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STEERING COMMITTEE FOR HUMAN RIGHTS

(CDDH)

Draft additional elements resulting from the Copenhagen Declaration that should be reflected in the future Interlaken follow-up report

as prepared by the Bureau
at its 101st meeting (Helsinki, 15–17 May 2019)
for consideration and possible provisional adoption by the CDDH
at its 91st meeting (18–21 June 2019)

Note:

Following the High-Level Conference regarding the reform of the Convention system in Copenhagen on 12–13 April 2018, the Ministers' Deputies, at their 1317th meeting on 30 May 2018, invited the CDDH to consider several additional topics in its future *Contribution to the evaluation provided for by the Interlaken Declaration.*

The CDDH, at its 90th meeting on 27–30 November 2018, decided that its Bureau, with the help of the Secretariat, would elaborate a first draft proposal regarding these topics. At its 101st meeting (Helsinki, 15–17 May 2019), the Bureau proceeded to a detailed examination of the manner to reflect these additional elements in the future Interlaken follow-up report. It prepared the present document for consideration by the CDDH at its 91st meeting (18–21 June 2019).

While inviting the CDDH to provisionally adopt this text in June, so that the Secretariat can reflect it in an appropriate way in the draft Interlaken follow-up report that it will prepare during the summer, the Bureau underlined that, in any event, the CDDH should adopt its report entitled *Contribution to the evaluation provided for in the Interlaken Declaration* at its 92nd meeting (November 2019) for transmission to the Committee of Ministers before 31 December 2019.

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INTRODUCTION

1. Following the High-Level Conference regarding the reform of the Convention system in Copenhagen on 12–13 April 2018, the Ministers' Deputies, at their meeting on 30 May 2018,[1] had invited the CDDH to include the following additional elements in its future *Contribution to the evaluation provided for by the Interlaken Declaration*:

(i) a comprehensive analysis of the Court's backlog of cases, identifying and examining the causes of the influx of cases from the States parties in order to identify the most appropriate solutions at the level of the Court and the States parties;

(ii) proposals on how to facilitate the prompt and efficient handling of cases, in particular repetitive cases, which the parties were prepared to settle by means of a friendly settlement or a unilateral declaration;

(iii) proposals on how to handle more effectively cases related to inter-State disputes, as well as individual applications arising from situations of conflict between States, without thereby limiting the jurisdiction of the Court, taking into account the specific features of these categories of cases, *inter alia* regarding the establishment of facts, and;

(iv) questions relating to the situation of judges of the European Court of Human Rights after the end of their mandate, mentioned in paragraphs 154 and 159 of the 2017 CDDH Report on the process of selection and election of judges of the European Court of Human Rights (document CM(2018)18-add1).

2. Having regard to the fact that the budgetary situation does not permit the setting up of another Drafting Group, the CDDH agreed at its 90th meeting that its Bureau, with the help of the Secretariat, would elaborate a first draft. This first draft text should be elaborated notably on the basis of written contributions from the Member States' delegations which were submitted by 22 March 2019 following an explanatory document prepared by the Secretariat.[2] Seven Member States submitted a contribution. The present document contains that first draft text, prepared on the basis of those contributions and of documents provided by the Court's Registry.

3. At its 91st meeting (June 2019) the CDDH is called upon to consider that draft text. It shall then decide whether it is desirable to organise a broader discussion notably on theme (iii), possibly involving experts, for example in the context of the DH-SYSC meeting in October 2019. In any event, the CDDH is called upon to adopt, at its 92nd meeting (November 2019), its *Contribution to the evaluation provided for by the Interlaken Declaration*, which will include the elements concerning the follow-up to the Copenhagen Declaration, for transmission to the Committee of Ministers before the end of 2019.

[1] 1317th meeting of the Deputies, decisions following the 128th Session of the Committee of Ministers held in Helsingør (Denmark) on 17–18 May 2018. Reference documents: CM/PV(2018)128-prov, CM/PV(2018)128-add, CM(2018)OJ-prov5, SG(2018)1, CM/Inf(2018)10, CM/Inf(2018)11, CM(2018)18-add1.

[2] See document CDDH(2018)R90, §§ 26–29.

