any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the OAS, may lodge petitions with the IACHR containing denunciations or complaints of violation of the ACHR by a State Party. Inter-State complaints can be filed under Article 45 of the ACHR which provides that any State Party may, when it deposits its instrument of ratification of or adherence to the ACHR, or at any later time, declare that it recognises the competence of the IACHR to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in the ACHR. The communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the

[93] Article 62 (3) of the American Convention on Human Rights.

[94] Ibid., Article 64 (1).

[95] Ibid., Article 61 (1).

[96] *Ibid*., Article 44.

aforementioned competence of the IACHR. The IACHR does not admit any communication against a State Party that has not made such a declaration.[97]

49. The IACHR considers inadmissible any petition or communication submitted under Articles 44 or 45 if, *inter alia*, the petition or communication is substantially the same as one previously dealt with by the IACHR or by another international organization[98] and if the subject of the petition or communication is pending in another international proceeding for settlement. [99] Given that the same grounds of inadmissibility apply to individual or inter-Sate petitions or communications no procedural questions regarding potential inconsistencies or duplications resulting from parallel processing of inter-State and individual complaints seem to arise. Also, relevant literature does not seem to have identified any practical issues in this respect.

V. QUESTIONS REGARDING THE PLURALITY OF INTERNATIONAL PROCEEDINGS

50. Inter-State proceedings before the Court cannot be considered in isolation from the constellation of inter-State dispute settlement or litigation before international bodies which function independently of each other in the framework of international treaties on specific human rights matters. Such broader availability of dispute settlement mechanisms may potentially lead to duplications or multiplications of proceedings concerning the same or similar disputes between the same parties. 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.

51. In connection with the latter scenario, conceptually, two main categories of international dispute mechanisms could be distinguished. The *first category* would encompass those procedures established on the basis of international human rights instruments which range from negotiation and conciliation to resolution of disputes by the relevant committees or the ICJ. A typical mechanism for resolving inter-State complaints is the Human Rights Committee (HRC) which monitors the United Nations International Covenant on Civil and Political Rights (ICCPR). No inter-State complaint has been submitted to the HRC. Some other international human rights instruments set out procedures for the Committees established thereunder to consider complaints from one State party which considers that another State party is not giving effect to the provisions of the Convention or not fulfilling obligations thereunder, whenever the State parties have made declarations accepting the competence of the relevant Committee in this regard. These are the examples of 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

[97] The States that have declared to accept the competence of the IACHR to receive and examine communications in which a State Party alleges that another State Party has committed a violation of the human rights established in the ACHR include, Chile, Ecuador, Jamaica, Venezuela, Costa Rica, El Salvador and Nicaragua.
[98] Article 47(d) of the ACHR.
[99] Ibid., Article 46§1(c).

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). Some of these instruments such as the ICERD (Articles 11-13) and the ICCPR (Articles 41-43) set out elaborate procedures for the resolution of disputes between State parties over a State's fulfilment of its obligations under the relevant instrument through the establishment of an *ad hoc* Conciliation Commission. The procedures apply only to State parties which have made declarations accepting the competence of the relevant Committees in this respect. Moreover, the ICERD (Article 22), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (Article 30) provide that inter-State disputes concerning the interpretation or application of some of these instruments may be referred to the ICJ if the parties fail to resolve them in the first instance by negotiation, or failing that, by arbitration. State parties may exclude themselves from this procedure by making a declaration at the time of ratification or accession, in which case, in accordance with the principle of reciprocity, they are barred from bringing cases against other State parties. The *second category* of international dispute mechanisms would encompass other dispute resolution mechanisms not exclusively established under a human rights treaty such as the ICJ and fact-finding commissions.

51/1. Furthermore, legal certainty as regards the applicable rules concerning the interpretation of the Convention, and its relationship with other rules of international law, for example on State responsibility or international humanitarian law, is of great importance for the States Parties. As the Court itself found on many occasions, as follows from Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, the Convention cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights.[100] The Court pronounced that it must endeavor to interpret and apply the Convention in a manner which is consistent with the framework under international law delineated by the ICJ.[101] The CDDH has also 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.[102]

52. The two scenarios described in para 50 above regarding the existence of multiple proceedings of cases related to inter-State disputes before the Court and other international dispute settlement mechanisms are dealt with below. They 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. The last part of this section offers some comparative perspectives into how other international human rights bodies address questions

[100] CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, CDDH(2019)R92 Addendum 1, paragraph 439.
[101] CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, document CDDH(2019)R92 Addendum 1, paragraph 69.
[102] CDDH(2019)R92Addendum1, paragraph 346-355.

related to plurality of international proceedings in respect of inter-State cases and in respect of individual cases in general.

1. *Individual applications submitted to the Court and another international procedure*

53. **Article 35 § 2 of the Convention does not apply to inter-State cases. However, with regard to individual applications the second limb of Article 35 § 2 (b) of the Convention foresees admissibility conditions that avoid duplications of procedures as it is explained in paragraphs 54 to 56 below.**

53/1. Potential risks of duplication and/or diverging decisions in respect of substantially the same case may arise in situations when there are inter-State and individual applications pending before the Court and cases pending before other international bodies which may, at least, in part concern the same subject-matter and relate to the same individuals.[103] ~~Parallel procedures could result in the adoption of contradictory decisions or overlapping jurisdiction, leading to legal uncertainty.~~[104]

54. 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.[105] The Court examines this matter on its own motion.[106] 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).[107]

55. The Court verifies, as it is the case with the first limb of Article 35 § 2 (b) (see paragraph 42 above), whether the applications to the different international institutions concern substantially the same persons, facts and complaints.[108] 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".[109] However, the Court has recently 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.

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[103] See document CDDH-BU(2019)R101 Addendum, §§ 89.
[104] This point was raised by the Russian Federation delegation, see document CDDH(2019)12, § § 3.1. and 3.2
[105] *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).
[106] *POA and Others v. the United Kingdom* (dec.), no. 59253/11, § 27, 21 May 2013.
[107] *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.
[108] *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.
[109] *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.

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.[110]

56. 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).[111] 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".[112] 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.[113] 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 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.[114]

56/1. (Opt 1) **Despite the relevant provisions of Article 35 § 2 (b) and the relevant jurisprudence explained above a risk is seen for the adoption of contradictory or overlapping decisions leading to legal uncertainty.** [115]

(Opt 2) ~~56/1. Despite the relevant provisions of Article 35 § 2 (b) and the relevant jurisprudence explained above a risk is seen for the adoption of contradictory or overlapping decisions leading to legal uncertainty.~~[116]

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

57. Generally speaking, 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.[117] Article 35 § 2 (b) of the Convention does not apply to inter-State cases.[118] 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

[110] *POA and Others v. the United Kingdom* (dec), quoted above, §§ 30-32.
[111] *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.
[112] *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.
[113] *Karoussiotis v. Portugal*, no. 23205/08, 1 February 2011.
[114] *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.
[115] **This point was raised by the Russian Federation delegation, see document CDDH(2019)12, § § 3.1. and 3.2.**
[116] ~~This point was raised by the Russian Federation delegation, see document CDDH(2019)12, § § 3.1. and 3.2.~~
[117] See document CDDH(2019)22, §§ 26 and 27.
[118] *Georgia v. Russia* (II) (dec.), no. 38263/08, § 79, 13 December 2011.

international procedures may, however, be raised under Article 55 of the Convention. [119] 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.[120] 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.[121] While the case-law of the Court on Article 55 is not extensive it clearly establishes the principle that the possibility of a State Party of withdrawing a case from its jurisdiction on the grounds that it has entered into a special agreement with the other State Party concerned is given only upon the consent of both parties concerned and in exceptional circumstances.[122]

58. 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.[123]

59. 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. Because of the principle of monopoly established in Article 55 as well as the significance of this provision of the Convention in respect of ensuring the separation between the system of the Convention and other international dispute settlement mechanisms it was necessary to include an interpretation of Article 55 in the (Opt 1) "Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms." The Draft Revised Agreement states in its Article 5 that proceedings before the Court of Justice of the European Union do not constitute a means

[119] 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.
[120] 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'.
[121] 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 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."
[122] *Cyprus v. Turkey*, no. 25781/94, decision of the Commission, part III.
[123] Ibid.

of dispute settlement within the meaning of Article 55 of the Convention.[124] Therefore, Article 55 of the Convention does not prevent the operation of the rule set out in Article 344 of the TFEU.[125] Also, while Article 55 gives the Court a monopoly in respect of the interpretation and application of the Convention it does not preclude the possibility for State parties to the Convention to seek resolution of their disputes before international non-human rights bodies.[126] (Opt 2) ~~"Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms." The Draft Revised Agreement states in its Article 5 that proceedings before the Court of Justice of the European Union do not constitute a means of dispute settlement within the meaning of Article 55 of the Convention.[127] Therefore, Article 55 of the Convention does not prevent the operation of the rule set out in Article 344 of the TFEU.[128] Also, while Article 55 gives the Court a monopoly in respect of the interpretation and application of the Convention it does not preclude the possibility for State parties to the Convention to seek resolution of their disputes before international non-human rights bodies.[129]~~

3. Comparative perspectives

3.1. The International Court of Justice

60. The ICJ Statute does not contain specific provisions regarding situations when proceedings on the same issues are brought before multiple international tribunals or bodies. The ICJ, however, has resorted to the general principles of law, notably *lis pendens* and *res judicata* to address the question of conflicting judgments. For example the Permanent Court of International Justice in the *Polish Upper Silesia Case* stated that the objective of the *lis pendens* doctrine is to prevent the possibility of conflicting judgments; if a case is pending before a competent tribunal,

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

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

[126] On 16 January 2017, Ukraine filed an application against the Russian Federation with the ICJ with regard to violations of the International Convention for the Suppression of the Financing of Terrorism and the ICERD. On the 8 November 2019, the ICJ found that it has jurisdiction on the basis of Article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism, to entertain the claims made by Ukraine under this Convention. Also, the ICJ found that it has jurisdiction, on the basis of Article 22 of the ICERD to entertain the claims made by Ukraine under this Convention, and that the application in relation to those claims is admissible. On 16 September 2016, Ukraine served on the Russian Federation a Notification and Statement of Claim in an Arbitration under Annex VII to UN Convention on the Law of the Sea in respect of a "dispute concerning coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait." On 21 February 2020 the Arbitral Tribunal had issued an award concerning preliminary objections of the Russian Federation, see PCA Case No. 2017-06.

(Opt 2)~~[127] See Final Report to the CDDH of the Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, contained in document 47+1(2013)008Rev2.~~

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it is prohibited to commence another set of competing proceedings concerning the same dispute before another judicial body.[130]

61. In the case *Nicaragua v. Columbia*[131], one of Columbia's preliminary objections to the exercise of the jurisdiction by the ICJ was that it had already decided Nicaragua's claim in Territorial and Maritime Dispute in the ICJ's judgment of 2012 in the case of *Nicaragua v. Colombia*.[132] The Court noted that *res judicata* was a general principle of law that was reflected in Articles 59 and 60 of the ICJ Statute, which protects at the same time the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal. For this principle to apply it is not sufficient that the case at issue is characterised by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The ICJ could not be satisfied merely by an identity between requests successively submitted to it by the same parties; it must determine whether and to what extent the first claim has already been definitively settled.[133]

62. The instances of inter-State cases being considered in parallel by the ICJ and the Court so far have not raised practical difficulties about conflicting judgments or legal uncertainty. On 12 August 2008, Georgia instituted proceedings before the ICJ against the Russian Federation relating to its actions on and around the territory of Georgia in breach of the ICERD relying on Article 22 of this instrument.[134] On 6 February 2009 Georgia had lodged the formal application with the Court alleging that the Russian Federation had allowed or caused an administrative practice to develop in violation of Articles 2, 3, 5, 8 and 13 of the Convention, and of Articles 1 and 2 of Protocol No. 1 and of Article 2 of Protocol No. 4 through indiscriminate and disproportionate attacks against civilians and their property in the two autonomous regions of Georgia – Abkhazia and South Ossetia – by the Russian army and/or the separatist forces placed under their control. [135] The case was communicated on 27 March 2009.

63. The respondent Party in the ICJ's proceedings did not raise any objections before the ICJ in connection with the parallel proceedings of the case *Georgia v. Russia* before the Court. In its judgment of 1 April 2011 the ICJ ~~considered~~ **held** that **"neither requirement contained in Article 22 has been satisfied. Article 22 of CERD thus cannot serve to found the [ICJ's] jurisdiction in the present case."** ~~Article 22 of the ICERD could not serve as a basis to find the ICJ's jurisdiction in the case.~~[136] However, in the proceedings before the Court the respondent Government drew the Court's attention to the risk of a conflict of case-law between the Court and the ICJ if the former were to declare the application by Georgia admissible, which would

[130] *German Interests in Polish Upper Silesia* (Germany. v. Poland.), 1925 P.C.I.J. (ser. A) No. 6 (August 1925)
[131] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 100
[132] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*,p. 719
[133] *Nicaragua* v. *Colombia, quoted above,* p. 100, § 59.
[134] Article 22 provides that "[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."
[135] *Georgia v. Russia* (II) (dec.), no. 38263/08, § 10, 13 December 2011.
[136] **Case concerning the application of ICERD (Georgia v. Russian Federation), Preliminary objections judgment of 1 April 2011, § 184. For the requirements contained in Article 22 ICERD (or Article 30 CAT) see also *supra*, para. 51.** ~~The ICJ could not find jurisdiction in the case because of the absence of a dispute relating to matters falling under ICERD prior to 9 August 2008 (that is prior to the day on which Georgia submitted its application with ICJ), the negotiations which took place after that date could not be said to have covered such matters, and were thus of no relevance to the ICJ's examination of the Russian Federation's second preliminary objection regarding non-fulfillment of procedural requirements under Article 22.~~

jeopardise the legal foreseeability required under international law.[137] The Court observed that in a judgment of 1 April 2011 the ICJ held that it did not have jurisdiction to entertain the application lodged with it by Georgia on 12 August 2008 under the ICERD. Noting that the procedure before the ICJ had ended and that Article 35 § 2 of the Convention applies only to individual applications the Court dismissed the respondent Government's objection (see also paragraph ~~48~~**53** above).[138]

(Opt 1) ~~63/1. The ECtHR pronounced that the Court must endeavor to interpret and apply the ECHR in a manner which is consistent with the framework under international law delineated by the International Court of Justice. (par.56) At the same time the Court regularly stresses "the special character of the Convention as an instrument of European public order (ordre public) for the protection of individual human beings". It may be noted that the necessary degree of control of a State over an entity, defined in some ECtHR decisions, is less stringent than the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State under the case-law of the ICJ and ICTY. (par.154).[139]~~

(Opt 2) **63/1. The ECtHR pronounced that the Court must endeavor to interpret and apply the ECHR in a manner which is consistent with the framework under international law delineated by the International Court of Justice. (par.56) At the same time the Court regularly stresses "the special character of the Convention as an instrument of European public order (ordre public) for the protection of individual human beings". It may be noted that the necessary degree of control of a State over an entity, defined in some ECtHR decisions, is less stringent than the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State under the case-law of the ICJ and ICTY. (par.154).[140]**

3.2. The Inter-American System of Human Rights

64. As it has been already mentioned (see paragraph 49 above) the IACHR considers any petition or communication submitted under Article 45 to be inadmissible if the subject of the petition or communication is pending in another international proceeding for settlement. [141] In the same line Article 33 of the Rules of Procedure of the IACHR provides that a petition cannot be considered by the IACHR if its subject matter is pending settlement before an international governmental organization or, if it duplicates a petition pending or already examined and settled by the IACHR or another international governmental organisation.

65. The IACHR elaborated on this rule in the case *Roberto Moreno Ramos v. United States*[142] which concerned proceedings before the ICJ regarding allegations of violations of international

[137] *Georgia v. Russia* (II) (dec.), quoted above, § 77. The respondent Government stated that "[i]n particular, the complaints lodged under Article 14 taken in conjunction with other provisions of the Convention – concerning alleged discriminatory attacks directed against civilians of Georgian origin – were outside the scope of the present application because they were not based on the Convention and were already the subject of examination by the ICJ. As the Court could not examine those issues, which were important for an understanding of the case as a whole, it should not examine the events related to them."

[138] *Georgia v. Russia* (II) (dec.), quoted above, § 79.

[139] ~~CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, document CDDH(2019)R92 Addendum 1, paragraphs 69 and 167.~~

[140] CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, document CDDH(2019)R92 Addendum 1, paragraphs 69 and 167.

[141] Article 46 § 1 (c) of the ACHR.

[142] IACHR, Report No.61/03, *Roberto Moreno Ramos v. United Stated,* October 10, 2003.

obligations by the United States of America in respect of Mexico under Articles 5 and 36 of the Vienna Convention on Consular Relations based upon its procedures in arresting, detaining, convicting, and sentencing 54 Mexican nationals on death row. The IACHR held that duplication exists when the application involves the same person, the same legal claims and guarantees and the same facts. It is up to the State raising the objection to substantiate the juridical requirements regarding duplication. Claims brought in respect of different victims or brought regarding the same individual but concerning facts and guarantees not previously presented and which are not reformulations, will not in principle be barred by the prohibition of duplication of claims.

66. The IACHR found that the parties involved in the proceedings before it and the ICJ and the legal claims raised before both tribunals were not the same. While the claims in both proceedings are similar, to the extent that they require consideration of compliance by the United States with its obligations under Article 36 of the Vienna Convention, this matter is raised in two different contexts; the ICJ is asked to adjudicate upon the United States' international responsibility to the state of Mexico for violations of the Vienna Convention on Consular Relations, while the IACHR is asked to evaluate the implications of any failure to provide Mr. Moreno Ramos with consular information and notification for his individual right to due process and to a fair trial under the American Declaration of the Rights and Duties of Man. The IACHR has followed the same reasoning in other cases concerning individual applications.[143]

3.3. The Human Rights Committee

67. Tasked with overseeing the implementation of the ICCPR the HRC may consider individual communications that allege a violation of individual's rights under the ICCPR if the State is a party to the First Optional Protocol to the ICCPR. The HRC is barred under Article 5 (2) (a) of the Optional Protocol from examining communications which are simultaneously examined with by another international body. However, the HRC may examine communications which have been considered previously elsewhere, even when a decision on the merits has already been issued.[144] Hence, the Committee can consider complaints already examined by the Court or other international bodies. 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.[145]

68. The HRC's long-standing jurisprudence regarding cases when the complainant has lodged a communication concerning the same events with the Court is that it does not consider 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 same matter should be deemed to have been examined within the meaning of the respective reservations to article 5 (2) (a) of the Optional Protocol.[146]

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[143] IACHR, Report No. 90/09, *Medellín, Ramírez Cardenas and Leal García v. United States*, August 7, 2009.

[144] 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.

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

[146] 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

69. 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.[147] In this context the HRC has in a number of cases reached different conclusions from the Court, for example, with regard to the same claims of violations of rights as a consequence of the application of domestic legislation prohibiting women from concealing their faces in public.[148] The Court had held in a previous judgment that the prohibition could be justified only insofar as it sought to guarantee the conditions for "living together" in a democratic society and that it was proportionate to and the least restrictive means of achieving that goal; consequently there had been no violation of the freedom religion of the applicants.[149]

70. The parties in this case as well as the HRC had indeed referred to the previous ruling of the Court. Nonetheless, the HRC concluded that the prohibition had violated the applicants' freedom of religion and their right to non-discrimination under the ICCPR.[150] Subsequently, the Chair of the HRC has commented that the decisions of the HRC were informed by the parallel judgment of the Court and follows to a large extent the reasoning of the latter. However, the Court follows a margin of appreciation doctrine and the HRC applies universal standards across a much more diverse constituency. Conflicting decisions pose difficulties for State compliance and for the development of international human rights law. For individual cases the fact that another human rights body has formed a position on the factual and legal issues at stake does carry weight, although such considerations may not be fully dispositive of the matter.[151]

71. The HRC has also considered that any ongoing enforcement proceedings of a final judgment of the Court shall also be taken into consideration when assessing whether the same matter is being examined under another procedure of international investigation or settlement.[152] In the case *Paksas v. Lithuania*, the same applicant submitted a communication before the HRC after the final judgment of the Court.[153] In its consideration of admissibility, the Committee considered that the part of the communication which related to the author's lifelong disqualification from parliamentary office was inadmissible under article 5 (2) (a) of the Optional Protocol because "this matter is currently being actively supervised by the Committee of Ministers of the Council of

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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."

147 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.

148 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 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.

149 *S.A.S. v France* (merits and just satisfaction) [GC], no. 43835/11, 1 July 2014. See also Communications CCPR/C/123/D/2807/2016 and CCPR/C/123/D/2747/2016 quoted above.

150 See Communications CCPR/C/123/D/2807/2016 and CCPR/C/123/D/2747/2016 quoted above.

151 UN Human Rights Committee condemns "Burqa Ban" countering European Court, International Justice Resource Centre, 14 November 2018.

152 Christophe Deprez, « The admissibility of multiple human rights complaints », Human Rights Law Review, 2019, 19, 517-536

153 *Paksas* v. *Lithuania* [GC], no. 34932/04, 6 January 2011.

Europe".[154] Therefore, even if a final judgment has been rendered by an international tribunal, the supervision process should be taken into account. However, in this particular case the HRC considered that it was not prevented from considering the claims which the Court had declared incompatible *ratione materiae* with the Convention.[155] Consequently, the Committee concluded that the applicant's claim related to his disqualification from other offices than in Parliament was admissible.

72. With regard to a complaint 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. [156]

73. 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-specific UN conventions.[157] 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 (Opt 1) **(see paragraph 51/1 above regarding the CDDH's conclusions**~~.~~ **[**~~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.~~[158]

(Opt 2) **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.**[159]

[154] Communication No. 2155/2012, CCPR/C/110/D/2155/2012, *Paksas v Lithuania*, Views adopted on 25 March 2014, § 7.2.
[155] Ibid, § 7.3.
[156] *Correia de Matos v. Portugal* [GC], no. 56402/12, 4 April 2018.
[157] 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.
~~[158] CDDH(2019)R92Addendum1 § 346-355~~
[159] CDDH(2019)R92Addendum1 § 346-355

3.4. The Committee on the Elimination of Racial Discrimination

74. The ICERD contains two mechanisms for settling inter-State disputes complaints. First, a State Party may bring a complaint before the CERD relying on Articles 11 and 13 of the ICERD) when it considers that another State Party is not giving effect to the provisions of the CERD. Second, a State Party may rely on Article 22 which provides that any dispute between two or more states parties with respect to the interpretation or application of the ICERD, which is not settled by negotiation or by the procedures expressly provided for in the ICERD, can be referred to the ICJ for decision.

75. The CERD has recently considered questions of parallel proceedings before it and the ICJ in connection with the inter-state communication submitted by Qatar against the United Arab Emirates.[160] The respondent State argued that the ICJ was only available at the end of carefully crafted linear and hierarchical processes; allowing two parallel proceedings to progress simultaneously would jeopardise the systemic integrity of the system and risk resulting in fragmented jurisprudence. Moreover, the respondent State observed that the applicant State had created a *litis pendens* situation where two parallel proceedings bearing on the exact same dispute between the same parties were progressing simultaneously. This violated the principle of *electa una via non datur recursus ad alteram* (when one way has been chosen, no recourse is given to another). It therefore argued that to continue in parallel would create irreparable harm to the procedural rights of the respondent State, which would be required to defend itself simultaneously against the same allegation in two overlapping and parallel procedures.[161]

76. The CERD considered that the wording of Article 22 of the ICERD clearly indicates that the State Parties may choose between the alternative proposed by that provision. Moreover, the Committee, an expert monitoring body entitled to adopt non-binding recommendations, was not convinced that a principle of *lis pendens* or *electa una via was* applicable where it would rule out proceedings concerning the same matter by a judicial body entitled to adopt a legally binding judgment.[162]

77. The ICJ has so far not pronounced itself on the relationship between the two mechanisms for settling inter-state disputes under the ICERD, respectively under Articles 11 to 13 on the one hand and Article 22 on the other hand. Nor has the ICJ pronounced itself as to whether negotiations and recourse to the procedures referred to in Article 22 constitute alternative or cumulative preconditions to be fulfilled before seizing the ICJ. In connection with requests for provisional orders the ICJ has not considered it necessary to decide whether any *electa una via* principle or *lis pendens* exception are applicable in that specific situation.[163]

3.5. The African Commission on Human and Peoples' Rights

78. The African Commission's mandate includes communication procedure, friendly settlement of disputes, state reporting, urgent appeals and other activities of special rapporteurs and working groups and missions. The Commission considers communications referred to it when they do not deal with cases which have been settled by those states involved in accordance with the principles

[160] *Qatar v. United Arab Emirates* (admissibility), CERD/C/99/4, 27 August 2019.
[161] Ibid, § 44.
[162] Ibid, § 49.
[163] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, *Order of 23 July 2018*, I.C.J Reports 2018 (II), pp. 420-421, para. 39.

of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the African Charter of Human and Peoples' Rights.[164]

79. In the case *Mpaka-Nsusu Andre Alphonse v. Zaire*, the Commission found the communication inadmissible as it had already been referred for consideration to the HRC established under the ICCPR. [165] In the case of *Bob Ngozi Njoku v. Egypt* [166], the respondent State argued that the communication should be declared inadmissible on the grounds that the Working Group of the United Nations Sub-Commission on the prevention and protection of minorities had been seized of the matter by the complainant. However, the Commission considered that the communication was admissible, observing that the decision of the United Nations sub-commission not to take any action and, therefore, not to pronounce on the communication submitted by the complainant does not boil down to a decision on the merits of the case and does not in any way indicate that the matter has been settled as envisaged under the relevant provisions of the African Charter on Human and Peoples' Rights.[167]

80. In *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v. Sudan*, the Commission observed that "while recognizing the important role played by the United Nations Security Council, the Human Rights Council and other UN organs and agencies on the Darfur crisis, [the Commission] is of the firm view that these organs are not the mechanisms envisaged under Article 56(7). The mechanisms envisaged under Article 56(7) of the Charter must be capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations." [168]

VI. THE ESTABLISHMENT OF THE FACTS

81. A number of challenges relating to the establishment of facts are specific to the processing and resolution of inter-State cases. These include the obtaining of necessary evidence *inter alia* by fact-finding missions and witness hearings as well the different sources of information and the assessment of the evidence by the Court. Such challenges arise notably in situations in which the Court has to act as a court of first instance for lack of a prior examination by the national courts.[169]

82. *(updated)* **Recently,** ~~T~~**t**he Court has ~~also pointed out~~ **noted** specific challenges ~~regarding the establishment of the facts, making reference to the examination of the question whether~~ **in cases concerning allegations of** the existence of an administrative practice ~~within the meaning of the Convention can be established.~~**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.[170] The Court observed that 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**

[164] Article 56(7) of the African Charter on Human and Peoples' Rights. Similarly the African Court of Human and Peoples' Rights deals with applications which do not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union, see Rule 40 of the *Rules of Court .*
[165] *Mpaka-Nsusu Andre Alphonse v. Zaire*, App. No. 15/88, Af. Comm. H.P.R. (Oct. 8, 1988), para. 2
[166] *Bob Ngozi Njoku v. Egypt*, App. No. 40/90, Af. Comm. H.P.R. (Nov. 11, 1997), para. 56 (French only).
[167] Ibid, para 5.
[168] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v. Sudan*, App. Nos. 279/03-296/05, Af. Comm. H.P.R. (May 27, 2009), para. 105.
[169] See document CDDH-BU(2019)R101 Addendum, § 87.
[170] ***Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, § 254, 16 December 2020.**

of time across a vast geographical area.[171] The Court has also underlined 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 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.[172]

82/1. *(update)* **Some of the difficulties in establishing the facts have been highlighted in the recent judgment Georgia v. Russia (II) when the Court addressed 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. The Court held, *inter alia*, that having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), it was not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date.**[173]

82/2. *(updated)* **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~~ 2) as well as the Court's current fact-finding practice (section ~~4~~ 3). 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.** (Opt 1) **The references to judgments in individual or inter-State judgments in this Chapter reflects this holistic approach of the Court. /** (Opt 2) ~~The references to judgments in individual or inter-State judgments in this Chapter reflects this holistic approach of the Court.~~

1. Principles on the admissibility and evaluation of evidence

83. Neither the Convention nor the Rules of the Court seek to regulate how evidence is to be admitted or assessed by the Court.[174] **In fact, bringing a State to international liability for violation of human rights and freedoms is similar, in terms of its gravity and consequences, to bringing a person to criminal or civil liability - meaning that litigation resulting in recognition of a State's responsibility for violating rights and freedoms must have the same guarantees and remedies against unjust and unfounded decisions. It can be achieved only by building a clear system of evaluation of such evidence. One of the first steps on the way to creating clear standards of proof is refusal to accept references to the media**[175] **and reports by non-governmental organisations as the sole evidence of**

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

[172] See document CDDH(2019)22, §§ 20 and 24.

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

[174] 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.

[175] **In particular, according to the Rule 40 (Admissibility of Applications) of the African Court On Human and peoples' rights: «applications to the Court shall comply with the following conditions: … 4) not be based exclusively on news disseminated through the mass media»…;**

existence of whichever event alleged to be a violation of the Convention. ~~The Court examines all the material before it, whether originating from the parties or other sources, and, if necessary, obtains material *proprio motu*.[176] 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.[177]~~

83/1. A lamentable example of consideration of an inter-State application without definite standards of proof is Georgia v. Russia (I) where the process of examination of witnesses, in particular of the author of the report by a non-governmental organisation, referred to by the applicant State, strikingly demonstrated that most of the allegations were manifestly ill-founded. In the same application, absence of foreseeable, in terms of their applying, standards of proof led to the situation where the administrative practice had been established without admissible evidence (and even, as was found out later, not based on the only "standard" of proof of the Court - beyond reasonable doubt), and the Court declared that violations of the Convention had been committed in respect of over 4,600 Georgian nationals, while at the stage of awarding just satisfaction the number of victims decreased threefold, and the Court expressly stated that its position in the judgment on the merits that "there is nothing enabling it to establish that the applicant Government's allegations are not credible", does not, however, affirm that they are proved "beyond reasonable doubt".

83/2. 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[178] and, if necessary, material obtained *proprio motu*.[179] ~~84.~~ 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.[180]

84. *(update)* **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.[181] It has often attached importance to the information contained in recent reports from independent international human rights protection associations or governmental sources.[182] In order to assess the reliability of these reports, the relevant criteria are the authority and reputation of their authors, the**

~~[176] *Ireland v. United Kingdom*, no. 5310/71, § 160, 18 January 1978.~~

~~[177] *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, § 147, 6 July 2005, ECHR 2005-VII.~~

[178] *Georgia v. Russia* (I), quoted above § 94; ***Mathew v. the Netherlands*, no. 24919/03, § 156;** *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, § 147, 6 July 2005, ECHR 2005-VII. *(update)* ***Georgia v. Russia* (II) (merits) no. 38263/08, § 59, 21 January 2021.**

[179] *Ireland v. United Kingdom*, no. 5310/71, § 160, 18 January 1978; ***Ukraine v. Russia (dec) [GC], nos. 20958/14 and 38334/18, § 257, 16 December 2020.***

[180] *Georgia v. Russia* (I), quoted above § 94.

[181] ***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.**

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

seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and whether they are corroborated by other sources.[183] 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.[184] ~~In establishing the existence of an administrative practice, the Court will not rely on the concept that the burden of proof is born by one or the other of the two Governments concerned, but will rather study all the material before it, from whatever source it originates.[185]~~

85. ~~One of the reasons for this flexible approach regarding the admissibility and evaluation of evidence could be the Court's location which is remote from the places where the incidents in question took place. Also, i~~In almost all cases, the Court establishes the facts relying on the documents submitted to it by the Parties. 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.[186]

(Updated) ~~*2. The States' duty to co-operate with the Court*~~

86. *(update)* **The Court may draw adverse inferences from the lack of co-operation of the Parties to an inter-State application, notably for failure to produce the requested evidence during the proceedings. This 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". Hence, an overview of the State Parties' duty to co-operate with the Court in the context of securing evidence is appropriate.**

86/1. Article 34 and Article 38 of the Convention set out procedural obligations to guarantee the efficient conduct of the judicial proceedings of the Court. Article 34 provides that Contracting Parties undertake not to hinder in any way the effective exercise of the right of any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the Contracting Parties of the rights set forth in the Convention. The Court has consistently held that State Parties have an obligation to furnish all necessary facilities to enable a proper and effective examination of applications as this is of utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention.[187] A failure on a Government's part to submit information which is in its hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 of the Convention (for an explanation of the consequences of

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

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

~~[185] *Georgia v. Russia* (I), quoted above § 95.~~

[186] 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.

[187] *Bazorkina v. Russia*, no. 69481/01, § 170, 27 July 2006; *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 253, 8 April 2004.

failure to discharge co-operation obligations see ~~section VI/3.2~~ **paragraphs 92/2-92/4** below).[188] **These principles, which the Court had established regarding individual applications, are also applied to inter-State applications.[189]**

87. This 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.[190] 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.[191] 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. [192]

88. In addition to the obligation not to hinder the effective exercise of the right of individual application under Article 34 of the Convention the State Parties have a duty to co-operate with the Court under Article 38 of the Convention which stipulates that the "Court shall examine the case together with the representatives of the parties, and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities for the effective conduct of the investigation." In respect of the relationship between Article 34 and Article 38 the Court has stated that the obligation under Article 38 is corollary to the obligation not to hinder the effective exercise of the right of individual application under Article 34 of the Convention. The effective exercise of this right may be thwarted by a Contracting Party's failure to assist the Court in conducting an examination of all circumstances relating to the case, including in particular by not producing evidence which the Court considers crucial for its task. 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. Although the structure of the Court's judgments traditionally reflects the numbering of the Articles of the Convention, it has also been customary for the Court to examine the Government's compliance with their procedural obligation 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.[193]

89. The Court also may establish a failure by the respondent Government to comply with their 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

[188] *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, in this case the Court affirmed in the operative part of its judgment that there had been a violation of Article 38 of the Convention although it did not award non-pecuniary damage on the account of this violation.

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

[190] *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.

[191] *Janowiec and Others v. Russia* [GC], quoted above, § 203.

[192] Ibid. § 203

[193] *Janowiec and Others v. Russia* [GC], quoted above. § 209

and in such a manner as to avoid any actual or potential chilling effect on the applicants or their representatives.[194]

90. 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-co-operation has been such as to prejudice the establishment of the facts or to otherwise prevent a proper examination of the case.[195]

91. 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 Court[196] or where it submitted an incomplete or distorted copy while refusing to produce the original document for the Court's inspection.[197]

92. 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.[198] *(update)* **The Court may also propose practical arrangements 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.[199]** 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.[200] 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.[201] 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.[202] Rule 33 of the Rules of the Court

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[194] Ibid.
[195] See for example case of *Musayev and others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, §183, 26 July 2007.
[196] *Maslova and Nalbandov v. Russia*, no. 839/02, §§ 128-29, 24 January 2008
[197] *Trubnikov v. Russia*, §§ 50-57, 5 July 2005.
[198] *Janowiec and Others v. Russia*, quoted above, § 205
[199] ***Georgia v. Russia* (II) (merits) [GC] no. 38263/08, § 345, 21 January 2021.**
[200] *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
[201] *Nolan and K. v. Russia*, no. 2512/04, § 56, 12 February 2009 and Janowiec and Others, quoted above, § 206
[202] Ibid. See also *Janowiec and Others v. Russia*, quoted above, § 207.

regulates issues regarding public access and restrictions to documents submitted by the Parties to the Registry of the Court. [203]

92/1. It appears that all documents submitted to the Court by the parties in an ongoing inter-State proceeding should not be released to third parties, without asking both parties for observations on this matter. Further reflection is needed to improve the current situation inter alia by considering the possibility of reviewing the Rules of Court as envisaged by the Court.

92/2. *(update)* **As stated in paragraph 86 above, the Court may draw adverse inferences from the lack of co-operation of the State Parties, notably for failure to produce the requested evidence during the proceedings.The Court has found that a failure of a respondent Government part to submit information as it is in its hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention but may also give rise to the drawing of inferences as to the well-foundedness of the allegations.** [204]

92/3. *(update)* **The Court has drawn negative inferences from the failure or refusal of respondent States to provide relevant documentary evidence in cases when an individual applicant was detained, noting the inability of the respondent Government to provide a satisfactory and plausible explanation as to what happened to that individual.**[205] **Similarly, the Court has drawn negative inferences from a respondent Government's failure to disclose documents from domestic investigation files and the fact that the Government failed to provide convincing explanations of the events in question.**[206]

92/4. *(update)* **With particular respect to inter-State applications, the Court may draw negative inferences based on its established case-law that proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.**[207] **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 co-operation 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 allegations.**[208] **In respect of the drawing of inferences by the Court when the respondent Government has not advanced convincing explanations for its delays or omissions in response to the Court's requests for witnesses see section VI/4.2 below.**

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[203] 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."

[204] ***Timurtaş v. Turkey*, quoted above, § 66.**

[205] ***Taş v. Turkey*, no. 24396/94, § 66, 14 November 2000.**

[206] *Tangiyeva v. Russia*, no. 57935/00, §82, 29 November 2007.

[207] *Ireland v. United Kingdom*, quoted above, § 161.

[208] *Georgia v. Russia* (I), quoted above § 104

~~3~~2. *The Court's practice with regard to the standard of proof*

(Update) ~~*3.1. Beyond reasonable doubt*~~

92/5. *(update)* **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.[209] The *prima facie* evidentiary 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 does the exhaustion rule under Article 35 § 1 of the Convention 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 examination on the merits.[210] 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.[211]**

92/6. *(update)* **Where the Court examined, at the admissibility stage, the question whether the matters complained 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.[212] This is understood that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. [213] 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.[214]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**

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[209] ***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.**

[210] ***Ukraine v. Russia (dec) [GC]*, nos. 20958/14 and 38334/18, § 363, 16 December 2020.**
[211] ***Ukraine v. Russia (dec) [GC]*, nos. 20958/14 and 38334/18, § 368, 16 December 2020.**
[212] ***Ukraine v. Russia (dec) [GC]*, nos. 20958/14 and 38334/18, § 265, 16 December 2020.**
[213] ***Ukraine v. Russia (dec) [GC]*, nos. 20958/14 and 38334/18, § 265, 16 December 2020.**
[214] ***Ukraine v. Russia (dec) [GC]*, nos. 20958/14 and 38334/18, § 266, 16 December 2020.**

form the basis of the applicant Government's complaints which belongs to the merits phase of the Court's procedure. [215]

93. *(update)* The standard of proof is not explicitly addressed in the provisions of the Convention or in the Rules of the 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.[216] This standard is not to be equated with the same standard applied in criminal proceedings[217] 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.[218] 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**~~under Article 19 of the Convention that is to ensure the observance by the Contracting States of their engagement to secure the fundamental rights and freedoms set out in the Convention. Thus, it is not the Court's role to rule on guilt under criminal law or on civil liability but on Contracting States' responsibility under the Convention~~.[219]

93/1. The existing principles of justification of an inter-State application constitute an excessively low "standard of proof", thereby opening an uncontrolled opportunity for States to lodge non-reasoned applications and applications not backed up by objectively adequate evidence, rather resolving political objectives in this way than pursuing the aims of protection of rights and freedoms of population of whichever State.

93/2. Such unfounded inter-State applications, generally lodged for protection of abstract victims, divert the Court from individual applications lodged by concrete existing and identified victims.

93/3. Development of clear and foreseeable (in terms of their application) standards of proof will help filter out unfounded inter-State applications, thus it will relieve the Court of its caseload and will incentivise the States who wish to resort to the Conventional mechanism of protection or rights to carefully prepare their applications with the Court.

(update) ~~94. The individual applicant has the initial burden of producing evidence in support of the application; the required standard of proof at this stage is to establish a *prima facie* case. In other words, there should be sufficient factual elements to enable the Court, at this initial stage, to conclude that the allegations are not groundless or "manifestly ill-founded", as in the words of Article 35 § 3.~~[220] ~~However, it appears that as with the standard of proof, the application of the concept of the burden of proof allows for a certain degree of flexibility; the Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit*~~

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[215] ***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.**

[216] ***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.**

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

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

[219] *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.**

[220] 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 17.

probatio (he who alleges something must prove that allegation).[221] This was affirmed in the inter-State case *Ireland v. the United Kingdom* where the Court held that it "does not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned. In the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*."[222]

3.2. Drawing adverse inferences

95. The Court may draw adverse inferences from the lack of co-operation of the State Parties, notably for failure to produce the requested evidence during the proceedings (see also paragraph 86 above).[223] The Court has found that a failure of a respondent Government part to submit information as it is in its hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention but may also give rise to the drawing of inferences as to the well-foundedness of the allegations.[224]

96. The Court has drawn negative inferences from the failure or refusal of respondent States to provide relevant documentary evidence in cases when an individual applicant was detained, noting the inability of the respondent Government to provide a satisfactory and plausible explanation as to what happened to that individual.[225] Similarly, the Court has drawn negative inferences from a respondent Government's failure to disclose documents from domestic investigation files and the fact that the Government failed to provide convincing explanations of the events in question.[226]

97. With particular respect to inter-State applications, the Court may draw negative inferences based on its established case-law that proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.[227] 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 co-operation 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 allegations.[228] In respect of the drawing of inferences by the Court when the respondent Government has not advanced convincing explanations for its delays or omissions in response to the Court's requests for witnesses see section VI/4.2 below.

[221] *Timurtaş v. Turkey*, no. 23531/94, § 66, 13 June 2000.
[222] *Ireland v. United Kingdom*, no. 5310/71, § 160, 18 January 1978
[223] This 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".
[224] *Timurtaş v. Turkey*, quoted above, § 66.
[225] *Taş v. Turkey*, no. 24396/94, § 66, 14 November 2000.
[226] *Tangiyeva v. Russia*, no. 57935/00, §82, 29 November 2007.
[227] *Ireland v. United Kingdom*, quoted above, § 161.
[228] *Georgia v. Russia (I)*, quoted above § 104

~~3.3. Shifting the b~~**B**urden of proof

(Opt 1 including updates)

~~98. The Court's approach not to rigidly apply the burden of proof rigidly is also demonstrated by the fact that it has on occasions accepted to shift the burden of proof from the applicant to the respondent Government. This applies to cases when the Court notes difficulties for an applicant to obtain the necessary evidence in support of his/her allegations that is in the hand of the respondent Government which fails to submit relevant documents. When the applicant makes a *prima facie* case and the Court is prevented from reaching factual conclusions by the absence of such documents, it is for the respondent Government to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants or to provide a satisfactory and convincing explanation of how the event in question occurred. The burden of proof is thus shifted to the Government.[229] In cases involving situations of injuries sustained in detention the Court has shifted the burden on the respondent Governments and has not accepted in principle the argument that for a violation of the Convention to be found, it was necessary for ill-treatment to be proved beyond reasonable doubt.[230]~~

~~99. Similarly, in cases involving deaths during a military operation in areas under the exclusive control of the authorities of the respondent Government, the Court has shifted the burden of proof to the respondent Government, in circumstances where the non-disclosure of crucial documents in the exclusive possession of the respondent Government prevented the Court from establishing the facts. It was, therefore, for the Government either to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred.[231] Also, in situations where persons are found injured or dead, or who have disappeared, in an area within the exclusive control of the authorities of the State and there is *prima facie* evidence that State agents may be involved, the burden of proof may also shift to the respondent Government since the events in issue may lie wholly, or in large part, within the exclusive knowledge of its authorities. If they then fail to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation, strong inferences may be drawn.[232]~~

99/1. *(update)* **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 probatio).*[233] The Court has, however, recognised that a strict application of this principle is not always appropriate.[234] Its approach to the distribution of**

~~[229] *Tangiyeva v. Russia*, quoted above, §81.~~

~~[230] Among others see *Salman v Turkey*, no. 21986/93, 27 June 2000, § 100. See *Ribitsch v Austria*, no. 18896/91, Commission Report, 4 July 1994 § 104 "[T]he authorities exercise full control over a person held in police custody and their way of treating a detainee must, therefore, be subjected to strict scrutiny under the Convention. Thus where injuries occurred in the course of police custody, it is not sufficient for the Government to point at other possible causes of such injuries, but it is incumbent on them to produce evidence showing facts which cast doubt on the account given by the victim, in particular if supported by medical evidence." See also *Ribitsch v Austria*, no. 18896/91, 4 December 1995 § 34 where the Court concluded that the Government have not satisfactorily established that the applicant's injuries were caused otherwise than - entirely, mainly, or partly - by the treatment he underwent while in police custody.~~

~~[231] *Akkum and Others v Turkey*, no. 21894/93, § 211, 24 March 2005; *Aslakhanova and Others. v Russia*, no. 2944/06 *and 8300/07, 50184/07, 332/08, 42509/10*, 18 December 2012 § 97.~~

~~[232] *Varnava and others v. Turkey*, quoted above, § 184.~~

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

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

the burden of proof takes into account circumstances in which the events in issue lie wholly, or on 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.[235] The burden of proof will only shift in this way where there are already concordant inferences supporting the applicant's allegations.[236] 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.[237] 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.[238] 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.[239] 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.[240]

99/2. *(update)* **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 proof; [241] Article 35 § 1 providing for such distribution.[242] 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 time[243], 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. [244] 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,[245] or that there existed special circumstances absolving the persons concerned from the requirement of exhausting that remedy.[246] One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what the authorities have done in response to the scale and seriousness of the matters complained of. [247]**

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

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

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

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

[239] ***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.**

[240] ***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.**

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

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

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

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

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

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

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

99/3. 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 (see paragraph 71 below)."[248]

(Opt 2)

98. The Court's approach not to rigidly apply the burden of proof ~~rigidly~~ is also demonstrated by the fact that it has on occasions accepted to shift the burden of proof from the applicant to the respondent Government. This applies to cases when the Court notes difficulties for an applicant to obtain the necessary evidence in support of his/her allegations that is in the hand of the respondent Government which fails to submit relevant documents. When the applicant makes a *prima facie* case and the Court is prevented from reaching factual conclusions by the absence of such documents, it is for the respondent Government to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants or to provide a satisfactory and convincing explanation of how the event in question occurred. The burden of proof is thus shifted to the Government.[249] In cases involving situations of injuries sustained in detention the Court has shifted the burden on the respondent Governments and has not accepted in principle the argument that for a violation of the Convention to be found, it was necessary for ill-treatment to be proved beyond reasonable doubt.[250]

99. Similarly, in cases involving deaths during a military operation in areas under the exclusive control of the authorities of the respondent Government, the Court has shifted the burden of proof to the respondent Government, in circumstances where the non-disclosure of crucial documents in the exclusive possession of the respondent Government prevented the Court from establishing the facts. It was, therefore, for the Government either to argue conclusively why the documents

[248] *Georgia v. Russia* (I) (just satisfaction), no. 13255/07, § 69, 31 January 2019
[249] *Tangiyeva v. Russia*, quoted above, §81.
[250] Among others see *Salman v Turkey*, no. 21986/93, 27 June 2000, § 100. See *Ribitsch v Austria*, no. 18896/91, Commission Report, 4 July 1994 § 104 "[T]he authorities exercise full control over a person held in police custody and their way of treating a detainee must, therefore, be subjected to strict scrutiny under the Convention. Thus where injuries occurred in the course of police custody, it is not sufficient for the Government to point at other possible causes of such injuries, but it is incumbent on them to produce evidence showing facts which cast doubt on the account given by the victim, in particular if supported by medical evidence." See also *Ribitsch v Austria*, no. 18896/91, 4 December 1995 § 34 where the Court concluded that the Government have not satisfactorily established that the applicant's injuries were caused otherwise than - entirely, mainly, or partly - by the treatment he underwent while in police custody.

in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred.[251] Also, in situations where persons are found injured or dead, or who have disappeared, in an area within the exclusive control of the authorities of the State and there is *prima facie* evidence that State agents may be involved, the burden of proof may also shift to the respondent Government since the events in issue may lie wholly, or in large part, within the exclusive knowledge of its authorities. If they then fail to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation, strong inferences may be drawn.[252]

~~**99/1. 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 (see paragraph 71 below)."[253]**~~

4. The fact-finding function of the Court

4.1. Investigative powers

100. *(updated)*The Court establishes the facts primarily based on documentary evidence which includes among others reports from international governmental and non-governmental organisations.[254] Being the master of its own procedure and its own rules, it has exclusive authority in assessing not only the admissibility and relevance of evidence as it has been described above (see section VI/1) but also the probative value of each item of evidence before it **(see also paragraph 84 above)**. The Court has often attached importance to the information contained in relevant reports from independent international human-rights-protection associations or governmental sources. In order to assess the reliability of these reports, the relevant criteria are the authority and reputation of their authors, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and whether they are corroborated by other sources.[255] **The Court may hold a hearing with witness and experts not**

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[251] ***Akkum and Others v Turkey*, no. 21894/93, § 211, 24 March 2005; *Aslakhanova and Others. v Russia*, no. 2944/06 *and 8300/07, 50184/07, 332/08, 42509/10*, 18 December 2012 § 97.**

[252] ***Varnava and others v. Turkey*, quoted above, § 184.**

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

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

[255] Ibid, § 138.

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.[256] In the recent judgment Georgia v. Russia (II) the Court has shown a systematic approach to the presentation and analysis of evidence for each of the claims of the applicant Government declared admissible, including written evidence and witness hearings.

101. 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 fact-finding hearings or on-site investigations. **It is reported that,** ~~A~~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, 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.[257]

102. 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.[258] 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 an essential part of a well-argued request for a fact-finding mission. [259] As regards the timing of fact-finding activities of the Court the Convention does not explicitly address this issue. However, the Rules of the Court specify that fact-finding takes place after a case has been declared admissible, or exceptionally, before the decision on admissibility.[260]

103. In the early days fact-finding missions in the context of inter-State applications became relatively frequent, but since the establishment of the "new" Court in 1998 fact-finding missions have been reduced to a certain extent. For example, in the case of *Denmark, Norway, Sweden and the Netherlands v. Greece*,[261] 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.[262] However, in recent years, the Court is more leaning towards "limited" forms of fact-finding. In particular, in the cases of *Georgia v. Russia* (I) and (II), the Court conducted hearings of witnesses which took place in Strasbourg. The Court's recent tendency not to carry out fact-finding missions is reportedly primarily related to cost and time factors; the increase in the Court's

[256] ***Georgia v. Russia* (II) (merits) no. 38263/08, § 74, 21 January 2021.**
[257] 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.
[258] Ibid.
[259] Ibid.
[260] Annex to the Rules of Court, Rule A1 (3)
[261] *Denmark, Norway, Sweden and the Netherlands v. Greece*, quoted above.
[262] *Cyprus v Turkey*, nos. 6780/74 and 6950/75, 26.5.75 *et seq.*, Commission Report of 10.7.76

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.[263]

104. The investigation powers of the Court are based on Article 38 of the Convention and are exercised pursuant to the Rules of the 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.[264]

4.2. Hearings with witnesses

105. As has been mentioned obtaining the necessary evidence by witness hearings (see paragraph 81 above) is one of the challenges that the Court often faces in relation to inter-State applications and related individual applications. Witnesses are summonsed by the Court's Registrar, [265] while the Contracting State in whose territory the witness resides is responsible for serving any summons sent to it by the Court.[266] 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.[267]

106. 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.[268]

107. Until now there have generally 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.[269] This approach has advantages for the Court in respect of the availability of legal staff, recording equipment and interpreters. It must also be noted that where a witness is summoned at the request of or on behalf of a Contracting Party, the costs of their appearance shall be borne by that Party unless the Chamber decides otherwise.[270] In addition, it can provide a neutral venue and thus avoids disagreement by the parties as to

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[263] **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** ~~note 162 above~~, page 45.

[264] Rule A1 § 3 of the Annex to the Rules of Court.

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

[266] See Rule 37 § 2 of the Rules of Court and Rule A5 § 4 of the Annex.

[267] Ibid., Rule A4 § 2 of the Annex.

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

[269] **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.**

[270] See Rule A5 § 6 of the Annex to the Rules of Court.

where the fact-finding hearing should take place. However, this approach presupposes that the witnesses are free and willing to attend the hearing.

108. Member States are obliged to ensure freedom of movement and adequate security for, among others, witnesses and experts.[271] 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.[272] 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.[273] 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.[274]

109. Witnesses' failure to appear before the Court ~~is~~ **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).[275] 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".[276] The Court on the other hand has no means to compel witnesses to attend its hearings. The Rules of the Court do not explicitly provide for hearing of witnesses through remote participation or electronic means. The feasibility of organising witness hearings in this way seems to be a working method worth further reflection.

110. 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.[277] 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 regard the Court

[271] Ibid., Rule A2 § 2.
[272] 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.
[273] Rule A7 § 4 of the Annex to the Rules of Court,
[274] See Commission's report in the case of *Cyprus v. Turkey*, §§ 33-47 and the judgment in the same case, §§ 105-118.
[275] *Georgia v. Russia* (I), quoted above, §§ 90-92.
[276] 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.
[277] *Taş v. Turkey*, quoted above, § 54.

may draw conclusions as to whether the respondent State has met its obligations under Article 38 of the Convention.[278] 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.[279] This practice is reflected in the Rules of the 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.[280]

4.3. On-the-spot investigations

111. On-the-spot investigations are an important element of the Court's fact-finding activities. They provide the Court with a unique opportunity to gain direct, first-hand impressions of the locations visited (notably detention centres), and accordingly to supplement their understanding of the situation gained previously from reviewing the pleadings and available documents in the case.[281] In the early days, as it was mentioned above, the Commission was conducting more on-the-spot investigations than the Court does nowadays; such investigations were carried out by the Court in several inter-State cases.[282] Recently, it appears that the Court to a certain extent has changed its practice and embraced a less procedurally challenging way of arriving at a conclusion in a given case.[283]

112. 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, difficulties encountered by the Court when investigating facts that have taken place years before the hearing ~~the appropriateness of fact-finding missions where the event in question had taken place many years before~~ have been raised as a potential issue.[284]

113. The effectiveness of on-the-spot investigations depends to a large extent on the full co-operation 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 territory[285] or to premises relevant to the case.[286] 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

[278] 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.
[279] *Orhan v. Turkey*, no. 25656/94, § 274, 18 June 2002.
[280] Rule 44 C inserted by the Court on 13 December 2004.
[281] 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 77.
[282] For example in the cases of *Cyprus v. Turkey*, quoted above and in the case of *Denmark, Norway, Sweden and the Netherlands v. Greece*, also quoted.
[283] In the cases of *Georgia v. Russia* (I) and (II) the Court carried out only witnesses hearings.
[284] See comments by Cyprus contained in document CDDH(2019)12.
[285] *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, 26.5.75 *et seq.*, Commission Report of 10.7.76;
[286] 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.

co-operative attitude. In such cases the Court has instead proceeded with preparation of the judgment on the basis of the evidence before it.[287]

5. Comparative perspectives

5.1. The International Court of Justice

114. The ICJ deals only with disputes submitted by States on issues of international law pursuant to Article 34 § 1 of the Statute of the ICJ. According to Article 44 of its Statute, the ICJ can procure evidence on the spot and summon witnesses and experts by applying to the Government of the State upon whose territory the visit will take place or notice has to be served. Witnesses and experts who appear before the ICJ upon its own decision are paid out by the funds of ICJ (Article 68 of the Rules of the ICJ). It seems that neither the Statute nor the Rules of the Court confer upon the ICJ the power to compel witnesses' appearance.

115. On-site visits are carried out by the full bench of the ICJ on the basis of a decision by the ICJ. As such they are to be distinguished from unofficial visits or visits by experts. This practice has an incidence on the number of on-site visits cases which are rare in practice. One example is the visit made in the *Gabčikovo* case during which the agent of Slovakia invited the Court to "visit the locality to which the case relates and there to exercise its functions with regards to the obtaining of evidence, in accordance with Article 66 of the Rules of the Court".[288] **Notably, both parties co-organized the visit, and the members of the ICJ held meetings with the representatives and experts from both sides on the objects that were situated in Slovakia and Hungary. Hence, both parties were given equal opportunities and time to present their position and organize their part of the visit of the ICJ.**

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

117. While Article 49 does not explicitly contain an obligation by the State Parties to disclose information it states that formal note shall be taken of any refusal to comply with the ICJ's request for information. In other words, the ICJ cannot compel the parties to produce evidence or subpoena witnesses. Neither the Statute nor the Rules of the ICJ mention specifically the duty of cooperation of states with the ICJ. Also, the ICJ seems reluctant to draw adverse inferences from a refusal to produce the requested information.[289]

118. Article 50 of the ICJ's Statute gives the ICJ the fact-finding power to appoint an expert to advise it regarding the case. The utility of an expert appointed by the ICJ can have two main constraints. Firstly, there is no obligation on the parties to cooperate with the expert or to provide him/her with information. Secondly, the parties do not have any right to cross-examine the expert appointed by the ICJ.[290]

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[287] *Shamayev v. Georgia and Russia*, no. 36378/02, §§ 26-49, 12 April 2005.
[288] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J Reports 1997, p. 7*
[289] See Michael P. Scharf and Margaux Day: "The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences" Chicago Journal of International Law, vol.13, no.1.
[290] Article 67 of the Rule of the ICJ does not provide for this possibility but only that every report or record of an enquiry or every expert opinion shall be communicated to the parties which shall be given the opportunity to comment on it.

119. Furthermore, Article 50 of the ICJ's Statute gives the ICJ the power to entrust an independent body or commission with the task of carrying out an inquiry. Such inquiries should be distinguished from site-visits discussed above because while a site visit will usually help to ascertain the facts of a case, Article 50 only covers inquiries that the Court entrusts to other bodies or institutions. The use of Article 50 powers by the ICJ has been rare in its practice.[291]

120. The Court has also the power to request information from public international organisations**.**[292] However, it was neither utilised nor referred to in the early years of the Court's operation.[293] The first use only came with the Aerial Incident of 27 July 1955 case.[294] Another means by which information and expert opinion not submitted by the parties could come before the Court is through amicus curiae briefs. The practice of the Court, unlike other international courts and tribunals, to date has been limited.[295]

121. The principles on burden and standard of proof have been established in various decisions of the ICJ. Generally, the ICJ applies the commonly accepted principle of *actori incumbit probatio*, which means that it is up to the claimant party to prove her claim.[296] The ICJ may take another approach to the burden of proof only when the parties contest the facts brought before the ICJ. In these cases, the ICJ may divide the burden of proof in relation to different facts or particular issues[297] or even shift the burden of proof to the party claiming to prove the negative.[298]

122. As regards the standard of proof the ICJ has to be persuaded of a claim and no particular standard is applicable. There appears some flexibility in the ICJ's approach regarding the standard of proof.[299] In sum, the ICJ decides which standard to apply when, based on the facts and merits of the case. Such flexibility seems to be justified in view of the cases presented before the ICJ which involve claims of rights of nations and political questions.

5.2. The Inter-American System of Human Rights

123. ~~Despite certain differences, the strongest similarities with the European system of human rights protection, in terms of fact-finding missions, can be found in the Inter-American system of~~

[291] *Case concerning the Factory at Chorzów (Germany v. Poland), Merits, 17 PCIJ (Series A) 29, 51, 1928; Corfu Channel case (United Kingdom v. Albania), Judgment of April 9th 1949, I.C.J. Reports 1949, p.4.*
[292] Article 34 (2) of the Statute of the ICJ.
[293] Pierre-Marie Dupuy, "Article 34" in A. Zimmermann (ed), *The Statute of the International Court of Justice: A Commentary.*
[294] *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)* 1959.
[295] James Gerard Devaney, The Law and Practice of Fact-Finding before the International Court of Justice, p.40
[296] *Corfu Channel case (United Kingdom v. Albania), Judgment of April 9th 1949, I.C.J. Reports 1949, p.4*; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, 1986 I.C.J. 14.
[297] *Ahmadiou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Merits, Judgment, I.C.J. Reports 2010, p. 639: The ICJ decided that it was for one party to establish that local remedies were exhausted or that extenuating circumstances existed that avoided this requirement – whilst at the same time it was for the other side to prove that these local remedies had not been exhausted.
[298] *Case of Certain Norwegian Loans (France v. Norway), Judgment of July 6th, 1957, I.C.J. Reports 1957, p.9*; the onus was on the party which raises the contention that local remedies have not been exhausted to prove before the Court that there are other domestic remedies which have not been used by the parties.
[299] In the *Corfu Channel* Case the ICJ appears to have employed a high standard, which is proof beyond reasonable doubt in respect of the allegations by the applicant party with regard to the knowledge and assistance of the respondent country regarding the damages incurred by the first, given the seriousness of such allegations. In the Nicaragua case, the ICJ elaborating on Article 53/2 of its Statute, which states that if a party fails to appear or defend its case, the ICJ, after satisfying itself that it has jurisdiction and the claim is "well founded in fact and law", shall rule in favor of the other party, held that 'satisfy itself' means that the ICJ must attain a "degree of certainty", as in any other case, that the facts are based on convincing evidence.

~~human rights protection.~~[300] The ACHR provides the IACHR with formal powers to carry out investigations to verify the facts of a submitted complaint.[301] On the site, a Special Commission appointed for that purpose will carry out the investigation.[302] A member of the IACHR who is a national or who resides in the territory of the State in which the onsite observation is to be conducted is unequivocally disqualified from participating in it.[303] Once the IACHR has obtained the consent of the State for an on-site observation, the latter is "governed by broad rules of inquiry".[304] The IACHR can specifically interview witnesses, government officials, etc. or perform on-site visits. The State will furnish to the IACHR all necessary facilities for carrying out its mission. Moreover, the State shall commit itself not to take any reprisals of any kind against any persons or entities cooperating with or providing information or testimony to the IACHR.[305]

124. If the proceedings before the IACHR are terminated and the case brought to the IACtHR either by the IACHR or a State, the IACtHR will consider the case. During this phase, the IACtHR is empowered to gather any additional evidence that it considers necessary in order to determine whether the State is responsible for the alleged violation.[306] These powers include witness hearings (including experts), requesting from the parties the production of certain evidence, requesting a report or opinion from a third party or appointing its own Judges to hold a hearing at the Court premises or elsewhere.[307] Hearings are public unless the IACtHR considers it appropriate to hold a hearing *in camera*. The IACtHR's Rules of Procedure authorise the use of electronic means to facilitate communication between those involved in the case. Therefore, the witnesses and others can give their statements through electronic audio-visual means.[308] One of the advantages of this approach is, surely, a reduction in expenses.

125. Article 26 of the Rules of the Procedure of the IACtHR refers to member States' obligations in relation to the attendance of witnesses. However, the IACtHR, similar to the Strasbourg Court, does not have the power to compel witnesses to attend a hearing. Also, the reasons of the non-attendance of the witnesses are various. In order to overcome these issues the IACtHR can designate an expert to visit a particular location to interview witnesses when the trip itself would be difficult or expensive for the entire IACtHR.[309] A witness can also be heard by a person appointed by the President of the IACtHR with the consent of the respondent State.[310]

~~[300] The IACHR with functions similar to the UN treaty monitoring bodies and the former European Commission of Human Rights, monitors the situation of human rights in the various member States, conducts on-site visits, handles complaints alleging human rights violations and hosts several thematic rapporteurs. The IACHR also brings cases to the IACtHR, as was done by the former European Commission of Human Rights in the Convention system prior to Protocol no. 11~~

[301] Article 48 (1)(d) of the ACHR.

[302] Article 53 of the Rules of Procedure of the IACHR on Human Rights.

[303] Ibid, Article 54.

[304] IACHR on Human Rights, Regulations Regarding On-Site Observations, Oas Doc.OEA /Ser.L/V/II.35.

[305] Articles 56 and 57 of the Rules of Procedure of the IACHR on Human Rights.

[306] Ibid, Article 58.

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

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

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

[310] In the case of *Caballero Delgado and Santana v. Columbia (8 December 1995*), for reasons of ill-health, the IACHR requested that one of the witnesses be heard in Colombia by an academic See, Héctor Faúndez Ledesma, The Inter-

126. As regards documentary evidence they must normally be authenticated before they can be admitted as evidence. In that respect, in the case of *Bámaca-Velásquez v. Guatemala*, the opposing party objected to the inclusion in the file of documents attributed to the Central Intelligence Agency that were not authenticated. They were, *inter alia*, not signed from another State and included statements from unknown witnesses etc. The party could not cross-examine the persons who had written the documents, nor could the judges question them to make a critical assessment of the reliability of the statements contained therein. The IACtHR refused to admit these documents confirming that they did not comply with the "minimum formal requirements for admissibility".[311]

VII. JUST SATISFACTION IN INTER-STATE CASES

1. The practice of the Court with regard to Article 41

127. The Court has already held that just satisfaction as enshrined in Article 41 of the Convention is applicable to inter-State cases. In the case of *Cyprus v. Turkey*[312] the Court, for the first time, made an award of just satisfaction to individuals regarding violations established on the merits in an inter-State case The Court derived its approach from the principles of public international law relating to state liability, the *travaux préparatoires* of the Convention as well as the International Law Commission Draft Articles on Diplomatic Protection.[313] 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."[314] **However, as previously noted (see par.31), applicability of rules of general international law regarding diplomatic protection is a) without prejudice to provisions of the Convention which form *lex specialis*, and b) reliant upon application of rules of general international law on State responsibility.**

128. The Rules of the 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.[315] 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.[316]

129. 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

American System for the Protection of Human Rights: Institutional and Procedural Aspects, Inter-American Institute of Human Rights, San Jose, 2008, pp. 699-700.

[311] See Pasqualucci, J., supra note 213.

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

[313] Ibid., §§ 40-46.

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

[315] Rule 46 (e).

[316] Rule 60 as amended by the Court on 13 December 2004.

to the Court.[317] 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.[318]

130. **The application of Article 41 of the Convention requires identification of the individual victims concerned.**[319] 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.[320] In the case of *Georgia v. Russia (I)* ~~the Court~~, **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.**[321] ~~I~~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.[322] 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.[323] 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.[324] **Meanwhile the lack of establishment of the specific facts namely the victims and violations concerned or the calculation of monetary compensation evidently hinders the execution process. 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** (Opt 1) **could not be regarded as such /** (Opt 2) **could not be awarded just**

[317] *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.**

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

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

[320] Ibid. § 28.

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

[322] 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.

[323] *Georgia v. Russia* (I) (just satisfaction), quoted above § 58.

[324] Ibid., §§63-65.

satisfaction in that procedure because they had lodged individual applications before the Court.[325]

131. The Court has observed that it was very important that the applicant State was, from the outset (Opt 1) **of the procedure on just-satisfaction**/ (Opt 2) ~~of the procedure on just-satisfaction~~ asked to submit the list of clearly identifiable individuals.[326] In this respect, **the Court reiterates 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 the Court. This obligation requires States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards examination of applications.**[327] **This duty to cooperate 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 the Court, must substantiate their claims, and also the respondent Government, in respect of who the existence of an administrative practice in breach of the Convention has been found in the principal judgment.**[328] ~~cooperation on this matter is important, which includes a duty to produce all information in its possession as prescribed by Article 38 of the Convention and Rule 44 A of the Rules of Court.~~ Thereby, the risk of awarding just satisfaction to individuals who are not eligible for such an award due to various reasons could be decreased. Moreover, it is important, in the operative part of the judgment on the merits, to fix

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[325] *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 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.

[326] See document CDDH(2019)22, § 31

[327] *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 59, 29 January 2019

[328] *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.

a time-limit for the parties' exchange of observations on just satisfaction[329] in order to avoid long intervals of time between the judgment on the merits and the judgment on just satisfaction.[330]

132. 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.[331] 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 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.[332]

133. 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. [333]

2. Comparative perspectives

2.1. *The International Court of Justice*

134. The Permanent Court of International Justice stated in the *Factory of Chorzów* case that "it is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law".[334] This means that compensation is a substitute for restitution in kind if the restitution in kind is impossible to fulfill. The amount must be based on the

[329] ~~Ibid. § 30.~~ **See document CDDH(2019)22, § 31**

[330] 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.

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

[332] *Georgia v. Russia* (I) (just satisfaction), quoted above § 73.

[333] Ibid. § 75.

[334] ICJ, *Case concerning the Factory at Chorzów, Merits, (Germany v. Poland)*, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, pp. 27-28.

value equivalent to what restitution in kind would have offered, i.e. on the value lost as compared to the situation if the illegal act had not occurred.[335]

135. In the *Corfu Channel* case the ICJ stated for the first time that it had jurisdiction to assess an amount of compensation.[336] The ICJ awarded an amount of compensation for the second time in the case of *Republic of Guinea v. Democratic Republic of the Congo* [337] in which the applicant State was exercising diplomatic protection with respect to one of its nationals and seeking compensation for the injury caused to him in connection with allegations of unlawful arrest, detentions and expulsion. The ICJ stated that "in the light of the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation". The parties failed to reach an agreed settlement, after a period of six months, on the amount of compensation to be paid by the DRC to Guinea and, therefore, the matter was settled by the Court itself in a subsequent phase of the proceedings.[338]

136. In respect of the question of calculation of the amount of the due compensation, the ICJ stated in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*,[339] that first, it considers for each head of damage whether an injury is established and then, ascertains "whether, and to what extent, the injury asserted by the [a]pplicant is the consequence of wrongful conduct by the [r]espondent [state]", taking into account "whether there is a sufficiently direct and certain causal nexus between the wrongful act and the injury suffered by the [a]pplicant"[340]. If the existence of injury and causation is established, the ICJ will then determine the value. The ICJ then found that, since it had not been shown that the genocide at Srebrenica would in fact have been averted if Serbia had attempted to prevent it, financial compensation for the failure to prevent the genocide at Srebrenica was not the appropriate form of reparation.[341]

137. Concerning non-material injury, the ICJ indicated that it can be established even without specific evidence.[342] For example, in *Ahmadou Sadio Diallo*, the Court took into account the number of days for which Mr. Diallo was detained.[343] It indicated that quantification of compensation for non-material injury necessarily rests on equitable considerations, referring notably to the Court in *Al-Jedda v. United Kingdom*.[344]

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[335] The ICJ did not award compensation in this particular case as in the order dated 25 May 1929, an agreement was settled between the two States. Therefore, the ICJ declared the proceedings terminated.
[336] ICJ, *Corfu Channel case (United Kingdom v. Albania), Judgment of April 9th 1949*, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949, p. 244. The ICJ awarded £844,000 to the United Kingdom in its separate judgment rendered on 15 December 1949, where the Albanian Government was absent. To assess this amount, the Court appointed experts, in conformity with Article 50 of the Statute to estimate the damages.
[337] ICJ, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Merits, I.C.J. Reports 2010, p.639.
[338] *Ahmadou Sadio Diallo, (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J Reports 2012, p.324.*
[339] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I), pp. 233-234, para. 462*
[340] *Ibid*.
[341] *Ibid*.
[342] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 639, para.21*
[343] *Ibid*., para. 22
[344] *Ibid., para.24*

2.2. *The Inter-American System of Human Rights*

138. The State parties to the ACHR have undertaken an international obligation to protect and ensure the rights enshrined in this treaty and to provide reparations to the injured parties if the State violates those rights.[345] The IACtHR indicated that *restitution in integrum* may include compensation, satisfaction and assurances that the violations will not be repeated.[346] The reparations awarded under this principle must be proportionate to the injury caused by the violations.[347]

139. Article 63(1) of the ACHR specifies that it is the "injured party" who shall receive reparations, meaning the person or persons affected by the violation.[348] For certain types of human rights violations (extra-judicial executions and forced disappearances), the IACtHR may consider the injured party to be not only the person who was killed or disappeared but also that person's next of kin who suffered as a result of losing a loved one and who was denied recourse by State authorities.[349] The definition of "next of kin" is provided in Article 2(15) of the Rules of Court, as the "direct ascendants and descendants, siblings, spouses or permanent companions, or those determined by the Court, if applicable".

140. Concerning the identification of victims, the IACtHR has held that alleged victims must be properly identified in the application that the IACHR files with the Court.[350] This approach has been confirmed in 2009, following the amendment to Article 33 of the Rules of the Court which became Article 34(1).[351] It should be noted that Article 35(2) of the Rules empowers the IACtHR to decide whether to consider individuals as victims when it has not been possible to identify all of the alleged victims in a case of mass or collective violations. While the IACHR should identify the victims of a case, the Court − as the judicial body in charge of interpreting and applying the ACHR in contentious cases − is ultimately responsible for assessing the merits and determining who is a victim and who, in turn, may participate in proceedings and be eligible for reparations.

141. In cases relating to indigenous communities where it often includes multiple victims, for example in the *Moiwana Community v. Suriname* case[352], the IACtHR recognised that frequently official documents such as birth or death registrations were lacking.[353] In such cases, the IACtHR accepted the inclusion of those "who may be identified subsequently, since the complexities and difficulties in individualizing them, suggest that there are still other victims to be determined."[354] As for cases with large numbers of unidentified victims, the IACtHR has ordered that victims must be identified by documentation presented to the competent authorities within a fixed time period.[355]

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[345] Article 63(1) of the ACHR
[346] *Case of Castillo Páez v. Peru* (Reparations), 27 November 1998, § 48.
[347] *Ibid*., § 51.
[348] Jo M. Pasqualucci, The practice and procedure of the Inter-American Court of Human Rights, p.235
[349] Case of *Trujillo Oroza v. Bolivia* (Reparations), 27 February 2002, § 54.
[350] Case of *"Juvenile Re-education Institute" v. Paraguay*, 2 September 2004, § 109.
[351] Article 34(1) of the Rules of Court reads as follow: "The Commission shall include the name and address of the alleged victims."
[352] Case of *Moiwana Community v. Suriname*, 15 June 2005.
[353] Case of *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006, para. 73.
[354] Case of *Plan de Sánchez Massacre v. Guatemala (Reparations)*, 19 November 2004, para. 48; and IACtHR, Case of *"Mapiripán Massacre" v. Colombia*, 15 September 2005, paras. 183, 305.
[355] Case of *"Mapiripán Massacre" v. Colombia*, 15 September 2005, para. 257; IACtHR, Case of *Ituango Massacres v. Colombia*, 1 July 2006, para. 358; and IACtHR, Case of *Plan de Sánchez Massacre v. Guatemala (Reparations)*, 19 November 2004, para. 67.

142. The amount of compensation that the Court may order a State to pay to the victim of human rights abuse is determined by the ACHR and the applicable principles of international law.[356] It is not limited by the defects, imperfections or deficiencies of national law.[357] Concerning material damages, the Court takes into account loss of earnings, medical expenses, costs incurred in searching for the victim when the State fails to investigate.[358] As for moral damages, the amount of compensation is grounded in the principles of equity, as in the European system.[359] In its assessment, the Court also considers the particular circumstances of each victim.[360] If the State does not comply with a judgment of the Court, Article 65 of the ACHR provides that the Court shall formulate pertinent recommendation in its annual report to the General Assembly of the OAS.

2.3 The Articles on Responsibility of States for Internationally Wrongful Acts

142 bis

VIII. FRIENDLY SETTLEMENT

1. The practice of the Court

143. 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."[361] The Court may, however, be satisfied that the content of a friendly settlement agreement even when the respondent State explicitly does not recognise a violation of the Convention in the particular case when the Court considers that it has specified the nature and scope of obligations of the respondent State in previous judgments concerning similar issues.[362]

144. 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.

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[356] *Case of Velàsquez Rodriguez v. Honduras* (Compensatory damages, 1989), para. 31.
[357] Ibid, para. 30
[358] Case of *Trujillo Oroza v. Bolivia* (Reparations) 27 February 2002, para. 74 (a)
[359] Case of *Velàsquez Rodriguez v. Honduras* (Compensatory damages, 1989), para. 27
[360] *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala* (Reparations) 25 May 2001, para. 104
[361] *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 wishes to withdraw their applications when it considered that 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.
[362] *Quattrini v. Italy*, no. 68189/01, 8 December 2005 (French only).

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** ~~T~~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.[363] No offer or concession made in the framework of an attempt to secure a friendly settlement may be referred to or relied upon in the contentious proceedings. 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.[364]

145. *(updated)* In 20~~19~~**20**, ~~1688~~ **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 ~~23~~**19**% decrease compared to 201~~8~~9 (~~2185~~**1668**). [365]

146. 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. Such cases date back from the time when the Commission was operational. 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.[366] The Commission in its report under the terms of the 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.[367] 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 has found to constitute a public emergency threatening the life of the nation under the terms of Article 15 of the Convention also seems 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.[368]

147. In the case of *Greece v. United Kingdom* (II)[369] 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

[363] Rule 62 of the Rules of the Court, as amended by the Court on 17 June and 8 July 2002 and 13 November 2006.
[364] See, for example, *Hadrabová and Others v. Czech Republic* (dec), nos. 42165/02 and 466/03, 25 September 2007 and *Miro Iubovs and Others v. Latvia*, no. 798/05, 15 September 2009.
[365] https://www.echr.coe.int/Documents/Stats_analysis_2019_ENG.pdf
[366] 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.
[367] *Ibid*.
[368] Resolution (59) 12, 20 April 1959, adopted by the Committee of Ministers Human Rights (Application No. 176/56).
[369] Greece v. United Kingdom (II), no. 299/57

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.[370] The report of the Commission was made public by the Committee of Ministers in 2006.[371] 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 London Agreements for the final settlement of the problem of Cyprus, resolved that no further action was called for.[372]

148. 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.[373] Following Greece's denunciation of the Convection 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.[374]

149. 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*.[375] 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.[376] 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).[377] 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

[370] Greece v. United Kingdom (II), no. 299/57, Report of the Commission, 8 July 1959
[371] Resolution of the Committee of Ministers, ResDH(2006)24, 5 April 2006
372 Resolution (59) 32, 14 December 1959, adopted by the Committee of Ministers, Human Rights Application No. 229/57.
[373] *Denmark, Norway, Sweden v. Greece (II)*, no. 4448/70, Report of the Commission, 4 October 1976.
[374] *Ibid*.
[375] *Denmark, France, Norway, Sweden and the Netherlands v. Turkey*, nos. 9940-44/82
[376] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos 9940-44/82, admissibility decision, 6 December 1983
[377] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos 9940-44/82, report of the Commission, 7 December 1985 (friendly settlement)

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.

150. The Court has accepted the friendly settlement reached between the Parties in the inter-State case, *Demark v. Turkey*. 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 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.[378]

151. Where an applicant has refused the terms of a friendly-settlement proposals pursuant to Rule 52 of the Rules of the 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 the 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.

152. The Court **has** considers**ed 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, whether the applicant's grievances under the Convention are adequately addressed.[379] Also, the Court rejects requests for striking cases out of the list on the basis of unilateral declarations when it considers

[378] *Denmark v. Turkey*, no. 34382/97, 5 April 2000.
[379] *Tahsin Acar v. Turkey* [GC], no. 26307/95, §§ 78, 79, 83

the serious nature of the allegations of human rights violations[380] 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.[381]

153. *(updated)* The number of unilateral declarations in 20~~19~~**20** was ~~1 511~~**402**, representing a~~n~~ ~~increase~~ **decrease** by 7~~5~~**3**% compared to 201~~8~~**9**, with ~~865~~ **1 511** declarations. [382]

~~154. 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.[383] 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.~~

~~155. 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.[384] 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.~~

156. 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*.[385] 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~~.~~[386] **, which the Court found in its judgments in**

[380] *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.
[381] *Tomov and others v. Russia*, nos. 18255/10 and others, §100, 9 April 2019.
[382] https://www.echr.coe.int/Documents/Stats_analysis_2019_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 UDs.
[383] Rule 61§1 of the Rules of the Court.
[384] 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; 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.
[385] *Xenides-Arestis v. Turkey*, no. *46347/99*, §§ 39, 40, 22 December 2005.
[386] *Ibid*, § 38.

***Loizidou v. Turkey*[387] and *Cyprus v. Turkey*,[388] to be imputable to Turkey.** In this connection it noted that approximately 1.400 property cases were pending before it brought primarily by Greek Cypriots against Turkey.[389] 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. [390]

157. Following the pilot judgment in the Xenides Arestis case an Immovable Property Commission (IPC) was set up in the northern part of Cyprus under **"TRCN"** 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 the property owned by Greek Cypriots". [391] The Court issued the just satisfaction judgment in the inter-State case *Cyprus v. Turkey* on 12 May 2014. The Cypriot Government requested the Court to adopt a "declaratory judgment" stating: "(i) that Turkey is required by Article 46 to abide by the judgment in *Cyprus v. Turkey* by abstaining from permitting, participating or acquiescing or being otherwise complicit in, the unlawful sale and exploitation of Greek Cypriot homes and property in the northern part of Cyprus; (ii) that this obligation arising under Article 46 is not discharged by the Court's admissibility decision in *Demopoulos and Others*." [392] The Court considered that it was "not necessary to examine the question whether it has the competence under the Convention to make a "declaratory judgment" in the manner requested by the applicant Government since it is clear that the respondent Government is, in any event, formally bound by the relevant terms of the main judgment. It is recalled in this connection that the Court has held that there had been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property, as well as any compensation for the interference with their property rights (Part III, point 4 of the operative provisions of the principal judgment). It thus falls to the Committee of Ministers to ensure that this conclusion, which is binding in accordance with the Convention, and which has not yet been complied with, is given full effect by the respondent Government. Such compliance could not, in the Court's opinion, be consistent with any possible permission, participation, acquiescence or other form of complicity in any unlawful sale or exploitation of Greek-Cypriot homes and property in the northern part of Cyprus. Furthermore, the Court's 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."[393]

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[387] 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.
[388] Cyprus v. Turkey [GC], no. 25781/94, ECHR 2001-IV.
[389] *Ibid,.*
[390] Ibid., §§ 40.
[391] *Demopolous 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.
[392] *Cyprus v. Turkey (just satisfaction) [GC]*, quoted above § 612.
[393] Ibid, § 63.

2. Comparative perspectives

158. The friendly settlement mechanism is envisaged in Article 48 (1) (f) of the ACHR and Article 40 of the IACHR's Rules of Procedure. Under those provisions, on its own initiative or at the request of any of the parties, the ACHR, at any stage of the examination of a petition or case, shall place itself at the disposal of the parties concerned for the purpose of opening a dialogue by which the states and the alleged victims of human rights violations may undertake negotiations with a view to reaching a friendly settlement of the matter, on the basis of respect for the human rights recognised in the ACHR, the American Declaration, and other applicable instruments. This process initiates and concludes by the consent of both parties and creates opportunities not only for a large variety of measures to be adopted to repair the alleged victims themselves, but also for measures to be adopted that may have a wide impact on society in terms of effecting change to improve observance of human rights standards.

159. Once both parties have notified the IACHR in writing of their interest in initiating a friendly settlement procedure, the latter facilitates the process by forwarding all written information to both parties for observations. It is worth noting that throughout the entire friendly settlement procedure, the IACHR plays an active role in promoting and advising the parties on the mechanism, as well as facilitating dialogue. However, the parties may hold meetings throughout the process, either in their countries of origin, with or without the direct participation of the IACHR, or in the presence of the IACHR in the context of its sessions or working visits to countries.

160. The IACHR may terminate its intervention in the friendly settlement procedure if any of the parties does not consent to its application, decides not to continue it, or does not display willingness to reach a friendly settlement. The IACHR may also terminate its intervention if it finds that the matter is not susceptible to such a resolution. In such an event, in accordance with Article 40 of its Rules of Procedure, the IACHR will continue to process the petition or case at the procedural stage that had been reached in the matter.

161. Once an agreement setting out the commitments adopted by the parties has been reached, the IACHR, in accordance with Article 49 of the ACHR, verifies that it meets the human rights standards recognized in the ACHR, the American Declaration, and other applicable instruments, after which it adopts a report containing a brief statement of the facts and of the solution reached. For legal purposes the report adopted under Article 49 of the ACHR concludes the proceedings before the IACHR.

162. After publishing a report on a friendly settlement report, the IACHR monitors compliance with the clauses of the agreement in accordance with the provisions contained in Article 48 of its Rules of Procedure, which enables it to adopt the follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings and/or working meetings in order to verify compliance with friendly settlement agreements. In any event, the IACHR follows up on agreements approved since 2000 through its Annual Report to the General Assembly of the Organization of American States.

IX. CONCLUSIONS

163. **The Convention lacks provisions regarding the issues of correlation between inter-State case and individual applications raising the same issue that had been raised in the inter-state case.** Processing inter-State cases and the high number of individual applications

when they concern inter-State conflicts raises exceptional challenges for the Court **and States-Parties to the dispute**, as these cases are particularly time-consuming ~~for Judges and Registry Staff~~ and complex as a result of their nature and dimension. The Court has already taken a number of measures to ensure an effective processing of these cases.

164. ~~Recently, the Court has introduced a number of practices to counter potential risks of duplication or inconsistencies stemming from the processing in parallel of inter-State applications and related individual applications. In particular,~~ w**W**here 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, ~~without being put aside~~, not decided before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case~~.~~ ~~A formalisation of this practice by the Court to the extent that this would not have collateral effects on the Court's discretion and flexibility to deal with each particular case on its own, would promote a sense of legal certainty amongst the governments of Council of Europe member States. Also, the Court's methodology to take into account any findings of administrative practice established in inter-State proceedings in related individual applications is conducive to avoiding any potential inconsistencies and duplication.~~ **At the same time, gradual and partial processing of individual applications related to the situations of inter-state conflicts can provide further guarantees that the rights of individual applicants in this type of cases are respected. In this regard, gradual communication of the cases to respondent governments in question can both serve as means to reduce backlog of pending applications and allow the Court and the States to continuously process these applications and further contribute to the development of the relevant Court's practice.**

164/1. However, this is not sufficient due to the fact that States-Parties experience difficulties because of the lack of concrete procedural rules that would specifically address issues relating to the processing of inter-State cases, especially establishment of facts and burden of proof.

164/2. Given the special nature of inter-State applications, especially the significantly decreased requirements as to their admissibility in comparison to individual applications, as well as the time and other resources needed for examination of applications lodged under Article 33 of the Convention (including those due to the need to hold hearings on admissibility and on the merits), it appears appropriate to introduce a new condition and new admissibility criterion for inter-State applications. In particular, 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. As regards the new admissibility criterion, an inter-State application or a part thereof must be declared inadmissible if at least one similar application from a concrete affected person is pending before the Court.

165. In practice few inter-State cases relating to the same events or 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 exist in the future and should be mitigated.** In respect of individual applications, there are a number of points of convergence with respect to admissibility requirements regarding plurality of international proceedings between the Court and other international bodies. The approach taken by the UN treaty bodies, notably the Human Rights Committee, with respect to admissibility may lead to situations overlapping competence of international human rights bodies over the same case or very similar ones. Situations of diverging or conflicting jurisprudence between the Court and other international bodies in cases involving the same or similar subject matter have occurred

in practice **with respect to individual applications** raising concerns about legal certainty for States Parties on how to fulfil their obligations, and for individuals as regards the scope of their rights, as well as 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.

165/1. Neither the Convention nor the Rules of the Court seek to regulate how evidence is to be admitted or assessed by the Court.

165/2. In fact, bringing a State to international liability for violation of human rights and freedoms is similar, in terms of its gravity and consequences, to bringing a person to criminal or civil liability - meaning that litigation resulting in recognition of a State's responsibility for violating rights and freedoms must have the same guarantees and remedies against unjust and unfounded decisions. It can be achieved only by building a clear system of evaluation of such evidence. One of the first steps on the way to creating clear standards of proof is refusal to accept references to the media[394] and reports by non-governmental organisations as the sole evidence of existence of whichever event alleged to be a violation of the Convention.

166. **According to t**~~T~~he Court's case law the latter may decide to hold fact-finding hearings or on-the-spot investigations when the domestic authorities have not adequately established the facts / (Opt 2) ~~when the domestic authorities have not adequately established the facts~~. The tendency of the Court in recent years is not to carry out on-the-spot investigations due to the fact that they are time consuming and expensive. Also, in some cases ~~relating to complex situations~~ there are ~~logistical and~~ 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 reluctance of national authorities to support and facilitate the activities of the Court's delegation. Consideration should be given to the question how member States can improve the ways they fulfil their obligation to cooperate with the Court under Article 38 of the Convention in this regard. One of the key issues arising during fact-finding hearings is that a number of witnesses summonsed 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.

167. The Court's case-law with regard to making an award of just satisfaction under Article 41 of the Convention to individuals regarding violations established on the merits in an inter-State case **seems to be** well established. 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. **Rules of general international law regarding compensation should be applied to the extent they do not contravene the provisions of the Convention. Furthermore, these rules are inseparable from other rules on international responsibility of States, which have formed in general international law and are reflected, particularly, in the practice of the International Court of Justice. As shown by the practice of proceedings in inter-State cases, the Court in this or that way faces the need to demand**

[394] **In particular, according to the Rule 40 (Admissibility of Applications) of the African Court On Human and peoples' rights: «applications to the Court shall comply with the following conditions: … 4) not be based exclusively on news disseminated through the mass media»…;**

an applicant State to identify the victims of violation of the Convention. At the same time, careless attitude towards preparation of an inter-State application, expressed in absence of a list of concrete persons affected by the violations of the Convention stated in such application significantly slows down the proceedings in the case. Submitting a list of clearly identifiable individuals by the applicant State from the outset (Opt 1) **at the just satisfaction stage**/ (Opt 2) ~~at the just satisfaction stage,~~ **of the proceedings** as well as the respondent State submitting all the relevant information in its possession, would **also** help reduce the risk of awarding just satisfaction to individuals who are not eligible for such an award. The feasibility of encouraging a formalisation of these practices, notably in the Rules of the Court, ~~would merit further reflection and discussions~~ **is required**. ~~Also, t~~**T**he 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, would help to handle inter-State cases more efficiently and avoid undue delays between the judgment on the merits and the just satisfaction judgment. The Council of Europe member States should give consideration to the question how to further promote such approaches as principles of cooperation with the Court pursuant to Article 38 of the Convention.

168. 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, ways of promoting recourse to the friendly settlement mechanism of the Convention by the Council of Europe member States should be considered.

Appendix
Statistical report on applications linked to inter-State disputes

Provided by the Registry of the Court

Updated on 1 January 2021

Explanation of terms for statistical purposes

An inter-State case is an application brought by one State against another in accordance with Article 33 of the Convention.

Applications submitted by individuals, physical persons or legal entities, concerning the issue identified in the inter-state case, irrespective of whether they are directed against the applicant State or respondent State or both, are considered to be related to that "conflict" or "dispute". In particular, they may concern the control of a territory. The degree of the connection required between the inter-state case and the individual applications always depends on particular circumstances surrounding the "conflict" or "dispute" in question and as well as on the relevant general context, and the Court is free in its evaluation of this question. Individual applications that are considered to be linked to the inter-state case can be lodged with the Court both before and after the introduction of the relevant inter-state case.

Such "dispute" situations may exist even if there are no inter-State applications as such where two States have been/will be called upon to answer before the Court for a situation concerning their jurisdiction. In such cases leading cases are identified to deal with these situations.

It is the need to resolve an overarching issue or issues that should determine whether cases are regarded as linked to an inter-State dispute (an analogy can be drawn with pilot-judgment proceedings in this respect).

I. Individual applications linked to the hostilities in "South Ossetia" and "Abkhazia"[395]

A. Pending applications

In total, 3,416 applications were lodged before the Court with relation to "South Ossetia" (3,216 against Georgia, 178 against Russia and 22 against both States). 19 applications were lodged with relation to "Abkhazia".

1. **Concerning the applications related to hostilities between Georgia and Russia in "South Ossetia" at the beginning of August 2008:** there is currently one pending inter-State case *Georgia v. Russia* (II) (no. 38263/08), in which a judgment on merits was delivered on 21 January 2021 and the question of the application of Article 41 of the Convention has been reserved. Out of 579 pending applications[396], 383 are pending against Georgia, 174 are pending against Russia and 22 are pending against both States. Out of these pending applications, 180 were communicated to the respondent Governments.

[395] The terms "South Ossetia" and "Abkhazia" refer to the regions of Georgia which are beyond the *de facto* control of the Georgian Government.
[396] The applicants alleged breaches of their Convention rights resulting principally from the hostilities and the absence of adequate investigations by the state authorities.

2. **As to the applications lodged concerning various issues in the region of "Abkhazia"**, 16 individual applications are pending: 3 against Russia, 1 against Georgia and 12 against both States. 11 of these were communicated to the respondent Governments.

In addition to that, one pending inter-State case *Georgia v. Russia* (IV) (no. 39611/18) relates to the alleged recent deterioration of the human rights situation along the administrative boundary lines between Georgian-controlled territory and "Abkhazia" and "South Ossetia". The case was communicated to the respondent Government and then adjourned pending the delivery of the judgment in *Georgia v. Russia* (II).

B. Finished applications

1. **Concerning the applications related to hostilities between Georgia and Russia in "South Ossetia" at the beginning of August 2008:** 1,554 applications[397] were struck out of the Court's list in 2010. Furthermore, three leading cases[398] were decided by a Chamber in November 2018, resulting in six applications being declared inadmissible and one application being communicated to the Government. These leading decisions served the basis for subsequent inadmissibility decisions. In total, the Court declared inadmissible 1,282 applications and struck out 1,555 applications out of 3,416 applications lodged.

2. **As to the applications lodged concerning various issues in the region of "Abkhazia"**, three applications were declared inadmissible.

3. There were also 10 applications lodged concerning essentially the alleged existence of an administrative practice involving the **arrest, detention and collective expulsion of Georgian nationals from Russia** in autumn 2006. They were all follow-up cases to the leading case *Georgia v. Russia (I)* [GC] (no. 13255/07)[399]. All 10 applications were decided: 9 resulted in judgments and one was struck out for a friendly settlement.

II. Individual applications linked to the conflict in Eastern Ukraine and Crimea

A. Pending applications

At present **10,262 applications were lodged with the Court concerning the events in Eastern Ukraine and Crimea**, out of which 7,898 are still pending. 216 of pending applications were communicated. These cases are linked to the pending inter-State cases of *Ukraine v. Russia (re Crimea)* (nos. 20958/14 and 38334/18[400]), and *Ukraine and the Netherlands v. Russia* (nos. 8019/16, 43800/14 and 28525/20)[401]. There is one other inter-State application lodged by Ukraine against Russia pending before the Court – *Ukraine v. Russia* (VIII) (no. 55855/18). For

[397] See *Abayeva and Others v. Georgia* (dec.), nos. 52196/08, 52200/08, 49671/08, 46657/08 and 53894/08, 23 March 2010; *Khetagurova and Others v. Georgia* (dec.), no. 43253/08 and 1548 applications, 14 December 2010.
[398] See *Dzhioyeva and Others v. Georgia* (dec.), nos. 24964/09, 20548/09 and 22469/09; *Kudukhova and Kudukhova v. Georgia* (dec.), nos. 8274/09 and 8275/09; *Naniyeva and Bagayev v. Georgia* (dec.), nos. 2256/09 and 2260/09.
[399] See *Georgia v. Russia* (I) [GC] *(merits)*, 3 July 2014; and the subsequent judgment on just satisfaction of 29 January 2019.
[400] See *Ukraine v. Russia (re Crimea)* (dec.), nos. 20958/14 and 38334/18, 16 December 2020. The application no. 38334/18 was joined to the case no. 20958/14 in December 2020.
[401] These applications were joined in November 2020.

details, please see the ECHR factsheet on Armed conflicts (p. 15-18) and the Q & A on Inter-State Cases.

6,879 pending applications concern Eastern Ukraine. 6,033 of these were lodged against Ukraine, 48 were lodged against Russia and 791 were lodged against both States and 7 applications were lodged against Russia, Ukraine and the United Kingdom. In this group, eight applications relate to the destruction of Malaysia Airlines commercial flight MH17 over the territory of Eastern Ukraine on 17 July 2014 (6 applications, out of 8 pending, lodged by 384 applicants, were communicated[402]).

The remaining **1,019 pending applications concern Crimea**. 896 of these were lodged against Russia, 10 were lodged against Ukraine and 110 were lodged against both States, one is lodged against Russia and Serbia, one is lodged against Austria and 16 other member States and one is lodged against Ukraine and 31 other member States.

B. Finished applications

An inadmissibility decision was adopted in the leading case of *Lisnyy v. Ukraine and Russia*[403], in which the Court declared inadmissible for complete lack of evidence the applicants' various complaints concerning, *inter alia*, the shelling of their homes during the hostilities in Eastern Ukraine from the beginning of April 2014 onwards.

Concerning issues in Eastern Ukraine, 1,677 applications were declared inadmissible[404] and 348 were struck out of the list of cases.

Concerning issues in Crimea, 320 applications were declared inadmissible and 26 were struck out of the list of cases. In addition, one inter-State case was struck out of the list of cases (see *Ukraine v. Russia (III)* (dec.), no. 49537/14, 1 September 2015).

In total, the Court decided 2,371[405] applications out of 10,262 applications lodged.

III. Individual applications linked to the conflict over Nagorno-Karabakh

A. Pending applications

Out of 2,342 applications lodged, there are 1,470 applications pending before the Court, which relate to the conflict over Nagorno-Karabakh: 874 against Armenia and 596 against Azerbaijan.

In addition, in view of recent events in the region, three inter-State applications were lodged before the Court: *Armenia v. Azerbaijan* (no. 42521/20), *Armenia v. Turkey* (no. 43517/20) and *Azerbaijan v. Armenia* (no. 47319/20). For details, please see the Q & A on Inter-State Cases.

[402] See *Ioppa and Others v. Ukraine* and *Ayley and Others v. Russia and Angline and Others v. Russia*.
[403] See *Lisnyy v. Ukraine and Russia* (dec.), nos. 5355/15, 44913/15 and 50853/15, 5 July 2016.
[404] Including the applications in the case *Lisnyy v. Ukraine and Russia*, cited above.
[405] This figure does not include the decided inter-State case.

1. **Displaced persons' continued inability to return to their homes and property from which they fled in the years 1988-93**: there are 811 pending follow-up *Chiragov*- and *Sargsyan*[406]-type applications with similar complaints – 414 against Armenia and 397 against Azerbaijan.

2. **"Four-day war" in April 2016**: has lead to 1,085 applications lodged, out of which 590 are still pending, divided into two groups:

a) 562 applications in this group are still pending (439 against Armenia and 123 against Azerbaijan) with complaints by civilians on both sides, predominantly regarding damage and destruction of property but a handful of cases also involve the killing of civilians. Of these, 5 applications were communicated to the respondent Governments.
b) Another 28 pending applications (5 against Armenia and 23 against Azerbaijan) concern mutilation of dead (mostly) soldiers' bodies. All the applications were communicated to the respondent Governments.

3. There are also 6 pending applications against Azerbaijan concerning the detention and alleged torture/killing of Armenian citizens in Azerbaijan. They were all communicated to the respondent Government.

4. As on 1 January 2021, there were 44 individual applications concerning individuals allegedly captured by Azerbaijan since the start of the recent conflict in late September 2020. The two inter-State applications *Armenia v. Azerbaijan* (no. 42521/20) and *Azerbaijan v. Armenia* (no. 47319/20) also concern alleged captives. The mentioned applications concern 203 individuals allegedly captured by Azerbaijan and 13 individuals allegedly captured by Armenia. Rule 39 was applied in almost all these applications.

5. Another 19 pending applications concern various issues, such as killing of soldiers near the line of contact in December 2016 or arrest, sentencing and detention in Nagorno-Karabakh of Azerbaijani nationals in 2015.

B. Finished applications

1. Displaced persons' continued inability to return to their homes and property from which they fled in the years 1988-93: two leading cases were examined and decided by a Grand Chamber (see *Chiragov and Others v. Armenia* and *Sargsyan v. Azerbaijan,* cited above). For further details, see Guide on Article 1 of the European Convention on Human Rights (p. 23) and the ECHR factsheet on Armed conflicts (p. 6-7).

Furthermore, 90 applications were declared inadmissible (87 against Armenia and 3 against Azerbaijan); and 285 applications were struck out of the list of cases (183 against Armenia and 102 against Azerbaijan). In total, 375 applications were finished by the end of 2020.

2. "Four-day war" in April 2016:

Two leading applications, one against Armenia and the other against Azerbaijan, were rejected as unsubstantiated[407]. Furthermore, 493 applications (255 against Armenia and 238 against Azerbaijan) were subsequently declared inadmissible.

In total, the Court declared inadmissible 495 applications out of 1,085 applications lodged under this head.

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[406] See *Chiragov and Others v. Armenia* [GC], no. 13216/05[406], ECHR 2015; and *Sargsyan v. Azerbaijan* [GC], no. 40167/06, ECHR 2015; both judgments on merits in June 2015 and on just satisfaction in December 2017.
[407] See *Amrahov v. Armenia* (dec.), no. 49169/16, 26 February 2019; and *Khudunts v. Azerbaijan*, no. 74628/16, 26 February 2019.

3. Detention and alleged torture/killing of Armenian citizens in Azerbaijan:

One case in this group resulted in a judgment (see *Saribekyan and Balyan v. Azerbaijan*, no. 35746/11, 30 January 2020).

IV. Individual applications related to Transdniestria

A. Pending applications

Out of 153 applications lodged concerning acts committed in the "Moldovan Republic of Transdniestria" ("MRT") 44 applications are still pending: 5 against Russia, 1 against the Republic of Moldova, 35 against the Republic of Moldova and Russia and 3 against the Republic of Moldova, Russia and Ukraine.

21 out of 44 applications were communicated to the respondent Governments and another one resulted in a judgment on merits[408].

B. Finished applications

Two leading cases, concerning 4 applications, were examined and decided by a Grand Chamber[409]. The first case concerned the complaint by children and parents from the Moldovan community in Transdniestria about the effects of a language policy adopted in 1992 and 1994 by the separatist regime forbidding the use of the Latin alphabet in schools and the subsequent measures taken to enforce the policy. The second case concerned conditions of detention of a man suspected of fraud, as ordered by the courts of the self-proclaimed "Moldavian Republic of Transdniestria" (the "MRT"). For more information, see Guide on Article 1 of the European Convention on Human Rights (p. 22-23).

In total, the Court decided 109 applications out of 153 applications lodged: 62 applications resulted in judgments, 43 applications were declared inadmissible and 4 were struck out of the list of cases.

V. Individual applications related to nothern Cyprus

A. Pending applications

The inter-State case *Cyprus v. Turkey*[410] examined by a Grand Chamber concerned the situation that existed in northern Cyprus since the conduct of military operations there by Turkey in July and August 1974 and the continuing division of the territory of Cyprus[411]. For more information, see Guide on Article 1 of the European Convention on Human Rights (p. 20-21) and the ECHR factsheet on Armed conflicts (p. 1-3).

Out of 1,815 applications lodged concerning Cypriot property issues 99 applications are still pending against Turkey, including 2 applications communicated to the respondent Government.

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[408] The application is still pending (see *Babchin v. the Republic of Moldova and Russia* (merits)[Committee], no. 55698/14, 17 September 2019).

[409] See *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, ECHR 2012 (extracts), 19 October 2012; and *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, 23 February 2016. See also *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII.

[410] See *Cyprus v. Turkey* [GC], no. 25781/94, 10 May 2001; and on just satisfaction of 12 May 2014.

[411] See also *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310; *Loizidou v. Turkey (merits)*, 18 December 1996, Reports of Judgments and Decisions 1996 VI; *Loizidou v. Turkey (Article 50)*, 28 July 1998, Reports of Judgments and Decisions 1998 IV.

B. Finished applications

Three judgments concerning Cypriot property issues were delivered by the Court. 1,699 applications were declared inadmissible, including a leading post-*Loizidou* case[412]. 14 applications were struck out of the list of cases, including one struck out for a friendly settlement.

In total 1,716 applications were decided by the Court out of 1,815 lodged.

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[412] See *Demopoulos and Others v. Turkey* [GC] (dec.), no. 46113/99 and 7 others, 1 March 2010.