



DH-SYSC-II(2019)R7

20/09/2019

STEERING COMMITTEE FOR HUMAN RIGHTS

(CDDH)

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

(DH-SYSC)

**DRAFTING GROUP ON THE PLACE OF THE EUROPEAN
CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND
INTERNATIONAL LEGAL ORDER**

(DH-SYSC-II)

MEETING REPORT

7th meeting

18 – 20 September 2019

Item 1: OPENING OF THE MEETING, ADOPTION OF THE AGENDA AND OF THE ORDER OF BUSINESS

1. The Drafting Group on the place of the European Convention on Human Rights in the European and international legal order (DH-SYSC-II) held its 7th and last meeting in Strasbourg from 18 to 20 September 2019. The list of participants appears in Appendix I.
2. The Chair, Ms Florence MERLOZ (France) opened the meeting, which was dedicated to the examination, with a view to its adoption, of the preliminary draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order.
3. The Group adopted the agenda (see Appendix II) and the order of business (DH-SYSC-II(2019)OT3).

Item 2: DISCUSSION ON, AND ADOPTION OF THE PRELIMINARY DRAFT CDDH REPORT ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER

4. Following a general discussion, the Group examined the preliminary draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order (document DH-SYSC-II(2019)43), prepared by several rapporteurs with the assistance of several contributors, *ad-hoc* experts and the Secretariat. It agreed on a number of amendments to the draft report in the light of the discussion and the written comments received from member States' delegations on the draft report (see document DH-SYSC-II(2019)42rev).
5. The Group adopted the text of the three chapters of its draft report, as well as its Introduction and Conclusion.
6. The delegation of the Republic of Moldova made a declaration regarding paragraph 187¹, stating that "The Republic of Moldova does not share the assessment of the way the facts were presented in this paragraph regarding the *Ilaşcu* and *Catan* cases." The delegation declared that it shares the assessment of the ECHR regarding the decisive influence and effective control applied in *Ilaşcu* and *Catan* cases. The position expressed by the delegation for the wording of this paragraph figures in Appendix III to the present meeting report.
7. The delegation of the Russian Federation made a declaration regarding paragraph 239², stating that "The Russian delegation regrets the lack of substantive recommendations corresponding to the challenges identified, and proposes to highlight the need that the Court, in the interest of preserving its authority, more consistently applied relevant rules of general international law, including those codified in the ARSIWA". It further made a declaration regarding paragraph 481³, stating that "The Russian delegation regrets that the conclusions of the report do not properly reflect the challenges and solutions identified, and proposes to

¹ The paragraph numbers referred to are the numbers as they appeared in document DH-SYSC-II(2019)43.

² The paragraph numbers referred to are the numbers as they appeared in document DH-SYSC-II(2019)43.

³ The paragraph numbers referred to are the numbers as they appeared in document DH-SYSC-II(2019)43.

highlight that clarity and consistency in the application by the Court of general rules of international law on state responsibility, is of great importance for the States Parties". This delegation considers that the need to preserve the authority of the Court was enshrined in the Copenhagen Declaration and in the report of the CDDH on the longer-term future of the system of the ECHR. This delegation further stated that one of the key challenges that threaten the authority of the Court lies in fragmentation of international law due to application by the Court of its own requirements for establishing jurisdiction and lack of clear distinction between jurisdiction and responsibility in the Court's decisions. The texts proposed by the delegation for the wording of these paragraphs figure in Appendix IV to the present meeting report.

8. As requested by the Group,⁴ the Secretariat had further drafted an executive summary of the report. In view of the complexity of the subjects dealt with, the Group could not agree on a text of the executive summary in the time remaining for its meeting, although a majority of the delegations would like to have a summary of the Report. The Chair of the DH-SYSC-II announced that she would transmit the draft executive summary, as a separate document, drafted under the sole responsibility of the Secretariat, not adopted by and not binding in any way the Group, to the President of the DH-SYSC for information.

9. The Group considered that with the adoption of the preliminary draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order (document DH-SYSC-II(2019)R7 Addendum), it had fulfilled its terms of reference for the biennium 2018–2019. It expressed its appreciation for the constructive approach shown by all members throughout its work in spite of the complexity of the subject and the divergences in the positions of delegations, and thanked the Chair of the Drafting Group for the excellent way in which the meetings had been conducted. The Group also paid tribute to the thorough work of the rapporteurs and the Secretariat.