A. COMPREHENSIVE ANALYSIS OF THE BACKLOG OF CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

I. Background

4. The concern about the growing number of applications brought before the Court and the growing deficit between applications introduced and applications disposed of has been the central focus of the process of the reform of the Convention system from the outset. That situation was considered to cause damage to the effectiveness and credibility of the Convention and its supervisory mechanism. According to the Interlaken Declaration, additional measures were indispensable and urgently required in order to enable the Court to reduce the backlog of cases and to adjudicate new cases within a reasonable time.[3]

5. In the Copenhagen Declaration, it was noted that since the beginning of the Interlaken process, the Court has managed to reduce the number of applications pending before it considerably despite a continuously high number of new applications. However, despite this, the Court's caseload still gave cause for concern.[4]

6. It was in that context that the Copenhagen Conference invited the Committee of Ministers, in consultation with the Court and other stakeholders, to finalise its analysis before the end of 2019 of the prospects of obtaining a balanced case-load, *inter alia*, by conducting a comprehensive analysis of the Court's backlog, identifying and examining the causes of the influx of cases from the States Parties so that the most appropriate solutions may be found at the level of the Court and the States Parties.[5]

7. The CDDH shall base its analysis of the Court's backlog on the comprehensive statistics provided by the Court on its website and at the Court-'s annual press-conference as well as statistical data provided by the Court's Registry specifically for the purposes of the present analysis. It shall further base its analysis on the comments sent by the CDDH members on that issue.[6]

II. Analysis of the statistical data provided by the Court

8. The Court provides extensive statistical information on its internet site,[7] comprising, *inter alia*, statistics on the number of applications allocated to a decision body, of pending applications and of applications decided upon by month, by year or by State. Statistics further show violations by Article and by State in the different years or provide thematic information on particular subject-matters, for instance on the number of interim measures accepted. The Court further provides an *Analysis of statistics* every year, containing an overview of the statistics of the respective year and both general and country-specific information on the development of its case-load,[8] which is released at its annual press conference.

[3] See Interlaken Declaration adopted at the High Level Conference on the Future of the European Court of Human Rights on 19 February 2010, points PP 7-9.
[4] See Copenhagen Declaration adopted at the High Level Conference in Copenhagen on 12 and 13 April 2018, §§ 43-44 and 49.
[5] See Copenhagen Declaration, *ibid.*, § 54 a).
[6] See for the methodology also document CDDH(2018)30; and for a Compilation of the contributions received from the Member States, document CDDH(2019)12.
[7] See https://www.echr.coe.int/Pages/home.aspx?p=reports&c=.
[8] See, for instance, the European Court of Human Rights' Analysis of statistics 2018 on the Court's internet site.

9. Furthermore, as convened in the 90th meeting of the CDDH (27–30 November 2018),[9] the Court's Registry provided the CDDH with a document on "*The development of the Court's case-load over ten years – Statistical data for the CDDH*" in order to allow the CDDH to better identify and examine the causes of the influx of cases from the States Parties.[10]

1. General information

10. As regards the development of the Court's **case-load in respect of the different Member States**, the statistics show that the case-load is not evenly distributed between them. On 31 December 2009, 61.7 % of the total number of applications pending before the Court was lodged against 5 of the 47 Member States. The majority of pending cases were against the Russian Federation (28.1 %), Turkey (11.0 %), Ukraine (8.4 %), Romania (8.2 %) and Italy (6.0 %).[11] That situation had not substantially changed subsequently. On 31 December 2018 68.7 % of the pending applications were lodged against the same 5 of the 47 Member States. The majority of pending cases were against the Russian Federation (20.9 %), Romania (15.1 %), Ukraine (12.9 %), Turkey (12.6 %) and Italy (7.2 %).[12]

11. As for the **number of incoming applications** which have been **allocated** to a judicial formation between 2009 and 2018, these have been varying between 65,800 in 2013 and 40,500 in 2015.[13] There is no absolutely clear trend in the development of the number of incoming applications. The number of applications allocated to a judicial formation has, as a general rule, decreased since 2014 compared to the previous years.[14] A significant number of the applications allocated to a judicial formation each year is clearly identified as inadmissible (between 51% in 2016 and 78 % in 2017).[15]

12. As a result of the entry into force of Protocol No. 14, the constantly evolving working methods and IT tools, the **number of pending applications** has decreased significantly, from 151,600 in 2011 to 56,350 in 2018.[16]

13. As for the **judicial formations** before which applications are pending, while on 31 December 2009 44,400 applications were pending before a Chamber and 74,900 before a Committee or Single Judge,[17] on 31 December 2018 22,250 applications were pending before a Chamber (or Grand Chamber), 29,350 before a Committee and 4,750 before a Single Judge.[18] In particular, the applications allocated to a Single Judge are processed as they come in and now account for a lower percentage of the applications pending before the Court.[19]

