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(CDDH)

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

(DH-SYSC)

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DRAFTING GROUP ON EFFECTIVE PROCESSING AND RESOLUTION OF CASES RELATING TO INTER-STATE DISPUTES

GROUPE DE RÉDACTION SUR LE TRAITEMENT ET LA RÉSOLUTION EFFICACE D'AFFAIRES CONCERNANT DES CONFLITS INTERÉTATIQUES

(DH-SYSC-IV)

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Compilation of experts' comments on the Draft CDDH report on the effective processing and resolution of cases relating to inter-State disputes (document DH-SYSC-IV(2022)02) /

Compilation des commentaires des experts sur le Projet de rapport du CDDH sur le traitement et la résolution efficace d'affaires concernant des conflits interétatiques (document DH-SYSC-IV(2022)02)

Note/Introduction

This document compiles comments sent by experts at the invitation by the DH-SYSC-IV (doc DH-SYSC-IV(2022)R5, paragraph 10). / Ce document recueille les commentaires qui ont été envoyés par les experts sur invitation de DH-SYSC-IV (doc. DH-SYSC-IV(2022)R5, paragraphe 10).

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By email

Mr Alain CHABLAIS
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8 July 2022

Dear Sir,

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

I am grateful to be given the opportunity to provide my comments on the draft CDDH report on the effective processing and resolution of cases relating to inter-State disputes (DH-SYSC-IV(2022)02, Draft 08/06/22).

My comments follow the order of the points set out in the draft report. They focus primarily, but not exclusively, on the relationship between inter-State cases and related individual applications.[1]

[1] Both types of cases fall within the Committee's remit as regards 'cases related to inter-State disputes'. See also para. 54(c) of the Copenhagen Declaration.

By way of a preamble, I would firstly like to emphasise the significance of these cases, for individual victims, communities, states and the European human rights system.[2] Therefore, I find the apparent tone of parts of the draft report to be regrettable. Take, for example, this passage:

> 'Cases relating to inter-State disputes are complex and their processing is resource and time-consuming for the Judges and the Registry as well as for the member States concerned. This threatens to jeopardise the longer-term effectiveness of the control system of the European Convention on Human Rights' (para. 3).

This wording seems to imply that such cases are an inconvenient nuisance. A riposte to that could be: these cases relate to very grave, large-scale human rights violations for some very vulnerable people who too often are deprived of any redress at the national level. One could also argue that the jeopardy to the system is in fact created by its failure to deal with such cases adequately (they take far too long and are rarely implemented). Given such difficulties, I very much welcome the fact that the CDDH aims 'to reinforce the States Parties' commitment to fully implement their duty to co-operate with the Court under Article 38 of the Convention' (para. 8).[3]

Prioritisation of inter-State cases

Reference is made (paras. 22-26) to the practice as regards the processing of inter-state and related individual applications. It is stated that individual applications are 'not decided before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case'. This passage assumes that inter-State applications necessarily take precedence over individual applications. In my view, this should not necessarily always be the case, and instead the Court should exercise its discretion as to how it processes both types of cases. In some situations, for example, the Court may decide to process an individual case, or group of individual cases, together with an inter-state application. This may depend on a number of factors, including the factual basis of the respective cases, the arguments that are made by the respective individual applicants or state applicants, and indeed on *how* the cases are being argued. It cannot be assumed that all the relevant key 'overarching issues' will be raised in the course of inter-State proceedings – they may be raised in individual applications, and of course different points may be taken in different applications. It is also important that key arguments or points raised in individual cases are not 'prejudiced' by only being considered through the lens of inter-state cases, and/or only after the excessive delays which are often associated with inter-State litigation.

The establishment of the facts

[2] See, for example, P. Leach, *On Inter-State Litigation and Armed Conflict Cases in Strasbourg*, European Convention on Human Rights Law review 2 (2021) 27-74, pp 37-40.
[3] On the problems of non-co-operation, see for example: P. Leach, *On Inter-State Litigation and Armed Conflict Cases in Strasbourg*, European Convention on Human Rights Law review 2 (2021) 27-74, pp 58-60.