10. It was noted that the preliminary draft Report would be submitted to the DH-SYSC for consideration and possible adoption of a draft Report at its meeting (15-18 October 2019) and subsequently to the CDDH for consideration and possible adoption of the final Report at its 92nd meeting (26-29 November 2019).

Item 3: ADOPTION OF THE MEETING REPORT

11. At the end of its meeting, the Group adopted the present meeting report in the two official languages of the Organisation.

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⁴ See document DH-SYSC-II(2019)R6, § 10.

Appendix I

List of participants

MEMBERS / MEMBRES

ARMENIA / ARMENIE

Ms Manushak ARAKELYAN, Acting Head of the Division of Multilateral International Treaties of the Department of International Treaties and Law of the Ministry of Foreign Affairs of Armenia

Mr Aram HAKOBYAN, Deputy to the Permanent Representative, Permanent Representation of Armenia to the Council of Europe

AUSTRIA / AUTRICHE

Ms Stefanie DÖRNHÖFER, LL.M., Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice, Constitutional Service

AZERBAIJAN / AZERBAIDJAN

Ms Saadat NOVROZOVA, Senior adviser, Human Rights Protection Unit, Department of Work with Law Enforcement Bodies, Administration of the President of the Republic of Azerbaijan

Ms Zhala IBRAHIMOVA, Deputy to the Permanent Representative, Permanent Representation of the Republic of Azerbaijan to the Council of Europe

BOSNIA AND HERZEGOVINA / BOSNIE-HERZEGOVINE

Ms Belma SKALONJIĆ, Agent of the Council of Ministers, Government Agent before the ECtHR, Sarajevo

BULGARIA / BULGARIE

Ms Svetlana STOYANOVA STAMENOVA, Attaché, Human Rights Directorate, Ministry of Foreign Affairs

CROATIA / CROATIE

Ms. Štefica STAŽNIK, Representative, Office of the Representative of the Republic of Croatia before the European Court of Human Rights

CZECH REPUBLIC / REPUBLIQUE TCHÉQUE

Mr Vladimír JANOUŠEK PYSK, Senior Ministerial Counsellor, Head of the Department for the Proceedings before the UN Treaty Bodies, Office of the Government Agent before the European Court of Human Rights

ESTONIA / ESTONIE

Ms Maris KUURBERG, Government Agent before the ECtHR, Ministry of Foreign Affairs

FINLAND / FINLANDE

Ms Satu SISTONEN, Legal Officer, Ministry for Foreign Affairs, Legal Service, Unit for Human Rights Courts and Conventions

Ms Katja KUUPPELOMÄKI, Legal Officer, Unit for Human Rights Courts and Conventions, Legal Service, Ministry for Foreign Affairs of Finland

FRANCE

Ms Florence MERLOZ, Sous-directrice des droits de l'homme, Direction des affaires juridiques, Ministère de l'Europe et des affaires étrangères, Chair of the DH-SYSC-II

GEORGIA / GEORGIE

Ms Nana TCHANTURIDZE, Ministry of Justice of Georgia, Head of the Litigation Unit of the Department of State Representation to the International Courts

Mr Giorgi BAGDAVADZE, Ministry of Justice of Georgia, Specialist of the Department of State Representation to the International Courts

GERMANY / ALLEMAGNE

Ms Petra VIEBIG-EHLERT, Legal Advisor, Federal Ministry of Justice and Consumer Protection

GREECE / GRÈCE

Ms Sofia KASTRANTA, Deputy Legal Counselor, Special Legal Department, Ministry of Foreign Affairs

ITALY / ITALIE

Ms Maria Laura AVERSANO, Co-Agent of the Italian Government at the Ministry of Foreign Affairs

LATVIA / LETTONIE

Ms Kristīne LĪCIS, Representative of Latvia before European Court of Human Rights, Ministry of Foreign Affairs of the Republic of Latvia

REPUBLIC OF MOLDOVA / REPUBLIQUE DE MOLDOVA

Mr Andrei URSU, Deputy to the Permanent Representative, Permanent Representation of the Republic of Moldova to the Council of Europe