14. As for the Court's **total case-load by priority category**,[20] it is recalled at the outset that in June 2009 the Court adopted a priority policy (reviewed in May 2017) with a view to speeding up the processing of the most important cases. It established seven categories of

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[9] See document CDDH(2018)R90, § 27.
[10] See document CDDH(2019)08.
[11] See the European Court of Human Rights' Analysis of Statistics 2009, p. 8.
[12] See the European Court of Human Rights' Analysis of Statistics 2018, p. 8; and the Press Release on the annual press conference of the Court of 24 January 2019.
[13] See document CDDH(2019)08, p. 4.
[14] It has to be borne in mind, however, that the lower number of incoming cases allocated to a judicial formation is partly the result of a new approach to Rule 47 of the Rules of Court, which determines what applicants are required to do for their application to be allocated for judicial decision (see ECHR Analysis of Statistics 2014, p. 4).
[15] See document CDDH(2019)08, p. 4.
[16] See document CDDH(2019)08, p. 4.
[17] See the European Court of Human Rights' Analysis of Statistics 2009, p. 6.
[18] See the European Court of Human Rights' Analysis of Statistics 2018, p. 6.
[19] See document CDDH(2019)08, p. 4.
[20] An explanation of the Court's priority policy can be found on the Court's internet site (http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf).

cases. Cases in priority category I are urgent applications covering in particular risks to life or health of the applicant, cases where the applicant is deprived of his/her liberty as a direct consequence of the alleged violation of his/her Convention rights, other circumstances linked to the personal or family situation of the applicant, particularly where the well-being of a child is at issue, and cases in which interim measures under Rule 39 of the Rules of Court have been ordered. Cases in category II cover applications raising questions capable of having an impact on the effectiveness of the Convention system (in particular a structural or endemic situation that the Court has not yet examined, notably cases subject to the pilot-judgment procedure) or applications raising an important question of general interest (in particular a serious question capable of having major implications for domestic legal systems or for the European system). Category III applications on their face raise as main complaints issues under Articles 2, 3, 4 or 5 § 1 of the Convention ("core rights"), irrespective of whether they are repetitive, and cases which have given rise to direct threats to the physical integrity and dignity of human beings. Category IV comprises potentially well-founded applications based on other Articles. Applications in category V raise issues already dealt with in a pilot/leading judgment ("well-established case-law cases"). Category VI applications are cases identified as giving rise to a problem of admissibility. Category VII finally covers applications which are manifestly inadmissible.

15. On 31 December 2018 1.5% of the total of 56,350 applications pending were in priority category I, 0.4% in category II, 34.8% in category III, 30.9% in category IV, 23.8% in category V and 8.5% in categories VI-VII.[21] As a consequence, the challenge of reducing the backlog of non-repetitive Chamber cases (category IV) and "priority cases" falling in the top three categories (notably category III) remains.[22]

2. Developments regarding the main subject-matters of pending applications

16. An analysis of the subject-matters of the applications pending before the Court discloses that on 1 January 2019 **five subject-matters** alone accounted for 54% of all applications pending before a judicial formation.[23] These subject-matters comprise conditions of detention, non-enforcement of domestic courts' judgments, length of proceedings before the domestic courts, issues linked to two Member States, and the Turkish events of July 2016. On 1 January 2009 these subject-matters (in so far as the events underlying the applications had already occurred) represented 45% of the applications pending before a judicial formation.[24] While the number of applications concerning the length of judicial proceedings or the non-execution of domestic courts' judgments have initially risen and then decreased in the period from 2009 until 2018, the number of applications concerning conditions of detention and that of applications concerning two States has considerably risen in the same period and the events in Turkey in July 2016 have led to a new category of main subject-matters of pending applications.[25]

17. It emerges from these figures that while the solution of some wide-spread problems could be achieved during that period, other systemic problems emerged. Moreover, exceptional **events** such as those **in Turkey in July 2016** – which, on 31 December 2018, represented 6% of the total number of applications pending before a judicial formation – can rapidly have a substantive impact on the Court's case-load.