The draft report appears to discount and discredit in-country fact-finding hearings, asserting that '[s]uch visits are expensive, time-consuming, add to the length of proceedings and their success often depends on the full co-operation of the respondent State' (para. 40). I would acknowledge that fact-finding hearings are more likely now to take place in Strasbourg, but in my view in-country fact-finding hearings are a potentially important element of the Court's practice. They have been utilised to very good effect in the past, and their use should certainly not be ruled out.[4] The very act of the Court being present in-country and being seen to exercise its jurisdiction within member States can be a significant factor in underlining the role, importance and legitimacy of the Court.

At a time when there is a real sense of fragility to the Convention system (following the expulsion of one former member state and continued resistance to the implementation of European Court judgments from several others), I believe that there is a need for more effective and concrete developments which will genuinely enhance the system. In spite of the expense and time involved, in-country missions may be required in certain circumstances, and respondent states are already required by the Convention to provide full co-operation (see Articles 34 and 38).

The draft report does not refer to evidence obtained through open source investigations. Such material has already become widely available and is frequently being used in the course of human rights litigation.[5] It has the potential to significantly enhance the Court's practice of establishing the facts in cases related to inter-state disputes. In my view, the Court should be encouraged both to explore such developments and publicise its practice as regards its handling of such evidence.

Just satisfaction

I welcome the proposals aimed at the speeding up of just satisfaction decisions in inter-State cases. There is no justification for the sort of very long delays which have occurred in prior cases.

Friendly settlement

I note the proposal to affirm the potential of the friendly settlement framework to resolve inter-State cases on the basis of respect for human rights.

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[4] See further: 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; P. Leach, *On Inter-State Litigation and Armed Conflict Cases in Strasbourg*, European Convention on Human Rights Law review 2 (2021) 27-74, pp 43-50.

[5] See, for example, P. Leach, *On Inter-State Litigation and Armed Conflict Cases in Strasbourg*, European Convention on Human Rights Law review 2 (2021) 27-74, pp 50-55.

It is recalled that in *Cyprus v Turkey* (No. 25781/94, 12 May 2014) the Grand Chamber underlined the following propositions as regards the award of just satisfaction in inter-State cases:

> '…it must always be kept in mind that, according to the very nature of the Convention, it is the individual, and not the State, who is directly or indirectly harmed and primarily "injured" by a violation of one or several Convention rights. Therefore, if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims' (para. 46).

Accordingly, it is important that when states enter into friendly settlement negotiations as regards inter-State cases, they should consult, and take proper account of the views of, all individuals affected (especially, but not only, as regards the payment of just satisfaction). They should satisfy the Court that this has been appropriately done, before any settlement is affirmed by the Court. In my view, these steps are required by the notion of 'respect for human rights'.

In general terms, I agree with the call for the greater utilisation of the friendly settlement framework. However, in order to ensure greater levels of compliance, there need to be two developments as regards the friendly settlement process: (i) a willingness from the parties, and the Court, to include clearer and more specific undertakings in such agreements; and (ii) much greater scrutiny, by way of follow up, to ensure compliance (whether through the means envisaged by Articles 37(2) or 39(4) of the Convention, or by any other means). These steps would assist in improving compliance and thereby further enhance the legitimacy of the Convention system.

Implementation

Regrettably, there is little in the draft report about improved implementation of judgments (or friendly settlements) in inter-State cases. It is said that '[t]he response to large-scale violations is a responsibility for the Council of Europe as a whole' (para. 58). For the reasons already outlined in this letter (as regards the need to strengthen the Convention system in the face of considerable ongoing threats), in my view the time is ripe to strive for a much improved system, in particular as regards the implementation of judgments. Therefore, I agree with the call made by the European Implementation Network (EIN) for the Council of Europe to formulate an effective public strategy to address the systemic non-implementation of ECtHR judgments.[6]

Yours faithfully,

[6] See: EIN Board writes to the CoE Secretary General and Committee of Ministers to call for action on the implementation of ECtHR judgments, 16 May 2022.

Philip Leach

Professor of Human Rights Law

Middlesex University,

1. Professor Geir Ulfstein

Oslo, 8 July 2022

Expert opinion

on

Draft CDDH report on the effective processing and resolution of cases relating to

inter-State disputes

Professor dr. juris emeritus Geir Ulfstein, PluriCourts, University of Oslo

Introduction

The Draft CDDH report on the effective processing and resolution of cases relating to inter-State disputes (08/06/22)[7] contain important observations and recommendations. I will only comment on the relationship between inter-state and individual complaints.