Mr Victor LĂPUȘNEANU, Deputy Permanent Representative, Permanent Representation of the Republic of Moldova to the Council of Europe

NETHERLANDS / PAYS-BAS

Ms Clarinda COERT, Senior legal adviser human rights law, Legislation Department and Legal Affairs, Ministry of Justice and Security

Ms Babette KOOPMAN, Government Agent before the ECtHR, Ministry of Foreign Affairs

NORWAY / NORVÈGE

Mr Morten RUUD, Special adviser, Norwegian Ministry of Justice and Public Security, Legislation Department

POLAND / POLOGNE

Mr Przemysław GUMIELA, Ministry of Foreign Affairs

ROMANIA / ROUMANIE

Mr Mihail-Andreas MITOȘERIU, Secrétaire III, Direction de l'Agent Gouvernemental auprès de la Cour Européenne des Droits de l'Homme, Ministère des Affaires Etrangères de Roumanie

Ms Ileana POPESCU, Secretar I/Premier Secrétaire, Direction du droit international et du droit de l'Union Européenne, Ministère des Affaires Etrangères de Roumanie

RUSSIAN FEDERATION / FÉDÉRATION DE RUSSIE

Ms Olga ZINCHENKO, Attaché in the Ministry of Foreign Affairs of the Russian Federation

Mr Konstantin KOSORUKOV, Head of Division, Legal Department of the Ministry of Foreign Affairs of the Russian Federation

Mr Stanislav KOVPAK, Représentant du Ministère de la Justice de la Fédération de Russie, Représentation de la Fédération de Russie auprès du Conseil de l'Europe

Mr Vladislav ERMAKOV, Adjoint au Représentant permanent de la Fédération de Russie auprès du Conseil de l'Europe

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Mr Roman SEDOV, Adjoint au Représentant permanent de la Fédération de Russie auprès du Conseil de l'Europe

SPAIN / ESPAGNE

Mr Alfonso BREZMES MARTÍNEZ DE VILLARREAL Co-Agent before the ECtHR, Senior State Attorney of the Constitutional Law & Human Rights Department, Ministry of Justice

SWEDEN / SUÈDE

Ms Katarina FABIAN, Deputy Director, Ministry for Foreign Affairs, Department for International Law, Human Rights and Treaty Law

TURKEY / TURQUIE

Mr Müşerref YAKIŞIK, Rapporteur Judge, Ministry of Justice, Ankara

Ms Günseli GÜVEN, Deputy to the Permanent Representative, Permanent Mission of the Republic of Turkey to the Council of Europe

Mr Ahmet Metin GÖKLER, Justice Counsellor, Permanent Mission of the Republic of Turkey to the Council of Europe

UNITED KINGDOM / ROYAUME-UNI

Mr Chanaka WICKREMASINGHE, Agent of the UK before the European Court of Human Rights, Legal Counsellor, Foreign and Commonwealth Office

OBSERVERS / OBSERVATEURS

HOLY SEE / SAINT SIÈGE

Mr Grégor PUPPINCK

Mme Giorgia BALDINO, Stagiaire

SECRETARIAT

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**Human Rights Intergovernmental Cooperation Division / Division de la coopération
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Mr Alfonso DE SALAS, Head of Division / Chef de Division, Secretary of the CDDH / Secrétaire du CDDH

Ms Dorothee VON ARNIM, Head of the Unit on the system of the European Convention on Human Rights / Chef de l'Unité sur le système de la Convention européenne des droits de l'homme, Secretary of the DH-SYSC-II / Secrétaire du DH-SYSC-II