18. As regards applications concerning **conditions of detention**, it may be noted that the number of applications on this subject-matter rose from 1% in 2010 to 22 % of all

[21] See the European Court of Human Rights' Analysis of Statistics 2018, p. 9.
[22] See the European Court of Human Rights' Analysis of Statistics 2018, p. 5; see also France's contribution in the Compilation of the contributions received from the Member States, document CDDH(2019)12.
[23] In this part, the pending applications (51,600) do not take into account the applications pending before a Single Judge (4,750).
[24] See document CDDH(2019)08, p. 5.
[25] See document CDDH(2019)08, p. 5.

applications pending before the Court in 2019. Furthermore, the statistics show the impact which an effective domestic remedy has on the number of applications pending before the Court: The number of applications concerning conditions of detention has substantially decreased in respect of Italy and Hungary, where effective domestic remedies addressing this issue had been put in place.[26]

19. As for **applications resulting from tensions between two Member States**, these comprise both individual and (some) inter-State applications. The applications relate to events in Abkhazia and South Ossetia (concerning Georgia and the Russian Federation), Karabakh (concerning Armenia and Azerbaijan) and the Donbass region and Crimea (concerning Ukraine and the Russian Federation). The total number of such applications has been rising in the past years. While they represented already 14% of all pending applications on 1 January 2010, they accounted for 17% of the pending applications on 1 January 2019.[27]

20. As regards cases concerning the **non-enforcement of domestic court decisions** the number of pending applications decreased in recent years. While on 1 January 2010 about 17% of pending applications concerned non-enforcement, on 1 January 2019 these cases represented about 6% of pending applications. There has been, on the one hand, a significant decrease in the applications against the Russian Federation following the introduction of a domestic remedy. On the other hand, the number of applications pending against Ukraine has substantially decreased following the strike-out of 12,148 applications by the *Burmych and Others v. Ukraine* judgment.[28] Furthermore, in Italy cases concerning the non-execution of judgments granting compensation for excessive length of proceedings – a domestic remedy introduced by the so-called Pinto law – first accumulated and now decrease as a result of friendly settlements concluded by the parties in a high number of applications. This example shows that the introduction of a domestic compensatory remedy, in order to be effective, must be accompanied by the necessary reforms to prevent the Convention violation in question and must be accompanied by sufficient budgetary funding.[29]

21. Finally, as for pending applications concerning the **length of judicial proceedings**, their number decreased in recent years. While on 1 January 2010 about 14% of all pending applications concerned the length of proceedings, on 1 January 2019 they concerned about 3% of pending applications. In particular, States including Bulgaria, Greece, the Russian Federation and Turkey have seen the number of applications drop once a domestic remedy was put in place. In January 2019, applications concerning the length of proceedings are still significant for two States (Hungary and Italy).[30]

III. The Member States' contributions

22. Six Member States submitted a contribution regarding the analysis of the Court's backlog of cases, the causes of the influx of cases from the States parties and most appropriate solutions at the level of the Court and the States parties (Estonia, France, Georgia, Portugal, the Russian Federation and the United Kingdom).[31]

23. Several States stressed that the Court had taken successful measures to reduce its backlog of cases considerably in the past years.[32] It was noted that the Court had streamlined its procedures and filtered out clearly inadmissible applications, ensured that

[26] See document CDDH(2019)08, pp. 6–7.
[27] See document CDDH(2019)08, p. 7.
[28] *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al, ECHR 2017.
[29] See document CDDH(2019)08, p. 8.
[30] See document CDDH(2019)08, p. 9.
[31] See for these answers the Compilation of the contributions received from the Member States, document CDDH(2019)12.
[32] See document CDDH(2019)12 (Estonia, Portugal, the United Kingdom).

applications raising issues which are the subject of well-established case-law of the Court take less judicial time and had started to apply the immediate simplified (IMSI) communication procedure which allows communicating cases more speedily.[33] One Member State underlined that despite these efforts, there is not yet a sustainable basis for the good functioning of the Court and that more needed to be done by all involved in making the Convention system work.[34]

24. As for the **causes for the influx of cases** from the States parties, several States considered that it was at least in part linked to the **insufficient implementation of the Convention at the national level**, including as regards the execution of judgments[35] and/or the **absence of effective domestic remedies** to redress an alleged violation of the Convention at the national level.[36] One Member State considered that there were several **further reasons** for the Court's backlog, namely the fact that the Court exceeded its authority in providing recommendations for the execution of its judgments without taking features of the national legal system into account; the fact that the Court interpreted the Convention rights too broadly, in breach of the principles of international law; the fact that the Court analysed the evidence submitted before the domestic courts as a court of fourth instance; the fact that the Court did not have transparent and predictable rules for determining the order of examination of cases by it and gave priority to politically motivated cases; and the fact that the Court examined cases dealt with under the simplified procedures more superficially and did not sufficiently reason its judgments, thereby not allowing their proper execution.[37]

