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Meeting of the Committee of Legal Advisers on Public International Law (CAHDI)

Strasbourg, 25 March 2021

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President of the European Court of Human Rights

Dear Chair,

Esteemed CAHDI members,

I am delighted to be able to participate remotely in this exchange of views on the important topic of inter-State cases before the European Court of Human Rights. I am honoured to follow in the footsteps of my predecessors, President Guido Raimondi, who addressed your 53rd meeting in 2017 and Judge Linos-Alexandre Sicilianos who intervened in a seminar last September on the margins of your 59th meeting in Prague.

We have thirty minutes for our exchange of views, and I propose to speak for about fifteen minutes to leave plenty of time for questions and discussion.

Let me begin by setting the scene.

As you all know, the inter-State application is provided for in Article 33 of the Convention. But what is its object and purpose? Is it a mechanism intended to settle international disputes between States or rather to ensure the collective enforcement of human rights, or both? Beyond these questions, there seems to be an interest in recalibrating how it functions, at least to ensure that it works as efficiently as possible.

Firstly, there is an ongoing internal reflection within the Court, through its Committee on Working Methods, on proposals for more efficient processing of inter-State cases. These reflections were shared with the Steering Committee for Human Rights ("the 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). The Group is preparing a report to be submitted to the Committee of Ministers by the end of the year and I understand that a draft will be available for a conference organised this April under the German chairmanship of the Committee of Ministers in which I will participate.

There have been just under 30 inter-State cases since the Convention entered into force and compared to the number of individual applications one can say that it is rather rarely used although the last decade has seen a marked increase in the number of inter-State applications being brought to the Court . There are currently thirteen pending applications[1].

On the one hand, this may unfortunately be a result of increased recent conflict in the European legal space, on the other, 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.

[1] https://echr.coe.int/Documents/InterState_applications_ENG.pdf

By way of example, since 2020 the Court has seen seven new inter-State applications being lodged. Three relate to the conflict in Nagorno-Karabakh[2]. One, Netherlands v Russia[3], concerns the shooting down of Malaysia Airlines Flight MH17 over Eastern Ukraine in 2014. Another, Liechtenstein v the Czech Republic[4] relates to alleged breaches of property rights of Liechtenstein citizens following the 2nd World War. Latvia v Denmark[5] has been struck off the list following the resolution of the issue (a possible extradition of a Latvian national to South Africa) and Ukraine v the Russian Federation (IX)[6] concerns allegations of a State-authorised targeted assassination operations against perceived opponents outside a situation of armed conflict.

These seven applications demonstrate the different 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 a more general "policing" role.[7] 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.

[2] Armenia v Azerbaijan (no. 42521/20); Armenia v Turkey (no. 4351/20) and Azerbaijan v Armenia (no.47319/20).
[3] no. 28525/20
[4] no. 35738/20
[5] no. 9717/20
[6] no. 10691/21
[7] P. Leech, On Inter-State Litigation and Armed Conflict Cases in Strasbourg, European Convention on Human Rights Law Review(2021) 1-48

Indeed, as of mid-March inter-State conflicts represent approximately 16% of all pending applications (currently that figure is about 65,000). How is this possible?

The reason is the number of individual applications associated with inter-State cases or more generally with conflict situations. Currently there are 9,600 associated individual applications. 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).

As you are aware there have been some recent developments in inter-State cases. These are the admissibility decisions in *Ukraine v Russia (re Crimea)*[8], and *Slovenia v Croatia*[9] and a judgment in respect of *Georgia v Russia (II)*[10] adopted on 21 January of this year.

[8] no. 20958/14
[9] no. 54155/16
[10] no. 38263/08

The admissibility decision in *Ukraine v Russia (re Crimea)*[11] contains some interesting developments *inter alia* as regards the assessment of evidence and the burden of proof (non-exhaustion/administrative practice). In *Slovenia v Croatia* the Court found that the Convention did not allow Governments to use the inter-State application mechanism to defend the rights of a legal entity that was not a "non-governmental organisation". Accordingly, the Court lacked jurisdiction to hear the complaint. In *Georgia v Russia (II)* the Court decided on important questions of jurisdiction; further defined the criteria of the concept of an administrative practice; and examined the interrelation between the provisions of the Convention and the rules of international humanitarian law.

For the purposes of my intervention this morning I will not comment on any particular judgment of the Court; I do not believe that that is my role. The judgments speak for themselves.

However, I would like to make one general point. As the Court has stated on many occasions, it follows from Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties that the Convention should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights. At the same time, the Court has evoked the special character of the Convention as a human rights treaty.