Ms Elisa SAARI, Assistant Lawyer / Juriste assistante

Ms Susanne ZIMMERMANN, Administrative Assistant / Assistante administrative

INTERPRETERS / INTERPRETES

Ms Chloé CHENETIER

Ms Sara WEBSTER

Ms Lucie DE BURLET

Mr Didier JUNGLING

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Appendix II**Agenda**

	Reference documents concerning all items on the agenda
DH-SYSC(2018)01	Extract of the terms of reference given by the Committee of Ministers to the CDDH regarding the work of the DH-SYSC during the 2018–2019 biennium and relevant extracts of the CDDH meeting reports
DH-SYSC-II(2017)002	Context of the work of the DH-SYSC-II on the future Report of the CDDH
CDDH(2019)R91	Report of the 91 st CDDH meeting (18–21 June 2019)
DH-SYSC-II(2019)R6	Report of the 6 th DH-SYSC-II meeting (22–24 May 2019)
DH-SYSC-II(2019)R5	Report of the 5 th DH-SYSC-II meeting (5–8 February 2019)
CDDH(2018)R90	Report of the 90 th CDDH meeting (27–30 November 2018)
DH-SYSC-II(2018)R4	Report of the 4 th DH-SYSC-II meeting (25–28 September 2018)
CDDH(2018)R89	Report of the 89 th CDDH meeting (19–22 June 2018)
DH-SYSC-II(2018)R3	Report of the 3 rd DH-SYSC-II meeting (3–5 April 2018)
CDDH(2017)R88	Report of the 88 th CDDH meeting (5–7 December 2017)
DH-SYSC(2017)R4	Report of the 4 th DH-SYSC meeting (9–10 November 2017)
DH-SYSC-II(2017)R2	Report of the 2 nd DH-SYSC-II meeting (20–22 September 2017)
CDDH(2017)R87	Report of the 87 th CDDH meeting (6–9 June 2017)
DH-SYSC(2017)R3	Report of the 3 rd DH-SYSC meeting (10–12 May 2017)
DH-SYSC-II(2017)R1	Report of the 1 st DH-SYSC-II meeting (30–31 March 2017)
CDDH(2015)R84 Addendum I	CDDH report on the longer-term future of the system of the European Convention on Human Rights
	Copenhagen Declaration
CDDH(2015)004	Brussels Declaration
CDDH(2012)007	Brighton Declaration
CDDH(2011)010	Izmir Declaration
CDDH(2010)001	Interlaken Declaration

DH-SYSC(2016)009	Decisions adopted at the 1252 nd meeting of the Ministers' Deputies on the CDDH Report on the longer-term future of the system of the European Convention on Human Rights (30 March 2016)
CM/Res(2011)24	Committee of Ministers' Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods
	ITEM 1: OPENING OF THE MEETING, ADOPTION OF THE AGENDA AND OF THE ORDER OF BUSINESS
DH-SYSC-II(2019)OJ3	Draft agenda
DH-SYSC-II(2019)OT3	Draft order of business
	ITEM 2: DISCUSSION ON, AND ADOPTION OF THE PRELIMINARY DRAFT CDDH REPORT ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER
DH-SYSC-II(2019)41	Preliminary draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order
DH-SYSC-II(2019)42rev (<i>Bilingual</i>)	Comments on the Preliminary draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, in view of the 7 th DH-SYSC-II meeting
DH-SYSC-II(2019)43	Revised Preliminary draft CDDH report on the place of the European Convention on Human Rights in the European and international legal order, as amended in the light of the experts' written comments in view of the 7 th DH-SYSC-II meeting
CDDH(2019)R91Addendum 7	Draft chapters of the future CDDH Report on the place of the European Convention on Human Rights in the European and international legal order provisionally adopted by the CDDH at its 91 st meeting (18–21 June 2019)
DH-SYSC-II(2018)24rev (extracts)	Revised draft chapter of Theme 1, subtheme ii: State responsibility and extraterritorial application of the European Convention on Human Rights (<i>extracts and Member States' comments</i>)
	ITEM 3: ADOPTION OF THE MEETING REPORT

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Appendix III**The position expressed by the Republic of Moldova, at the 7th DH-SYSC-II meeting, concerning the wording of paragraph 187⁵ of the draft Report****The Republic of Moldova proposed the following text:**

187. Several other judgments further developed the scope of the States' jurisdiction where they were found to have effective control of an area and in particular in cases where that control was found to be exercised not directly, but through a subordinate administration. In several cases concerning the existence, within the territory of a Contracting State, of an entity which is not recognised by the international community as a sovereign State, with the support of the respondent State, the Court had not only had regard to the strength of the State's military presence in the area. In *Ilaşcu* the Court did not require effective control, considering "decisive influence" to be a sufficient requirement for establishing jurisdiction. In *Catan*, even though no direct involvement of the agents of the respondent State was established [insert footnote: reference to paragraph 177 of the current report], the Court nevertheless concluded that the respondent State exercised "effective control and decisive influence" over the separatist administration, which was found to continue in existence "only because of Russian military, economic and political support".⁶