25. As regards the **most appropriate solutions** in order to reduce the Court's backlog of cases, it was stressed that in order to reduce the number of new incoming applications, the Member States were called upon to ensure a better implementation of the Convention at the national level, in accordance with the principle of subsidiarity, including as regards the execution of judgments. It was further stressed that this should be furthered by the ratification, by the two States which have not yet done so,[38] of Protocol no. 15 to the Convention.[39]

26. Furthermore, in order to reduce the existing backlog notably of category III priority cases, which comprise a large number of repetitive cases, in addition to the necessary efforts at the national level in order to better implement the Convention in respect of the subject-matter at issue, it was proposed by one State that more resources should be allocated to ensure a dialogue with and technical assistance to the Member States concerned, and in particular high case-count countries, to implement the relevant Court judgments.[40] Another State stressed in respect of repetitive cases resulting from the existence of systemic problems in the legal systems of the Member States and/or the absence of effective domestic remedies, that it was important that the Court upheld its practice of adjourning pending follow-up cases and referring the applicants to a newly created effective domestic remedy once it was put in place.[41]

27. Several States commented in this context also more generally on the **new procedures** introduced more recently within the Court, and notably used in respect of

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[33] See document CDDH(2019)12 (Estonia, United Kingdom). For some concerns regarding the new procedures adopted by the Court see chapter B below.

[34] See document CDDH(2019)12 (United Kingdom).

[35] See document CDDH(2019)12 (France, United Kingdom).

[36] See document CDDH(2019)12 (Portugal, Russian Federation).

[37] See document CDDH(2019)12 (Russian Federation).

[38] See the Website of the Treaty Office for the chart of signatures and ratifications of Protocol No. 15. On 4 June 2019, Bosnia and Herzegovina and Italy had both signed, but not yet ratified that Protocol.

[39] See document CDDH(2019)12 (France, United Kingdom).

[40] See document CDDH(2019)12 (France).

[41] See document CDDH(2019)12 (Russian Federation).

repetitive cases in order to reduce the backlog, in particular the so-called IMSI procedure and the WECL procedure. As regards the IMSI procedure, one State expressed concern that it may lead to a partial reversal of the burden of proof where Governments were asked to submit documents the applicant has not submitted and that there was a risk that cases were communicated that would not have been communicated under the "normal" procedure.[42] Moreover, it had to be evaluated whether efficiency gains at the communication stage were not lost at the judgment stage as a result of an insufficient delimitation of the facts owing to which the parties may submit too complex or broad statement of facts.[43]

28. As regards the WECL procedure, on which some States equally commented, several States stressed the importance of reflecting the facts of the case and the Government's submissions also in judgments given by Committees and to sufficiently take the specific circumstances of the case concerned into account in order not to undermine the clarity of the Court's judgments for the domestic authorities.[44]

29. Two States further considered that a further rationalisation of the existing procedures (IMSI, WECL, broader WECL, fast-track WECL) should be envisaged.[45]

30. As for the backlog of non-priority, non-repetitive, potentially well-founded cases (category IV), which have not recently been a priority for the Court, but include a number of complex cases, one Member State suggested that allocating further resources to the Court and developing new working methods could allow to handle the case-load in this respect.[46]

31. One Member State further submitted that a new alternative dispute resolution mechanism at the European level could be set up, which could further diminish the Court's backlog.[47]

32. Another State considered that in view of the sharp rise in the number of applications linked to conditions of detention in several countries, the reasons therefor should be determined and effective domestic remedies should be identified by the CDDH.[48]

IV. The CDDH's conclusions

33. In the light of the information emanating from an analysis of the statistical material provided by the Court and from the Member States' contributions, the CDDH considers that the following main finding can be made as regards the **causes for the influx of cases** lodged against the different States Parties and the analysis of the resulting backlog of cases pending with the Court.

34. Even if the above statistics show that the number of incoming applications allocated to a judicial formation has generally decreased since 2014, there is no absolutely clear trend in the development of that number. It varied notably as a result both of a new approach to Rule 47 of the Rules of Court (which led to applications being disposed of administratively without being allocated to a judicial formation if the more strictly interpreted formal requirements for lodging an application were not met) and as a result of exceptional events such as the events in Turkey in 2016 (which led to a high number of new applications being lodged within a short period of time).

[42] See document CDDH(2019)12 (Estonia).
[43] See document CDDH(2019)12 (Portugal).
[44] See document CDDH(2019)12 (Estonia, Portugal).
[45] See document CDDH(2019)12 (France, United Kingdom).
[46] See document CDDH(2019)12 (France).
[47] See document CDDH(2019)12 (Georgia).
[48] See document CDDH(2019)12 (Portugal). It may be noted in this context that the Court's Registry, along the same lines, proposed that the CDDH elaborate a Compilation of effective national remedies for complaints about undue conditions of detention in order to assist the Member States in preparing the most appropriate domestic remedy for their country, see document CDDH(2019)08, p. 7.

35. Several persisting causes for the influx of cases can be identified. There is, on the one hand, still a significant number of the applications allocated to a judicial formation each year which is clearly identified as inadmissible (between 51% in 2016 and 78% in 2017). These applications may therefore be seen as disclosing an incorrect assessment by the applicants of the chances of success of their application to the Court. On the other hand, the remaining large number of incoming applications appears potentially well-founded and therefore keeps being allocated each year to Chambers or to Committees (if the subject-matter they concern is already covered by well-established case-law of the Court).

36. The above statistics further disclose that among these potentially well-founded cases, 54% of all applications pending before a judicial formation on 1 January 2019 concerned only five subject-matters. These either concerned systemic problems in a smaller number of Member States (conditions of detention, non-enforcement of domestic courts' judgments and length of proceedings before the domestic courts) or specific events which had resulted in a large number of applications lodged with the Court (cases concerning issues linked to two Member States and the Turkish events of July 2016).

37. As regards the Court's **backlog of cases** resulting from this influx of cases, the above statistics show that the large category of clearly inadmissible cases lodged with the Court now accounts for less than ten per cent of the applications pending before a judicial formation (on 31 December 2018 4,750 applications out of a total of 56,350 applications were pending before a Single Judge). This can be seen as the result of a streamlining of the working methods within the Court in the past years in respect of this category of cases, which are, moreover, processed as they come in. At the same time, on 31 December 2018 29,350 applications were pending before a Committee and 22,250 before a Chamber (or Grand Chamber).

38. As for the proportion of more than 50 per cent of the total number of pending cases which have been allocated to a Committee, the above statistics show that a substantive part of these applications result from systemic problems related to very few subject-matters (currently notably conditions of detention potentially in breach of Article 3 of the Convention) generating a larger number of applications against a relatively small number of Member States.

39. As for the proportion of some 40 per cent of the total number of pending cases which are pending before a Chamber (or Grand Chamber), these cover potentially well-founded applications which are not covered by well-established case-law. This group of cases, which often raise new issues regarding the interpretation and application of the Convention, are not only important for the development of the system of protection of human rights under the Convention system. They are, as a rule, not suitable for grouped or more summary treatment and therefore necessitate considerably more resources if the quality of the judgments and decisions delivered in this group of cases is to be ensured. Reducing the backlog in this group of cases has thus rightly been identified as one of the principal challenges the Convention system is currently facing.

40. It must further be noted in that context that the latter group of applications not covered by well-established case-law could be even larger in the Governments' view, given that they may consider a higher number applications as not being covered by well-established case-law than the Court.

41. As regards the **most appropriate solutions** at the level of the Court and the States parties to tackle the Court's backlog, it is clear that different solutions must be envisaged for the different types of cases, as regards both the judicial formation before which they are pending and the subject-matter they concern.

42. Nevertheless, it has to be welcomed in general that the Court continuously took a number of initiatives during the past years aimed at optimising the procedures before it, which led to a substantive reduction of the backlog. The Court, with the considerable help of IT tools developed by it, streamlined its procedures to filter out clearly inadmissible applications and ensured that applications raising issues which are the subject of well-established case-law of the Court can be dealt with in a grouped manner and take less judicial time. In addition, it started to apply new tools to potentially well-founded cases, notably the immediate simplified (IMSI) communication procedure which allows communicating cases more speedily and has started testing a new non-contentious phase of the proceedings aimed at facilitating friendly settlements. It is important, though, that the parties keep being consulted on the introduction of new procedures applied by the Court, that the parties' rights in the proceedings are not curtailed by these procedures, that in these procedures the quality of the Court's judgments and decisions is maintained and that the usefulness of these procedures in order to attain the aim of a reduction of the backlog of cases is properly evaluated after a certain time.

43. Whereas the backlog of Single-Judge cases pending before the Court no longer constitutes an issue, the burden on the Court resulting from the backlog of applications pending before a Committee should be addressed by all the actors in the Convention system. The Court should, with due regard to the *caveats* expressed above, continue striving to optimise its working methods in order to handle this group of cases raising issues which are already the subject of well-established case-law. The same holds true for the Department for the Execution of Judgments of the Court. Furthermore, both the Court and the Execution Department should strengthen the dialogue with the States Parties in order to find solutions for systemic problems at the national level generating large numbers of repetitive applications, in accordance with the principle of subsidiarity. To that end, further resources should be made available to the Convention system, including means allowing the Execution Department to carry out targeted assistance programmes aimed at helping States Parties to implement Court judgments disclosing systemic or large-scale problems. The States Parties, for their part, should ensure a better implementation of the Convention at the national level, including by a speedy execution of the Court's judgments. They should notably ensure that effective domestic remedies are created rapidly where systemic problems arise.

44. As regards the backlog of potentially well-founded applications not covered by well-established case-law and pending before a Chamber or Grand Chamber, it must be acknowledged that finding procedural and/or group solutions is often not possible in these cases and that, in view also of the complexity of these applications, a rapid decrease of the backlog by an optimisation of the Court's working methods alone cannot be expected. It must further be stressed in that context that the reduction of the backlog may not become an aim in itself. It should neither be achieved to the detriment of the quality of the Court's judgments and decisions nor amount to changing the individual application system "by the backdoor". Therefore, a considerable reduction of the Court's backlog of cases notably in this category can only be achieved by allocating further resources to the Court.

45. The CDDH recalls that contributing to improving the effectiveness of the control mechanism of the Convention and the implementation of the Convention at national and European levels is its permanent priority.[49] It stands ready to assist, within the confines of its mandate and subject to the necessary resources, in the identification and development of measures aimed at reducing the backlog of cases before the Court, and in particular concerning the identification of effective domestic remedies for individuals to complain about an alleged breach of the Convention before the national courts.

[49] See for the terms of reference of the CDDH for the biennium 2018-2019 document CDDH(2018)01.

B. PROMPT AND EFFICIENT HANDLING OF CASES, IN PARTICULAR REPETITIVE CASES PENDING BEFORE THE COURT, BY FRIENDLY SETTLEMENTS OR UNILATERAL DECLARATIONS

I. Background

46. The number of repetitive cases brought before the Court and the best ways to reduce it has been a concern for the stakeholders in the Convention system for a number of years. Initially, as demonstrated by Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, in order to avoid repetitive cases being brought before the Court (and thus reduce the Court's workload) the emphasis was laid on the creation or improvement of domestic remedies at national level for all arguable claims of a violation of a Convention right.[50]

47. As shown in chapter A above, there is still a considerable number of repetitive cases pending (notably in the group of category III priority cases). In the Copenhagen Declaration, the Conference stated that the massive influx of repetitive applications notably arising from the non-execution of pilot judgments can place a significant burden on the Court and thus constituted a challenge to the Convention system.[51] It further invited the Committee of Ministers, in consultation with the Court, and other stakeholders, to finalise its analysis, as envisaged in the Brighton Declaration, before the end of 2019, of the prospects of obtaining a balanced case-load, *inter alia*, by exploring how to facilitate the prompt and effective handling of cases, particularly repetitive cases, that the parties are open to settle through a friendly settlement or a unilateral declaration.[52] While it equally stresses the importance of the States Parties creating and improving effective domestic remedies especially in situations of serious systemic or structural problems,[53] the Copenhagen Declaration thus adds an additional path to explore in resolving this issue.

48. The CDDH shall base its analysis on how to facilitate the handling of, in particular, repetitive cases by friendly settlements or unilateral declarations on statistics and other information available on the development of repetitive cases, on a document entitled *"Encouraging resolution of the Court's proceedings through a dedicated non-contentious phase of the proceedings"*[54] submitted by the Court's Registry as convened in the 90th CDDH meeting,[55] and on contributions submitted by the CDDH members on that topic.[56]

II. Information regarding a new procedure to facilitate friendly settlements provided by the Court

49. In its document *"Encouraging resolution of the Court's proceedings through a dedicated non-contentious phase of the proceedings"*[57] the Court's Registry explained that in order to facilitate the prompt and efficient handling of cases which the parties are prepared to settle by a friendly settlement or unilateral declaration, the Court introduced a new

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[50] See Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, adopted by the Committee of Ministers at its 114th session on 12 May 2004, point II.
[51] See the Copenhagen Declaration, *ibid.*, § 51.
[52] See the Copenhagen Declaration, *ibid.*, § 54 b).
[53] See the Copenhagen Declaration, *ibid.*, § 16 a).
[54] See document CDDH(2019)09.
[55] See document CDDH(2018)R90, § 27.
[56] See for the methodology also document CDDH(2018)30.
[57] See document CDDH(2019)09.

practice from 1 January 2019 involving a dedicated, non-contentious phase in respect of all Contracting States, currently for a one-year test period. The purpose of introducing such a phase, which does not necessitate an amendment of Article 39 of the Convention or Rules 62 and 62A of the Rules of Court, is to facilitate friendly settlements.