As emphasized in the Draft report, inter-state cases are 'complex and their processing is resource and time-consuming'. There are currently 18 inter-state application pending before the European Court of Human Rights (ECtHR, or the Court) and around 11 000 pending individual cases relating to these inter-state cases. This 'threatens to jeopardise the longer-term effectiveness' of the ECHR control system.[8] The combination of interstate and individual complaints represents particular challenges.[9]

[7] Draft CDDH report on the effective processing and resolution of cases relating to inter-State disputes. DH-SYSC-IV(2022)02. Draft 08/06/22.
[8] Draft report, paragraph 3.
[9] Draft report, paragraph 9.

As stated in the Draft report, 'the real measure of effectiveness is not the quantity of judgments and decisions rendered every year, but the degree to which the Court is able to fulfil the role given to it under the Convention, namely to ensure the observance by the States Parties of their obligations under the Convention'.[10]

The main purpose of the present opinion is to suggest measures the Court could take to increase its effectiveness in dealing with inter-state and individual applications with a view to better ensure that member states respect their obligations under the European Convention of Human Rights (ECHR, or the Convention). I will discuss Inter-state and individual complaints in the next section, and suggest some Recommendations in the final section.

Inter-state and individual complaints

The Draft report refers to several reform proposals. Under the heading V Friendly relations, we find a reference to a proposal put forward by Professor Andreas Zimmermann and myself:

> 56. Another expert's comment focused on the friendly settlement of individual applications connected to inter-State cases. It construes the judgment in an inter-State case as one deciding on general legal questions of the Convention and outlining the parameters based on which the individual applications connected to the inter-State case would be decided. In this construct, the judgment in the inter-State case would serve as a new kind of pilot judgment, based on which the respondent State Parties concerned would try to reach friendly settlements with applicants in each individual cases; if they fail, the Court could decide on cases in some form of an abbreviated procedure.[11]
>
> 57. The CDDH considers that these comments and proposals, at present, remain under exploration within the expert community and are not yet susceptible to formal consideration or adoption by the Court. The CDDH will remain attentive and open to their further development.

The following analysis and recommendations are based on this proposal, and are developed further. The proposal is not limited to friendly settlement, and the Report may benefit from adding a new section with the heading: The relationship between inter-state and individual applications.

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[10] Draft report, paragraph 5.

[11] Geir Ulfstein, Andreas Zimmermann, in Inter-State Cases under the European Convention on Human Rights. Experiences and Current Challenges. Council of Europe (2022), page 107 (https://rm.coe.int/interstate-cases-under-the-echr/1680a5e82c).

Former Registrar of the European Court of Human Rights, Roderick Liddell, has proposed that the challenges connected with inter-state cases requires 'thinking outside the box'. He adds that the most difficult inter-state cases 'will have similarities to the situations of systemic or structural violation which gave rise to the pilot judgment procedure'. He asks: 'Are there lessons to be learnt from that?'[12] The main idea of the present proposal is to save time and resources in the inter-state and individual proceedings, while ending up in results serving the protection of human rights.

Stages of inter-state cases

Inter-state complaints – like individual complaints – may have several stages: interim measures; admissibility; merits; and remedies (reparations). Interim measures will continue to be a separate stage. However, the Draft report notes 'that there have been long intervals of time between the judgment on the merits of inter-State cases and the judgment on just satisfaction'.[13] Therefore, the three other stages should as far as possible be integrated, in order to save time. I address the integration of the merits and reparations stages, as well as the relationship to parallel individual complaints. I also discuss the elements and information needed at these different stages to facilitate more effective proceedings.