Nevertheless, it is to be noted that the development of the Courts' assessment from *Ilaşcu* case to *Catan* case occurred due to the changes of the situation in the transnistrian region of the Republic of Moldova which took place after the events described in *Ilaşcu*. In *Catan*, the Court explained the way in which the respondent state (Russian Federation) transformed its decisive influence in the transnistrian region through all of its means of support (military, economic and political) to the separatist regime, which determined not just a decisive influence but an effective control.

[...]

⁵ *Note by the Secretariat*: The paragraph number referred to is the number as it appeared in document DH-SYSC-II(2019)43.

⁶ *Catan and Others*, cited above, § 122.

Appendix IV

The position expressed by the Russian Federation, at the 7th DH-SYSC-II meeting, concerning the wording of paragraphs 239 and 481⁷ of the draft Report

The Russian delegation regrets the lack of substantive recommendations corresponding to the challenges identified in the report. The need to preserve the authority of the Court was enshrined in the Copenhagen Declaration⁸ and in the report of the CDDH on the longer-term future of the system of the ECHR⁹. The Russian Federation considers it an important issue that must be reflected in the concluding part of this chapter. One of the key challenges that threaten the authority of the Court lies in fragmentation of international law due to application by the Court of its own requirements for establishing jurisdiction¹⁰ and lack of clear distinction between jurisdiction and responsibility in the Court's decisions.¹¹ This approach goes against the rules of general international law and practice of other international courts, including the ICJ. Therefore the Russian Federation suggests that paras.239 and 481 be strengthened by referencing the need that the Court, in the interest of preserving its authority, more consistently applied relevant rules of general international law, including those codified in the ARSIWA.

The delegation of the Russian Federation proposed the following text:

239. Apparent inconsistencies in the Court's interpretation of "jurisdiction" will result in unpredictability and uncertainty among the States as to how their actions might be qualified by the ECtHR. Providing legal certainty is central to the legitimacy of the ECtHR and the maintenance of its effectiveness and authority as an independent and competent judicial institution. In view of the foregoing, and in order to avoid a risk of fragmentation of the international legal order, as well as in the interest of preserving the authority of the Court's decisions, it would be desirable if the Court more consistently applied relevant rules of general international law, including those codified in ARSIWA in cases concerning attribution of conduct to the respondent State before it.

481. Legal certainty as regards the applicable rules concerning the interpretation of the ECHR, and its relationship with other rules of international law, for example international humanitarian law, as well as clarity and consistency in the application by the Court of general rules of international law on state responsibility, is of great importance for the States Parties. As the ECtHR itself found on many occasions, as follows from Article 31 § 3 (c) of the 1969

⁷ *Note by the Secretariat*: The paragraph numbers referred to are the numbers as they appeared in document DH-SYSC-II(2019)43.

⁸ "The quality and in particular the clarity and consistency of the Court's judgments are important for the authority and effectiveness of the Convention system" (par.27 of the Declaration).

⁹ "While acknowledging that the interpretation of the Convention is a prerogative of the Court itself, the CDDH noted that an interpretation of the Convention which is at odds with other instruments of public international law (such as international humanitarian law) could have a detrimental effect on the authority of the Court's case law and the effectiveness of the Convention system as a whole." (par.186 of the CDDH report); "The authority of the Court is vital for its effectiveness and for the viability of the Convention system as a whole. These are contingent on the quality, cogency and consistency of the Court's judgments, and the ensuing acceptance thereof by all actors of the Convention system, including governments, parliaments, domestic courts, applicants and the general public as a whole." (par. 195(ii) of the CDDH report).

¹⁰ See, *inter alia*, paras. 187, 190, 232 of the draft report.

¹¹ See, *inter alia*, paras. 144, 189, 238, 480 of the draft report.

Vienna Convention on the Law of Treaties, the ECHR cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights.