

**INTER-STATE CASES UNDER  
THE EUROPEAN CONVENTION  
ON HUMAN RIGHTS**  
EXPERIENCES AND CURRENT CHALLENGES

**AFFAIRES INTERÉTATIQUES EN VERTU  
DE LA CONVENTION EUROPÉENNE  
DES DROITS DE L'HOMME**  
EXPÉRIENCES ET DÉFIS ACTUELS



Proceedings of the Conference organised under the aegis  
of the German Presidency of the Committee of Ministers  
(Berlin, 12 – 13 April 2021)

Actes de la Conférence organisée sous l'égide  
de la Présidence allemande du Comité des Ministres  
(Berlin, 12 – 13 avril 2021)

**INTER-STATE CASES UNDER  
THE EUROPEAN CONVENTION  
ON HUMAN RIGHTS / AFFAIRES  
INTERÉTATIQUES EN VERTU DE  
LA CONVENTION EUROPÉENNE  
DES DROITS DE L'HOMME**



***Proceedings of the Conference***

***Actes de la Conférence***

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# PROGRAMME

Day 1 – 12 April

## 15:00 Opening of the conference

**Christine Lambrecht**, Minister of Justice and Consumer Protection of Germany

**Marija Pejčinović Burić**, Secretary General of Council of Europe

**Róbert Spanó**, President of the European Court of Human Rights

## I. SETTING THE SCENE

Moderator: **Isabella Risini**, Ruhr-Universität Bochum

### 15:15 History and typology of Inter-State proceedings under the ECHR

**Ed Bates**, University of Leicester

### 15:35 Inter-State proceedings under human rights treaties other than the ECHR

Interviews with:

**Frans Viljoen**, University of Pretoria (South Africa)

**Laurence Burgogue-Larsen**, Université de Paris 1 Panthéon - Sorbonne

**David Keane**, Dublin City University

*Coffee Break (16:05 – 16:35)*

### 16:35 Panel discussion and Q & A

**Thilo Maruhn**, University of Gießen

**Aletta Mondre**, University of Kiel

**Angelika Nusberger**, University of Cologne

**Peter Tzeng**, Foley Hoag LLP, Washington D.C. (USA)

### 17:45 Presentation of intergovernmental work at the Council of Europe

**Alain Chablais**, Chair of the Drafting Group on the effective processing and resolution of cases relating to Inter-State disputes (DH-SYSC-IV)

Day 2 – 13 April

## II. CHALLENGES IN INTER-STATE CASES BEFORE THE ECtHR

Moderator: **Başak Calı**, Hertie School, Berlin

**09:30 Welcome**

### 09:35 Workshop 1: The challenge of fact-finding

Moderator: **Geir Ulfstein**, University of Oslo

Speakers:

**Martina Keller**, Deputy Section Registrar of the European Court of Human Rights

**Philip Leach**, Middlesex University London

**Alina Miron**, University of Angers

### Workshop 2: The challenge of processing Inter-State cases and related individual applications in parallel

Moderator: **Andreas Zimmermann**, Universität Potsdam

Speaker:

**Helene Tigroudja**, Aix-Marseille University

### Workshop 3: Is there room for friendly settlements in Inter-State cases?

Moderator: **Nicola Wenzel**, German Federal Ministry of Justice and Consumer Protection

Speakers:

**Jorge Contesse**, Rutgers Law School (USA)

**David Keane**, Dublin City University

**Helen Keller**, Universität Zürich

*Coffee Break (10:55 – 11:20)*

### 11:20 Reports from Workshops 1 – 3

**Morten Ruud**, Norwegian Ministry of Justice and Public Security

**Norman Weis**, Universität Potsdam

**Hans-Jörg Behrens**, German Federal Ministry of Justice and Consumer Protection

### 11:50 Panel discussion and Q & A: Possible ways forward

**Alain Chablais**, Chair of DH-SYSC-IV

**Christos Giakoumopoulos**, Director General Human Rights and Rule of Law, Council of Europe

**Thomas Hammarberg**, MP and former CoE Human Rights Commissioner

**Debbie Kohner**, ENNHRI

**Roderick Liddell**, Former Registrar of the European Court of Human Rights

**Isabella Risini**, Ruhr-Universität Bochum

### 13:00 Concluding remarks

**Geir Ulfstein**, University of Oslo

**Andreas Zimmermann**, Universität Potsdam

# PROGRAMME

Premier jour – 12 April

## 15:00 Ouverture de la Conférence

**Christine Lambrecht**, Ministre allemande de la justice et de la protection des consommateurs

**Marija Pejčinović Burić**, Secrétaire Générale du Conseil de l'Europe

**Róbert Spanó**, Président de la Cour européenne des droits de l'homme

## I. PRESENTATION DU CONTEXTE

Modérateur: **Isabella Risini**, Ruhr-Universität Bochum

## 15:15 Histoire et typologie des procédures interétatiques en vertu de la CEDH

**Ed Bates**, Université de Leicester

## 15:35 Procédures interétatiques en vertu de traités en matière de droits de l'homme autres que la CEDH

Échanges de vues avec:

**Frans Viljoen**, Université de Pretoria (Afrique du Sud)

**Laurence Burgogue-Larsen**, Université de Paris 1 Panthéon - Sorbonne

**David Keane**, Université de la Ville de Dublin

*Pause-café (16h05 – 16h35)*

## 16:35 Table ronde et Q & R

**Thilo Maruhn**, Université de Giessen

**Aletta Mondre**, Université de Kiel

**Angelika Nusberger**, Université de Cologne

**Peter Tzeng**, Foley Hoag LLP, Washington D.C. (USA)

## 17:45 Présentation des travaux intergouvernementaux au sein du Conseil de l'Europe

**Alain Chablais**, Président du Groupe de rédaction sur le traitement et la résolution efficace d'affaires concernant des conflits interétatiques (DH-SYSC-IV)



Deuxième jour – 13 April

## II. DÉFIS LIÉS AUX AFFAIRES INTERÉTATIQUES DEVANT LA CourEDH

Modérateur: **Başak Cali**, Ecole Hertie, Berlin

**09:30 Bienvenue**

### **09:35 Atelier 1: Le défi de l'établissement des faits**

Moderateur: **Geir Ulfstein**, Université d'Oslo

Intervenants:

**Martina Keller**, Greffière adjointe de section à la Cour Européenne des droits de l'homme

**Philip Leach**, Université du Middlesex, Londres

**Alina Miron**, Université d'Angers

### **Atelier 2: Le défi de traiter en parallèle les affaires interétatiques et les demandes individuelles qui y sont liées**

Modérateur: **Andreas Zimmermann**, Université de Potsdam

Intervenante:

**Helene Tigroudja**, Université d'Aix-Marseille

### **Atelier 3: Y a-t-il de la place pour les règlements à l'amiable dans les affaires interétatiques ?**

Modérateur: **Nicola Wenzel**, Ministère fédéral allemand de la justice et de la protection des consommateurs

Intervenants:

**Jorge Contesse**, École de droit Rutgers, (USA)

**David Keane**, Université de la Ville de Dublin

**Helen Keller**, Université de Zürich

*Pause-café (10h55 – 11h20)*

### **11:20 Rapports des Ateliers 1 – 3**

**Morten Ruud**, Ministère norvégien de la justice et de la sécurité publique

**Norman Weis**, Université de Potsdam

**Hans-Jörg Behrens**, Ministère fédéral allemand de la justice et de la protection des consommateurs

### **11:50 Table ronde et Q & R : Pistes d'action possibles**

**Alain Chablais**, Président du DH-SYSC-IV

**Christos Giakoumopoulos**, Directeur Général Droits de l'Homme et État de droit, Conseil de l'Europe

**Thomas Hammarberg**, MP et ancien Commissaire aux droits de l'homme

**Debbie Kohner**, ENNHRI

**Roderick Liddell**, Ancien Greffier de la Cour européenne des droits de l'homme

**Isabella Risini**, Ruhr-Universität Bochum

### **13:00 Remarques finales**

**Geir Ulfstein**, Université d'Oslo

**Andreas Zimmermann**, Université de Potsdam

## **Christine LAMBRECHT**

*Federal Minister of Justice and Consumer Protection, Member of the German Bundestag / Ministre fédéral de la justice et de la protection des consommateurs, Membre du Parlement allemand*

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Ladies and gentlemen,  
Dear conference guests,

When we talk about the European Court of Human Rights we seldom refer to inter-state cases. Generally, the focus is on individual applications. One obvious reason for this is the large number of cases of this sort pending in Strasbourg.

However, the European Convention on Human Rights was designed from the very outset to allow the Court to decide on conflicts between the High Contracting Parties.

But that's not all: The Convention's founding fathers and mothers saw inter-state applications as a powerful tool for actually achieving the promise of peace, rule of law and human rights in Europe.

Today the Court faces a rising number of inter-state applications. These are a reflection of conflicts between the Member States of the Council of Europe.

For a long time, inter-state applications played a small role, if any. This period now appears to be drawing to a close. Article 33 of the Convention is not dead. It is living law!

I am therefore pleased that today and tomorrow we will be revisiting these types of cases with "fresh eyes". Our conference brings together prominent experts from judicial practice and the field of international law, as well as from administrative practice, the bar and academia.

I would like to thank all participants for taking the time to share their knowledge, experience and visions.

I would also like to thank our partners who worked with my ministry to organise this conference: the PluriCourts Centre at the University of Oslo and the Human Rights Centre at the University of Potsdam.

Germany currently holds the Presidency of the Committee of Ministers of the Council of Europe. The outcomes of this conference will provide us with a lot of valuable input.

The question is: How do we overcome the practical challenges facing the Convention and the Court today?

With inter-state applications, the challenges are rather specific. In these cases, the Court takes on a very different role than in the case of individual applications.

This includes that the Court is required to investigate the facts itself.

And the Court must determine how an inter-state application stands in relation to parallel individual applications. This is because the conflicts in question also usually give rise to applications by individuals. In this context, a number of practical problems – and very fundamental legal issues – arise.

The Court must overcome all the challenges it faces within a reasonable period of time and, in most cases, while the conflict is still ongoing and is constantly developing.

This requires that the Court is both flexible and sticks to its principles.

In order to find the right answers to these challenges, the Steering Committee for Human Rights has set up a working group. It commenced its activities last year.

It is my firm conviction: our conference will provide valuable impetus for these activities as well.

Ladies and gentlemen,

Europe's common values not only mean that we must work together constructively to protect the rights deriving from the Convention.

We must also work to ensure fair and effective proceedings to settle conflicts.

By doing this we will ensure that the Council of Europe can continue to fulfil its role in the future: as our most important guarantor of human rights, the rule of law and peace in Europe.

I wish you a fruitful conference, inspiring presentations and productive discussions. And I hope we will once again be able to meet at events like this in person in the near future.

## **Marija PEJČINOVIĆ BURIĆ**

*Secretary General of the Council of Europe / Secrétaire Générale  
du Conseil de l'Europe*

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Madame la Ministre,  
Monsieur le Président de la Cour européenne des droits de l'homme,  
Mesdames et Messieurs,

C'est avec plaisir que je prends part à l'ouverture de cette Conférence, qui vient à point nommé.

Pendant des décennies, assez peu d'affaires interétatiques ont été portées devant la Cour européenne des droits de l'homme, qui a été principalement saisie au titre du droit de requête individuelle.

Cette situation est en train d'évoluer.

Il y a, aujourd'hui, non seulement une dizaine d'affaires interétatiques devant la Cour -

Mais aussi dix mille requêtes individuelles liées à des conflits interétatiques, qui représentent 16% du total des affaires en instance devant la Cour.

On le voit, ces chiffres ont atteint un niveau significatif.

D'autant plus que les affaires présentant des éléments interétatiques s'accompagnent de difficultés bien spécifiques.

Elles sont souvent très complexes et prennent beaucoup de temps, notamment car pour la majorité d'entre elles, ces affaires sont liées à des conflits armés ou gelés dans nos États membres.

Dans ces circonstances, comment établir les faits alors que ceux-ci sont souvent très controversés et difficiles à vérifier ?

Lorsque sont pendantes en même temps devant la Cour des affaires interétatiques et des requêtes individuelles qui y sont liées, comment articuler au mieux leur traitement ?

Est-il possible de conclure des règlements amiables dans de telles affaires ?

Et le cas échéant, quel rôle devrait jouer la Cour européenne des droits de l'homme, ou le Conseil de l'Europe ?

Ont-ils les moyens de le faire ?

Ce sont quelques-unes des questions sur lesquelles vous allez vous pencher aujourd'hui et demain, et je serai très attentive à vos réflexions.

L'éclairage que vous pourrez apporter en tant qu'universitaires et professionnels du droit – sur les principes, mais aussi les aspects pratiques - seront précieux pour progresser.

\*\*\*\*\*

And we are clear that change is required.

Not just because of the increased numbers, but because getting them right matters.

Inter-State cases were always envisaged as means to deliver justice where it is often needed most:

In contentious, difficult circumstances, where large-scale human rights violations may be alleged, and international law is the best hope of peaceful resolution.

This is the very essence of Article 33 of the European Convention.

The application of the European Convention and the execution of the Court's judgments are legal obligations.

They are designed to depoliticise human rights, so that these should not be regarded as a matter for debate in the political arena but should instead be seen through a legal prism.

When it comes to inter-State cases, the Court's case-law has provided positive examples of this.

But questions remain, and the reality is that there are still cases like this pending execution, under the supervision of the Committee of Ministers and sometimes remaining unresolved for decades.

Our member States know this too.

At the High-Level Conference on the reform of the Convention system in Copenhagen three years ago, the Ministers of Justice invited our Committee of Ministers to explore ways to handle inter-State dispute cases more effectively and in light of their specific features.

The Committee of Ministers launched this work, which our Steering Committee for Human Rights is leading.

And you will hear a presentation from its working group today.

In addition to drawing on our member States' intergovernmental approach, I know that it will be open to the insights that you share today and tomorrow.

This is very important.

For our Convention system – to maintain its credibility, it must work efficiently and effectively.

And the judgments of the Court must be implemented and executed fully and swiftly.

This is required in law, by the European Convention, which all 47 of our member States freely ratified.

At last year's Ministerial Session in Athens, there was agreement on the Convention's "central role in maintaining and fostering democratic stability across the Continent":

And that there should be further efforts that ensure that it can "continue to respond effectively to the numerous human rights challenges Europe faces".

Inter-State cases are such a challenge.

Together, we can make progress on addressing it.

And I am grateful to the German authorities for providing this forum, and to all of you for being here today.

Thank you.

## Róbert SPANÓ

*President of the European Court of Human Rights / Président de la Cour européenne des droits de l'homme*

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Dear Minister,  
Dear Secretary General,  
Distinguished speakers and guests,

It is my pleasure to be able to open this two-day conference on “Inter-State cases under the European Convention on Human Rights”, organised under the German Presidency of the Council of Europe. I would like to congratulate the German Presidency who have been very active and creative in their organisation of a number of online events, despite the obvious challenges which the pandemic has thrown in their way.

In particular, I would like to highlight two examples of recent cooperation with the Court: the 2<sup>nd</sup> International Human Rights Forum which brought together the Inter-American Court of Human Rights and the African Court on Human and Peoples’ Rights on 25 March 2021 and again this week an important conference on the Rule of Law.

There have been just under 30 inter-State cases since the European Convention entered into force in 1953 and compared to the number of individual applications the Court has dealt with over the last 60 years, one can say that as an international law mechanism it has been rather rarely used. However, the last decade has seen a marked increase. There are currently thirteen pending applications<sup>1</sup>, seven of which were lodged since 2020.

The pending applications demonstrate the different, but serious, nature of inter-State applications. Some arise from political conflict or dispute; some are the result of steps taken by States to represent the interests of individual nationals; others demonstrate the possibility for States to operate, what has been called, a more general “policing” role. All inter-State applications are factually complex and invariably raise difficult legal questions. These judgments have important political ramifications and may affect a large number of individuals.

Why have we seen more of a reliance on this mechanism in recent years? This may unfortunately be a result of increased recent conflict in the European legal space. However, it also shows a certain confidence in the role that can be played by the Court in resolving disputes that arise at the inter-state level within the Council of Europe.

The inter-State application is provided for in Article 33 of the Convention. But what is its object and purpose? There appears to be an interest in recalibrating how it functions, at least to ensure that it works as efficiently as possible.

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<sup>1</sup> [https://echr.coe.int/Documents/InterState\\_applications\\_ENG.pdf](https://echr.coe.int/Documents/InterState_applications_ENG.pdf)

Firstly, there is an ongoing internal reflection within the Court itself, notably through its Committee on Working Methods and other reflection groups, on proposals for more efficient processing of inter-State cases. A number of these have already been put into practice and more will be put into place shortly to improve communication and strengthen consistency of approach. Many of these reflections were shared with the Steering Committee for Human Rights (CDDH) during the Committee's work on the place of the European Convention in the European and International legal order. The CDDH currently has a drafting group working on effective processing and resolution of cases relating to inter-State disputes (DH-SYSC-IV) and I note that you will hear directly from its chair, Mr Alain Chablais, this afternoon in view of the report they are currently preparing.

The processing of inter-State cases raises exceptional challenges for the Court, and indeed the States parties, in particular when they concern armed conflicts. Complicated legal issues of admissibility, jurisdiction, and the Convention's relationship to International Humanitarian Law must often be addressed. The factual situations also pose challenges, as does the relationship between the inter-State case itself and the hundreds if not thousands of related cases. Indeed, as of mid-March inter-State conflicts represent approximately 16% of all pending applications before the Court (currently that figure is about 65,000). I am pleased to see that a number of your panels will be dealing specifically with those challenges.

Let me thank again the German Presidency for putting together this impressive line up of academics, including two former Judges of the Court who I salute in particular, as well as Court staff and former Registrar of the Court, Roderick Liddell.

I wish you a very successful conference and look forward to reading your conclusions.



## Ed BATES

*Associate Professor in Law, University of Leicester / Professeur associé, Université de Leicester*

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In 1950 the Convention's member States agreed to take:

*'the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration of Human Rights'.<sup>2</sup>*

'Collective enforcement' entailed that each Convention State had an enduring interest in the enforcement of European human rights law *by other States*. The national interests of Convention States could now be superseded by a higher order interest: *European human rights protection*.

This was reflected in the early inter-state case of *Austria v Italy*, which confirmed that the States' purpose in creating the Convention was:

*'to realise the aims and ideals of the Council of Europe... and [so] to establish a common public order of the free democracies of Europe'.<sup>3</sup>*

The notion that the Convention established a type of new legal order helps us appreciate why it saw inter-state cases as a central feature of it, and their envisaged nature. *Austria v Italy* noted that an applicant in an inter-state case should:

*'not be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe'.<sup>4</sup>*

One early commentator, later a Strasbourg judge, referred to inter-state cases as pursuing aims of 'public interest'.<sup>5</sup>

This, and the idea of the Convention as a 'common public order', requiring national law to be kept within the boundaries of European human rights law, helps us appreciate why an applicant state did not have to claim a special impact on it to take a case to Strasbourg: '*in abstracto*' cases were possible under Article 24 (now Article 33).

And, of course, at the outset inter-state cases were the *only* means of accessing the Convention collective guarantee.<sup>6</sup> This reinforced the Convention's initial identity as a '*pact for collective action*',<sup>7</sup> an expression employed by the first President of the European Commission on Human Rights in 1958.

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<sup>2</sup> Preamble to the Convention.

<sup>3</sup> *Austria v Italy* 4 (1961) YB 116 at 138.

<sup>4</sup> *Ibid.*

<sup>5</sup> W Ganshof van der Meersch, 'Does the Convention have the force of 'ordre public' in municipal law', in A H Robertson, *Human Rights in National and International Law* (Manchester University Press, 1968) 97 at 107.

<sup>6</sup> They were a *mandatory* feature of Convention membership (cf 'individual petition' was originally an optional feature: Article 25 of the pre-Protocol 11 Convention text).

<sup>7</sup> C M H Waldock, 'Address by C M H Waldock', in *Council of Europe, Fifth Anniversary of*

## 1950-2000

We know, however, that over the latter half of the last century the Convention's success was associated with individual applicant cases. To some extent, the Convention's emergent identity as a type of 'European Bill of Rights for the individual' outshone the original idea of it as a 'collective pact' to protect a 'common public order'.

'Outshone' - *but not eclipse*. Here I make three points.

First, although individual applications became associated with obtaining remedies at Strasbourg, arguably that was not their original aim. Rather, in the words of one leading text, an individual application, 'was [originally] envisaged as a mechanism for bringing to light a breach of a Convention obligation owed by one state to others'.<sup>8</sup>

Seen that way, individual applications were another means – *in addition to inter-state cases* - of seeking collective enforcement of the Convention as the 'public order of Europe'.

Second, although up to the 1990s inter-state cases were relatively few and far between, unlike individual applications, they enabled general, national human rights situations, and so populations at large, to come under the Strasbourg spotlight. That was the main point, even if, coincidentally, the applicant state might have had 'a political interest to assert in [bringing] the proceedings'.<sup>9</sup>

Third, these early inter-state cases made their own contribution to Convention law, especially that on Articles 3 and 15, and had important human rights outcomes. Consider here the legacies of the 'Greek' case, and the 'Northern Irish' case. The latter established that inter-state cases could be the subject of international judicial resolution. The United Kingdom tried but was unable to prevent a hearing in open court, and a subsequent ruling on whether the notorious 'five techniques' violated the Convention.

So, the handful of inter-state cases under the old system were very important and should not be eclipsed by individual applications.

Moreover, and as explained in Dr Risini's excellent monograph,<sup>10</sup> the key principles associated with inter-state litigation were developed under the old, pre-Protocol 11 regime.

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*the Coming into Force of the ECHR: Brussels Exhibition, 3 September 1958*, (Strasbourg: Council of Europe, 1959) 27.

<sup>8</sup> D Harris, M O'Boyle, and C Warbrick, *Law of the ECHR*, (London: Butterworths 1995) at 33.

<sup>9</sup> *Ibid* at 587, noting that 'often' inter-state cases had 'concerned allegation of violations of human rights on a large scale'.

<sup>10</sup> I Risini, *The Inter-state Application under the European Convention on Human Rights: between Collective Enforcement of Human Rights and International Dispute Settlement*, (Leiden: Brill Nijhoff, 2018).

Strasbourg's position as regards the concept of an administrative practice and evidentiary standards, for example, were hammered out on the anvil of cases involving original signatory states.

Similar comments could be made about the fact-finding practise as developed at Strasbourg, for virtually all early inter-state cases involved significant fact-finding visits.

Still, one must be wary of painting too rosy a picture of matters.

Up to the 1990s, all inter-state cases bar one were decided by the Committee of Ministers, acting under its (former) 'Article 32' capacity, and some were concluded in ways that stretched the limits of 'collective enforcement'. They constituted 'dark stains' on Strasbourg's record according to an article published by Professor Tomuschat in 1992.<sup>11</sup> He concluded by asking:

*can the system of the ECHR operate successfully only under generally favourable conditions, which make violations an exceptional occurrence, an accident like event which can be easily remedied?*<sup>12</sup>

## The Convention in 2000

The question remained in 2000, by which stage the Convention's control machinery had been reformed by Protocol 11, and the process of enlargement was well underway.

Prior to this, the Council of Europe's Vienna Declaration of 1993 spoke of '*[t]he end of the division of Europe offering an historic opportunity to consolidate peace and stability on the continent*'.<sup>13</sup>

The Declaration eyed Europe as '*a vast area of democratic security*'.

Protocol 11 judicialized the decision-making part of the Convention machinery, establishing a 'new', full-time Court with a right of access to it for individuals that was not contingent on the old 'optional clauses'. Post-Protocol 11 individual applicants could take their own cases (so-to-speak) to Strasbourg. That was significant for all pre-Protocol 11 inter-state cases bar one had been taken against respondent states who had not accepted the optional clauses at the time of the relevant application.<sup>14</sup>

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<sup>11</sup> C Tomuschat, 'Quo Vadis Argentoratum? The Success story of the ECHR—and a few dark stains', 13 (1992) *HRLJ* 401. Experience of the initial *Cyprus v Turkey* inter-state litigation revealed 'many murky aspects'. Professor Tomuschat commented, '[t]he procedure under Article 24 is not meant to end up in a diplomatic communiqué which carefully accommodates the susceptibilities of the parties involved', at 402. Thank you to Dr Risini for highlighting this quotation to me.

<sup>12</sup> *Ibid* at 406.

<sup>13</sup> 'Vienna Declaration of 9 October 1993 of the Heads of State and Government of the Council of Europe Member States', 14 (1993) *HRLJ* 373.

<sup>14</sup> i.e. individual applications were not possible. The exception was *Ireland v United Kingdom*.

Despite the comparative rarity of inter-state cases,<sup>15</sup> and even though in the future individual applicants would be guaranteed a right of access to Strasbourg, there was no suggestion that the inter-state procedure be removed from the Convention. That is, Protocol 11 retained the compulsory nature of inter-state cases, and the privileged position of applicant states compared to individual applicants.

It was also agreed that the 'new' Court would rule upon inter-state cases, as well as individual applications.<sup>16</sup> So, the Committee of Ministers' 'Article 32' decision-making role was removed by Protocol 11, notwithstanding the potential political nature of certain of the preceding inter-state cases.

The continuing relevance of the inter-state procedure was underlined by the Secretary General of the Council of Europe in 2000, during proceedings of a European Ministerial Conference celebrating the Convention's fiftieth anniversary.<sup>17</sup>

He noted their potential importance in the contexts of conflict settings, such as that in Chechnya. The inter-state procedure was identified as having "comparative advantages" compared to individual applications, offering a more appropriate means of addressing widespread human rights violations. They potentially allowed the Court to rule in a more general manner, and in relation to certain laws or practises and their compliance with European standards.

The Declaration of member States associated with this fiftieth anniversary Conference<sup>18</sup> concluded by reaffirming that:

*'the Convention must continue to play a central role as a constitutional instrument of European public order on which the democratic stability of the continent depends'.*

It:

*'deplor[ed] the fact that... massive violations of the most fundamental human rights still persist in the world, including in our continent, and call[ed] upon states to put them to an end immediately'.*

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<sup>15</sup> Cf the comment made by Harris, O'Boyle and Warbrick, '[i]n the close-knit community of like-minded states in the council of Europe, contracting parties will be reluctant to jeopardise their good diplomatic relationships with other parties and undoubtedly prefer negotiation to a legal process which may be lengthy counterproductive and ultimately ineffective', at 587.

<sup>16</sup> See Explanatory Report to Protocol 11, at paras 16-17 referring to a 'Dutch-Swedish initiative' which would have retained the Committee of Ministers' role for inter-state cases. Of course, post-Protocol 11 the Committee of Ministers retains its role as regards supervising the implementation of all judgments (Article 46(2)-(4)).

<sup>17</sup> Report of W Schwimmer in Council of Europe, European Ministerial Conference on Human Rights, Rome (3-4 November 2000), (Council of Europe Publishing, 2002) 41 at 45.

<sup>18</sup> *The European Convention on human rights at 50: what future for the protection of human rights in Europe?*

## Today's Convention and Court

I now jump ahead to the present day.<sup>19</sup>

The 2018 Copenhagen Declaration called for an exploration of:

*54. c) '... ways to handle more effectively cases related to inter-State disputes, as well as individual applications arising out of situations of inter-State conflict'*

How did we get here?

The Copenhagen Declaration was part of a reform process initiated in 2010 at Interlaken to address Strasbourg's case overload. The Court had become unable to perform all the roles required of it by the Convention, hence the issuance by it of a Priority Policy (June 2009) to handle individual applications.

However, it transpired that, over the 2010s, a new wave of inter-state cases reached Strasbourg.<sup>20</sup> Several involved applicant and respondent states on opposing sides to a crisis or conflict, including in relation to a respondent state's military action on the territory of the applicant state.<sup>21</sup> Inevitably many individual applications ensued. As of mid-March 2021, some 9,600 individual applications were associated with inter-state 'conflict' cases, accounting for around 16% of the Court's caseload.<sup>22</sup>

So, we are here because inter-state cases and related individual applications present major challenges for a Court *already* overloaded with work. It is recognised too that 'the breadth of the questions raised by inter-state cases, cause specific difficulties, in particular concerning certain procedural aspects or concerning the way in which the facts are established'.<sup>23</sup>

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<sup>19</sup> For an excellent up-to-date account on the overall picture, see P Leach, 'On Inter-State Litigation and Armed Conflict Cases in Strasbourg', *European Convention on Human Rights Law Review* (2021) 1-48.

<sup>20</sup> See Speech by President Robert Spano, 'Meeting of the Committee of Legal Advisers on Public International Law (CAHDI)', 25 March 2021.

<sup>21</sup> In September 2014, the Court's Registrar, Erik Fribergh, commented that 'the Court is seen as the last resort not only for individuals but also for some States' (Presentation to the 3rd meeting by the Registrar of the European Court of Human Rights, Drafting Group F on the Reform of the Court, GT-GDR-F(2014)021, 24 September 2014).

<sup>22</sup> Speech by President Robert Spano, 'Meeting of the Committee of Legal Advisers on Public International Law (CAHDI)', 25 March 2021 at p 2. He commented: 'Essentially they relate to conflicts in the following three regions: (i) Abkhazia and South Ossetia (with applications pending against Georgia and before Russia); Nagorno-Karabakh (with individual applications pending against Armenia and Azerbaijan) and Eastern Ukraine and Crimea (with individual applications pending against Ukraine and Russia)'.

<sup>23</sup> *Contribution of the CDDH to the evaluation provided for by the Interlaken Declaration*, CDDH(2019), R92Addendum2 (29/11/2019) at para 11. See also para 233/4, referring to the 'particular complexity' of inter-state cases. See also, *Comment from the European Court on Human Rights on the CDDH contribution to the evaluation of the Interlaken reform process* (11/02/2020): 'Dealing with cases linked to armed conflicts - and in particular inter-State cases and the high number of individual applications generated - is also a major challenge for the Court... These cases are particularly time-consuming for Judges and Registry staff', para 18. See also, Speech by President Robert Spano,

In these regards, the experience and insights that this event will bring on important matters such as fact-finding, interim measures, and parallel litigation at other regimes, will surely prove very valuable.

## Some reflections

Allow me now to add four personal reflections on what is potentially in issue more generally.

First, past experience suggests some opposed to the Court may point to its situation and identify *it* – i.e. the Court – as the problem.

We must be clear, then, that Strasbourg’s continuing case overload predicament – of which individual applicant cases associated with inter-state conflict is part - is in no way the Court’s fault. In fact, the measures taken by the Court over the Interlaken reform process have proven how efficient, progressive and adaptable it is - *and that far more should be expected of many of its States.*<sup>24</sup>

Second, yes lessons should be drawn from the past. However, expectations of what the Court can do need to take account of the burdens on it today.

Comparisons between now and era of the ‘old’, pre-Protocol 11 system must be approached with caution.

Reforms enabled the ‘old’ Court to keep up with its workload, just about. Today, however, and notwithstanding the Interlaken process, individual applications unconnected to inter-state cases *remain* at levels that are far more than the Court can comfortably handle. This is underlined by amendments to the Court’s Priority Policy, and the development of a new case-processing strategy (March 2021).<sup>25</sup>

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‘Meeting of the Committee of Legal Advisers on Public International Law (CAHDI)’, 25 March 2021 at p 4 (‘One of the greatest challenges in inter-State cases following armed conflict is the establishment of the facts and the assessment of whether or not there has been an administrative practice. Usually, there have been no decisions of domestic courts and the Court must, by sheer necessity, act as a court of first instance’). In his ‘Farewell Speech at the European Court of Human Rights (16 September 2019), Secretary General Jagland commented, ‘The Council of Europe’s monitoring bodies and other institutions do not have access to all territories where there are unresolved conflicts. This poses a challenge for the Court since it always looks at reports from our monitoring bodies when dealing with applications’. He added, ‘It is time for governments to make it clear that it is intolerable to have such grey zones in our human rights protection system. The Council of Europe does not have a remit to address security issues that are being dealt with by the United Nations Security Council and the OSCE. But we do have a responsibility to address the causes and consequences of human rights violations whenever and wherever they occur within territory covered by the Convention’.

<sup>24</sup> *Contribution of the CDDH to the evaluation provided for by the Interlaken Declaration*, CDDH(2019), R92Addendum2 (29/11/2019). See Secretary General Jagland Speech: ‘Ministers of Justice: European Human Rights System in the Future Europe’, 12 April 2018 (Copenhagen).

<sup>25</sup> See European Court of Human Rights, “A Court that matters/Une Cour qui compte”: A strategy for more targeted and effective case-processing’, 17 March 2021.

As regards inter-state cases, until recently, Strasbourg tended to only have one major inter-state at any one time, and these consumed many resources and were long, drawn out affairs. Today's Court has a dozen or so inter-states cases pending,<sup>26</sup> many comparable, if not larger, in magnitude than the older inter-state cases.<sup>27</sup> It is expected to address these simultaneously, notwithstanding their inter-state conflict dimension (amongst others) presents brand new issues and challenges.

These pressures upon the Court underline the prudence of its general approach whereby it prioritises an inter-state application over related individual applications, allowing the overarching issues stemming from the inter-State proceedings to be determined first.<sup>28</sup> We must give latitude to the Court when it states that, '[a]s more experience is gained in processing inter-State cases, [its] working methods can be evaluated and fine-tuned'.<sup>29</sup>

A third reflection is to warn against quick fixes that undermine the place of Article 33, as an effective means of bringing to light 'alleged violations of the public order of Europe' (*Austria v Italy*) to Strasbourg, as intended by the Convention's drafters.

The Copenhagen Declaration rejected suggestions that inter-State cases be dealt with by 'separate mechanisms'.<sup>30</sup> It stipulated that new steps should *not* 'limit[...] the jurisdiction of the Court'.<sup>31</sup> In that regard, I look with concern upon suggestions that appear to me to limit inter-state cases in practice, such as the idea that such applications should be required to identify all victims upfront.<sup>32</sup> My eyebrows were also raised at the idea that an individual application might prevent a subsequent, related inter-state case being brought.<sup>33</sup>

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<sup>26</sup> See [https://www.echr.coe.int/Documents/InterState\\_applications\\_ENG.pdf](https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf).

<sup>27</sup> The case file in *Georgia v. Russia (II)* runs to about 30,000 pages (European Court of Human Rights, Redacted version of the report adopted by the Plenary of the Court on 18 June 2018, [Committee on Working Methods Proposals for More Efficient Processing of Inter-state Cases], 5 June 2019, n 5).

<sup>28</sup> See Copenhagen Declaration 12/13 April 2018 at para 45.

<sup>29</sup> See Committee on Working Methods Proposals for More Efficient Processing of Inter-state Cases, para 18. On the Court's on-going reflections on this matter, see Speech by President Robert Spano, 'Meeting of the Committee of Legal Advisers on Public International Law (CAHDI)', 25 March 2021.

<sup>30</sup> See Draft Copenhagen Declaration 5 February 2018 (para 54(b), calling for an analysis of the 'establishment of separate mechanisms or other means to deal with inter-State cases as well as individual communications stemming from a conflict between two or more States Parties). The final Declaration omitted this suggestion.

<sup>31</sup> Copenhagen Declaration 12/13 April 2018 at para 54(c).

<sup>32</sup> See CDDH, Compilation of comments by member States on the Draft CDDH report on the effective processing and resolution of cases relating to interState disputes (DH-SYSC-IV(2020)04), DH-SYSC-IV(2020)05REV - 11/09/2020, at p 17.

<sup>33</sup> *Ibid* at p 16. See also the suggestion that a new admissibility criterion be introduced for inter-state cases, requiring an applicant State to reasonably explain why the affected individuals or legal entities cannot apply to the Court independently. This seems to misunderstand the special nature of the inter-state procedure in the 'collective enforcement' context.



A fourth reflection is that there is no avoiding the reality that some inter-state cases concern ongoing political disputes the ultimate resolution of which relies on political processes. Some inter-state cases relate to active hostilities, and their aftermath. Few could disagree with Registrar Fribergh's comment that the Court 'cannot settle war-like conflicts between States',<sup>34</sup> even if it has been prepared to issue carefully worded interim measures. That the Court has started to refer some of these to the Committee of Ministers underlines how ultimately the responsibility for the actual enforcement of the Convention as a 'common public order' lies beyond the Court.<sup>35</sup>

## Conclusions

To conclude, how will history judge the present?

Future commentators may observe how the Interlaken reform process repeatedly stressed the Convention's 'extraordinary contribution' to human rights protection and the rule of law, and the 'central role it plays in maintaining democratic security and improving good governance across the continent'. But history will surely question whether these were, for some at least, platitudes for a Court that ended the Interlaken decade still in a case overload situation, and apparently under-resourced by the States.<sup>36</sup>

Does this not say something about *some* States' enthusiasm for the Convention as a 'common public order'?

Over the decade to come, the Court seems destined to rule on a whole batch of inter-state cases. It will continue to do its part, in exceptionally difficult circumstances, to fashion the legal aspect of the Convention as a 'common public order'.

The recent Grand Chamber ruling in *Georgia v Russia II (2021)* underlines the great responsibility it has, and the genuine predicaments it is faced with as regards matters such as admissibility, jurisdiction issues and the relationship between Convention law and international humanitarian law.

Similar comments apply as the Court grapples with the many thousands of individual applications connected to inter-state cases. Will the Court's Priority Policy be taken to its natural conclusion here? If so, it will be a consequence of a Court that is left to use its limited resources as best it can.

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<sup>34</sup> Fribergh above at p 4.

<sup>35</sup> European Court of Human Rights Press Release, 'Armenia v. Azerbaijan and alleged captives: notification to the Committee of Ministers of interim measures indicated', 16 March 2021. On interim measures see Speech by President Robert Spano, 'Meeting of the Committee of Legal Advisers on Public International Law (CAHDI)', 25 March 2021, at p 5, and see generally K Dzehtsiarou and V Tzevelekos, 'Interim Measures: Are Some Opportunities Worth Missing?', *European Convention on Human Rights Law Review* (2021) 1-10.

<sup>36</sup> See *Comment from the European Court on Human Rights on the CDDH contribution to the evaluation of the Interlaken reform process* (11/02/2020) para 25.



I do not doubt that such a situation would not be approved of by those who first labelled the Convention as a 'common public order'. I do not doubt either that the Court will strive to do the best it can, continuing to prove itself to be the most loyal custodian of that order, and here I pay tribute to it.

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## Inter-state communications under the African human rights system

### Introduction

The African regional human rights system is based on the African Charter on Human and Peoples' Rights (African Charter), which was adopted in 1981, and which entered into force on 21 October 1986 – almost 35 years ago. When it was established, a quasi-judicial body, the African Commission on Human and Peoples' Rights (African Commission), with a mandate of promotion and protection, was its only supervisory body. A judicial body, complementing the Commission's protective mandate, has been in operation since 2006, now 15 years ago.

An inter-state procedure is provided for explicitly in the African Charter. It largely mirrors that in the International Convention on the Elimination of Racial Discrimination (ICERD). There is, however, no provision for referral to the International Court of Justice (ICJ).

### 1. Automatic nature

Acceptance of inter-state communications is **automatic** upon ratification of or accession to the African Charter. No opt-in is required; and no opt-out is allowed. This means that submitting inter-state communications is within the competence of 54 African states (all African Union member states with the exception of Morocco). None of these state parties to the African Charter has entered a reservation in respect of the relevant Charter provisions.

In this, the African Charter is similar to ICERD (art. 11-13) and the European Convention of Human Rights (art. 24 of the 1950 Convention), but it differs from the American Convention, which under art. 45 requires opt-in by state parties.

In other words, the African Charter is **one of three human rights treaties** to make inter-state communications “compulsory”.

The African system is the only international human rights system (at the UN and regional level) which from its inception made **both inter-state and individual communications** a necessary consequence of treaty acceptance. Among UN treaties, ICERD is the only that makes inter-state communications automatic, but it required states' explicit acceptance of individual communications. While inter-state communications were automatic, under the European Convention, as it was adopted in 1950, at that time the competence of both the Commission and

Court to accept individual communications was made optional. For a communication to be heard by the European Commission, the state had to accept the Commission's competence in the matter (art. 24 of the 1950 Convention); and the matter could be referred to the European Court only if the State had, in addition, declared that it recognised the Court's jurisdiction. This position changes in 1998, when the Court became the single organ, and individual submission automatic.

## 2. Submission of inter-state communications

There are two main avenues through which states may submit inter-state communications, either to the African Commission on Human and Peoples' Rights (African Commission) or (directly or indirectly) to the African Court on Human and Peoples' Rights (African Court).

The submission to the **African Commission** may, in turn, take two forms.

### Submission subsequent to failed settlement

The first option (under art. 47 and 48 of the Charter) is the **conciliatory procedure**: In this instance, the state against which a communication is directed has three months to engage with the complaining state to reach an amicable resolution of the dispute, through "bilateral negotiation or by any other peaceful procedure". The ideal is to settle the dispute and avoid a formal approach to and a potential decision by the African Commission. However, if the matter is not settled amicably, one of the states involved may submit the matter to the Commission.

### Direct submission

The second option (under art. 49 of the Charter) is for the state to submit the communication **directly** to the Commission.

### African Court

A case can reach the African Court if the Commission refers, under its mandate of complementarity, the communication/ case to the Court. In other words, the case can reach the Court **indirectly**, by way of the submission of an inter-state communication to the Commission; and by the Commission to the Court.

Although not explicitly stated, a submission to the African Court of inter-state cases seems possible under art. 5(1)(d) of the Court Protocol, which reads as follows: "The following are entitled to submit cases to the Court: The state party whose citizen is a victim of a human rights violation." The formulation does not refer to cases submitted by the Commission (as art. 1(a) to (d) do), but is self-standing, and on a literal and a common sense reading allows for a state party to the Protocol to submit a case against another state party to the Protocol. Both the complaining state and the state complained against need to fall under the Court's jurisdiction for the Court's personal jurisdiction to be vested.

While the possibility of submitting a communication to the Commission would be possible in respect of 54 states, the possibility of submission to the Court would be open only to the 31 state parties to the Court Protocol.

### 3. Extent of submissions thus far

To date, the Commission has considered the following **three inter-state communications**:

First: Communication 227/99, *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (merits decision taken at the 33rd Ordinary Session of the Commission held in May 2003).

Second: Communication 422/12, *Sudan v South Sudan*. At its 13th Extraordinary Session, in February 2013, the Commission decided not to be seized with this communication. This was presumably because the Commission considered that South Sudan was not bound by the African Charter as this country, which only gained independence in July 2011, had not at the time ratified it.<sup>37</sup> However, it is questionable whether this in itself should prevent the Commission from being seized of the case, as a successor state is generally seen as being bound by the human rights commitments of the state to which it used to belong. South Sudan entered its instrument of ratification to the Charter in October 2013.

Third: Communication 478/14, *Djibouti v Eritrea*, declared admissible at the 25th Extraordinary Session of the Commission held in February 2019 is currently at the merits stage. The admissibility decision has not yet been made public.

No inter-state case has as yet been submitted to the African Court.

### 4. Reasons for the infrequent use of inter-state communications procedure

One reason for the reluctance of states to complain against other states lies in the general culture of non-intervention. One of the foundational values of both the OAU and AU is “non-interference by any member state in the internal affairs of another” (art. 4(g) AU Constitutive Act). At an institutional level, within the Executive Council, this culture has led to a decision *not* to “name and shame” states that have not complied with the orders of the African Court.

Another reason is related to the nature of matters that are likely to be referred. From a perusal of submitted inter-state cases, it appears that such cases are most likely to be submitted in contexts where the relationships between states had seriously broken down, where there is conflict between states, and where military force may be used/ international armed conflict is imminent or real. In these circumstances, the (quasi)-judicial route is – particularly within the African continent – not the most appropriate channel to explore. Within the AU, such matters are best brought to the attention and resolved by the AU Peace and Security Council (AU PSC). Even before the AU PSC comes into play, the various regional economic communities are to be approached to endeavour to resolve such conflicts. For example, the SADC **Organ** for Politics, Defence

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<sup>37</sup> See *Killander and Nkrumah*, ‘Human rights developments in the African Union during 2012 and 2013’ (2014).

and **Security (Organ)** was launched in June 1996 as a formal institution of **SADC** with the mandate to support the achievement and maintenance of **security** and the rule of law in the **SADC** region. Within ECOWAS, the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping, and Security has been established, and ECOWAS has played an influential role in numerous conflicts in West Africa. It would be difficult for African states to “leapfrog” or to sidestep the role of these overlapping networks of conflict resolution, and to negate the importance of its belonging to these IGOs in which collectivity and solidarity are important constituent elements.

Insofar as the judicial route is regarded as an option, African states have over the years placed not inconsiderable confidence in the International Court of Justice (ICJ). Since 1986, the year in which the African Charter entered into force, 13 cases were instituted and concluded between African states.<sup>38</sup>

This is a considerable but not a dominant number, taking into account that a total of 86 cases were instituted and concluded in this period. While a majority are frontier/delimitation disputes, disputes of a more fundamental nature were presented in:

[Ahmadou Sadio Diallo \(Republic of Guinea v. Democratic Republic of the Congo\)](#) (concluded in 2013); [Armed Activities on the Territory of the Congo \(New Application: 2002\) \(Democratic Republic of the Congo v. Rwanda\)](#) (concluded in 2016); [Armed Activities on the Territory of the Congo \(Democratic Republic of the Congo v. Burundi\)](#) (concluded in 2001); [Armed Activities on the Territory of the Congo \(Democratic Republic of the Congo v. Rwanda\)](#) (concluded in 2001); with [Armed Activities on the Territory of the Congo \(Democratic Republic of the Congo v. Uganda\)](#) still pending.

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<sup>38</sup> [Armed Activities on the Territory of the Congo \(New Application: 2002\) \(Democratic Republic of the Congo v. Rwanda\)](#) (concluded in 2016); [Frontier Dispute \(Burkina Faso/Niger\)](#) (concluded in 2013); [Ahmadou Sadio Diallo \(Republic of Guinea v. Democratic Republic of the Congo\)](#) (concluded in 2013); [Frontier Dispute \(Benin/Niger\)](#) (concluded in 2005); [Land and Maritime Boundary between Cameroon and Nigeria \(Cameroon v. Nigeria: Equatorial Guinea intervening\)](#) (concluded in 2002); [Arrest Warrant of 11 April 2000 \(Democratic Republic of the Congo v. Belgium\)](#) (concluded in 2002); [Armed Activities on the Territory of the Congo \(Democratic Republic of the Congo v. Burundi\)](#) (concluded in 2001); [Armed Activities on the Territory of the Congo \(Democratic Republic of the Congo v. Rwanda\)](#) (concluded in 2001); [Kasikili/Sedudu Island \(Botswana/Namibia\)](#) (concluded in 1999); [Maritime Delimitation between Guinea-Bissau and Senegal \(Guinea-Bissau v. Senegal\)](#) (concluded 1995); [Territorial Dispute \(Libyan Arab Jamahiriva/Chad\)](#) (concluded in 1994); [Arbitral Award of 31 July 1989 \(Guinea-Bissau v. Senegal\)](#) (concluded in 1991); [Frontier Dispute \(Burkina Faso/Republic of Mali\)](#) (concluded in 1986)

## 5. Analysis of DRC case

### Admissibility

The Charter requires, for an inter-state communication to be admissible, that local remedies be exhausted “if they exist”, unless the procedure to achieve exhaustion would be unduly prolonged.<sup>39</sup> In the *DRC* case, since the actions of the respondent states took place in the DRC itself, the question of exhaustion of local remedies did not arise.<sup>40</sup>

On the substance, the Commission held that the violations of international humanitarian law fall within the Commission’s mandate. Strictly speaking, this statement is not quite accurate – while the Commission may refer to IHL in its interpretation of the Charter, its findings should arguably be rooted in AU human rights instruments.<sup>41</sup> In any event, the Commission does not find that IHL has been violated, but read and interpreted the African Charter, of which violations are found, in the light of IHL.

### Multi-forum litigation

The DRC case was also submitted to the ICJ. In fact, the DRC submitted three cases related to the same subject matter to the ICJ. Below, a chronological sequence is extracted:

- February 1999: The case to the Commission was submitted (*DRC v Burundi, Rwanda and Uganda*)
- 23 June 1999: three separate DRC cases against Burundi, Uganda and Rwanda are submitted to the ICJ.
- 15 January 2001: DRC informed ICJ of its intention to discontinue the proceedings instituted against Burundi and Rwanda, stating that it reserved the right to invoke subsequently new grounds of jurisdiction of the Court.
- 30 January 2001: the two cases against Burundi and Rwanda have been struck off ICJ roll.
- 28 May 2002: DRC submits a (new) case against Rwanda with the ICJ.
- May 2003: African Commission took its decision on the DRC case, finding all three states in violation.
- 19 December 2005: ICJ handed down its merits decision on *DRC v Uganda*, finding that the unlawful military intervention by Uganda was a grave violation of the prohibition on the use of force expressed in Article 2(4) of the United Nations Charter. The Court also held that UPDF (Uganda Peoples’ Defence Forces) troops had committed violations of international humanitarian law and human rights law, and that these violations were attributable to Uganda. On Uganda’s counter-

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<sup>39</sup> Art 50 ACHR.

<sup>40</sup> Communication 227/99, *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, para 63 (“The [African] Commission takes note that the violations complained of are allegedly being perpetrated by the Respondent States in the territory of the Complainant State. In the circumstances, the [African] Commission finds that local remedies do not exist, and the question of their exhaustion does not, therefore, arise”).

<sup>41</sup> Communication 227/99, *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, para 64.

claim, it found that the DRC violated its obligations under the Vienna Convention on Diplomatic Relations (by attacking the Embassy and committing acts of maltreatment against Ugandan diplomats at Ndjili International Airport).

- 3 February 2006: ICJ ruled that it did not have jurisdiction in the matter of the DRC against Rwanda.
- Mid 2006: the Commission's decision was only made public in the Commission's 20<sup>th</sup> Activity Report.
- 13 May 2015: Noting that the negotiations with Uganda on the question of reparations had failed, the DRC asked the Court to determine the amount of reparation owed by Uganda.
- 1 July 2015: ICJ observed that although the Parties had tried to settle the question directly, they had clearly been unable to reach an agreement; parties required to file written pleadings on the question of reparations.
- April 2021: Case is due to be heard.

Two issues stand out:

The Commission took more than **four years** before it included the decided cases in its annual report, which was made public after authorised by the Executive Council. The African Commission seems to have been influenced by the fact that a similar case to the one decided by it was before the ICJ. To explain this delay, which stands as an aberration in the Commission's practice, it should be noted that the ICJ merits decision on the case against Uganda was handed down on 19 December 2005. This sequence of events begs the question: Would the Commission have been more reticent to release this decision if the ICJ had come to a different conclusion?

Uganda made the following argument during the proceedings: "Uganda also noted that the Democratic Republic of Congo has accused Uganda in several other fora: the UN Security Council, the ICJ, the Lusaka Initiative, and the OAU. According to the Respondent State, these actions "present a dilemma to the conduct of international affairs... and adjudication," undermining the credibility of these institutions and the [African] Commission as divergent opinions may be reached."<sup>42</sup> Although there is no formal requirement that the matter cannot be before another dispute settlement mechanism, the Commission seems to have been aware and took this into account in its release of its own decision.

For an ordinary (individual) communication, there is an admissibility requirement that a matter is inadmissible before the Commission if it had been settled by a similar mechanism of dispute settlement to the Commission.<sup>43</sup> This requirement is not made applicable to inter-state communications. In any event, if the Commission had applied this rule in this case, it would have had no problem finding the matter admissible, because the matter before the ICJ was, at 2003, pending and not yet settled. (In fact, the matter is still pending on reparations even today.)

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<sup>42</sup> Communication 227/99, *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, para 34.

<sup>43</sup> Art. 56(7), African Charter.

## **Conciliation and friendly settlement**

As the DRC case was submitted under art. 49, there is no prerequisite of attempting to reconcile the parties. Taking heed of the circumstances of the case, the Commission concluded that an attempt at reconciliation would not be appropriate, as “such contacts will not be diplomatically either effective or desirable”<sup>44</sup> in the particular case, adding: “Indeed, the situation of undeclared war prevailing between the Democratic Republic of Congo and its neighbours to the east did not favour the type of diplomatic contact that would have facilitated the application of the provisions of Articles 47 and 48 of the [African] Charter”<sup>45</sup>.

## **Inter-state and individual claims before Commission**

There were no individual communications submitted related to the subject matter in the DRC case. The non-submission of such cases is most likely due to the massive and widespread nature of violations.

## **Substantive issues**

The Commission found violations by all three respondent states of articles 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22 and 23 of the African Charter.

## **Fact-finding and resources**

To a large extent, the Commission relied on admissions/acknowledgements by the respondent states. The fact that Burundi presented no argument or evidence; and that Rwanda did not take part in the case beyond the admissibility phase to some extent hampered the ability to arrive at a full, authentic and authoritative picture.

On the issue of harm by Uganda to the DRC’s natural resources, the Commission found that the state’s averments were reliably contradicted by the “Report of the Panel of Experts, submitted to the Security Council of the UN in April 2001 (under reference S/2001/357) identified all the Respondent States among others actors, as involved in the conflict in the Democratic Republic of Congo. The report profusely provides evidence of the involvement of the Respondent states in the illegal exploitation of the natural resources of the Complainant State”<sup>46</sup>.

## **Reparations / outcome**

Due to the delay in deciding the case, the situation has to a large extent resolved itself.

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<sup>44</sup> Communication 227/99, *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, para 61.

<sup>45</sup> *Ibid.*

<sup>46</sup> Communication 227/99, *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, para. 92.



The Commission therefore took “note with satisfaction, of the positive developments that occurred in this matter, namely the withdrawal of the Respondent States armed forces from the territory of the Complainant State”<sup>47</sup>. Perhaps to ensure that the process is fully completed, it urged the three states to withdraw their troops “immediately” from the DRC. This recommendation begs the question whether the Commission communicated its 2003 decision to the states at that time, or whether it only did so when it was made public in 2006. Clearly, the effectiveness of a remedy such as this is time-sensitive.

The Commission also recommended that “adequate reparations” be paid, **“according to the appropriate ways”, “for and on behalf of the victims of the human rights”** by the three states while their forces were in “effective control of the provinces”.<sup>48</sup>

As with many other decisions of African Commission, it is unclear to what extent this reparations recommendation has been taken up by states. It appears that the debate about the appropriate remedy – at least as far as Uganda is concerned – has “shifted” to the ICJ, where a final determination in the issue is pending.

## **6. The distinction between inter-state and individual communications**

The discussion on inter-state communications is premised on the existence of a clear distinguishing line between what an ‘inter-state’ communication/case is, as opposed to an ‘individual’ communication/case. However, this is not always the case, especially in a context where NGOs (a broadened category of ‘individuals’, at least in the African system), may in fact not be representing civil society, but act at the government’s behest.

In 1996, at a time of turmoil in Burundi, a Belgian-based NGO, the *Association pour la Sauvegarde de la Paix au Burundi* submitted a communication to the Commission. During the admissibility phase, the Commission observed as follows: “It would appear that authors of the communication were in all respects representing the interests of the military regime of Burundi”<sup>49</sup>. However, the Commission dealt with the matter as an “individual communication”. The decision has been criticised, on the basis that the logical consequence of the finding on the nature of the applicant should have been that the NGO be considered as an “under-cover” NGO and that the matter should have been dealt with as an inter-state communication.<sup>50</sup>

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<sup>47</sup> Communication 227/99, *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, Holding.

<sup>48</sup> Ibid.

<sup>49</sup> Communication 157/96, *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaire and Zambia*, published in the Commission’s 17<sup>th</sup> Activity Report, para 63; see also Communications 233/99, 234/99 (joined), *Interights (on behalf of the PanAfrican Movement and others) v Eritrea and Ethiopia*.

<sup>50</sup> See AD Olinga’s case discussion (2005) 5; *African Human Rights Law Journal* (year and volume?), 424 at 427.

## **7. Assessment**

The inter-state complaints system under the African system is one of a few in the world that follows automatic upon ratification. Such complaints/cases may be submitted both to the African Commission and the African Court, by 54 African Union member states. This suggests the considerable potential for the submission of inter-state cases in the African system.

However, only three cases have thus far – in the 35 years since the entry into force of the African Charter – been submitted, all to the African Commission. One of these cases, related to the conflict in the Great Lakes region in the aftermath of the 1994 genocide in Rwanda, has been decided on the merits. The Commission decided not to consider one; and one is still pending.

The reasons for the dearth of inter-state cases are manifold. One of the reasons is the uninspiring outcome of the one decided inter-state communication. A four-year delay between the submission of the matter (in 1999) and the Commission's decision (in 2003) meant that the most pressing circumstances have in fact already been resolved/fundamentally changed by the time of the Commission's decision. A further four-year delay between the Commission's decision and its publication (in 2006) casts doubt on the factors motivating and guiding the Commission in its decisions. Non-implementation of the recommendations adds to the sense of disillusionment.

## Laurence BURGORGUE-LARSEN

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### **Le traitement des *différends* interétatiques dans le cadre du Système interaméricain**

#### **Introduction**

*Deux !* Uniquement deux affaires interétatiques ont été traitées dans le cadre du mécanisme de règlement des différends prévu par la Convention américaine des droits de l'homme de 1969 à l'article 45 lequel est, toute proportion gardée, l'équivalent de l'article 33 de la Convention européenne. Il y a ici une rareté contentieuse singulière qui contraste grandement avec le système européen de garantie des droits de l'homme. En 2006, le premier litige interétatique fut présenté devant la Commission interaméricaine et opposa le Nicaragua au Costa Rica. Le gouvernement de Managua dénonçait une pratique généralisée de discrimination à l'encontre des ressortissants nicaraguayens au Costa Rica. Seulement trois ans après cette première affaire, en 2009, l'organe « quasi-judiciaire » interaméricain recevait une seconde communication interétatique opposant, cette fois-ci, l'Équateur à la Colombie. Elle concernait l'exécution extrajudiciaire d'un Équatorien dans le cadre d'une vaste opération militaire menée par des agents colombiens qui s'étaient infiltrés en territoire équatorien, et qui était dirigée contre les FARC.

Si la Cour interaméricaine ne fut pas en mesure de statuer sur ces deux affaires interétatiques, cela s'explique par deux éléments procéduraux singuliers propres à chacune d'entre elles. Le premier élément concerne, dans l'affaire *Nicaragua / Costa Rica*, le barrage de la Commission interaméricaine au stade de l'examen de la recevabilité. Elle déclara en effet en 2007 l'irrecevabilité de la communication pour défaut de preuves d'une pratique généralisée de discrimination à l'endroit des ressortissants nicaraguayens au Costa Rica. Le second élément concerne, dans l'affaire *Équateur / Colombie* – et après que la communication cette-fois-ci ait été déclarée recevable – la radiation de l'affaire du rôle par la Commission, après l'obtention d'un règlement amiable en 2013. On l'a compris, aucun des deux litiges interétatiques qui virent le jour dans le cadre de l'article 45 de la Convention américaine, n'a pu donner lieu à un arrêt au fond de la Cour interaméricaine.

En dépit de ce maigre panorama contentieux, il est toutefois possible de tirer des conclusions intéressantes, tant sur le déroulement procédural du mécanisme interétatique, que sur sa philosophie (I). Après la présentation de ces différents éléments, je vais tenter d'expliquer, dans un second temps, pourquoi le système interaméricain de protection des droits n'a pas été suffisamment attractif pour

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les États. Pour ce faire, il faudra élargir le champ de l'analyse aux activités de l'OEA dans son ensemble et examiner la manière dont l'organisation panaméricaine aborde les conflits politiques (II).

## I. La Convention américaine et les *différends* interétatiques

De ces deux précédents, quelles sont les conclusions qui peuvent être tirées sur le mécanisme de l'article 45 de la Convention américaine ?

*Prima facie*, l'analyse exégétique du mécanisme de l'article 45 de la Convention américaine laisserait penser, en apparence, que le système interaméricain de protection des droits a opté pour une procédure classique de règlement des différends. En réalité, il n'en est rien, grâce à l'interprétation *pro garantie collective* de l'article 45 par la Commission interaméricaine ; elle en a fait un élément majeur de la sauvegarde de ce qu'elle a expressément nommé un « ordre public interaméricain ».

*En apparence* donc, on pourrait penser que l'article 45 de la Convention américaine traite d'une procédure classique de règlement des différends. En effet, tant l'État demandeur que l'État défendeur doit avoir expressément souscrit une déclaration attestant son accord afin d'être attiré devant la Commission (article 45 § 3). Ladite déclaration doit être déposée au Secrétaire général de l'Organisation des États Américains (OEA). *A priori*, à la vue de ces éléments procéduraux relevant du pur classicisme international où le jeu du consentement et de la réciprocité sont majeurs, on aurait pu penser que la Convention américaine n'avait pas opté pour un système *d'actio popularis* tel qu'il existe dans le cadre du système européen conformément à l'article 33 de la Convention européenne.

*En réalité*, la Commission considéra que l'article 45 de la Convention américaine visait à sauvegarder un « ordre public interaméricain ». En effet, dans l'affaire *Nicaragua/Costa Rica*, elle déploya une analyse exégétique, dégagea l'intention des États signataires (§ 197), mobilisa le principe de l'effet utile dans le cadre de l'interprétation des clauses procédurales (§ 198), et en vint, logiquement à activer une analyse téléologique où la spécificité des traités de protection des droits de l'homme fut valorisée (§ 199). Dans ce contexte, elle en vint à affirmer que l'article 45 de la Convention américaine « consac[ait] l'intention collective des États américains de garantir la préservation de l'*ordre public interaméricain* dans le domaine des droits de l'homme » (§ 199) (c'est nous qui soulignons).

Que l'article 45 soit un mécanisme de garantie collective afin de préserver l'ordre public régional est une chose. Une fois cet élément établi, il est nécessaire de découvrir la manière dont la Cour est en mesure de le mettre en œuvre. Ici, je voudrais juste insister sur deux points mis en avant par l'affaire *Equateur/Colombie*. La Commission posa très clairement sa compétence *ratione loci* dans le cadre d'une affaire où un État exerça sa compétence extraterritoriale sur le territoire d'un autre État, puisque la Colombie avait bombardé un camp en Equateur qui était supposé accueillir des membres des FARC. La Commission interaméricaine fit sien le critère de l'autorité et du contrôle des États sur ses agents (§ 98). Dans le même ordre d'idées, elle reconnut également sa

compétence pour utiliser le droit international humanitaire à des fins d'interprétation de la Convention américaine. Elle se basa à cet effet sur la jurisprudence de la Cour interaméricaine qui, dans l'affaire

*Las palmeras/Colombie* en 2000, avait été très claire en la matière ; elle n'hésita pas non plus à faire référence à sa propre doctrine. Elle ne trouva donc aucune raison de s'écarter de tels précédents.

En ce sens, on peut affirmer sans ambages ici que les systèmes européen et interaméricain sont en osmose quant à la *philosophie* des recours interétatiques, telle qu'elle a été posée par les interprètes des deux Conventions, ainsi que dans le cadre de l'interprétation des éléments majeurs relevant de la compétence *ratione loci et materiae*.

En dépit de l'importance des principes présentés dans ces deux affaires interétatiques, une question ne manque pas toutefois de surgir. Pourquoi seulement deux ? Quelles sont les raisons qui expliquent que les États parties à la Convention américaine n'ont pas plus mobilisé l'article 45 ? Afin de répondre à cette interrogation, il est nécessaire d'aborder un point de vue plus large, qui englobe les activités de l'Organisation des États américains (OEA).

## II. L'OEA et la résolution des *conflits* intra-étatiques

Une approche contextuelle est nécessaire ici afin d'intégrer la part de stratégie judiciaire qui imprègne la politique juridique extérieure des États et les enjeux géopolitiques qui saisissent aujourd'hui le continent américain et qui façonnent l'action de l'OEA.

Le faible nombre d'affaires interétatiques devant les organes interaméricains de protection des droits de l'homme, ne veut pas dire qu'il n'y a pas eu, sur le continent, des conflits qui n'aient pas trouvé une sortie de crise devant un juge international ; cela veut simplement dire que la procédure choisie n'a pas été celle de l'article 45 de la Convention américaine. La pratique démontre que les États ont tantôt utilisé un autre *forum* judiciaire (extérieur au système interaméricain), tantôt sont restés dans le cadre des mécanismes prévus à l'échelle interaméricaine, mais en déjouant la procédure contentieuse de l'article 45.

Ainsi, s'agissant du premier point, les États latino-américains ont pris l'habitude de régler leurs différends devant un autre *forum* judiciaire, le plus classique qui soit, celui de la Cour internationale de justice. Cela s'explique car le plus gros des affaires a porté sur des contentieux de délimitation des frontières – soit maritimes, soit terrestres, soit les deux – mais aussi d'utilisation des eaux fluviales ou encore de délimitation du plateau continental, voire de façon exceptionnelle, d'affectation de l'environnement. Quant au second élément, il appert que les États ont joué avec d'autres procédures, plus spécifiquement avec la procédure consultative déclinée à l'article 64 de la Convention américaine. En effet, la charge politique en arrière-plan de certaines demandes d'avis consultatif présentée à la Cour interaméricaine fut parfois majeure, révélant pour certaines de ses demandes, soit des conflits interétatiques sous-

jacents (ainsi entre le Mexique et les États-Unis), soit des problématiques politiques au sens large, mettant en réalité en jeu la stabilité de certaines régions du continent, voire le continent dans son ensemble (je fais notamment référence ici au dernier avis rendu par la Cour interaméricaine, le 9 novembre 2020 le retrait de la Convention américaine et de la Charte de l'OEA et de ses effets sur les obligations des États en matière de droits de l'homme – formulé à la demande de la Colombie).

Cet avis est révélateur des enjeux géopolitiques qui étreignent aujourd'hui le continent américain. Alors que l'histoire du continent a été marquée par de graves conflits armés internationaux tout au long du XX<sup>ème</sup> siècle, la fin du XX<sup>ème</sup> siècle et le début du XXI<sup>ème</sup> siècle est caractérisé par un changement de la nature des conflits. Ce qui marque en effet les évolutions contemporaines au sein du continent, concerne plus les phénomènes protéiformes de délitement démocratique (qui mettent à mal la forme démocratique des gouvernements) que des conflits interétatiques. Dans ce contexte, l'OEA s'est engagée à préserver les éléments majeurs de la démocratie représentative (qui est la forme démocratique qu'elle a toujours valorisée conformément à l'article 3 d. de sa charte constitutive). Les États du continent franchirent un pas supplémentaire le 11 septembre 2011 – grâce notamment à la diplomatie péruvienne et l'habileté de Javier Perez Cuellar – en adoptant, à l'unanimité, la *Charte démocratique interaméricaine* sous forme de résolution de l'Organisation. Structurée autour de cinq chapitres, le IV<sup>ème</sup> organise la marche à suivre dans l'hypothèse d'une rupture de l'ordre démocratique au sein d'un des États membres.

Elle fut appliquée à plusieurs reprises au regard d'événements graves survenus au Guatemala, en Bolivie, au Paraguay, au Honduras, au Venezuela, en Equateur, au Pérou, au Nicaragua et au Venezuela. Le Honduras fut suspendu en 2009 (sur la base de l'article 21 de la Charte) et la dégradation de la situation au Nicaragua ces dernières années laisse à penser que l'on pourrait se diriger également vers le scénario de la suspension. Il en va de même pour la situation critique au Venezuela, le Secrétaire Général de l'OEA – l'Uruguayen Luis Almagro – ayant affirmé depuis 2016 que le Venezuela avait, purement et simplement, violé toutes les dispositions de la Charte démocratique. Le bilan toutefois de son application n'est pas considéré comme positif par une partie importante des acteurs politiques comme de la doctrine.

Si la lecture de la *Charte démocratique interaméricaine* démontre que tout doit être mis en œuvre afin que le dialogue politique soit constamment maintenu, y compris quand le droit de participation aux activités de l'Organisation d'un État est suspendu, la pratique laisse à voir que l'OEA fut incapable d'éviter le pire au Nicaragua et ne fut pas en mesure de faire revenir le Venezuela à la raison, à savoir un dialogue politique de bonne foi. Du coup, ce dernier pays, après avoir dénoncé la Convention américaine en 2012, dénonça également son appartenance à l'organisation panaméricaine en 2017 et s'enfonça dans une crise majeure, à ce jour non résolue.

Il était important, afin de comprendre la rareté du mécanisme interétatique de règlement des différends dans le système interaméricain de protection des droits de l'homme, d'essayer d'en comprendre les raisons. Au-delà de l'utilisation d'autre *fora* judiciaire pour régler des conflits (essentiellement centrés sur des questions de délimitation des frontières), c'est avant tout le panorama géopolitique du continent qui explique une telle rareté. Les conflits ne sont plus interétatiques, mais intra-étatiques, marqués par une déconsolidation démocratique de grand ampleur.

## David KEANE

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### **A Unique Jurisdiction: Inter-State Communications under Article 11 of the International Convention on the Elimination of Racial Discrimination**

*Thank you for the invitation and it is a great honour to address you today at this important and timely event.*

#### **1. Introduction**

The International Convention on the Elimination of All Forms of Racial Discrimination (or ICERD), adopted on 21 December 1965, is the first of the core UN human rights treaties. It has 182 states parties and is nearing universal acceptance – only Brunei, Malaysia, Myanmar, North Korea, South Sudan and a number of Pacific Island Countries, are not a party to the treaty. I will examine briefly its unique provisions and practice in relation to inter-state communications, the first to arise before a UN treaty body. Articles 11-13 ICERD provide the only compulsory inter-state communications mechanism in the UN human rights system. It lay dormant for over 50 years before its activation in 2018 in three inter-state communications, *Qatar v Kingdom of Saudi Arabia*, *Qatar v United Arab Emirates* and *Palestine v Israel*. I will explore the origins of this unique global jurisdiction, before looking at the communications themselves - all still in progress - and offering some brief conclusions.

#### **2. Origins**

In 1947, the United Nations Commission on Human Rights began work on the “International Bill of Rights”, comprised of a declaration and convention with measures of implementation. In 1954, it submitted a draft of the covenants to the Economic and Social Council. The 1954 draft Covenant on Civil and Political Rights provided for the establishment of a treaty body, the “Human Rights Committee” (HRC). It set out a compulsory inter-state communications mechanism to the HRC and provided for referral of the case to the International Court of Justice (ICJ) if no solution were reached. Between 1954 and 1966, the measures of implementation of what would become the International Covenant on Civil and Political Rights 1966 (ICCPR) were substantially revised in the Third Committee of the General Assembly. The Third Committee made the system of inter-state communications optional under Article 41(1) ICCPR, requiring a declaration from both state parties recognising the competence of the Committee to receive such communications. It eliminated the clause vesting jurisdiction in the ICJ.

The drafting of ICERD started much later in time but the process would be quicker with the support of the emergent group of newly-independent African and Asian states. It began as a response to an outbreak of anti-Semitic incidents in



the winter of 1959-60 known as the “Swastika epidemic”, but driven by international concern with apartheid and colonialism, it was adopted on 21 December 1965 as the first of the core UN human rights treaties.

The 1954 draft Covenant on Civil and Political Rights served as a model for the measures of implementation of the 1965 Convention. These did not undergo the same revisions in the Third Committee as did the draft Covenant. As a result, and as set out in the 1954 draft Covenant, ICERD provides a compulsory inter-state communications mechanism unique in the UN human rights treaties. Buergenthal has attributed this difference to ‘Cold War paranoia’ and the perception that ICERD, with its jurisdiction over racial discrimination, offered the Soviet Union and its allies ‘a propaganda tool to be used against the West’. Schwelb however points to wider opposition, highlighting that in the drafting of the Covenant, the African and Asian grouping were also not prepared to accept an obligatory inter-state communications procedure and jurisdiction of the ICJ. Likewise, the representative of France expressed the view that the ICERD system had been established ‘for both moral and legal reasons’ and was ‘too stringent for the Covenant’.

### **3. Inter-State Provisions**

In terms of its provisions, ICERD provides two mechanisms for inter-state “cases”. Articles 11-13 provide for inter-state communications before the Committee on the Elimination of Racial Discrimination (or CERD). The original draft of Article 11 referred to inter-state “complaints” but Mexico proposed substituting the word “communications”, adopted for its less adversarial tone. Article 11(1) reads: ‘If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee.’ Article 11(1) contains no requirement of direct “victimhood” and what might be termed a “public interest” inter-state communication is possible.

Article 12(1)(a) provides for the appointment by CERD of an ad hoc Conciliation Commission ‘comprising five persons who may or may not be members of the Committee’. This body is appointed automatically upon completion of the steps in Article 11. The Commission’s ‘good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention.’ A conciliation body is found in the inter-state provisions of two other UN human rights treaties, the 1966 ICCPR and the 1984 Convention Against Torture, but for these instruments the proceedings can be completed without recourse to the conciliation body. The automatic character of conciliation within the Articles 11-13 mechanism is also unique to ICERD.

Article 13(1) tasks the Commission with preparing ‘a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute’, then submitted to the Chairman of CERD. The Chairman communicates the report of the Commission to each of the States Parties to the dispute, who inform the Chairman whether or not they accept the recommendations in the report. Finally, the Chairman communicates the report

and the declarations of the States Parties concerned to the other States Parties to the Convention, closing the mechanism.

The limits of the mechanism were noted at the time. As Pant (India) summarised in November 1965: ‘If the solution proposed was not binding, it could hardly be of any practical value; yet it would be difficult to make it binding’.

Article 22 then provides for the referral of disputes between two or more States Parties to the International Court of Justice (ICJ/the Court). This judicial remedy is the most reserved provision in the treaty, having been the subject of 25 reservations in total. Reserving states include the world’s most populous nations, China, India, Indonesia and the United States, among others. Inter-state cases under ICERD arose first before the ICJ under Article 22, and there have been three to date – *Georgia v Russian Federation* (2008), *Ukraine v Russian Federation* (2017) and *Qatar v United Arab Emirates* (2018). The ICJ has ruled that there is no requirement to first go through the CERD mechanism before seising the Court, with *Ukraine v Russian Federation* now at the merits stage without having been before the Committee.

In March-April 2018, three inter-state communications were submitted to CERD under Article 11(1). *Qatar v Kingdom of Saudi Arabia* and *Qatar v UAE* were submitted on the same day and involve broadly the same facts and issues related to the “blockade” of Qatar by its neighbours, including the alleged expulsion of Qatari residents and visitors from Saudi Arabia and the UAE. *Palestine v Israel*, submitted the following month, refers to violations of ICERD committed in the Occupied Palestinian Territory.

On 27 August 2019, CERD reached its decisions on jurisdiction and admissibility in *Qatar v Kingdom of Saudi Arabia* and *Qatar v United Arab Emirates*, the first such decisions ever taken by a UN human rights body. It found it had jurisdiction and declared the communications admissible. An ad hoc Conciliation Commission has now been appointed in both communications. Note that only four out of the ten ahCC members are also CERD members. On 12 December 2019, CERD found that it had jurisdiction to hear the communication in *Palestine v Israel*, which is now at the admissibility stage. The decision on Jurisdiction is notable for a 5-person dissent, only the second in CERD history. There have been no further decisions in inter-state communications since then due to the pandemic. Some aspects of these “historic” decisions may be briefly highlighted.

#### **4. CERD Decisions in Inter-State Communications**

The decisions on jurisdiction and admissibility would see the determination of certain procedural aspects of Article 11, which involves written and oral submissions. CERD issued new Rules of Procedure in April 2019 governing the ‘hearings’ of Article 11. These include for example Rule 5 ‘Conduct of the hearings’, which provides a direction that ‘the hearings of the Committee shall be held in private.’ Article 11 does not mandate confidentiality of hearings. It may be contrasted with the inter-state provisions of the ICCPR, where Article 41(1)(d) reads: ‘The Committee shall hold closed meetings when examining communications under this article’.

The differing roles of CERD under Article 11 and the ad hoc Conciliation Commission under Articles 12-13 was affirmed. The 2019 Rules of Procedure read that if the issues ‘do not possess an exclusively preliminary character’ they should be examined under Article 12. In *Qatar v UAE*, the Committee found an issue raised by the UAE ‘cannot be dealt with separately from the merits of the communication’, meaning it was an issue for the Commission. In sum, CERD deals with preliminary issues of jurisdiction and admissibility only, while the Commission deals with the merits. However, the Commission remains under the auspices of CERD, which appoints it and closes the mechanism with the communication of the Commission report.

A number of substantive points were reached in the decisions. These include – (i) a different standard for exhaustion of domestic remedies for inter-state as opposed to individual communications; (ii) that the existence of parallel proceedings in *Qatar v UAE* before the ICJ did not preclude examination of the communication by CERD; and (iii) that discrimination based on ‘nationality’ is within the scope of Article 1(1) of the Convention, under the definitional ground ‘national...origin’. It may be noted on this last point that the ICJ would later reach the opposite conclusion in its February 2021 Judgment in *Qatar v UAE*.

A strong feature of the decision in *Palestine v Israel* is the weight accorded to decisions of the regional human rights bodies, judicial and non-judicial, that affirm human rights treaties benefit from a ‘collective enforcement’. [CERD cited the decision of the European Commission in *Cyprus v Turkey* (1983) in which the applicant state, Cyprus, was not recognised by the respondent state, Turkey. It quoted the European Commission which found that ‘to accept that a Government may void collective enforcement of the Convention under Art. 24, by asserting that they do not recognize the Government of the Applicant State, would defeat the purpose of the Convention.’]

## 5. Conclusions

CERD member Gay McDougall, commenting on the *Palestine v Israel* decision, writes of ‘the possibility of new pathways for human rights enforcement’ [in relation to ‘previously intractable failures of states to fulfill their obligations under the Convention.’] We may reach some brief conclusions on this potential new pathway.

First, its uniquely compulsory character is an important feature – none of the three respondent states have opted in to any other inter-state communications mechanism under the UN human rights treaties. These communications would not have happened, at least at this point in time, if the mechanism were optional. In that light, Articles 11-13 has significance as a near-universal and compulsory contentious human rights jurisdiction, to which there are no reservations. Strategically, it may be particularly useful in addressing human rights situations where no alternative regional human rights mechanism exists, which has been the case in the three inter-state communications to date.

Second, that potential is limited by the fact that it is an inter-state communications mechanism and, as is well-known, states are generally reluctant to make use of these mechanisms. However, the triggering of Article 11 in 2018 may lead to its greater use. The Human Rights Committee highlights in its General Comment 31: ‘the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.’

Third, confidentiality of Article 11 proceedings is not mandatory and the 2019 Rules of Procedure in this regard could be viewed as an opportunity lost for the Committee to better publicise the treaty and its work. Justifications that apply in individual communications may be more difficult to sustain in inter-state communications. The 2019 Rules of Procedure are easily amended by a decision taken by the Committee.

Fourth, *Qatar v Kingdom of Saudi Arabia* and *Qatar v UAE* are challenged by the February 2021 judgment of the ICJ. There is support for CERD’s admissibility decision in dissenting opinions of the ICJ, as well as in wider commentaries. Its understanding of ‘nationality’ as falling within the scope of the treaty, based on text, context and object and purpose as well as its constant practice, appears the right one from the perspective of Article 11.

Finally, there is potential for Articles 11-13 to contribute to the wider understanding of friendly settlements in human rights cases. CERD has expressly looked to the regional human rights bodies in its decision-making under Article 11, and these may do the same to inform the understanding of non-judicial remedies in human rights cases. In the inter-state communications currently before it, CERD must reach an amicable solution without the potential for further recourse to a judicial solution. The compulsory process of conciliation and the amicable solution of Articles 12-13 has the potential for creative, structural remedies that may be of interest to other human rights bodies, which I will discuss in more detail in tomorrow morning’s panel.

*Thank you.*

## Thilo MARAUHN

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1. A warm welcome to everybody. Thank you to the organizers for inviting me to contribute to the debate about inter-state cases under the ECHR. My name is Thilo Marauhn. In my statement I will draw on my research as a Professor of Public Law and International Law at Justus Liebig University Giessen and at the Peace Research Institute Frankfurt. In addition, and possibly more important in this particular context, I will build on practical insights emerging from my other role as President of the International Humanitarian Fact-Finding Commission. This body is treaty-based, established under Article 90 of the 1977 Additional Protocol I to the 1949 Geneva Conventions, focusing on international humanitarian law. The Commission was only established in the early 1990s. And it took the Commission 25 years to perform its first operative mission in 2017. Some of the lessons learned in this context may be helpful for re-designing the procedural framework for inter-state cases under the ECHR.
2. To begin with, I would like to address **the role of fact-finding** in inter-state cases under the ECHR. Internationally, there have never ever been as many commissions of inquiry or similar ad hoc bodies than today, from Syria to Yemen, from Venezuela to Myanmar. This quantitative finding notwithstanding, the qualitative output is very limited. Expectations that international bodies can establish facts along the same lines as national courts do, have largely been frustrated. Apart from *de facto* obstacles to access locations, or to get hold of witnesses and documents, limited financial and human resources have minimized the fact-finding potential of these bodies. The International Criminal Court and, in particular, the Prosecutor's Office provide a similarly disillusioning narrative. It is against this background, that the International Fact-Finding Commission has meanwhile adopted a policy of exemplary fact-finding only. The financial implications of our 2017 operative mission have taught us an important lesson to this end. For the ECHR, in inter-state cases, it is plausible to exclude fact-finding from the Court's agenda, limiting the Court's role to an evaluation of the facts put before it by the parties. The Court should focus on the law and 'keep its eye on the ball', without getting drawn into disputes about facts which are hard to resolve for judicial bodies at the international level.

This is not to say that international fact-finding does not generate effects. These are, however, less of a judicial nature but rather political or diplomatic. Fact-finding bodies signal that the international community has an eye on a particular issue. Among others, they operate against impunity. By way of example, this is one of the most important objectives for the establishment of the International, Impartial and Independent Mechanism ('triple IM') by the UN General Assembly in 2016. The role of the European Court of Human

Rights in inter-state cases is totally different. It comes closer to traditional inter-state dispute settlement with fact-finding being part of diplomacy, and the judiciary focusing on the interpretation and application of the law. Fact-finding in inter-state cases does not strengthen the role of the Court. The message is: ‘Stick to your knitting’ – build on your doctrinal skills.

3. As a second issue, I would like to address **the outcome of inter-state cases**. It may be worthwhile to give precedence to a friendly settlement, according to Article 39 ECHR, rather than a judgment. In contrast to individual complaints, inter-state cases do not only focus on the determination of human rights violations but on disputes between two of the High Contracting Parties. The important question is whether settling the dispute is more important than determining a human rights violation. In the case of the International Humanitarian Fact-Finding Commission, Article 90, para. 2 (c) (ii), of Additional Protocol I includes interesting terminology by stating that the Commission is competent to “facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.” Let me point out that,

- “good offices” opens a flexible avenue,
- “respect for” is much broader than “compliance”,
- “attitude” goes beyond the law in the narrow sense,
- “restoration” reassures all participants of their pre-existing promise to uphold the law, and
- “facilitate” indicates that the Commission is meant to encourage rather than to enforce law-abiding behaviour.

With a view to reforming the procedural framework for inter-state cases under the ECHR it may be beneficial to consider a similar wording as an explicit avenue to settle such disputes.

4. What follows from this, is the question of **preliminary proceedings** or **pre-trial proceedings**. While I am not arguing to re-install something similar to the European Commission on Human Rights, even though its practice provides useful insights, comparative studies of other dispute settlement bodies suggest that some kind of preliminary proceedings may be helpful in inter-state cases. By way of example, the consultation stage as part of the WTO dispute settlement process links formal rigidity (in terms of timing) and substantive flexibility, notwithstanding that the WTO system allows conciliation, mediation and good offices throughout. The International Humanitarian Fact-Finding Commission has even indicated a clear preference to offering good offices rather than entering into a formal inquiry. What may be drawn from this?

It seems that States appreciate the benefits of procedural formality coupled with a degree of flexibility in substance. As I can take from our experience at the International Humanitarian Fact-Finding Commission, States value the benefits of confidentiality and expertise. They display a degree of openness in such a formalized discourse, the outcome of which remains flexible. This

suggests that Court-based preliminary proceedings in inter-state cases under the ECHR help to avoid the arbitrariness of a purely political exchange while at the same time not exclusively focusing on a Court ruling. This kind of preliminary proceedings might not only allow for a friendly settlement in accordance with Article 39 ECHR, but perhaps even contribute to framing such a friendly settlement and giving precedence to it.

5. A final consideration in inter-state disputes are **rules of evidence**, perhaps to some extent also those on the **burden of proof**.

Building on my arguments in support of preliminary proceedings, rules of evidence serve as 'handrails' in court proceedings. This is particularly important if the parties, as in inter-state cases, need to somehow save their faces in order to stay within the system as a whole. Furthermore, as comparative studies of fact-finding with human rights implications have shown, the standard of proof (in contrast to the burden of proof) is an elevating screw in pertinent disputes. There is a scale that might be worthwhile to be included in procedural rules for inter-state cases, extending from "reasonable suspicion", "sufficient evidence", "clear and convincing evidence", "overwhelming evidence" up to "beyond reasonable doubt" (cf. Stephen Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, Geneva Academy of international humanitarian law and human rights, 2014).

It may also be promising to consider admissibility criteria re-assuring States that the inter-state procedure is not abused, building, by way of example, on Article IX, paragraph 17, of the Chemical Weapons Convention, which is not as unrelated as it may look at first sight. Indeed, the Executive Council of the Organization for the Prohibition of Chemical Weapons may reject a request for a challenge inspection by a three-quarter majority if such request is considered abusive. Similar powers, perhaps including strict time limits, might be explicitly assigned to the Court in inter-state cases under the ECHR – notwithstanding the differences between a Court and a political organ.

6. While all these reflections put before you are meant to stimulate debate, their interrelationship must be carefully considered in order to establish a balance between the various functions to be fulfilled by the Court in inter-state cases.

Thank you very much for your kind attention.



## **Aletta MONDRÉ**

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### **Studying the Increase in Inter-State Applications**

Only rarely states initiate court proceedings against other states. Up to today, there are 27 Inter-State applications to the European Court of Human Rights. In light of the total of some 920,000 applications to the Court, Inter-State applications are extremely rare. This scarcity partly stems from the nature of human rights violations. In a nutshell, a human rights violation occurs when a government infringes specific rights of its own citizens. In so far the relationship of a government to its citizens lacks any transboundary implications, this relationship may be of little immediate concern to the governments of third states. And indeed, the Inter-State applications to the European Court of Human Rights concern alleged human rights violations of citizens of the applicant state by the opposing state party.

At the same time, infrequent use of inter-state litigation is true in all areas of international law. We can observe that longer existing international courts will be used more frequently than more recently established international courts. So maybe it is just finally the time for using the ECtHR. The Court has been existing for several decades and contributed greatly to a shared understanding of the norms of the European Convention on Human Rights. Yet it is a fact that most states shy away from bringing a case against another state in most circumstances. There has been an increase in applications since 2007 with again a significant spike in 2020. So what can explain the recent increase in Inter-State cases under the European Convention on Human Rights?

The first cut needs to look at the obvious. The increase in Inter-State complaints could be due to the increase in membership in the Council of Europe, or an indication of an increase in human rights violations in member states of the Convention for the Protection of Human Rights and Fundamental Freedoms. The most notable increase in membership occurred between the late 1980 and mid-1990s but not in the past decade. Checking for an assumed increase in human rights violations poses challenges in itself. It would need to be undertaken independent of applications to initiate proceedings under the Convention. It would not be appropriate to include every allegation of a violation unchecked in reliable data sets, yet it is anything but trivial to specify sources of allegations, types of (alleged) violations, and methods of verifications. These type of challenges apply to any fact-finding by the court, too.

Different researchers have used different criteria to build data sets for different purposes. The comprehensive data set by Farris aims to measure how a government protects the physical integrity of its citizens. The data set takes into account torture, government killings, political imprisonment, extrajudicial



executions, mass killings and disappearances since 1949 to construct a Human Rights Protection Score, but does not cover all norms included in the ECHR. Based on empirical data available, the general trend shows either a stable situation or even improvements in human rights protection in many of the member states. Alas, this is not true for all member states. Yet is also a long-standing occurrence that a significant number of complaints concern a small number of states. So, an increase in human rights violations is not the full explanation for the increase in Inter-State applications.

A second cut could assess whether an increased willingness to defend human rights in international courts induces more Inter-State cases. Again, such an assessment would require sound methods to enrich anecdotal evidence and personal impressions. More importantly, taking “willingness” into account, takes me straightaway to a different approach for thinking about the increase in Inter-State applications. What are the reasons that some states do decide to turn the ECtHR in the first place?

Befitting my role as the political scientist, I would like to second-guess the common assumption that international legal proceedings are foremost a tool for dispute settlement and/or seeking clarification on substantive norms. If Inter-State applications were a common and just another routine event of international relations, we would not be concerned and puzzled by the recent increase. In a way, the grand narrative of international law as a benign civilizing force of brute international affairs clashes with states’ practices. Rather than considering legal proceedings as a ‘civilized’ way of conflict resolution, states tend to take offence at finding themselves as a defendant in an international court. In turn, governments seriously ponder the step to initiate legal proceedings against another government. In weighing their options, several considerations play a role. Generally speaking, the most important consideration is the likelihood of winning the actual case. This involves a careful assessment of the legal merits. At the same time, not every case that could be brought to the ECtHR is taken to Strasbourg. This is again an indication that the legal merits are an important factor but not sufficient by themselves.

There are additional considerations at play in such a grave decision that are likely to impact diplomatic relations. An Inter-State application can be viewed as another piece in the diplomatic toolbox. In previous research, I have emphasized that an application to an international court generates international visibility for a sitting government. Turning to an international court is a very effective way for a government to demonstrate to its citizens it is taking a matter seriously as well as defending their rights. So it is an important policy decision with a domestic audience in mind. This is especially the case in matters of war and peace because of the importance domestic audiences attribute to such matters.

In addition, a government is exposing its grievances to an international audience. The easy access to the ECtHR allows governments to employ an Inter-State application in this manner at rather low costs. It is a strive for support for the own point of view in foreign capitals as well as in international media. A government may be seeking this kind of amplified international attention and drive the decision to initiate proceeding at least as much as seeking a favorable judgment.

An application to an international court is also publically putting blame on the opposing state as an alleged perpetrator of human rights violations. Such a strategy aims to discredit the other government in the eyes of the international community. This may be particularly attractive to small states facing a more powerful opponent. In this way, states can tap into a civilizing function of international law in a different way: the procedural equality of all states in an international court levels out the power differentials of the diplomatic playing field. The significance some states attach to generating international visibility is further supported by the number of fora they turn to. Forum shopping is not just a strategy to select the most favorable court in terms of procedural issues and substantive law but also to present a position to an international audience.

Let me conclude by posing the question why an increase in Inter-State applications appears to be a problem requiring action. The main issue seems to be the workload and implications for routine operations of the ECtHR, that has been suffering from a severe backlog already. Yet these cases are potentially very important to the maintenance of the European system of human rights protection. They involve not just many individuals but also touch upon the value the community of European states places on speaking out against human rights violations on a large scale. Actually adjudicating governments is a significant signal to the credibility of the system as well as strengthening the belief of individuals that member states hold each other accountable. The public commitment to a high level of protection of human rights has been a significant pull for states to join the Council of Europe and to lock-in the transition to democracy in many Eastern European states. The procedures of such important legal remedies should be as simple as possible in the interest of the system of European human rights protection. While we might second-guess government motivations we should be careful to raise the bar for access to a successful and important international court. After all, we are discussing very few instances that are important to very many individuals.

## Angelika NUßBERGER

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### The Way Forward

#### **A Pragmatic Approach in Addressing Current Challenges of Inter-State Cases**

In armed conflicts human rights violations are omnipresent. The victims are not counted one by one, but by the hundreds or thousands. For a court such as the European Court of Human Rights it is a major challenge to give answers to all those seeking justice in such circumstances, and to give answers – according to its own principles – “within a reasonable time”. This is all the more so when individuals and States complain in parallel about the same human rights violations.

The last decade has shown that it is difficult for the Court to live up to this challenge. While it was confronted with an ever growing number of inter-State cases, it was not well equipped to deal with them efficiently. A major reform might therefore be necessary. But it would certainly be illusionary to expect the 47 member States to find a compromise on substantive changes of the system of interstate complaints in the near future. Nevertheless, even without changing the system as a whole, a few steps could be taken to improve the *status quo*.

This contribution therefore aims at identifying those screws that can be easily turned to better cope with some of the challenges. My first proposal would be to refer inter-State cases immediately to the Grand Chamber of the Court instead of first dealing with them on the Chamber level. Second, I would suggest to appoint in inter-State proceedings *ad hoc* judges drawn from a list set up by the governments involved. Finally, I think it would be fair to shift the financial burden for inter-State proceedings from the Court to the States involved.

The Court's authority does not only depend on the acceptability of its judgments. As famously said in *Rex v Sussex Justices, Ex parte McCarthy*, “justice must not only be done, but also seen to be done”. Therefore, questions of how to organize the procedure in inter-State cases are important not only for successful conflict resolution, but also for inspiring confidence in the system as a whole. That is why it is worth taking procedural issues seriously.

One of the guiding ideas underlying my proposals is that it is of utmost importance to reduce the time it takes to adjudicate an inter-State case in Strasbourg. This is not only necessary for complying with the idea of a fair trial, but it is also a question of acceptability of the judgments. Judges' mandates are nine years. In inter-State cases that last for a decade or more, the judges on the Bench in the beginning will have to be replaced by others coming in later.

Even if judges can continue working on cases after the end of their mandate, it is in these cases rather the rule than the exception that questions of admissibility, questions linked to the merits, and questions of compensation are decided by completely different judges. Institutional knowledge is thus lost. For the victims observing the process of adjudication such permanent changes are discomfoting, to say the least.

This is the background against which the following proposals are made.

### **Immediate referral of inter-State applications to the Grand Chamber**

First, I propose to refer inter-State applications directly to the Court's Grand Chamber. In the current design, all applications including inter-States cases, are first dealt with by a Chamber on admissibility and merits (*cf.* [Article 29 ECHR](#)). However, almost all inter-State applications raise "a serious question affecting the interpretation of the Convention or the Protocols" (*cf.* [Article 30 ECHR](#)) so that, as a rule, the Chamber will relinquish jurisdiction in favour of the Grand Chamber. If the Chamber nevertheless decides to hear the case, the judgement does not become final immediately but may be subject to a referral to the Grand Chamber as provided for in [Article 43 ECHR](#). Inter-State cases always raise politically "hot" questions. Therefore, it is almost unimaginable that the losing party would not try to bring the case to the second instance, the Grand Chamber. And with all probabilities, the Grand Chamber Panel would grant the request. Thus the deliberations before the Chamber represent more or less an 'empty round'. Bringing inter-State applications directly before the Grand Chamber would avoid this duplication of procedural steps and thus a loss of time that can be considerable, especially if it involves the hearing of witnesses or other fact-finding measures. It is true that the measure proposed would involve a change of [Article 29 \(2\) ECHR](#) and cannot be dealt with on the level of the Rules of Court only. In an ideal world, such a change could be quickly made. But experience shows that this is not to be expected. Yet, nothing can hinder the Chamber to relinquish inter-State applications in a shortened procedure and thus more or less automatically. With the forthcoming entry into force of [Protocol No. 15](#) after the recent [ratification by Italy](#), the States concerned will no longer be able to veto a relinquishment (*cf.* [Article 3 of Protocol No. 15](#)). Thus, even without a modification of the text of the Convention, a little screw can be turned to change the situation for the better.

It is worth noting that advisory opinions under [Protocol No. 16 to the Convention](#) are already today directly dealt with by the Grand Chamber (*cf.* [Articles 31 \(c\), 47 ECHR](#)). Inter-State proceedings, especially those having an armed conflict as subtext, deserve no less attention. In the long run, a default competence of the Grand Chamber would render the proceedings faster and adequately reflect their importance within the Convention system.

## Ad-hoc judges instead of national judges

In all cases before the Strasbourg Court the “national judges”, i.e. the judges elected in respect of the State accused of a human rights violation, are *ex officio* members of the Bench (Article 26 (4) ECHR). This rule is inherited from other international courts such as the ICJ (cf. Article 31 (1) Statue of the ICJ) in view to “represent” the accused State and to give it a “legal voice” in the dispute. In contrast, in the ECHR system the reason is rather to avoid cases being decided without the necessary insider knowledge of national law. This rule is also applied in inter-State cases so that both the judge elected in respect of the applicant and the judge elected in respect of the respondent States are *ex officio* members of the Bench (cf. Rule 51 (2) of the Rules of Court).

This rule has, however, negative consequences as it tends to blur the human rights character of the case and contributes to its politicization.

The respective national judges may feel pressed into the role of State representatives, a role they do not have and should not be seen to have. Yet, dissenting opinions in previous inter-State cases speak a clear language. With very few exceptions national judges mirror the position of “their” home countries and “defend” the respective positions.

At the same time, while all judges of the Court should be “equal” in all respects including their workload, the fact that they are *ex officio* members in inter-State cases burdens some judges disproportionately more than others.

This is where my second proposal comes in. In order to avoid judges’ role conflicts and to enhance the vision of a neutrally composed Bench, it would be better if the Governments of the applicant and respondent State would appoint *ad hoc* judges replacing both national judges. Ideally, they would appoint non-nationals. It is true that this suggestion might be considered a rupture with traditions of international law. But, in fact, the Convention itself provides for the appointment of (potentially non-national) *ad hoc* judges, albeit for different reasons (cf. Rule 29 of the Rules of Court), thus the practice is not entirely foreign to the ECHR system (see also existing list of ad hoc judges). Considering the complexity of inter-State cases, the list for these judges could comprise former judges of the Court, who have experience in human rights adjudication and are familiar with the Court’s working methods.

## Court fees, additional resources for staff at the Court

Proceedings at the Court are free of charge, as enshrined in Article 50 ECHR. This is an important feature of the Convention’s architecture. But there is no reason why this privilege for individual applicants should also be given to States in inter-State conflicts.

Therefore, my third proposal is to have an open debate on the financial resources needed by the Court to deal with inter-State cases. In fact, these types of cases include complex issues in terms of facts and law, and the Court is more often a court of first instance, than not. In some of the more recent cases, the files comprised more than 30,000 pages. As a consequence, some of the Court's case lawyers are exclusively dealing with inter-State cases. This imbalance in the case allocation might create further problems as these lawyers are "lost" for dealing with individual cases, which are piling up more and more. A solution could be to provide for an additional budget for this type of cases, which would permit to hire extra lawyers for the registry. This budget could come directly from the States involved, which could contribute to a special account. This is already done now, but not linked to inter-State applications and only on a voluntary basis; States can, for example, contribute financially to specific projects of the Court in order to support them. For the States concerned, such an approach would not be overly burdensome, especially when compared to costs they face in other international fora or in arbitration. For the Court, however, it would make a real difference; the Court is evidently underfunded and has no influence whatsoever on the amount of inter-State applications coming in. A fairer distribution of the financial burden would help to ensure that cases are processed faster and that sufficient human resources are available to deal with them.

### **The way forward**

This contribution focused on three pragmatic ideas. It is hoped that they have the potential to ease the Court's workload and to enhance the acceptability and legitimacy of the judgments rendered in inter-State cases. It is true that to date, not a single Euro of compensation has been paid to the victims in inter-State proceedings, although the Court has fixed high amounts of compensation payments several times. But despite this failure, the judgments in inter-State cases are extremely important as it is not only the money that counts. Winning a case may also help heal the victims' wounds. But if it takes too long until justice is served, this positive effect might be lost.

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### Interim Measures in Inter-State Proceedings

I have been asked to address the issue of interim measures in inter-State proceedings. Given the sensitivity of this topic, I will not discuss any particular case. Rather, I will merely comment on this subject from an institutional and comparative perspective.

The European Court of Human Rights (ECtHR) has a well-established procedure for dealing with interim measures for individual applications. The question I wish to pose today – with no set answer in mind – is whether that same procedure should also be applied to inter-State applications.

The reason why I raise this question is simple: inter-State proceedings before the ECtHR look awfully like inter-State dispute settlement proceedings. And yet interim measures in the former follow a procedure very different from that followed in the latter. Coming from a background of litigating inter-State disputes, I find that three elements of the interim measures procedure in inter-State proceedings before the ECtHR stand out in particular.

First, interim measures are effectively granted *ex parte*. The respondent is not given an opportunity to make formal written or oral pleadings on the applicant's request. This stands in stark contrast to the procedure at the International Court of Justice (ICJ), where there is almost always an oral hearing on interim measures – which are called provisional measures before the ICJ – during which the respondent is given an opportunity to present its arguments.

Second, the Strasbourg Court renders decisions on interim measures very quickly, usually within a day of the request. The ICJ, on the other hand, sometimes takes a couple of months to render a decision after a request for interim measures has been lodged. It took two months in *Georgia v. Russia*, and three in *Ukraine v. Russia*.

Third, the ECtHR's decisions on interim measures are not accompanied by much, if any, reasoning. By contrast, the ICJ's decisions on interim measures often have extensive reasoning, usually concerning a set of criteria it has established for the indication of interim measures.

Now when I mention these three elements, they may sound like criticisms. It is only ordinary for a lawyer to stand for adversarial proceedings, a deliberative process, and judicial reasoning. At least theoretically, such a judicialized procedure makes decisions more legitimate. But at the same time, from a

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<sup>52</sup> The views expressed herein are solely those of the author, and do not necessarily reflect the views of any institution with which the author is or has been affiliated.

practical perspective, there are also some disadvantages that flow from how these three elements play out at the ICJ.

Starting with the first element, the fact that the ICJ holds oral hearings on interim measures has, in practice, led some States to effectively litigate the merits of their cases, sometimes in great depth, at the interim measures stage. The ICJ has adopted a practice direction to discourage this practice, but commentators have questioned the extent to which this practice direction has been respected.

Turning to the second element, the fact that the ICJ sometimes takes months to render an interim measures order obviously has practical consequences for the dispute itself. In the context of an armed conflict, lives could be lost. Another consequence is that the situation could materially change during the time period that the ICJ is considering the request for interim measures.

Finally, as for the third element, while it may be helpful to have thorough reasoning and established criteria in decision-making, this limits flexibility in indicating interim measures. And some might say that if there is any procedure where flexibility is required, it would be interim measures.

Despite these disadvantages, one would hope that a key advantage deriving from a judicialized procedure is that States would comply more frequently with the interim measures. But commentators have noted that the record of compliance with interim measures issued by the ICJ is far from ideal. So while the ICJ can pride itself in having a judicialized interim measures procedure, it is not crystal clear whether a judicialized procedure is the most appropriate one for interim measures.

Let's now return to our main question: Should the ECtHR apply the interim measures procedure for individual applications to inter-State applications? Or should it judicialize its own interim measures procedure for inter-State cases?

I think the answer depends on what one hopes to accomplish with interim measures. If one believes that a well-reasoned, judicial decision on such measures can stop armed conflicts, then perhaps the ECtHR should indeed move to judicialize interim measures. But let's not forget former Registrar Erik Fribergh's remarks in 2014 that "the Court is ... not equipped to deal with large scale abuses of human rights", and that "[i]t cannot settle war-like conflicts between States". It should furthermore be recalled that the Court, in the context of inter-State cases of armed conflict, often does not go that much further beyond calling upon the parties to comply with their existing obligations under the Convention, in particular Articles 2 and 3.

At the end of the day, there is no clear answer to the question. No judicial institution has mastered the procedure of interim measures. There is no ideal model to follow. It is something that international courts and tribunals everywhere are struggling with, and something which they will probably continue to struggle with for some time. Given the importance of this procedure in the context of the European Court of Human Rights, however, it is something worth focusing on and discussing to ensure that it helps achieve the object and purpose of the Convention.



## **Alain CHABLAIS**

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Madame la Ministre,  
Madame la Secrétaire générale,  
Monsieur le Président,  
Mesdames et Messieurs,

Permettez-moi de me joindre aux autres participants pour féliciter la présidence allemande d'avoir organisé cette conférence. En ma qualité de Président du DH-SYSC-IV, je tiens aussi à saluer les nombreux membres de notre Groupe de rédaction qui participent à cette conférence.

Nous l'attendons avec impatience. Nous apprécions de tels événements ainsi que l'opportunité qu'ils nous offrent de dialoguer avec des experts indépendants.

La 3<sup>e</sup> réunion du DH-SYSC-IV se tiendra d'ailleurs à la suite de cette conférence dont nous espérons pouvoir tirer des enseignements utiles.

C'est donc un privilège pour moi de présenter aujourd'hui les travaux conséquents que nous réalisons au Conseil de l'Europe sur les affaires concernant les conflits interétatiques.

C'est en même temps une grande responsabilité, en raison de la sensibilité et de la complexité des questions que nous examinons.

### **Notre mandat**

Je voudrais d'emblée expliquer le cadre et l'état d'avancement de nos activités.

Le Comité directeur pour les droits de l'homme est composé de représentants des 47 États membres du Conseil de l'Europe - généralement les agents des gouvernements devant la Cour européenne des droits de l'homme.

Son Groupe de rédaction est composé de 11 États membres désignés par le comité directeur.

Notre mandat découle de la Déclaration adoptée par la conférence des Ministres de haut niveau qui s'est tenue en juin 2018, à Copenhague.

La Déclaration reconnaît les défis que les situations de conflit et de crise en Europe posent au système de la Convention et la charge significative des affaires liées à ces situations pour la Cour.

En conséquence, le Comité des Ministres nous a confié la tâche d'examiner le traitement et la résolution efficace d'affaires concernant les conflits interétatiques pendant la période 2020-2021 et de faire des propositions à cet égard.

Une réserve notable dans notre mandat porte sur le fait que nos propositions ne doivent pas limiter la compétence juridictionnelle de la Cour.

Dans ce cadre, nous avons tenu deux réunions jusqu'à présent.

Bien entendu, la crise sanitaire n'a pas été sans incidence sur la cadence de nos travaux, comme c'est le cas dans presque tous les autres domaines de la vie.

Néanmoins, nous avons été en mesure d'analyser et d'aborder un certain nombre de questions.

Nos discussions ont montré que sur certaines d'entre elles, il existe une diversité de points de vue parfois difficiles à réconcilier, mais qui rendent nos débats substantiels et riches.

Je vais aborder les principales questions que nous examinons au sein du Groupe de rédaction dans l'ordre où elles ont été traitées dans notre projet de rapport.

### **Premièrement, le traitement en parallèle des requêtes interétatiques et individuelles connexes**

Si le nombre de requêtes interétatiques est connu, l'une des questions que nous nous posons depuis le début est celle du nombre d'affaires individuelles qui peuvent être considérées comme liées à ces requêtes ou à des différends interétatiques.

Nous savons, grâce aux statistiques de la Cour, que la Cour elle-même compte [comme l'a souligné la Secrétaire Générale du Conseil de l'Europe dans son discours] plus de 10 000 requêtes individuelles liées à des requêtes interétatiques en cours ou à un conflit ou un différend.

Sans entrer dans la question juridique complexe des critères permettant de relier les requêtes individuelles aux affaires ou conflits interétatiques, nous nous accordons tous sur un point : le nombre croissant d'affaires interétatiques pendantes devant la Cour et le nombre élevé de requêtes individuelles connexes constituent un défi majeur pour la Cour.

Cette préoccupation est à l'origine de nos travaux dans ce domaine. La Cour a également formulé des observations sur ce défi dans ses commentaires dans le cadre de l'évaluation du processus de réforme d'Interlaken en février 2020.

Passons maintenant aux questions de procédure qui ont été soulevées au sein de notre Groupe de rédaction.

L'un des points de vue avancés est que le traitement parallèle des requêtes interétatiques et individuelles pose quelques problèmes.

Le premier est le manque d'efficacité en termes de temps et de budget. À cela s'ajoute un risque de double emploi - par exemple, les violations des droits des mêmes personnes pourraient être constatées à la fois dans les procédures interétatiques et dans celles engagées sur des requêtes individuelles.

Il n'existe pas de dispositions spécifiques de la Convention traitant de la corrélation entre les affaires interétatiques et les requêtes individuelles soulevant les mêmes questions. Les conditions de recevabilité sont moins élevées en ce qui concerne les requêtes interétatiques que les requêtes individuelles. Compte tenu de cette absence de réglementation dans la Convention elle-même, c'est jusqu'ici principalement de la pratique de la Cour que sont venues des précisions sur les rapports entre requêtes interétatiques et requêtes individuelles, même si toutes les questions ne sont pas encore clarifiées à cet égard.

Les discussions sur ces questions se poursuivent. À ce stade, je ne peux faire état d'aucune conclusion, mais seulement souligner que nous avons abordé ces questions sous deux angles principaux.

Le premier tient à la nature distincte de la requête interétatique ainsi qu'à la raison d'être des conditions de recevabilité moins strictes et du régime distinct de traitement des affaires concernant cette requête, comme le prévoit la Convention.

Le second angle concerne la pratique récente de la Cour en matière de hiérarchisation des priorités. Lorsqu'une affaire interétatique est pendante, les requêtes individuelles soulevant les mêmes questions ou découlant des mêmes circonstances sous-jacentes ne sont, en principe, pas tranchées avant que les questions primordiales découlant de la procédure interétatique aient été déterminées dans l'affaire interétatique.

Passons maintenant à une autre série de questions de procédure que nous examinons.

### **Le traitement parallèle des affaires devant la Cour de Strasbourg et d'autres mécanismes internationaux de règlement des litiges**

Ici, nous avons distingué conceptuellement deux scénarios.

Le premier porte sur l'existence d'une affaire interétatique devant la Cour de Strasbourg et d'une affaire interétatique entre les mêmes parties, concernant les mêmes faits et présentant des revendications identiques ou similaires devant un autre mécanisme international de règlement des différends.

Dans un cas où ce scénario s'est concrétisé, la procédure de la Cour n'a heureusement pas causé de difficultés pratiques liées à des jugements contradictoires ou à une incertitude juridique. Toutefois, cela ne signifie pas que des risques potentiels de double emploi ou de décisions contradictoires concernant une affaire sensiblement identique puissent survenir à l'avenir.

Le second scénario concerne l'existence d'une requête individuelle liée à un différend interétatique devant la Cour et l'existence d'une affaire requête entre les mêmes parties, concernant les mêmes faits et les mêmes revendications devant un autre mécanisme international de règlement des différends.

Jusqu'à présent, nos réflexions sur cette question s'appuient sur le travail déjà réalisé par notre Comité directeur. En 2019, le CDDH a en effet analysé en profondeur les questions de chevauchement des compétences de la Cour de Strasbourg et des organes de traités de l'ONU - telles que le potentiel de duplication et/ou de conclusions contradictoires ; le forum shopping ; ainsi que l'incertitude juridique pour les États parties sur la meilleure façon de remplir leurs engagements en matière de droits de l'homme en vertu de la Convention et d'autres instruments internationaux.

Le sentiment général au sein de notre Groupe de rédaction consiste à dire que le rapport existant sur la place de la Convention dans l'ordre juridique international devrait inspirer nos discussions actuelles sur les requêtes inter-étatiques.

### **L'établissement des faits est peut-être le plus grand défi que la Cour doit relever dans les affaires interétatiques**

À cet égard, la Cour elle-même fait référence à des affaires dans lesquelles elle agit en tant que juridiction de première instance parce qu'il n'y a généralement pas eu de décisions des tribunaux nationaux.

La Cour évoque également des affaires dans lesquelles, compte tenu de l'ampleur des violations alléguées, elle a dû établir l'existence d'une pratique administrative au sens de la Convention.

D'autres questions telles que la complexité des faits dans les affaires interétatiques, la nature volumineuse des soumissions des parties, la langue des documents produits par les Parties ou encore la complexité des questions juridiques en jeu, ont également été soulignées par la Cour.

Récemment, la Cour a noté dans son arrêt qu'il avait été particulièrement difficile d'établir les faits dans le contexte d'une affaire interétatique concernant un conflit armé et ses conséquences, impliquant des milliers de personnes et se déroulant sur une période significative dans une vaste zone géographique.

En ce qui concerne notre Groupe de rédaction, des questions relatives à l'admissibilité et à la valeur probante de certaines preuves, mais aussi le niveau de preuve requis par la Cour, ont été soulevées.

Ces questions sont toutes très sensibles étant donné qu'elles relèvent de la compétence exclusive de la Cour, qui s'étend à toutes les questions concernant l'interprétation et l'application de la Convention.

C'est pourquoi, jusqu'à présent, nous les avons abordées en faisant le point sur les principes de la Cour en matière d'appréciation des preuves.

Quelques observations sur lesquelles nous n'avons pas forcément tiré de conclusions mais sur lesquelles nous allons poursuivre nos réflexions.

Tout d'abord, la Cour n'effectue pas de visites d'information dans les pays concernés destinées à établir les faits, comme c'était le cas de la Commission dans le passé.

Deuxièmement, il y a toujours eu des auditions de témoins dans les affaires interétatiques, en personne, principalement à Strasbourg.

Troisièmement, nous constatons, dans les décisions et arrêts les plus récents de la Cour, que la complexité particulière des faits - y compris quant à la difficulté de les établir - ne s'est pas démentie, bien au contraire. Cette complexité des faits est également liée à la complexité des questions juridiques récemment traitées dans les affaires interétatiques, par exemple sur les relations entre le droit international humanitaire et la Convention ou encore sur la question de la juridiction. Il conviendra d'approfondir nos discussions pour voir quels enseignements tirer de ces derniers arrêts et décisions rendus par la Cour.

Un autre domaine que nous explorons au sein du Groupe de rédaction en relation avec les défis liés à l'établissement des faits est l'obligation des États parties en vertu de l'article 38 de la Convention de fournir à la Cour les preuves qu'elle demande.

Maintenant, passons à la **satisfaction équitable**.

Une question clé dont nous avons discuté porte sur la liste de victimes présumées qui doit être soumise à la Cour. Il s'agit d'une question très importante, en pratique, pour les États concernés et la pratique de la Cour s'est développée plus récemment à cet égard. Le stade procédural auquel cette liste doit être soumise et les exigences relatives à cette liste ont été longuement évoquées.

Il existe deux courants de pensée.

L'un d'eux soutient que la liste devrait être soumise lors de la phase de satisfaction équitable.

L'autre soutient l'idée qu'aux fins de l'application de l'article 41 de la Convention, la liste devrait être soumise dès le début de la procédure interétatique.

Selon ce dernier point de vue - la difficulté ou l'incapacité de la Cour à établir précisément l'identité des victimes et les violations concernées ou le calcul de la compensation financière peut entraver le processus d'exécution de l'arrêt.

Encore une fois, l'une des perspectives à travers laquelle nous essayons d'aborder ces questions est celle du devoir des États parties de coopérer avec la Cour sur la base de l'article 38 de la Convention.

Cette obligation - comme la Cour l'a récemment constaté - s'applique tant à l'État requérant qu'à l'État défendeur.

Dans le dernier chapitre de notre projet de rapport, nous traitons du **règlement amiable**.

En faisant le point sur la pratique de la Cour, nous avons constaté que les affaires interétatiques qui ont été résolues soit sur la base de l'ex-article 28 § b, soit par des accords hors du cadre de la Convention, remontent le plus souvent à l'époque de la Commission.

Une question que nous continuerons, je pense, à nous poser est de savoir comment maximiser le potentiel de l'utilisation de l'article 39 de la Convention afin de résoudre les requêtes interétatiques.

Sur ce chapitre de notre travail, nous espérons apprendre davantage des actes de cette conférence.

Enfin, après cette présentation technique du travail que nous effectuons au Conseil de l'Europe, je voudrais vous faire part de quelques réflexions plus générales sur les fondements de la requête interétatique.

Mesdames et Messieurs, la jurisprudence de la Cour de Strasbourg nous a montré que la requête interétatique consiste à protéger les droits de l'homme et les libertés fondamentales des individus - qu'ils soient victimes d'un conflit armé ou de tout autre type de désaccord, qu'ils soient ressortissants de l'État requérant ou non.

La procédure interétatique sert à leur rendre justice et non pas à permettre aux États parties de poursuivre leurs propres intérêts nationaux.

La procédure interétatique repose sur la légitimité de l'action des États parties pour saisir la Cour d'une violation alléguée de l'ordre public européen.

Les États parties garantissent collectivement les droits et libertés énoncés dans la Convention, qui bénéficient à leur tour d'une application collective - cette dernière étant un objectif fondamental explicitement énoncé dans le préambule de la Convention.

Par conséquent, préserver cette voie procédurale permettant à nos États membres de saisir la Cour - tout en assurant son efficacité - fait partie de la responsabilité partagée entre les États parties, la Cour et le Comité des Ministres pour assurer le bon fonctionnement du système de la Convention.

Je conclurai en remerciant le vice-président du Groupe de rédaction - M. Elias Kastanas - ainsi que les anciens et actuels rapporteurs - M<sup>me</sup> Jenny Dorn, M. Chanaka Wickremasinghe, M<sup>me</sup> Kathrin Mellech et M. James Gaughan - pour leurs excellentes contributions et leur dévouement qui ont été cruciaux pour la poursuite de nos travaux en ces temps difficiles de crise sanitaire.

Je vous remercie de votre attention !

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# THE CHALLENGE OF FACT-FINDING (ESTABLISHMENT OF FACTS) IN INTER-STATE CASES<sup>53</sup>

## Introduction

The processing of inter-State cases, because of their nature and dimension, raise exceptional challenges for the European Court of Human Rights, in particular when they concern armed conflicts and are accompanied by thousands of related individual applications.

As reiterated yesterday by the President of the Court, complicated legal issues of admissibility, jurisdiction and the relationship between the Convention and International Humanitarian Law must often be addressed.

Furthermore, one of the biggest challenges is the establishment of the facts.

In the Copenhagen declaration adopted by Member States in 2018, the latter called upon the Court to explore “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.**”

The discussions in the DH-SYSC IV (subgroup of the Steering Committee for Human Rights (CDDH), Drafting Group on effective processing and resolution of cases related to inter-State disputes) also address this question.

This presentation, which is certainly not comprehensive, is an attempt to analyse this challenge and how the Court addressed it in practice in the light of its recent case-law (in particular in the judgments in *Georgia v. Russia* (I) and (II) and the decision on admissibility in *Ukraine v. Russia*).

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<sup>53</sup> The views expressed in this presentation are those of the author and do not necessarily reflect the position of the European Court of Human Rights.



## I. Characteristics of the challenge

a. **The scale of the task**, which the Court openly admits in its judgment in *Georgia v. Russia* (II) concerning the armed conflict between Georgia and Russia in 2008 and its aftermath, in the part on the establishment of the facts as well as in the part on the examination of the question of jurisdiction during the active conduct of hostilities.

“61. The Court observes at the outset that it is particularly **difficult to establish the facts** in the context of an inter-State case such as the present one, which concerns an armed conflict and its consequences, involving thousands of people and taking place over a significant period of time across a vast geographical area.”

“141. However, 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), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of “jurisdiction” as established to date.”

For example, to give an idea, in this case the observations of the parties and the annexes represented approximately 30 000 pages.

The examination of these cases is therefore very time consuming for the Registry lawyers and Judges, already under pressure to tackle the Court’ backlog.

And it has to be underlined that in inter-State cases the Court cannot rely on the decisions of domestic courts and therefore acts as a court of first instance, which is certainly not its role as it was conceived by the Convention and goes contrary to the “principle of subsidiarity”, which it constantly reiterates in its case-law.

### b. **The establishment of the existence of an “administrative practice”**

In most inter-State cases, the applicant Government does not ask the Court to establish individual violations of the Convention, but to establish the existence of an “administrative practice”. See *Georgia v. Russia* (II):

“102. It refers in this connection to the definition of the concept of “administrative practice” outlined in *Georgia v. Russia* (I) (cited above):

“122. The Court reiterates that an administrative practice comprises two elements: the ‘repetition of acts’ and ‘official tolerance’ (see *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940-9944/82, Commission decision of 6 December 1983, Decisions and Reports 35, p. 163, § 19, and *Cyprus v. Turkey*, cited above, § 99).

123. 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 to amount not merely to isolated incidents or exceptions but to a pattern or system' (see *Ireland v. the United Kingdom*, cited above, § 159, and *Cyprus v. Turkey*, cited above, § 115).

124. By '**official tolerance**' is meant that illegal acts 'are tolerated in the sense that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied'. To this latter element, the Commission added that 'any action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system' (see *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, cited above, pp. 163-64, § 19). In that connection, the Court has observed that 'it is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected' (see *Ireland v. the United Kingdom*, cited above, § 159)."

## II. Methodology applied by the Court

Relevant provisions: Article 38 of the Convention, Rule 33 §§ 2 and Rule 44C of the Rules of Court and Annex to the Rules of Court (see the Annex to this presentation).

### a. Written and oral evidence

As regards written evidence, the Court generally relies on the observations of the parties, the numerous documents submitted by them (with a requirement for the parties in practice to translate the pertinent documents in one of its official languages), and, most importantly, on other sources such as reports of international governmental and non-governmental organisations, but also satellite imagery or decisions of other international courts like the International Criminal Court.

See in particular *Georgia v. Russia* (II) : the EU fact-finding report, satellite images from the report « *High-Resolution Satellite Imagery and the Conflict in South Ossetia* » published by « *the American Association for the Advancement of Science* » (AAAS), and the decision of 27 January 2016 of the Pre-Trial Chamber I of the International Criminal Court which "authorise[d] the Prosecutor to proceed with an investigation of crimes within the jurisdiction of the Court, committed in and around South Ossetia, Georgia, between 1 July and 10 October 2008".

The Court also requested the parties to provide additional documentary evidence (“combat reports”) by referring to Rule 33 § 2 of the Rules of Court, “which provides that public access to a document or to any part of it may be restricted and to the fact that sensitive passages may also be removed and/or a summary of the relevant passages submitted.”

As regards oral evidence, the former Commission held witness hearings in inter-State cases in the relevant countries in the cases of *Ireland v. United Kingdom* and *Cyprus v. Turkey*, but also in numerous individual applications. Before 1998 there was a “division of tasks/roles” between the Commission and the Court in this respect. It was indeed the role of the Commission to decide on issues of admissibility and to establish the facts, as the Court stated in *Kaya v. Turkey*:

“75. It is important to emphasise in this respect that under the Court’s settled case-law **the establishment and verification of the facts are primarily a matter for the Commission** (Articles 28 § 1 and 31 of the Convention). While the Court is not bound by the Commission’s findings of fact and remains free to make its own appreciation in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area.”

After 1998 the Court had the double task to assess the admissibility and the merits of applications, and the dramatic increase in incoming applications in particular from the new Member States, together with budgetary constraints, is certainly one of the explanations why the Court has become, as Michael O’Boyle mentioned it (in his article written together with Natalia Brady on the “investigatory powers of the ECtHR”), “a reluctant *in situ* fact-finder”.

More recently the Court held witness hearings in Strasbourg in the cases of *Georgia v. Russia* (I) concerning the existence of an “administrative practice” of arrest, detention and collective expulsion of Georgian nationals in 2006 (one week – 21 witnesses) and *Georgia v. Russia* (II) (two weeks – 31 witnesses).

In both cases the Court asked each party to submit a list of witnesses and it also directly chose a certain number of witnesses and experts it wanted to hear.

See *Georgia v. Russia* (II):

“74. The Court also had regard to the statements of witnesses and experts during the witness hearing held in Strasbourg from 6 to 17 June 2016. **As well as the establishment of the facts, the purpose of the hearing was to test the veracity of the evidence submitted by the parties and the evidence set out in the reports by international organisations concerning some of the aspects of the application outlined above** (see paragraphs 51-55 above). The Court heard a total of thirty-three witnesses: fifteen had been called by the applicant Government, twelve by the respondent Government and six directly by the Court (see paragraph 24 above, and also the list of witnesses and experts and the summary of their statements in the annex to the judgment).

## **b. The principles of assessment of evidence, standard and burden of proof**

No strict Rules in the Convention or the Rules of Court in this respect

### **i. At the admissibility stage**

**“Prima facie evidence”** See *Ukraine v. Russia*:

“254. In the light of the legal and evidential complexities of the present case, the Court considers it important at the outset to set out the approach it will take to the questions of proof (both the burden and the standard of proof) in relation to the issues to be decided at this stage of the proceedings. **This is of particular importance in an inter-State case concerning, as the present case does, allegations of an “administrative practice”, because 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.**”

(...)

### **Standard of proof**

259. In this latter connection, the Court considers it important to identify the relevant standard(s) of proof which, according to its case-law, are applicable to the respective issues before the Court. In considering this question, the Court is mindful that it is at this stage only concerned with the admissibility of the present application.

“As to the alleged existence of an administrative practice

“263. (...) **Furthermore, it considers that the same standard of proof, notably whether there is sufficiently substantiated prima facie evidence, is to be satisfied at this admissibility stage of the proceedings in respect of the applicant Government’s substantive allegations of an administrative practice of human rights violations.** In the Court’s view, the close interplay between the two admissibility issues, namely the exhaustion rule and the substantive admissibility of the complaint of an “administrative practice” said to amount to an “alleged breach” (in the French version “*manquement ... qu’elle croira pouvoir être imputé*”) under Article 33 of the Convention, requires the application of a **uniform standard** in order for the complaint of an administrative practice to be admissible on both formal and substantive grounds. **This standard is to apply to each of the two component elements of the alleged “administrative practice”, namely the “repetition of acts” and the necessary “official tolerance”.** In the absence of such evidence, the complaint of an administrative practice cannot be viewed as admissible and warranting the Court’s examination on the merits.”

In this decision, the Court clearly states that at the admissibility stage the applicant Government must submit “prima facie evidence” as regards both aspects of the existence of an administrative practice (compare and contrast with the decisions on admissibility in *Georgia v. Russia* (I) and (II) where the Court

indicated that “88. In determining the existence of prima facie evidence, the Court must ascertain – in the light of the criteria already applied by the Commission and the Court in inter-State cases – whether the applicant Government’s allegations are wholly unsubstantiated (“*pas du tout étayées*”) or are lacking the requirements of a genuine allegation in the sense of Article 33 of the Convention (“*feraient défaut les éléments constitutifs d’une véritable allégation au sens de l’article 33 de la Convention*”) (see *France, Norway, Denmark, Sweden, Netherlands v. Turkey*, Commission decision cited above, § 12; *Denmark v. Turkey*, decision cited above; and *Georgia v. Russia (I)*, decision cited above, § 44).”

## ii. At the merits stage

**“Proof beyond reasonable doubt”** (classical approach of free evaluation of evidence)

See *Ireland v. UK* (§ 30): “A reasonable doubt is a doubt for which reasons can be drawn from the facts presented and not a doubt raised on the basis of a mere theoretical possibility or to avoid a disagreeable conclusion.”

See *Georgia v. Russia (II)*:

“59. The Court refers in this connection to the general principles which were recently summarised as follows in *Georgia v. Russia (I)* ([GC], no. 13255/07, ECHR 2014):

“93. In assessing evidence the Court has adopted the standard of proof **‘beyond reasonable doubt’** laid down by it in two inter-State cases (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25, and *Cyprus v. Turkey* [GC], no. 25781/94, § 113, ECHR 2001-IV) and which has since become part of its established case-law (see, *inter alia*, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 26, ECHR 2004-VII, and *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, § 158, 1 July 2010).

94. However, it has never been its purpose to borrow the approach of the national legal systems that use that standard in criminal cases. The Court’s role is to rule not on guilt under criminal law or on civil liability but on Contracting States’ responsibility under the Convention. The specificity of its 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. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. **It 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. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted 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 (see, *inter alia*, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII, and *Mathew v. the Netherlands*, no. 24919/03, § 156, ECHR 2005-IX).

**95. In establishing the existence of an administrative practice, the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned, but will rather study all the material before it, from whatever source it originates (see *Ireland v. the United Kingdom* and *Cyprus v. Turkey*, both cited above). 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 (see *Ireland v. the United Kingdom*; *Ilaşcu and Others*; and *Davydov and Others*, all cited above).**

...

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

### **c. The obligation of the State parties to cooperate (article 38 of the Convention)**

See *Georgia v. Russia* (II):

"341. In *Georgia v. Russia* (I) (cited above, § 99) the Court pointed out that the following general principles, which it had established regarding individual applications in particular, should also be applied to inter-State applications:

"... it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper

and effective examination of applications. **This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 of the Convention** (see *Tahsin Acar v. Turkey* [GC], no. 26307/95, §§ 253-54, ECHR 2004-III; *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI; and *Tanrikulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV).

(see *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 202, ECHR 2013)."

In many individual applications and also in *Georgia v. Russia* (I) the Court drew inferences due to the lack of cooperation of the respondent State ("109. "(...) It will draw all the inferences that it deems relevant regarding the well-foundedness of the applicant Government's allegations on the merits"), whereas in *Georgia v. Russia* (II) it simply held that the respondent State had failed to comply with its obligations under Article 38 of the Convention.

## **Conclusion**

As can be seen from the above, the Court is well aware of the challenge that the processing of inter-States (and related individual applications) represents, in particular as regards the establishment of the facts. It has tried, through different legal techniques and also its investigatory powers, to address this challenge. A trend towards shifting more responsibility on the parties and in particular on the applicant Government when it comes to the establishment of the existence of an "administrative practice" can be seen in its recent decision in *Ukraine v. Russia*.

## **ANNEX**

### **Article 38 of the Convention**

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.

### **Rule 32 § 2 of the Rules of Court**

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.



### **Rule 44C – Failure to participate effectively**

1. 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.
2. Failure or refusal by a respondent Contracting Party to participate effectively in the proceedings shall not, in itself, be a reason for the Chamber to discontinue the examination of the application.

## **Annex to the Rules (concerning investigations)**

### **Rule A1 – Investigative measures**

1. The Chamber may, at the request of a party or of its own motion, adopt any investigative measure which it considers capable of clarifying the facts of the case. The Chamber may, *inter alia*, invite the parties to produce documentary evidence and decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in carrying out its tasks.
2. The Chamber may also ask any person or institution of its choice to express an opinion or make a written report on any matter considered by it to be relevant to the case.
3. 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.
4. The provisions of this Chapter concerning investigative measures by a delegation shall apply, *mutatis mutandis*, to any such proceedings conducted by the Chamber itself.
5. Proceedings forming part of any investigation by a Chamber or its delegation shall be held in camera, save in so far as the President of the Chamber or the head of the delegation decides otherwise.
6. The President of the Chamber may, as he or she considers appropriate, invite, or grant leave to, any third party to participate in an investigative measure. The President shall lay down the conditions of any such participation and may limit that participation if those conditions are not complied with.

### **Rule A2 – Obligations of the parties as regards investigative measures**

1. The applicant and any Contracting Party concerned shall assist the Court as necessary in implementing any investigative measures.



2. The Contracting Party on whose territory on-site proceedings before a delegation take place shall extend to the delegation the facilities and cooperation necessary for the proper conduct of the proceedings. These shall include, to the full extent necessary, freedom of movement within the territory and all adequate security arrangements for the delegation, for the applicant and for all witnesses, experts and others who may be heard by the delegation. It shall be the responsibility of the Contracting Party concerned to take steps to ensure that no adverse consequences are suffered by any person or organisation on account of any evidence given, or of any assistance provided, to the delegation.

**Rule A3 – Failure to appear before a delegation**

Where a party or any other person due to appear fails or declines to do so, the delegation may, provided that it is satisfied that such a course is consistent with the proper administration of justice, nonetheless continue with the proceedings.

**Rule A4 – Conduct of proceedings before a delegation**

1. The delegates shall exercise any relevant power conferred on the Chamber by the Convention or these Rules and shall have control of the proceedings before them.

2. The head of the delegation may decide to hold a preparatory meeting with the parties or their representatives prior to any proceedings taking place before the delegation.

**Rule A5 – Convocation of witnesses, experts and of other persons to proceedings before a delegation**

1. Witnesses, experts and other persons to be heard by the delegation shall be summoned by the Registrar.

2. The summons shall indicate

- (a) the case in connection with which it has been issued;
- (b) the object of the inquiry, expert opinion or other investigative measure ordered by the Chamber or the President of the Chamber;
- (c) any provisions for the payment of sums due to the person summoned.

3. The parties shall provide, in so far as possible, sufficient information to establish the identity and addresses of witnesses, experts or other persons to be summoned.

4. In accordance with Rule 37 § 2, the Contracting Party in whose territory the witness resides shall be responsible for servicing any summons sent to it by the Chamber for service. In the event of such service not being possible, the Contracting Party shall give reasons in writing. The Contracting Party shall further take all reasonable steps to ensure the attendance of persons summoned who are under its authority or control.

5. The head of the delegation may request the attendance of witnesses, experts and other persons during on-site proceedings before a delegation. The Contracting Party on whose territory such proceedings are held shall, if so requested, take all reasonable steps to facilitate that attendance.

6. Where a witness, expert or other person is summoned at the request or on behalf of a Contracting Party, the costs of their appearance shall be borne by that Party unless the Chamber decides otherwise. The costs of the appearance of any such person who is in detention in the Contracting Party on whose territory on-site proceedings before a delegation take place shall be borne by that Party unless the Chamber decides otherwise. In all other cases, the Chamber shall decide whether such costs are to be borne by the Council of Europe or awarded against the applicant or third party at whose request or on whose behalf the person appears. In all cases, such costs shall be taxed by the President of the Chamber.

#### **Rule A6 – Oath or solemn declaration by witnesses and experts heard by a delegation**

1. After the establishment of the identity of a witness and before testifying, each witness shall take the oath or make the following solemn declaration:

“I swear” – or “I solemnly declare upon my honour and conscience” – “that I shall speak the truth, the whole truth and nothing but the truth.”

This act shall be recorded in minutes.

2. After the establishment of the identity of the expert and before carrying out his or her task for the delegation, every expert shall take the oath or make the following solemn declaration:

“I swear” – or “I solemnly declare” – “that I will discharge my duty as an expert honourably and conscientiously.”

This act shall be recorded in minutes.

#### **Rule A7 – Hearing of witnesses, experts and other persons by a delegation**

1. Any delegate may put questions to the Agents, advocates or advisers of the parties, to the applicant, witnesses and experts, and to any other persons appearing before the delegation.

2. Witnesses, experts and other persons appearing before the delegation may, subject to the control of the head of the delegation, be examined by the Agents and advocates or advisers of the parties. In the event of an objection to a question put, the head of the delegation shall decide.

3. Save in exceptional circumstances and with the consent of the head of the delegation, witnesses, experts and other persons to be heard by a delegation will not be admitted to the hearing room before they give evidence.

4. The head of the 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.

5. The head of the delegation shall decide in the event of any dispute arising from an objection to a witness or expert. The delegation may hear for information purposes a person who is not qualified to be heard as a witness or expert.

### **Rule A8 – Verbatim record of proceedings before a delegation**

1. A verbatim record shall be prepared by the Registrar of any proceedings concerning an investigative measure by a delegation. The verbatim record shall include:

- (a) the composition of the delegation;
- (b) a list of those appearing before the delegation, that is to say Agents, advocates and advisers of the parties taking part;
- (c) the surname, forenames, description and address of each witness, expert or other person heard;
- (d) the text of statements made, questions put and replies given;
- (e) the text of any ruling delivered during the proceedings before the delegation or by the head of the delegation.

2. If all or part of the verbatim record is in a non-official language, the Registrar shall arrange for its translation into one of the official languages.

3. The representatives of the parties shall receive a copy of the verbatim record in order that they may, subject to the control of the Registrar or the head of the delegation, make corrections, but in no case may such corrections affect the sense and bearing of what was said. The Registrar shall lay down, in accordance with the instructions of the head of the delegation, the time-limits granted for this purpose.

4. The verbatim record, once so corrected, shall be signed by the head of the delegation and the Registrar and shall then constitute certified matters of record.

## Philipp LEACH

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### **Enhancing fact-finding – a critical role for the European Court of Human Rights**

At the April 2021 conference, European Court President Robert Spano averred that inter-state cases present exceptional challenges for the Court, not least complex issues of jurisdiction and law,<sup>54</sup> as well as factual disputes. The Court's Committee on Working Methods has recently described establishing the facts as being 'one of the greatest challenges'.<sup>55</sup> This is likely to be so whenever the Court is, in effect, required to operate as a court of first instance (where no domestic court has carried out the fact-finding role) and is often further complicated in inter-state cases by the scale and gravity of the Convention violations being alleged. Moreover, the Court will frequently be tasked in such cases with deciding whether there has been an 'administrative practice' of breaches, which will require an additional assessment of the repetition of the violations and whether there was official tolerance by the respondent state.<sup>56</sup>

Challenges there may be, but I take quite a different view from Professor Thilo Marauhn who described a 'disillusioning narrative' of international fact-finding, and who suggested that it would be plausible to exclude fact-finding in inter-state cases, so that the Court can 'focus on the law'.<sup>57</sup> I would argue that, on the contrary, establishing the facts has always been, and should continue to remain, fundamental to the Court's role (pursuant to Article 19 of the European Convention on Human Rights) of ensuring Convention compliance across the 47 Council of Europe states. It is a role in which the Court has proved its expertise, notwithstanding the challenges and indeed the absence of cooperation from some states in some cases. It has done so in both inter-state cases, and also consistently in individual cases concerning gross violations, even cases of enforced disappearances.

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<sup>54</sup> See, for example, J Gavron and P Leach, 'Damage control after *Georgia v Russia* (II) – holding states responsible for human rights violations during armed conflict', Strasbourg Observers, 8 February 2021.

<sup>55</sup> European Court of Human Rights, Committee on Working Methods, Proposals for More Efficient Processing of Inter-state Cases, 5 June 2019 (a redacted version of a report adopted by the plenary of the Court on 18 June 2018), paras. 20-21.

<sup>56</sup> *France, Norway, Denmark, Sweden and the Netherlands v Turkey* 9940-9944/82 (ECmHR, dec, 6 December 1983) paras 19-20.

<sup>57</sup> T Marauhn, 'Less is More. Limited Fact-Finding to Avoid Overburdening the European Court of Human Rights in inter-State Cases', Völkerrechtsblog, 29 April 2021.

In this brief article,<sup>58</sup> I would like to address two issues in particular, relating to the task of establishing the facts of a case: the conduct of fact-finding hearings, and the use of new technology.

## Fact-finding hearings

Although now very rare in individual cases, it is still the norm for the Court to hold fact-finding hearings in inter-state cases. Research published in 2009<sup>59</sup> (the ‘fact-finding research report’) underscored how critical such hearings can be. By that time, the former European Commission of Human Rights, and the Court, had carried out fact-finding hearings in 92 cases, including five inter-state cases, 63 individual conflict-related cases and 19 cases concerning ill-treatment of detainees. The research findings were primarily based on interviews with, and questionnaire responses from, many of the personnel who had been involved in such cases, including Commission members, Court judges, Commission and Court registry lawyers, government representatives and applicants’ lawyers. There had been a finding of at least one Convention violation in 71 of the 92 cases (a number of which had been settled). Of those 71 cases, ninety per cent concerned the right to life or the prohibition of torture and inhuman or degrading treatment or punishment. Ninety per cent of the respondents were of the view that in some cases fact-finding hearings are crucial in securing a fair judgment. The research also established that the Court is more likely to hold fact-finding hearings if there has been a systematic failure in the functioning of the domestic courts, and where there are reasonable prospects of establishing a *substantive* violation of the Convention, not just a *procedural* one.<sup>60</sup>

The holding of fact-finding hearings, then, is, in certain circumstances, essential to the Court’s role of securing justice and establishing violations of the Convention. If they are to be continued, and indeed revived, where deemed necessary, in individual cases as well as inter-state cases, there are a number of pressing issues which need to be reviewed. One is the location of any fact-finding hearing. There appears to be a clear preference at present for hearings to be held in Strasbourg, no doubt on grounds of costs and convenience to Court judges and officials. It is also recognised as being a ‘neutral’ venue, which may facilitate the fact-finding process.<sup>61</sup> However, the choice of venue may be critical for applicants and witnesses, for whom there may be logistical difficulties – it needs to be considered whether they are free to travel, and that they can afford to travel (perhaps requiring time off work). Moreover, as Judge O’Donoghue argued cogently in *Ireland v UK*,<sup>62</sup> there may be real value in judges visiting the

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<sup>58</sup> This contribution is based on a section on fact-finding in the author’s recent article: ‘On Inter-State Litigation and Armed Conflict Cases in Strasbourg’, *European Convention on Human Rights Law Review* (2021) 1-48.

<sup>59</sup> P Leach, C Paraskeva and G Uzelac, ‘International Human Rights & Fact-finding – an Analysis of the Fact-finding Missions Conducted by the European Commission and Court of Human Rights’, London Metropolitan University, 2009.

<sup>60</sup> *Ibid.* paras. 38-43.

<sup>61</sup> M O’Boyle and N Brady, ‘Investigatory Powers of the European Court of Human Rights’ (2013) *European Human Rights Law Review* 378, 379.

<sup>62</sup> *Ireland v the United Kingdom* 5310/71 (ECtHR, 18 January 1978).

site of the incidents in question, and commentators have underlined the importance of an international court being seen, and having a presence, in-country.<sup>63</sup>

Another area of great concern has been the problem of the non-attendance of witnesses. The fact-finding research report established that some eye-witnesses will not attend due to their fear of the consequences of giving evidence ‘against the state’. It is also not unusual for state agents to fail to turn up – including prosecutors, police and security force officers – with all manner of ‘reasons’ being put forward for their non-attendance, such as that they are not contactable, or are on holiday. These problems highlight the fact that the Court has no powers to compel witnesses to attend its hearings, and there is a strong case for the introduction of new measures which are specifically designed to ensure the safety and security of witnesses.

### **The use of new technology in fact-finding**

During the current global pandemic, the Court has been holding admissibility and merits hearings online. Could similar procedures be used to supplement (but not replace) fact-finding hearings? There are undoubtedly additional challenges in hearing and assessing witnesses as to facts in an online context, but there are many ways in which new technologies could be used to facilitate European Court fact-finding. Here are three examples which have arisen recently in the context of inter-state proceedings or situations of armed conflict.

Although the Court’s assessment of the facts will frequently take place long after the events in question, technology can of course be used to enhance<sup>64</sup> such processes. Commissioned by the European Human Rights Advocacy Centre (EHRAC),<sup>65</sup> Professors Rebecca Gowland and Tim Thompson have recently explained how techniques of forensic archaeology, anthropology and genetics can be used to investigate mass graves and identify human remains, even after many years.<sup>66</sup>

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<sup>63</sup> See, for example, C Burbano Herrera, ‘The Inter-American Court of Human Rights and its Role in Preventing Violations of Human Rights through Provisional Measures’ in Y Haeck, O Ruiz-Chiriboga and C Burbano Herrera (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia, 2015) 356, 372-374; C Sandoval, P Leach and R Murray, ‘Monitoring, Cajoling and Promoting Dialogue: What Role for Supranational Human Rights Bodies in the Implementation of Individual Decisions?’ (2020) *Journal of Human Rights Practice* 1, 11-13 (this article discusses hearings in the context of the implementation of judgments and decisions).

<sup>64</sup> See, for example, D Accatino and C Collins, ‘Truth, Evidence, Truth: The Deployment of Testimony, Archives and Technical Data in Domestic Human Rights Trials’ (2016) 8(1) *Journal of Human Rights Practice* 81-100, 91-92.

<sup>65</sup> See: [ehrac.org.uk](http://ehrac.org.uk)

<sup>66</sup> Committee of Ministers, DH-DD(2019)1406, Rule 9.2 - Communication from a NGO (EHRAC) (25/10/2019) in the KHASHIYEV and AKAYEVA group of cases v. Russian Federation (Application No. 57942/00), 26 November 2019, 11: <[https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2019\)1406E%22%5D%7D%7E%3E%3E](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2019)1406E%22%5D%7D%7E%3E%3E)>.

There also are new techniques available to help in obtaining and sifting through evidence available on the internet.<sup>67</sup> In another example from EHRAC's litigation, the open source investigative agency, Forensic Architecture, was commissioned to locate evidence for a case arising from the armed conflict between Ukraine and Russia. They devised an algorithm using machine learning to search the internet for evidence of military hardware and personnel at a particular location, over a specified period of time. This platform has been submitted to the European Court in those proceedings, as a supplement to the available witness evidence.<sup>68</sup>

A third example illustrates the way in which technology can be used to verify evidence. The investigative agency Bellingcat was asked to assess videos which emerged in October 2020 in the midst of the renewed hostilities between Armenia and Azerbaijan over Nagorno-Karabakh. The videos purported to show the detention and execution of two Armenian soldiers by Azerbaijani soldiers in the town of Hadrut. Using geolocation techniques such as shadow analysis, Bellingcat concluded that the videos were authentic.<sup>69</sup>

Such technologies will undoubtedly throw up new challenges, not least as to the authenticity and veracity of such evidence, but they offer numerous ways in which the fact-finding role of international judicial bodies such as the European Court of Human Rights can be significantly enhanced.

## Conclusion

The assessment of the facts will remain at the heart of the work of the European Court of Human Rights. In particular contexts, such as inter-state litigation and other conflict-related cases, where the Court is faced with immense challenges in ascertaining what has happened, by holding fact-finding hearings and by creatively utilising new technologies, the Court will be much better placed to do its essential work.

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<sup>67</sup> See, for example, J Aronson, M Cole, A Hauptmann, D Miller and B Samuels, 'Reconstructing Human Rights Violations Using Large Eyewitness Video Collections: The Case of Euromaidan Protester Deaths' (2018) 10(1) *Journal of Human Rights Practice*, 159

<sup>68</sup> See, for example: S Walker, 'New evidence emerges of Russian role in Ukraine conflict' *The Guardian* (London, 18 August 2019). The online platform can be viewed here: <<https://ilovaisk.forensic-architecture.org/>>. The case in question is *Ponomarenko v Ukraine and Russia, and 19 other applications* 60372/14 (communicated on 28 August 2017).

<sup>69</sup> N Waters, 'An execution in Hadrut, Bellingcat' (Bellingcat.com, 15 October 2020): <<https://www.bellingcat.com/news/rest-of-world/2020/10/15/an-execution-in-hadrut-karabakh/>>.

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## **Fact-finding or just evidence assessment? Practice of the ICJ and ITLOS in inter-State cases**

The international adjudicatory system has developed few compulsory rules concerning the production, admissibility and weight of evidence. This is particularly true for judicial institutions like the International Tribunal for the Law of the Sea (ITLOS) and the International Court of Justice (ICJ), which decide disputes between States. Sovereignty acts as a shield protecting litigants from overly intrusive rules of evidence and inquisitive adjudication. These courts do not have any power of injunction and, whenever they intervene on issues of evidence, they must seek to preserve sovereign sensitivity and equality between the parties. However, both the ICJ and ITLOS have increasingly used their inherent powers to ensure the good administration of justice and to allow for the manifestation of the truth.

### ***States are leading the dance of evidence***

Inter-State litigation follows the adversarial system, in which evidence is freely produced by the parties, the role of the tribunal being essentially to evaluate the information received and to ensure procedural fairness. In a system of free production of evidence, States unsurprisingly lead the tango.

Evidence is submitted essentially during the written phase and takes the form of a mass of documents. In international adjudication, “written evidence” covers not only documentary evidence, but may contain videos, testimonies or expert reports. In January 2021, the ICJ has [tried](#) to put an end to “the proliferation and protraction of annexes to written pleadings” (see amended [Practice Direction III](#)), by suggesting a page-limit of 750 pages for the production of documents . It remains to be seen whether States will accept to sleep in this Procrustean bed.

New evidence may exceptionally be submitted after the closure of the written proceedings, either under the form of witness or expert testimonies or even of a new written document. However, the production of evidence at this late stage is strictly controlled because it affects the equality between the parties, impairing their capacity to respond adequately.

In principle, new written material is not admissible at this stage anymore, except with the consent of the other party or upon the Court’s authorization (for the ICJ, see [Rule 56 of the Rules of Court of the ICJ](#)). An extreme example of this issue may be found in [Somalia v. Kenya](#), currently pending before the ICJ: Kenya [sent](#) around 4,000 pages, including a fully-fledged legal argument, to the Court just 10 days before the start of the oral hearings. Somalia informed the Court that it did not object to the production of most of the new material, except to what



Somalia called the “Rejoinder-bis” to which it asked for the opportunity to respond (see Somalia’s [written comments](#) of 22 March 2021). Consequently, the Court decided to admit the new set of documents, pursuant to Art. 56 (1) for the material to which Somalia had not objected and to Art. 56 (2) for the material to which Somalia had objected (see [CR 2021/2, p. 10-11](#)) in line with Rule 56 (2) of the Rules of Court (see Letter of the Registry of 11 March 2021). This is unorthodox, but the reason for such a conciliatory approach from Somalia and the Court was to encourage Kenya to appear during the hearings. Yet, in the end, Kenya chose not to do so and sent instead yet another round of written pleadings, which were however not admitted on the record.

Witness evidence is another area where the practice is still developing and principles of administration of evidence still need to crystallize. Three points may be made in this respect.

Witnesses are usually called by the parties. To date, there was no instance where a witness was summoned by the ICJ or ITLOS. But courts may decide to call at the bar and ask for further evidence from some of the witnesses presented by the Parties (such was for instance the case in the [Arctic Sunrise Arbitration](#) before the Permanent Court of Arbitration).

The safety of witnesses was sometimes an issue: in the [Croatia Genocide case](#), the ICJ adopted a number of pragmatic measures to conceal the identity of witnesses such as the postponement of the publication and the redaction of information (see [2015 judgment](#), para. 39). The Court’s concern was to strike the right balance between, on the one hand, the protection of witnesses and, on the other, the transparency and the right to information of the public. It managed to guarantee both. When witness safety is an issue, leaks leading to the publication of court documents without redactions put them in jeopardy. Fortunately, this is a rare phenomenon and has so far not concerned neither the ICJ nor ITLOS, but some arbitral tribunals.

The third point concerns witness proofing by counsel, which continues to be a real issue. Although the procedures of the ICJ and ITLOS on witness interrogation broadly follow the English model, not all judges and counsels are familiar with that. Therefore, clarity is lacking on matters of detail and it is regrettable that neither the respective Rules of Court, nor even the Practice Directions of the ICJ contain provisions to monitor this practice.

### **The benches’ timid initiatives**

A more proactive, yet discreet, involvement of the bench in the production of evidence is needed and sometimes observed in practice, but it remains far from the accusatory model or from the regime of discovery in the common-law systems. Furthermore, the ICJ and ITLOS remain much more hesitant than the Strasbourg Court in their use of investigative powers. In the following lines, I will address two areas, where courts have taken timid initiatives.

The first area concerns the document production. In fact, both the ICJ and ITLOS lack the power to address an injunction of document production to States. Undoubtedly, they have the power to make requests, but they have refrained from issuing these requests through a binding act. These requests generally take the form of questions, rather than orders. Furthermore, they cannot be accompanied by any coercive measures and it is doubtful that the refusal of cooperation by one party may be considered an unlawful act in itself.

In making such requests, the courts seek to preserve the equality between the parties. On some rare occasions, the ICJ and the ITLOS made them either *proprio motu* or at the initiative of the other party (see the [ELSI case](#) before the ICJ or the [Louisa case](#) before ITLOS). More recently, in the [Norstar case](#) before ITLOS, Panama had embarked on a fishing expedition and sought to obtain discovery for a broad-ranging category of unspecified documents. ITLOS showed some openness but directed Panama to point to particular documents. Since the latter failed to do so, the matter ended there (see paras 95-97 of the judgment).

States' reluctance to produce documents is sometimes justified on grounds of concerns relating to State security concerns. The arbitral tribunals in [Guyana v. Suriname](#) and in [Chagos](#), which were based on the United Nations Convention on the Law of the Sea, used innovative ways to reconcile these legitimate concerns with the proper administration of justice: they chose examination *in camera* by the tribunal itself or by a court-appointed expert.

It was suggested in the course of the conference that international courts might draw negative inferences from a party's refusal to disclose specific documents (see also the 2009 award in the *Abyei* Arbitration before the PCA, para 61). By contrast, both the ICJ and ITLOS held back from such a radical solution and, if important evidence is lacking, they prefer to decide on alternative legal and factual bases.

The situation is therefore different from the one before the European Court of Human Rights (ECtHR), who considers the unjustified failure of a respondent Government to be a violation of Article 38 of the Convention and a reason for drawing inferences as to the well-foundedness of the allegations (*Al Nashiri v Poland*, 2014, para 375; *Georgia v Russia I*, 2014, paras 99-110). However, one may wonder if such negative inferences are appropriate in inter-State cases. The situation in inter-State litigation is indeed different from the one before the ECtHR's "normal" cases with individual applicants, where there is a structural inequality between the parties, which the Court has sought to compensate by taking proactive procedural measures in favour of the weaker party, i.e. the private party.

The second area in which shy steps have been observed, concerns the appointment of experts by the courts themselves. International courts and tribunals dealing with inter-State cases have the inherent power to appoint experts. When should they do so? Obviously, experts would be particularly helpful in cases that are heavily dependent on scientific evidence (for instance, for an environmental assessment) and in which the expert-evidence submitted by the parties remains self-serving. The other field in which court-appointed experts play an increasingly significant role is the one of damage evaluation, including for massive violations of human rights, stemming from an inter-State conflict. In its first case, the [Corfu case](#) of 1949, the ICJ had appointed a group of experts to assist it with the evaluation of damages. 70 years later, it finally went down this road again, in the [DRC v. Uganda](#) case (currently pending). The case is divided into two stages: first the merits and second the reparations. The Court directed the parties to negotiate on the latter aspect, considering its jurisdiction as subsidiary (para. 344 of the [2005 Judgment](#) on the merits).

The *DRC v. Uganda* may be a particular source of inspiration for the ECtHR in the challenges posed by inter-State cases. In this case, the International Court of Justice appeared to be increasingly proactive. While it sought the parties' opinion on the individuals selected as experts, their opposition was not dispositive. Furthermore, the Court established a particularly broad mandate for the experts (see the orders of [8 September](#) and [12 October 2020](#)), since it included:

- the loss of human life (in particular, the global estimate of the lives lost among the civilian population due to the armed conflict on the territory of the DRC and the amount of compensation due);
- the loss of natural resources (in particular, the approximate quantity of natural resources unlawfully exploited during the occupation);
- and property damage.

If the appointment of a group of independent experts may be an appropriate way to respond to the challenge of damage assessment, this comes at a price, as it may become a considerable financial burden for the Court, especially if the allowance for unforeseen expenses in the budget remains so small as it is at present. The creation of a special fund or line of expenses for this purpose may be necessary in the future.

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### **Towards an ‘Amicable Solution’: Conciliation under Articles 12-13 of the International Convention on the Elimination of Racial Discrimination**

*Thank you once again for the invitation and it is a great honour to be part of this distinguished panel.*

#### **1. Introduction**

As outlined yesterday, Articles 11-13 of the 1965 International Convention on the Elimination of Racial Discrimination (ICERD) provide a compulsory mechanism for inter-state communications before the Committee on the Elimination of Racial Discrimination (CERD), unique in the UN human rights treaties. This includes a role for a non-permanent body in Articles 12-13, an ad hoc Conciliation Commission, whose good offices shall be made available to the States concerned with a view to an amicable solution. There are currently three inter-state communications under Articles 11-13, the first before a UN treaty body, all still in progress – *Qatar v Kingdom of Saudi Arabia*, *Qatar v United Arab Emirates* and *Palestine v Israel*. Decision-making to date has been conducted by the Committee under Article 11 only, which covers preliminary issues of jurisdiction and admissibility. *Palestine v Israel* is still before CERD, at the admissibility stage of Article 11. The Qatar communications have moved to Articles 12-13 but we have yet to have any procedure or outcome on this conciliation aspect of the proceedings. I will explore briefly the origins of conciliation in ICERD; the composition of the ad hoc Conciliation Commissions; and then look forward to the Article 13 report and what might be meant by an ‘amicable solution’.

#### **2. Origins of Conciliation**

According to Jean-Pierre Cot, the phrase ‘international conciliation’ originates after the First World War and finds its first definition in a 1919 report by the Swiss jurist Max Huber. The *Institut de Droit International* addressed the issue in 1927, laying down the “classical model” whereby: ‘Conciliation was to be implemented by a conciliation commission, normally composed of five persons, including conciliators appointed by each party... the commission was to draft a report and propose an amicable settlement.’ The proceedings were not mandatory and the concept of a “compulsory conciliation” would have contradicted the logic of the procedure. The 1945 Charter of the UN would list ‘conciliation’ among different types of the pacific settlement of disputes in its Article 33.

ICERD’s inter-state provisions would draw on a number of influences. This included the 1954 draft Covenant on Civil and Political Rights, which read in its draft Article 43(1) on inter-state communications: ‘the Committee shall ascertain

the facts and make available its good offices to the States concerned with a view to a friendly solution of the matter on the basis of respect for human rights as recognized in this Covenant.’ It did not provide for a conciliation body, which was drawn from both the ILO and the 1960 UNESCO Convention against Discrimination in Education and its 1962 Protocol, which instituted a Conciliation and Good Offices Commission ‘responsible for seeking the amicable settlement of disputes’. The 1962 UNESCO Protocol allowed its Conciliation and Good Offices Commission to be seised by one state party without requiring the consent of the other. At the drafting stage, the USSR and other Eastern bloc states made clear their opposition to this and would ultimately abstain from voting on the Protocol.

ICERD’s Article 11-13 inter-state communications mechanism may be considered a hybrid of the 1954 draft Covenant and 1962 UNESCO Protocol, combining a UN treaty body and a conciliation body. Once the steps in Article 11 ICERD are complete, the Chairman of CERD ‘shall’ appoint an ad hoc Conciliation Commission under Article 12(1)(a). It is constituted automatically upon completion of Article 11, and is as a result compulsory, in line with the UNESCO model. It is comprised of five persons, in accordance with the “classical model” of conciliation. It seeks an ‘amicable solution’, the word “amicable” being used in the UNESCO Protocol, and the word “solution” being used in the draft Covenant.

This UN treaty body-conciliation body hybrid approach would be emulated in two other UN human rights treaties, the 1966 ICCPR and the 1984 Convention Against Torture 1984 (CAT). UN human rights treaties adopted after these instruments would not provide for a conciliation body. Not all of these would have inter-state communications provisions, but for those that did, or those that adopted such provisions in later protocols, conciliation and a conciliation body are absent, with the mechanism tasked to the treaty body only.

Under Article 42 ICCPR, the ad hoc Conciliation Commission is appointed ‘with the prior consent of the States Parties concerned’. It requires what could be termed a “double opt-in” from both states parties, firstly to the inter-state communications procedure under Article 41, and then to conciliation under Article 42. Article 21 of the Convention Against Torture requires an “opt-in” from both states parties to the inter-state communications procedure but from there, conciliation appears to be discretionary on the part of the Committee Against Torture. It reads: ‘the Committee may, when appropriate, set up an ad hoc conciliation commission’. It lies somewhere between the compulsory Article 12 ICERD and the consensual Article 42 ICCPR.

### **3. Ad Hoc Conciliation Commissions**

On 27 August 2019, CERD decided in *Qatar v Kingdom of Saudi Arabia* and *Qatar v United Arab Emirates* that it had jurisdiction and declared the communications admissible. CERD then affirmed in its annual report that two ad hoc Conciliation Commissions had been appointed under Article 12(1)(a) ICERD, following consultations with the states parties concerned as set out in the provision. However according to some newspaper reports in January 2021,

Qatar may drop its 'international lawsuits' as part of a regional diplomatic agreement with its blockading neighbours. In the absence of any statement from CERD, we may presume the Commissions remain seised of the matter. Even if ultimately discontinued, their appointment provides an interesting precedent. Only four out of ten are CERD members, underlining the separate character and role of the Commissions, although they remain under the aegis of the Committee. One member is a former judge and vice-president of the ICJ. Under Article 12(3), the Commission(s) shall adopt their own rules of procedure.

#### **4. Article 13 Report**

Article 13(1) ICERD tasks the Commission with a 'report embodying its findings on all questions of fact...and containing such recommendations as it may think proper for the amicable solution of the dispute'.

As noted yesterday, under ICERD, a state may attempt to reach an amicable solution before CERD under Articles 11-13 and then, if the dispute has not been settled, refer the matter to the ICJ under Article 22. However this perhaps ideal scenario has yet to occur for a number of reasons. First, the ICJ ruled in *Ukraine v Russian Federation* that there is no requirement to go through the Articles 11-13 mechanism before seising the Court, and an inter-state dispute under ICERD may come to be decided by the Court only. Second, the large number of reservations to Article 22 means that Articles 11-13, where engaged, may be the beginning and end of the matter - in *Qatar v Kingdom of Saudi Arabia* and *Palestine v Israel*, Saudi Arabia and Israel have a reservation to Article 22, and the dispute is before CERD only. Third, a state may engage both mechanisms in parallel, seen in *Qatar v United Arab Emirates*, where the possibility of a judicial solution has now ended with the upholding of the UAE's first preliminary objection by the Court, while the communication continues before CERD. In sum, the 'amicable solution' of Articles 12-13 must be capable of having an autonomous and final meaning.

The reporting obligation of the conciliation body under the UNESCO Protocol, the ICCPR and CAT all distinguish between a solution being reached and a solution not being reached. Where a solution is reached, the reporting obligation is confined to a brief statement of facts and of the solution reached. If a solution is not reached, the reporting obligation is to provide recommendations, findings or views on the possibilities of an amicable solution. ICERD does not specify these two pathways in Article 13, but the understanding of conciliation from these related instruments implies that it is not confined to an agreement only, in other words a solution being reached. Conciliation across the four instruments clearly envisages also a solution not being reached, with a wider reporting obligation where this occurs. The Commission's reporting obligations under Article 13 ICERD could be considered most relevant where an agreed solution has not been reached – here, the Commission's recommendations act as a guide towards the amicable solution.

Cot cautions that conciliation generally has not met the expectations attached to it. The UNESCO Conciliation and Good Offices Commission has never considered any dispute. A 2019 UNESCO consultation rejected calls to remove it altogether or render it ad hoc, concluding that it ‘was still of use, despite the fact that it had never been called upon to exercise its functions.’ Similarly the inter-state communications mechanisms including conciliation in the ICCPR and CAT have never been used. In the drafting of ICERD, the limits of conciliation were noted. Waldron-Ramsey (United Republic of Tanzania) commented in the Third Committee: ‘Conciliation... was not particularly appropriate to the subject of the Convention. He did not see how complaints concerning human rights violations could be settled by conciliation.’

## 5. Towards an Amicable Solution

More positively, in *Palestine v Israel*, the majority commented: ‘The Committee observes the mechanism’s special nature which is conciliatory, opposite to adversarial. The Committee considers that given that the inter-state mechanism has been designed to be a conciliatory procedure, it should be practical, constructive and effective. Therefore, it considers that a formalistic approach cannot be adopted in this regard.’ We may consider the meaning of an amicable solution in that light.

Firstly, it should be practical. In an inter-state context, with a potentially large number of alleged victims, this could involve structural remedies such as reviewing legislation or policy. Issues of effective and genuine access to justice capable of redressing harm could inform such recommendations.

Secondly, it should be constructive. The fundamentally non-binding character of inter-state communications under Articles 11-13 cannot be ignored, and the Commission may draw on the submissions and hearings of both disputants. Its report could include *inter alia* recommendations for bilateral mechanisms or the setting up of a joint body supported by both disputants.

Thirdly, it should be effective. Article 13 ICERD is silent on the issue of a finding of a breach of the Convention but it would appear unnecessarily restrictive if the Commission considered itself unable to pronounce on this. For the procedure to be effective, the potential for the Commission report to find a breach or violation of the Convention is apparent, and recommendations may then address this.

Finally the Committee has cautioned against a formalistic approach. There is the potential within the mechanism for a more imaginative solution than negotiation, judicial settlement or other forms of the pacific settlement of disputes may bring. An amicable solution could display a combination of state-specific, bilateral, regional and international remedies by way of recommendations, providing a *sui generis* understanding of conciliation in the context of human rights.

*Thank you.*



## **Helen KELLER**

*Professor of Law, University Zürich / Professeur de droit,  
Université de Zürich*

*Former Judge at the European Court of Human Rights / Ancienne  
juge à la Cour européenne des droits de l'homme (2011 – 2020)*

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### **Is there room for friendly settlements in inter-state cases?**

#### **Introduction**

I would like to thank the German Presidency of the Council of Europe for the kind invitation.

Reaching a friendly settlement is particularly challenging in inter-state cases because of the indispensable will of the parties involved. Today, I would like to show that, despite this significant hurdle, different stages of the proceedings may well offer room for friendly settlements.

I will start with the legal framework and illustrate at which points friendly settlements can be reached. We will then look at the only two instances in which inter-state cases were terminated by a friendly settlement. After considering possible advantages, risks and technicalities, I will discuss how the tasks related to friendly settlements could be shared between the Court and the parties and present certain suggestions by which friendly settlements could be encouraged in the future.

#### **Legal framework**

The amicable resolution of disputes is a classic instrument of international law. It gives the parties the possibility to settle their dispute before a court decides on it in a contentious procedure.

The Convention regime imposes only few legal requirements in this regard, both in terms of content and procedure. The relevant provision is contained in Article 39.

This article provides that the Court can place itself at the disposal of the parties at any stage of the proceedings in order to reach a friendly settlement. The negotiations are strictly confidential.

But there is an important restriction: The conclusion of a settlement does not automatically terminate the proceedings but requires the approval of the Court. The Court thereby examines whether the settlement proposed by the parties respects human rights, as guaranteed under the Convention and the Protocols. Otherwise, the Court is obliged to continue the examination of the application. This means that the result is necessarily a judicial settlement, and not an alternative dispute resolution mechanism. Therefore, the final responsibility of whether the settlement is appropriate or not remains with the Court.



If the Court is satisfied that the settlement is compatible with human rights, it will strike out the application by a decision. This decision contains only a brief statement of the facts and of the solution reached. However, the Court does not pronounce itself on whether there has been a violation or not. Neither does a friendly settlement mean that the respondent State recognizes a Convention violation.

These settlements are legally binding between the parties and their implementation is supervised by the Committee of Ministers. However, if the respondent Government does not implement the agreed settlement, the case might be restored to the Court's list of cases according to Article 37 paragraph 2 of the Convention.

## Innovative use by the Court for individual applications

This flexible legal framework has already proven helpful to the Court in managing the high number of individual applications.

The minimal legal requirements allowed the Court to reshape the original conception of this instrument in an innovative way: Within areas of well-established case law, friendly settlements do not serve mainly as a framework for negotiations between the parties but as a substitute for a fast-track procedure. In these cases, the Court routinely includes a concrete proposal for a friendly settlement when the application is notified.

Such a fast track procedure is not possible for inter-state applications as there are far too few of these cases. However, the Convention regime allows for the settling of inter-state case at various stages, as I will now illustrate.

## Possible stages

This chart shows the progression of an inter-state application through the various judicial stages and the respective possibilities for friendly settlements.

The first opportunity for a friendly settlement arises directly after the registration of the complaint. But at this point, much is still unclear, which is why the prospects of successful negotiations are probably rather low.

The chances are likely to be better once the application has been declared admissible. Here is the second possible stage for a friendly settlement. The parties involved may now be more inclined to settle their dispute, as the proceedings before the Court have progressed further and a judgment is on the horizon.

Another option to settle is after the Court has issued a judgment only on the merits and postponed the question of just satisfaction under Article 41.

Finally, it is also possible to resolve follow-up cases through friendly settlements. Such friendly settlements would technically not resolve an inter-state case but would help the Court in managing follow-up cases.

## Practice to date

To date, only two inter-state cases were terminated by a friendly settlement.

The first friendly settlement was reached under the Commission in 1985 concerning an application brought by Denmark, France, Norway, Sweden and the Netherlands against Turkey. Turkey promised in the friendly settlement, among other things, that there would be no future violations such as those alleged, and that the Government would keep the Commission informed on human rights issues. The settlement also contained a declaration by Turkey saying that they hoped to lift martial law soon. This outcome clearly did not respond adequately to the human rights violations at issue. But it did achieve one major success, namely that Turkey accepted the right to individual petition as a tacit condition of the agreement.

The second friendly settlement was agreed upon in the case of Denmark v. Turkey under the new Court in the year 2000. Denmark was concerned about the alleged ill-treatment of one of its citizens during his detention in Turkey. It wanted to know whether the interrogation methods in question were a widespread practice in Turkey. In the friendly settlement, Turkey made a statement of regret and an ex-gratia payment, and the parties agreed to cooperate in the field of police training and to hold a continuous dialogue.

## Potential advantages

Let us now turn to the various advantages that friendly settlements can offer in inter-state cases.

One advantage is that friendly settlements take into account the concerns of the parties involved. They also allow for more flexibility and tailored measures. Under such circumstances, one would assume that the agreed terms will be implemented better.

Past experience has shown that the Court may take years to rule on the admissibility alone. Therefore, it is to be expected that friendly settlements can in general be reached faster than a judgment in contentious proceedings.

Finally, friendly settlements are an interesting alternative for States in that they attract a different kind of attention than a judgment. In particular, they are not listed as a violation of the Convention in the Court's statistics.

## Potential risks/technicalities

Despite these advantages, it is also important to consider possible risks and technicalities that can come with friendly settlements.

First of all, the Court must be careful not to rubber-stamp serious human rights violations for the sake of political expediency.

Managing such negotiations also constitutes a difficult diplomatic mission for the Court. The Court does not have the necessary resources and experience to act as a negotiator in politically complex situations – especially in light of the fact that the Court is already overburdened.

Another challenge is to determine the content of the settlement and the consequences for individual follow-up cases.

The confidentiality of the negotiations further raises the question of who within the Court is best suited to be responsible for friendly settlements.

But even if all these difficulties can be mastered, the success of friendly settlements depends especially on one single element: The will of the parties.

## Task sharing between the Court and the Parties

Since the Court has limited resources to influence the will of States, I believe that one option to encourage friendly settlements in the future would be to introduce a two- or three-step procedure. This could take place at any stage of the proceedings.

If there are indications that a friendly settlement might be an option, the Court should be pro-active and draft a roadmap that sets out the key points and a timetable. This would provide the State Parties with a balanced framework as a starting point for the negotiations.

As the Court would probably be overburdened by leading the negotiations, these should be delegated to the States. Once the States are ready with a draft FS, they can return to the Court, which will then review the substance of the proposed settlement.

## Suggestions for the future

As a suggestion for the future, the Court should prepare its Registry on how to be pro-active in inter-state cases, since this is a sensitive task. There are several key moments when efforts to reach a friendly settlement can be effective and the chances of success can improve over time. For example, in an inter-state case that has been pending before the Court for years, a change of government could give a new impetus to a friendly settlement. Court personnel should be able to recognize such important moments and take appropriate action.

It is also important to be aware of what the Court can manage and what the State Parties have to deal with. As I have shown just before, this could be addressed by a roadmap and a timetable for the negotiations.

Finally, individual follow-up cases present a difficult management task because the content of individual applications can vary greatly. This means that there is no “one fits all” solution. One answer to this might be to set up a search commission and to propose settlements based on its findings. Technically, this would no longer constitute an inter-state friendly settlement, but rather a model settlement that could be created for different constellations, such as, for

example, ill-treatment in detention or the loss of a house. The State would then be responsible for encouraging its citizens to accept the model friendly settlement.

These approaches would, in my opinion, help increase the use of friendly settlements in inter-state cases with reasonable efforts.

## Concluding remarks

This brings us to the end of my speech.

Coming back to our original question: Is there room for friendly settlements in inter-state cases? Yes, there is!

But it is important to bear in mind that any successful negotiation depends first and foremost on the will of the States involved. In addition, the Court is not generally equipped to function as a mediator. In this sense, the Court can mainly serve as a kind of safety net, which ensures that not just any agreement puts an end to the proceedings.

Therefore, and similar to individual applications, friendly settlements in inter-state cases might prove particularly successful when they relate to pecuniary issues, such as in the recent application of Liechtenstein filed against the Czech Republic. Under such circumstances, it is conceivable that the Court could successfully provide a framework for negotiations that ultimately lead to a friendly settlement.

In contrast, in situations that essentially relate to unresolved political problems between States, such as in Ukraine versus Russia re Crimea, it is unlikely that the Court has the required resources and experience to act as a mediator.

In any case, if the goal is to resolve more inter-state cases through friendly settlements in the future, it is necessary to develop a procedure that carefully takes into account the particular difficulties involved without imposing an even greater burden on the Court.

Thank you for your kind attention.

## **Christos GIAKOUMOPOULOS**

*Director General, Directorate General Human Rights and Rule of Law, Council of Europe / Directeur Général, Direction générale Droits de l'Homme et État de droit, Conseil de l'Europe*

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Ladies and Gentlemen,

Let me begin by warmly congratulating the German Presidency for organising this Conference. I have followed the valuable contributions of various participants over these two days with a lot of interest. Important points have been made and thought-provoking perspectives have been put forward which will feed relevant ideas into the work that is being carried out by the Council of Europe's Steering Committee for Human Rights (CDDH) in respect of the effective processing and resolution of cases related to inter-State disputes.

The issue of inter-State cases under the European Convention on Human Rights has become increasingly topical over several years in view of the number, and the complexity of both such cases and individual cases related to inter-State conflicts, and the underlying political issues, with important repercussions on the Council of Europe as a whole.

Article 33 of the Convention has cast the European Court of Human Rights in the very important role of the guarantor of a peaceful public order in Europe. The legacy of inter-State proceedings before the European Commission of Human Rights and later on before the Court in terms of strengthening the Convention system is remarkable, as the Conference has also highlighted.

Through the inter-State case-law, the Commission and the Court have affirmed the objective nature of States Parties' obligations as being designed to protect the fundamental rights of individual human beings and not to create reciprocal rights and obligations for the State Parties in pursuance of their national interests.

The inter-State case-law has also consolidated the notion that the State Parties collectively guarantee the rights and freedoms set forth in the Convention. This notion underpins the principle that State Parties can refer to the Court any alleged breach of the Convention regardless of whether the victims of the alleged breach are nationals of the applicant State or whether the breach affects the interests of the applicant State.

The experience of the execution of judgments in inter-State cases revealed that these cases can have a positive impact as they can contribute to accelerate political processes that are put in place to resolve major political issues, as for example in the case of *Greece v. United Kingdom*<sup>70</sup>.

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<sup>70</sup> *Greece v. United Kingdom*, Application No. 299/57.

There is also the case of France, Norway, Denmark, Sweden and the Netherlands v. Turkey<sup>71</sup> which strongly supported and accelerated the process of re-establishing democracy and the full integration of Turkey into the system of the Convention, with full acceptance of individual application and the compulsory jurisdiction of the Court.

Another example is the case Cyprus v. Turkey<sup>72</sup> which took out of the political realm a series of problems related to freedom of religion, the right to education, the right to property and other rights. Clear indications as regards what could be accepted as a solution were given which enabled a more limited scope of political negotiations at the United Nations level capable of reaching a global solution to the problem. In Cyprus v. Turkey (III)<sup>73</sup> the Committee of Ministers confirmed the position of the Commission and considered that the best way to find solutions to the conflict was under the auspices of the United Nations. However, it was only after the Loizidou v. Turkey<sup>74</sup> case and the judgment in Cyprus v. Turkey (IV)<sup>75</sup> in 2001 by the Court that the situation finally evolved. This demonstrates the importance and significant potential of the Council of Europe processes.

The fact-finding procedure is as important as the findings in a case. The experience of the execution of judgments in inter-State cases has taught us that presumptions should be avoided. For example, the experience before the Committee of Ministers shows that presumptions of facts can be detrimental at the stage of execution where some exercises of national fact-finding may contradict the Court's own fact-finding, thereby, complicating the implementation of the judgment. In the Greek case fact-finding played a crucial role in the success of the application.

In a nutshell, we have witnessed some examples of successful resolution of inter-State cases in the past. We should build upon these successful precedents when we address the current challenges.

Turning to the Conference discussions – these have been very valuable for us. The challenges that Conference has identified resonate fully with the challenges that the CDDH, notably its Drafting Group, has identified and is currently examining. The German organisers rightly put the challenge of fact-finding and evidence amongst the key topics of the conference. An important point that was reiterated through the discussions of this Conference is that this challenge should be addressed without limiting the jurisdiction of the Court. This is essential.

There is also convergence between the discussions of the Conference and those here in Strasbourg regarding the fact that Inter-State cases are not only challenging for the Court, but also for the member States which are confronted with particular difficulties when pleading those cases before the Court.

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<sup>71</sup> Denmark, France, Norway, Sweden & the Netherlands v. Turkey, Application Nos. 9940/82 to 9944/82.

<sup>72</sup> Cyprus v. Turkey (I), Application No. 6780/74.

<sup>73</sup> Cyprus v. Turkey (III), Application No. 8007/77.

<sup>74</sup> Loizidou v. Turkey [GC], Application No. 15318/89.

<sup>75</sup> Cyprus v. Turkey (IV), Application No. 25781/94.

This challenge emerges more prominently in the context of the parallel processing of inter-State cases and related individual applications which is why it is one of the main issues discussed in our Drafting Group. The case of *Cyprus v. Turkey (IV)*<sup>76</sup> demonstrated the beneficial interaction between the inter-State application and related individual applications. The latter offer a less conflictual framework in terms of applying not only the principles of inter-State cases but also other principles of the Convention and making little steps as regards the level of confidence between the parties following different execution processes carried out properly and without politicisation.

As regards the execution of judgments in inter-State cases, the Committee of Ministers has, indeed, been confronted with difficulties in the supervision of the execution of the Court's judgements in such cases. Despite some issues arising at the stage of the payment of the just satisfaction in inter-State cases, there are also some cases, where the award was paid fully, one example is the case *Denmark v. Turkey*<sup>77</sup>.

Another important question that was discussed in the Conference is that of friendly settlement. In addition to the Convention as the main framework, we should also think about other possibilities that Council of Europe institutions can offer to facilitate the dialogue between its member States, to help build relationships based on mutual trust and the values of the Organisation – human rights, democracy and rule of law – and ultimately contribute to dispute-settlement. Indeed, settlement whether in the framework of the relevant provisions of the Convention or through agreements outside the framework of the Convention has proved to be a viable avenue for the resolution of some of the early inter-State cases.

Following the Copenhagen Declaration<sup>78</sup> the member States have given to the CDDH a mandate to examine and make proposals on ways of improving the effective processing and resolution of cases relating to inter-State disputes. While the CDDH continues with its work, it is perhaps worth recalling a key resolution of the Committee of Ministers in the context of its evaluation of the follow-up to the Interlaken Process, which was included in the Athens Declaration last November. This reads as follows:

“[W]hilst no comprehensive reform of the Convention machinery is now needed, further efforts should be pursued by the Council of Europe as a whole to ensure that the Conventions system can continue to respond effectively to the numerous human rights challenges Europe faces, including through the efficient response of the Court to pending applications.”<sup>79</sup>

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<sup>76</sup> Ibid.

<sup>77</sup> *Denmark v. Turkey*, Application No. 34382/97.

<sup>78</sup> Parliamentary Assembly, Recommendation 2129 (2018), Copenhagen Declaration, appreciation and follow-up.

<sup>79</sup> [CM/Del/Dec\(2020\)130/4](#) **Securing the long-term effectiveness of the system of the European Convention on Human Rights.**

This should be one of the guiding principles for our work. Our approach should be a balanced one, as stated in the Committee of Ministers' conclusion.

It should be in the spirit of shared responsibility between the States Parties, the Court and the Committee of Ministers to ensure the proper functioning of the Convention system.

Thank you for your attention!



## **Debbie KOHNER**

*Secretary General, European Network of National Human Rights Institutions / Secrétaire Générale, Réseau européen des Institutions Nationales des droits de l'homme (ENNHRI)*

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### **Introduction**

Thank you to the German Presidency of the Council of Europe for organising such an interesting and timely event.

Inter-state cases will always be challenging, but they are a vital mechanism for the collective guarantee of human rights across Europe. While the increase in inter-state cases can be interpreted as a confidence in the Strasbourg Court, it is essential that these cases reach judgment, and indeed execution of judgments, for there to be real results for individuals living in Europe. Fundamentally, these cases relate to individuals' human rights.

By their nature, inter-state cases inevitably pose particular difficulties for the Court. They are always complex, politically sensitive, and time consuming to address, particularly when the Court might be acting as a court of first instance. They generally involve serious or widespread violations of human rights, and the inter-relation with individual applications also risks duplication, delays or even contradictory judgments.

The extended timelines required to address these challenges has impacts on individuals, whether through the time required for the inter-state case itself, or the thousands of individual applications that are delayed until judgment on the overarching facts addressed in the inter-state case.

We have heard the procedural challenges; and some efficiencies in procedure must be found in order that they, and the parallel individual applications, can deliver results for rights holders.

### **Proposals for Action**

The Court's caselaw and practice has already addressed some of these challenges, but more is clearly required to achieve timely justice. I am therefore encouraged by the attention placed on this topic by Member States through the Interlaken process, at CDDH, and in particular the Drafting Group SYSC-IV. I would like to congratulate Alain Chablais and the Drafting Group for making such good progress in such a challenging area.

Indeed, we have heard from SYSC-IV, the Court, and in these last two days from our distinguished fellow participants, some helpful and practical suggestions for improving the efficiency and effectiveness of inter-state cases, such as:

- For efficiencies:
  - o Use of technology, including for witness statements and other evidence,
  - o Requiring translated summaries of the key documents lodged
  - o Considering the merits alongside admissibility, when appropriate;
  - o Taking into account some individual cases at the same time as inter-state cases; and
  - o Providing a preliminary procedure and time limit for the relevant states to reach a friendly settlement;
  
- For effectiveness, as well as more resources:
  - o Allowing for communications without the full summary of facts;
  - o Considering a power to compel - and protect - witnesses;
  - o Clarifying the requirements for a precise and objectively identifiable group for the purposes of just satisfaction, and imposing time limits for the latter;
  - o Specifying the parameters of interim measures; and
  - o Taking into account parallel procedures before other international mechanisms

While these procedural considerations might assist with the effectiveness of the passage of each case, it is fundamentally the execution of any judgment reached that will be the true test of the effectiveness of inter-state cases. The huge amount of work invested will come too little if we do not see a change in the administrative practices and reparation of acts that have breached the Convention.

## **Role of NHRIs**

National Human Rights Institutions (NHRIs) work closely with all organs of state, and civil society, to support the implementation of the Convention, including the execution of judgments. This was also recognised in the Brussels and Copenhagen Declarations, the review of the Interlaken Process, and most recently in the Committee of Ministers Recommendation on the development and strengthening of effective, pluralist and independent NHRIs, which was adopted on 31 March 2021.

This Recommendation recognises the great potential and impact of independent NHRIs for the promotion and protection of human rights in Europe, and in particular for the effective implementation of the Convention and communication for the supervision of the execution of judgments. It also calls for a stronger role for and meaningful participation of NHRIs in the Council of Europe for the enhanced promotion and protection of human rights.

NHRIs are working actively on the execution of judgments through monitoring, advising state actors, reporting to the Committee of Ministers including through the Rule 9 Procedure, and awareness raising at national level. At ENNHRI, in partnership with the Council of Europe, we provide training to NHRIs, resources, and exchange of practices, in order to reinforce NHRi actions towards implementation.

NHRIs also provide information to a variety of international human rights mechanisms on the human rights situation in-country, including through fact-finding, monitoring and cooperation with civil society actors. This information, relied upon by Treaty Bodies and other monitoring mechanisms, could also be of great use to the investigatory functions of the Court, particularly when it is not realistic for domestic remedies to be exhausted in advance.

NHRIs can also provide further information to the Court through *amicus curiae*, and have a practice of this, albeit mainly in individual applications.

### **Ongoing Promotion and Protection of Human Rights**

We are all aware that, even with the best efforts of all actors concerned, inter-state cases will always be complex and take some time to address. In the meantime, actions can be taken to address specific or systemic human rights violations, and indeed towards the prevention of future violations.

NHRIs continue to work towards implementation of the Convention through their broad mandates. ENNHRI has also paid specific attention to the role of NHRIs in situations of conflict or post conflict, and published guidance on how to achieve this – including through NHRIs' cooperation across borders – so that even small steps can be taken to improve the human rights situation of individuals affected.

### **Conclusion**

It is noted that, despite the developing caselaw and practice, some changes in procedure might be required to give effect to proposals made. As a result, I encourage Member States to continue the work of SYSC-IV and provide it with the required mandate to make concrete suggestions, without limiting the jurisdiction of the Court.

Indeed, it is for the member States and the Court to decide which, if any, of the proposals will proceed. Whichever approach taken, ENNHRI – made up of all NHRIs across the Council of Europe – will continue to support the Court and the Convention system, and to work on the execution of judgments, and the promotion and protection of human rights, including in such challenging contexts.

## Roderick LIDDELL

*Former Registrar of the European Court of Human Rights / Ancien Greffier à la Cour européenne des droits de l'homme*

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I thank the organisers for inviting me to participate in this interesting and important conference.

In the thirty-two and a half years that I spent in the Registry, I cannot say that inter-State proceedings were always at the forefront of our concerns. As is well-known, particularly from 1998 it was the mass of individual applications which was our major pre-occupation. However, when a Danish delegation visited the Court to begin preparing the Copenhagen conference and I was asked what the main challenges facing the Court were, I had no hesitation in pointing to the relatively recent proliferation of inter-State proceedings as a particularly worrying development. I have read criticism of the Danish organisers for having raised the possibility in their first draft that it might be necessary to think outside the box as far as inter-State proceedings were concerned. Such criticism was unfair or at least if it was fair then I should share the responsibility for having nudged them in that direction; I thought then and I still think that inter-State proceedings represent an exceedingly grave challenge to the Court and the Convention system. In the end the Copenhagen declaration led to a mandate to the CDDH to consider proposals on more effective handling of 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. This was hardly an invitation to think outside the box.

Throughout my career I was motivated by the idea that for the Convention system to remain relevant it had to be to be effective in a practical and concrete way. This was driven by an increasing awareness of the threat to that system's credibility posed by seemingly ever-lengthening processing and adjudication times and also the enormous amount of time and energy devoted to unmeritorious cases. Without rehearsing all the long reform process, this led to the development of the priority policy and the pilot judgment procedure and then following the entry into force of Protocol No. 14 the setting up of the filtering section and the ruthless albeit necessary exploitation of the Single judge procedure. The philosophy of Protocol No. 14 was indeed to target important, complex cases while minimizing judicial input for straightforward cases. If I have understood correctly the same spirit guides the current impact policy which President Spano is in the process of implementing and which I welcome wholeheartedly. It is right that we should focus on the cases that have real impact in terms of pursuing and attaining Convention goals.

So how does that translate to inter-State proceedings. There can be no doubt such cases will generally be impact cases to use President Spano's terminology, from every perspective: the numbers of people concerned, the importance of the principles at stake and the political and the potential geopolitical consequences. At the same time and for the same reasons, they present particular difficulties as we have heard. The logistical and practical problems for the Registry in collating

the relevant material in the cases resulting from geopolitical conflicts are daunting. The political pressures both internally and externally are immense. Any suggestion that the Court is a political Court must be firmly resisted, but of course there is often a political dimension to its work. Where inter-State proceedings are concerned that dimension is inescapable. This places for example the national judges whose role is frankly never easy in an almost impossible position. Registry lawyers of the nationalities involved have to be kept in so far as possible at arms' length, at least in the conflict cases, which adds to the already considerable difficulties in such activities as evidence gathering.

No one contests the proposition that the possibility for States to seek to have aspects of a dispute between them determined by an international tribunal is highly desirable.

No one contests that under the Convention States have a clear and unequivocal legal right to hold other High Contracting Parties to account for alleged breaches of the Convention.

I think few would dispute that the vision of the Convention drafters did not foresee the inter-State mechanism as operating in the context of an armed conflict between High Contracting Parties.

Most would accept that inter-State cases, particularly those deriving from open and frozen conflicts place a near intolerable burden on the fragile and hard-pressed Strasbourg machinery.

So if it were up to me, I would still call for thinking outside the box. However, perhaps fortunately it is not up to me and in any event I am under no illusions as to the difficulty of such an exercise. I certainly have no miracle solutions. Ultimately the Convention system will always run into difficulty when the good faith acceptance of the principles underpinning it can no longer be taken for granted. One fundamental assumption is that fully democratic states governed by the rule of law do not go to war with each other. There are and there will always be limits to what the Convention can achieve in such circumstances.

Having said that, I have every confidence in the Court's and its Registry's ability to make processing of these cases and the countless related applications as efficient as possible. Of course not all inter-State cases are so problematic, although some of the features of the Article 33 procedure will always distinguish them from individual applications. The most difficult ones will have similarities to the situations of systemic or structural violation which gave rise to the pilot judgment procedure. Are there lessons to be learned from that? The principal idea behind that procedure is that the issues which are at the origin of the violation are more effectively dealt with at national level than by processing huge numbers of cases in Strasbourg. This means the sooner that those issues can be identified and solutions explored at domestic level the better, whether in pre-judgment negotiation or at the execution stage. This is also expressed in the notion of shared responsibility, and that responsibility is shared between the Court, the individual States concerned and the member States acting collectively in the Committee of Ministers. So where are these disputes between States most

effectively resolved? Is it indeed in the Court or is it through a political process in the Committee of Ministers or some emanation of that body? Is the procedure before the Court a necessary step before such a political process? Is it possible to simplify the procedure before the Court so as to bring the issues before the Committee of Ministers more rapidly? What might be the role of interim measures in this context? Is there any scope for the sort of preliminary procedure which I understand has been advocated by Professor Marauhn? I am fully conscious that these are of course questions, not answers.

Finally, I may not be wholly objective, but I would say that despite all the difficulties and notwithstanding the delay, the Court has succeeded in delivering important, comprehensive and soundly reasoned judgments in the inter-State cases that it has so far adjudicated and it deserves full credit for that.

## Isabella RISINI

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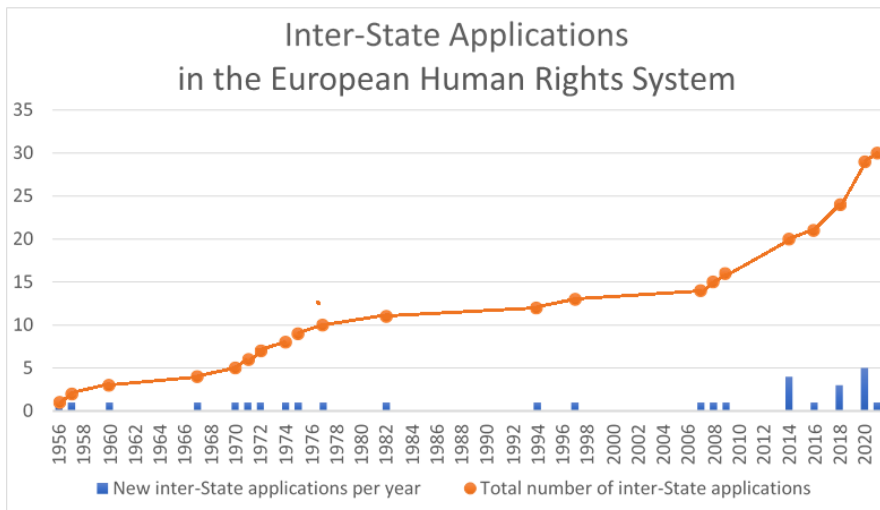
### DAY 1: Introduction

In view of my research interests which revolve around inter-State applications<sup>80</sup>, I myself might not be entirely objective on the question of how important inter-State applications are under the European Convention on Human Rights. As you all know, a reform process within the Council of Europe underlies the present gathering. We will hear about that process later today by Alain Chablais.

In a sincere effort to set the scene objectively, I offer some statistical information.

*The graph was kindly prepared by Justine Batura and is based on the information provided on the Court's website.*

As of April 2021, there are ten sets of inter-State cases pending before the Court, some of which bring together several inter-State applications in one proceeding. In 2020, the use of the inter-State application has reached an all-time high of six applications within one year. The Court has never had to deal with a comparable number of inter-State cases at once. I will mention a few cases which stand out, for the lack of time, I will not go through all cases in detail.



Source: [https://www.echr.coe.int/Documents/InterState\\_applications\\_ENG.pdf](https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf) (J.Batura, 02/2021)

<sup>80</sup> Isabella Risini, *The Inter-State Application under the European Convention on Human Rights, Between Collective Enforcement of Human Rights and International Dispute Settlement*, 2018 (Brill).

The case of *The Netherlands v Russia* which is now *Ukraine, The Netherlands v Russia* revolves around the armed conflict between Ukraine and Russia in Eastern Ukraine. The Netherlands complain about the downing of flight MH-17 in the summer of 2014 over the territory of Eastern Ukraine. About two thirds of the victims were Dutch nationals.

Worthwhile to mention is that Canada has sought to join the case. One victim was Canadian.

The three cases of *Armenia v Azerbaijan*<sup>81</sup>, *Armenia v Turkey*<sup>82</sup>, and *Azerbaijan v Armenia*<sup>83</sup> concern the conflict in and around Nagorno Karabakh, which peaked again in late 2020.

It is the first time in the history of the Convention that a State has taken the step of a “counter-inter-State application”.

The Court has issued interim measures concerning the right to life and the right to be free from inhuman and degrading treatment and torture addressed to *all* States involved, thereby continuing a practice which started in 2008 with the case of *Georgia v Russia (II)*<sup>84</sup> and which was continued during the conflict between Ukraine and Russia.

In its 9<sup>th</sup> inter-State application against Russia, which was lodged earlier this year, Ukraine alleges ‘an ongoing administrative practice by the Russian Federation consisting of targeted assassinations against perceived opponents of the Russian Federation, in Russia and on the territory of other States’.<sup>85</sup>

What can be observed objectively is that most of the inter-State proceedings concern a large number of individuals and their fate in situations of acute and/or protracted conflict. In the cases of Russia and Ukraine, the individuals which inhabit the affected territories are several million, with Crimea alone being home to some two million individuals.

Most of the inter-State proceedings come with large numbers of overlapping individual applications.

- more than 2,300 applications refer to the situation in Nagorno-Karabakh.
- more than 3,400 applications were lodged in connection with the conflict between Georgia and Russia.
- and more than 10,000 applications were lodged concerning the events in Eastern Ukraine and Crimea.<sup>86</sup>

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<sup>81</sup> Application No. 42521/20.

<sup>82</sup> Application No. 43517/20.

<sup>83</sup> Application No. 47319/20.

<sup>84</sup> *Georgia v. Russia (II)*, Application No. 38263/08, Dec. of 13 December 2011.

<sup>85</sup> See ECHR, Press Release 069 (2021).

<sup>86</sup> Draft CDDH report on the effective processing and resolution of cases relating to inter-State disputes, DH-SYSC-IV (2020)04REV2 15/03/2021, (<https://rm.coe.int/dh-sysc-iv-2020-04-rev2-15-march-21/1680a1c9a9>).



The challenges related to inter-State proceedings are manifold and are reflected in the program of the conference.

My – *purely objective* – assessment of the scenery is that the scale of the challenges the Court faces with regard to the inter-State cases concerns no less than the overall functioning of the European Convention on Human Rights.

The challenges associated with inter-State applications, specifically armed conflicts between member states, stem from *outside* of the Convention. There is nothing inherently wrong with the Convention as such. The precondition of the Court's successful operation is a rule-based framework which is respected by all.

My *subjective hope*, which I take the liberty to express at this point is, that the inter-State application is recognized as a centerpiece of the European Convention of Human Rights. The current reform, so goes my hope, will make the proceedings stronger and more efficient, and not render them theoretical and illusory.

## **DAY 2: Short intervention in the last panel.**

When I look at the European Convention on Human Rights and its embeddedness in its mother organization, the Council of Europe, I see that the system is one of peer review, the peers being the member States of the Convention and the Council of Europe. Bruno Simma has described the whole concept of human rights protection figuratively as foxes guarding chickens. This picture provides some background for my observations.

In this brief comment, I would like to raise two main points: the relationship between inter-State and individual applications and the scarcity of resources the Court faces, especially in a context where facts are disputed between the parties.

### **1. Relationship between individual applications and inter-State applications**

One issue which emerged in many panels on the conference is the relationship between individual applications and inter-State applications. This relationship has been tackled as a problem because (for reasons which lie with the way the Convention was drafted) the Convention does not regulate how they relate to each other. I would like to offer a more positive look at the challenge of relating the two types of proceedings. I mention this also in light of paras. 40 and 41 of the draft report of the working group (in the version of March 2021). The report contains the proposal of an additional requirement for the admissibility of inter-State applications. In short, the idea of the proposal is that States would have to justify an eventual inter-State application where an individual application has been lodged or would be possible.

related idea which is likewise contained in the report is that States would be under an obligation to provide for a list of victims at the outset of inter-State proceedings. These two ideas, which essentially make it harder for States to use the mechanism, causes quite a stir in my “academic bubble”, which is why I bring them up here.

In my opinion, both of these ideas need to be rejected. The issues raised by inter-State applications, the serious human rights violations which underly them, will not be solved by making it harder for States to use the type of procedure.

With regard to the relationship of individual and inter-State applications, I would like to underline that they have common goals and do not exclude each other. On the contrary, they could be used for a fruitful interplay. I would like to illustrate this idea with one example.

Where the Court starts receiving large numbers of individual applications from a specific region or around a specific problem, this could be taken into account when assessing the admissibility requirements of inter-State applications. The idea here would be: where there is smoke, there might as well be a fire.

Often, inter-State applications deal with alleged administrative practices which do not require the exhaustion of domestic remedies. At the admissibility stage, the required standard of proof for an alleged administrative practice in inter-State applications is *prima facie* evidence. Large numbers of individual applications can indicate such an administrative practice.

## 2. Resources for the Court

A further point I would not like to leave unmentioned is the issue of resources, which in my opinion should be acknowledged more openly as one of the root causes of the slow administration of justice in inter-State proceedings. Instead of cutting back the possibilities to use the inter-State mechanism, the Court should be equipped with more resources to live up to its assigned task, including fact-finding. Many panelists, for example Martina Keller, as well as Angelika Nußberger<sup>87</sup>, have mentioned the scarcity of resources as one reason why the administration of justice in inter-State cases is delayed.

The object and purpose of inter-State applications is to address the situations of many (sometimes millions, as for example in the Ukraine cases) affected individuals. I would like to steer away from the idea that these large numbers of individuals necessarily need to be monetarily compensated *within inter-State proceedings*. With this, I do not intend to say that there should be no compensation. What I would like to say is that the distribution of compensation could be deferred – perhaps more and not completely – to the responsibility of the member States.

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<sup>87</sup> See also Angelika Nußberger: The Way Forward: A Pragmatic Approach in Addressing Current Challenges of Inter-State Cases, *Völkerrechtsblog*, 26.04.2021 (<https://voelkerrechtsblog.org/de/the-way-forward/>).

To conclude, I would add, in a variation of the famous dictum by Böckenförde, that the European Court of Human Rights cannot ensure the preconditions it needs to operate successfully, especially in the inter-State context. The States are under an obligation to cooperate with the Court to ease its burden and to put it into a position to administer justice in a timely manner.

## **Geir ULFSTEIN**

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### **Concluding remarks**

The interrelationship between interstate proceedings before the European Court of Human Rights on the one hand and individual applications on the other is among the most crucial issues to be addressed when analyzing how the Court should deal with the recent increase in the number of interstate cases being brought. The number of individual cases based on essentially the same facts as those of a related interstate complaint is significant.

One has to therefore consider what might be possible options to address that overlap issue, be it by way of a change in the Court's jurisprudence (possibly to be eventually anticipated or supported *ex post facto* by the political organs of the Council of Europe) or by a formal amendment to the Convention. The first alternative might be to limit the holding in the respective 'leading' interstate case to more general legal questions of the Convention. Such general questions could *inter alia* include the extraterritorial application of the Convention; attribution of responsibility; the relationship between the Convention and international humanitarian law; evidentiary issues; finding possible patterns of violations of the Convention and deciding the underlying legal questions; and how to resolve compensation to victims covered by the interstate claim but which have not been subject to individual claims.

The judgment in such interstate proceeding, provided it were to find the general prerequisites of a violation of the Convention to be fulfilled at the first place with regard to a given generalized situation, would then however not yet make concrete findings of a violation of the Convention with regard to one or more specific individuals, nor indeed award them compensation under Art. 41 ECHR.

Rather the judgment in the interstate case would instead serve as a new kind of a 'pilot judgment', merely outlining the parameters by which the covered individual cases would then have to be decided. Once these more general issues

would have been decided by the Court as part of the interstate case, the State parties concerned involved in the proceedings could either try to reach a friendly settlement on that basis or, should this not be possible, the Court itself could decide the individual cases related to the interstate proceedings in question in some form of an abbreviated procedure.

This document contains the Proceedings of the Conference on inter-State cases under the European Convention on Human Rights which took place on 12 and 13 April 2021 via videoconference. It was organised by the German Presidency of the Committee of Ministers in co-operation with the Steering Committee for Human Rights (CDDH).

The Conference was the occasion to open a space for discussion of problems raised by interstate cases and possible solutions. The growing number of interstate cases represents a serious challenge for the system of European Convention on Human Rights. Beyond the fact that they are particularly time-consuming and complex, they raise difficult issues, in particular as regards the establishment of facts by the Strasbourg Court; moreover, numerous challenges appear when it comes to execute the Court's judgments. The questions of fact-finding and friendly settlements deserved also special attention.

The Conference was intended to inform the current reflection being conducted by the Steering Committee for Human Rights (CDDH) on the best ways of dealing with interstate cases in the Convention system without undermining its overall effectiveness.



An increasing number of inter-State applications have been brought before the European Court of Human Rights recent years. As they often relate to conflict situations, the Court is faced with challenges regarding the establishment of facts and various complex legal issues. The situation is compounded by the fact that around 11 000 individual applications related to inter-State applications are also pending before the Court. Moreover, numerous challenges appear when it comes to the execution of the Court's judgments in cases related to inter-State disputes.

These issues were discussed in the Conference "Inter-State cases under the European Convention on Human Rights" organised by the German Presidency of the Committee of Ministers in co-operation with the Council of Europe's Steering Committee for Human Rights (CDDH) on 12 and 13 April 2021. The Conference provided food for thought to the ongoing work of the CDDH on the effective processing and resolution of cases relating to inter-State disputes. This document contains the interventions of the high-level speakers and experts in various panels of the Conference.

Ces dernières années, la Cour européenne des droits de l'homme a été saisie d'un nombre croissant de requêtes interétatiques. Comme elles portent souvent sur des situations de conflit, la Cour est confrontée à des défis concernant l'établissement des faits et diverses questions juridiques complexes. La situation est aggravée par le fait qu'environ 11 000 requêtes individuelles liées à des requêtes interétatiques sont également en instance devant la Cour. En outre, de nombreux défis apparaissent lorsqu'il s'agit de l'exécution des arrêts de la Cour dans des affaires liées à des conflits interétatiques.

Ces questions ont été discutées lors de la Conférence «Les affaires interétatiques en vertu de la Convention européenne des droits de l'homme» organisée par la Présidence allemande du Comité des Ministres en coopération avec le Comité directeur pour les droits de l'homme (CDDH) du Conseil de l'Europe, les 12 et 13 avril 2021. La Conférence a permis de nourrir les travaux en cours du CDDH sur le traitement et la résolution efficace d'affaires concernant des conflits interétatiques. Ce document contient les interventions des orateurs de haut niveau et des experts lors des différents panels de la Conférence.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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