Merits

The decision on the merits should be restricted to what is required to determine the claims by the applicant and the reparations in the inter-state case, while providing guidance to individual claims proceedings. This 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.[14] A parallel could be drawn to the pilot judgment procedure, where the Court shall 'identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take'.[15]

Reparations

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[12] Roderick Liddell in. Inter-State Cases under the European Convention on Human Rights. Experiences and Current Challenges., Council of Europe (2022), pp. 99-102, at 100.
[13] Draft report, paragraph 45.
[14] Geir Ulfstein and Andreas Zimmermann, op. cit., p. 107.
[15] Rules of the Court, art. 61(3) (https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)

When it comes to reparations, the Court has so far only adopted two judgments in inter-state cases. In none of these cases did the Court specify reparations to individualized victims:

Cyprus v Turkey (just satisfaction) [Grand Chamber] (2014):

> 58. In view of all the relevant circumstances of the case, and making its assessment on an equitable basis, the Court considers it reasonable to award the Cypriot Government aggregate sums of EUR 30,000,000 for non-pecuniary damage suffered by the surviving relatives of the missing persons, and EUR 60,000,000 for non-pecuniary damage suffered by the enclaved residents of Karpas peninsula, plus any tax that may be chargeable on these amounts.[16]

Georgia v Russia (I) [Grand Chamber] (2019):

> (a) that the respondent State is to pay the applicant Government, within three months, EUR 10,000,000 (ten million euros) in respect of non-pecuniary damage suffered by a group of at least 1,500 Georgian nationals;
>
> (c) that this amount shall be distributed by the applicant Government to the individual victims, by paying EUR 2,000 to the Georgian nationals who were victims only of a violation of Article 4 of Protocol No. 4, and EUR 10,000 to EUR 15,000 to those of them who were also victims of a violation of Article 5 § 1 and Article 3 of the Convention, taking into account the length of their respective periods of detention;[17]

As already mentioned, I suggest that the merits and reparations phase as far as possible should be combined. The combined merits and reparations judgment should decide on the claims by the applicant state and should – as in *Cyprus v Turkey* (2014) and *Georgia v Russia (II)* (2019) – determine general, but not individualized reparations.

The Court has in these two judgments emphasized the close connection between the rules on state responsibility in general international law and the ECHR art. 41. The Court stated in *Cyprus v Turkey* that art. 41 'is directly derived from the principles of public international law related to State liability, and has to be construed in this context' (para. 40). Furthermore, it clarified that satisfaction is 'not […] sought with a view to compensating the State for a violation of its rights but for the benefit of individual victims' (*Georgia*, para. 26). The basis for establishing inter-state reparations is equity (*Cyprus*, para. 56 and *Georgia*, para. 73).

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[16] *Cyprus v. Turkey (just satisfaction) [GC]*, no. 25781/94.
[17] *Georgia v. Russia* (I) (just satisfaction), no. 13255/07.

It is essential to determine what is required of information for the Court to establish the reparations in the generalized way as in the *Cyprus* and *Georgia* cases. The Draft report supports the practice of requiring a list of victims at the start of the just satisfaction procedure.[18] The Court stated in *Georgia* that it is essential that 'the application of Article 41 of the Convention requires identification of the individual victims concerned' (para. 55). However, it further explained that it 'does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of specific facts or the calculation of monetary compensation' (para. 65).

It is interesting that the Court found that it could base itself on a 'sufficiently precise and objectively identifiable' group (para. 71). This should not necessarily require an individualized list of victims in order to establish non-individualized reparations, as was done in *Cyprus v Turkey* and *Georgia v Russia (I)*. Instead, it would seem sufficient that the Court only requires information necessary to establish the non-individualized reparations. It is assumed that a lessening of this requirement may save important time both before and under the oral proceedings.

The relationship to the individual complaints

The individual complaints relating to the same issues as the inter-state complaints should generally be put on hold until the inter-state case has been decided, which is also the practice today.[19] However, the pilot judgment procedure goes even further by providing the possibility of freezing the handling of individual cases 'pending the adoption of the remedial measures required by the operative provisions of the pilot judgment'.[20] It may be considered whether the individual applications related to inter-state cases should await the execution of the inter-state case, including payment of reparations. This could be combined with including a more flexible approach also comparable to the one used in pilot judgments, where the Court can at any time examine adjourned cases whenever the interests of justice so require.[21]

Finally, when it comes to handling the individual applications, I support Professor Philip Leach's proposal that to the extent that sufficient information is available in the inter-state judgment, the Court could consider treating these applications as 'WECL' cases (well-established case law), for a more efficient procedure.[22]

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[18] Draft report, paragraph 49.
[19] Draft report, paragraph 22.
[20] Rules of the Court, art. 61(6)(a).
[21] Rules of the Court, art. 61(6)(c).
[22] Leach, P. (2021). "On Inter-State Litigation and Armed Conflict Cases in Strasbourg." European Convention on Human Rights Law Review: 1-48., 31.

Recommendations

- The CDDH Report should include a new heading separate from Friendly settlement, named The relationship between inter-state and individual applications;
- The proceedings concerning admissibility, merits and reparations should as far as possible be integrated;
- The decision on merits should be restricted to what is required to determine the claims by the applicant and the reparations in the inter-state case, while providing guidance to individual claims proceedings;
- The decision on reparations in the inter-state case should continue to be non-individualized reparations;
- The Court should in the inter-state case only require information necessary to adopt non-individualized reparations;
- Individual complaints should continue to await the proceedings in the inter-state case, and possibly also execution of the inter-state judgment;
- Individual complaints proceedings should be based on inter-states judgments, preferably dealt with on the basis of the more efficient well-established case law (WECL) procedure.

3. Dr. Isabella Risini

Dr. Isabella Risini, LL.M.
questions and comments welcome at: isabella.risini@rub.de

Comments on the on the draft CDDH Report of 8 June 2022 on the effective processing and resolution of cases related to inter-State disputes,

8 July 2022

At the outset, I would like to express my gratitude for the possibility to feed my comments and ideas into the work of the DH-SYSC-IV drafting group. I remain open for any further queries or questions.

I welcome the readiness of the CDDH to firmly stand behind the inter-State application in the framework of the European Convention on Human Rights.

The affirmation that the vindication of the "public order of Europe" is at stake in inter-State proceedings is rhetorically appealing. The term which goes back to the *Austria v Italy* case can mean many things to many people – perhaps it could be specified what is intended. In para. 58, the report states that the response to large-scale violations is a responsibility of the Council of Europe as a whole. I welcome that it is clear that the Court deals, in an objective manner, with the legal questions raised, not primarily with the political ones.

The formulation "human rights of its nationals **or** other victims" could be replaced with "human rights of its nationals **and** other victims". This formulation appears at least twice in the document.

With regard to Article 38 ECHR, I welcome that Article 38 ECHR applies to all stages of the proceedings; in order to render the interim phase more effective, it could be added "including in the interim phase". It could be added that the timely collaboration of the High Contracting Parties is of the essence.

The "Conflicts' Unit" in paras. 59 is described in the report, perhaps more detail and clarity would be helpful to gain perspective. Especially the relation of its staff (12 lawyers currently as stated in para. 61 – later on in the same para it states that there are "eight to nine full-time lawyers") especially in comparison to other staff at the Court would provide some perspective. This perspective would help to render transparent how much of the Court's resources are

dedicated to the inter-State proceedings and related individual applications, which make around 15% of the total number of pending individual cases (para. 3). It is not clear from the description whether the related individual applications are also processed within the "Conflicts' Unit".

In para. 3 of the report, the last sentence says "**This** threatens to jeopardise the longer-term effectiveness of the control system of the European Court of Human Rights." I would clarify that it is not the inter-State cases and the related individual cases that are the reason for concern; the root cause for concern is the behaviour of some of the High Contracting Parties and the Russian Federation that triggered the proceedings.

I welcome that is spelled out clearly in para. 7 that one of the aims of inter-State proceedings is to "put and end to them [violations of the Convention]".

I also welcome the firm rejection of more restrictive admissibility criteria for inter-State applications (para. 12).

I welcome the recommendation to clearly communicate how overlapping individual cases are treated. As suggested before, this could also be done on the Court's website, together with the list of inter-State cases. I would welcome if the Council of Europe would offer help with the practical coordination between individual and inter-State applications.

Para. 40, where the report rightfully states that the Court has not carried out fact-finding visits since 1998 contains a unnecessary preclusion of such a possibility. In view of the ongoing war in Ukraine, which is subject to at least one set of inter-State proceedings, the possibility of a delegation of judges visiting the country may seem remote, but as the situation evolves should not be ruled out altogether. The visits carried out in Kiev by heads of States from all over the world shows that also symbolic gestures of solidarity are important in times of crisis. Visits can also take place in order to assess the scale of hardship caused by the Russian actions in Ukraine at a later stage, once the active conflict will have ended.

I welcome, in para. 49, the clear rejection of the idea to request lists of victims at the outset of inter-State proceedings.