[11] no. 20958/14

In rejecting the Russian Government's arguments on jurisdiction in *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, § 102, 23 February 2016 and their reliance on two cases decided by the International Court of Justice, the Court reiterated that the test to be applied by the Court under Article 1 of the Convention differed from the test for establishing a State's responsibility for an internationally wrongful act under international law. In other words, interpreting the Convention "as far as possible" in harmony with other rules of international law does not necessarily lead to the conclusion that the interpretation of the Convention by the Court is, in all circumstances, ultimately determined by other international bodies applying principles of public international law, as the legal issues they are determining may differ.

I would also like to reiterate a point which I made recently before the Committee of Minsters. When Member States decide to become members of the Council of Europe and, hence, be subjected to the jurisdiction of the Court and the obligations to protect human rights provided for by the Convention, it inevitably follows that some judgments will, from time to time, be rendered with which Member States may disagree. That is the self-evident consequence of deciding to adhere to an international human rights system. From this it follows naturally, and this I have had reason to emphasise several times recently, that judgments and decisions of the Court are to be executed whatever the respondent Government's views of the respective judgments. There are no exceptions envisaged under the Convention.

For our exchange today, I would like to set out the challenges which inter-State cases, and in particular those brought following armed conflict, as well as the associated individual applications, represent for the Court and consequently for the Convention system.

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.

This was acknowledged in the Copenhagen Declaration adopted by member States in 2018, where States called upon the Court and other stakeholders 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*."

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. The parties' observations and annexes are generally considerable in length, for example in *Georgia v Russia (II)* the file ran to 30,000 pages. Examination of these cases is therefore very time-consuming for Registry lawyers and Judges, already under enormous pressure to ensure that the Court's backlog remains at manageable levels. In addition to the complexity of the facts there are often difficult legal questions involved and requests for extensions of time-limits. All these factor can lead to criticism that the Court is too slow in its case-processing.

Moreover, in order to establish the facts and obtain evidence, the Court often has to request documents or information from the parties under Article 38 of the Convention. If either party fails in their duty to provide the Court with all the necessary information the Court may draw the appropriate conclusions.

The holding of witness and expert hearings may also complement the information brought before the Court by the parties. However, these are time-consuming and costly. Until now there have always been witness hearings in inter-State cases dealing with armed conflict. While in the cases of *Ireland v the United Kingdom* and *Cyprus v Turkey* the fact-finding missions by the Commission took place in the countries concerned, in *Georgia v Russia (I) and (II)* the witness hearings took place at the Court in Strasbourg lasting one and two weeks' respectively. The Court's increasing familiarity with videoconferencing, prompted by the pandemic, may perhaps pave the way for this technology to be used more frequently in the future.

Coordinating the processing of inter-State cases and related individual applications also poses a challenge for the Court, given the huge number which are associated with the various inter-State applications or conflict situation. Recently, the Court has introduced a number of practices to counter potential risks of duplication or inconsistencies stemming from the processing in parallel of inter-State applications and related individual applications. In particular, where an inter-State case is pending, individual applications raising the same issues or deriving from the same underlying circumstances are, in principle and in so far as practicable, without being put aside, not decided before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case

Let me conclude by mentioning some areas worthy of further reflection.

The first concerns friendly settlements. Friendly settlements have been successful in only a handful of inter-State cases, by way of example *Denmark, Norway, Sweden and the Netherlands v Turkey* (nos. 9940/82 and 9944/82) before the former Commission and the case of *Denmark v Turkey* (no. 34382/97) before the Court. One should not I think exclude, a priori, that inter-State cases, by their very sensitive and political nature, can potentially be suitable for resolution by friendly settlements. On the other hand, these very factors, and external political pressure, might militate against either side being seen to negotiate or agree with the other.

Secondly, I would like to mention the use of Rule 39 by the Court. You are probably aware of the latest development in this regard in relation to the situation in Nagorno-Karabakh. I reiterate the point I made last week in my exchange with the Committee of Ministers. Clear distinctions have to be made between Rule 39 decisions of the Court and its examination of applications lodged. The decisions on interim measures taken by the Court under Rule 39 are intended to prevent irreparable harm. They do not prejudge the admissibility or merits of the applications. There are different legal elements that come into play when the Court examines a request to impose a Rule 39 measure. Some call for the Court to go further in its use of interim measures, others note the inherent limits in this mechanism, notably in terms of ensuring compliance. I will not go further into these issues here today. It is for the particular judicial composition of the Court, that is seized at any given moment of a Rule 39 request, to take a position on its application in the light of the facts as adduced before it.

Dear Chair, Dear CADHI members.

I will finish here as I am anxious to leave sufficient time for an informed exchange with you all. Thank you for your attention.