50. There will be two distinct phases in the procedure: a 12-week friendly settlement/unilateral declaration phase (non-contentious) and a further 12-week observations phase (contentious).

51. In the non-contentious phase, the Registry, under judicial oversight, will now, as a rule, make a concrete friendly settlement proposal on communication of the application to the respondent Governments in every case (and not, as previously, only in a limited number of cases concerning essentially conditions of detention and length of proceedings). There are, however, specific exceptions to the rule of making a concrete friendly settlement proposal, notably if a case raises novel issues which have never been examined by the Court or cases where for any specific reason it may be inappropriate to propose a friendly settlement. If the Government conclude that there are no grounds to pursue the contentious procedure, they can either conclude a friendly settlement with the applicant or, where the applicant is not inclined to accept the friendly settlement, seek to have the application struck out of the list of cases by introducing a unilateral declaration (UD) reproducing the content of the friendly settlement declaration.

52. If no friendly settlement is concluded or the case not struck off the list following a UD by the Government, the parties are invited to exchange observations in a second, contentious phase.

53. Consequently, the contentious and non-contentious parts of the procedure no longer run in parallel as before.[58] This prevents Governments from having to start drafting, as a precaution, observations and a statement of facts (in the IMSI procedure) at the same time as conducting friendly settlement negotiations. The new procedure thus both ensures that the Government's resources spent on drafting these texts are not wasted in case of a subsequent friendly settlement or UD and make the conclusion of friendly settlements more attractive.

III. The Member States' contributions

54. Six Member States submitted an answer on how to facilitate friendly settlements or unilateral declarations and thus to handle the cases concerned, and in particular repetitive cases, more quickly and effectively (Estonia, France, Georgia, Portugal, the Russian Federation and the United Kingdom).

55. Several Member States explained that a broad recourse to **friendly settlements and unilateral declarations** by the Court in close cooperation with the Member States had proved successful and should be continued.[59] The introduction of a non-contentious phase of the proceedings was welcomed in this context, as it not only gave Governments more time to try to reach a friendly settlement,[60] but generally allowed for greater efficiency[61] and a quicker solution of cases in line with the parties' interests[62]. One Member State stressed,

[58] Under the previous standard procedure, Governments were given 16 weeks to submit both their observations on the admissibility and merits of a case and to inform the Court whether they were prepared to conclude a friendly settlement.
[59] See document CDDH(2019)12 (France, Portugal, Russian Federation, United Kingdom).
[60] See document CDDH(2019)12 (France).
[61] See document CDDH(2019)12 (United Kingdom).
[62] See document CDDH(2019)12 (Portugal).

however, that Governments should not be obliged to discuss settlements if they consider that the Convention had not been breached.[63]

56. Member States mentioned a number of **points** which, in their view, it was important to bear in mind in order for the new procedure, and friendly settlement procedures in general, **to be successful**. While two States stressed the importance of making a concrete friendly settlement proposal including an acceptable amount payable to the applicant in order to facilitate the procedure,[64] one State considered it problematic that the Court's Registry fixed the amount proposed in the context of the friendly settlement procedure based only on the facts of the case as submitted by the applicant in his application[65]. Another Member State argued that the amounts proposed in compensation should not be increased.[66] Several Member States further underlined that Governments should not be asked to undertake measures which, in a democratic society, only the judiciary could take, in particular to order the reopening or the speeding-up of proceedings.[67] Furthermore, the number of communicated applications should still permit the State to examine the respective applications and ensure timely payment of the amounts in question.[68] Finally, one State stressed that the Court had to ensure an equal approach to the acceptance or not of Member States' unilateral declarations in comparable situations.[69]

57. As mentioned above in chapter A, one Member State proposed that a new alternative dispute resolution mechanism at the European level could be set up to which relevant cases could be submitted.[70]

58. Finally, it was submitted that the Court Registry's proposal to create a Working Group to identify best practices for non-contentious settlements and to rationalise the procedures should be considered.[71] More generally, a closer cooperation between the Court's Registry and the Government Agents should be encouraged.[72]

IV. The CDDH's views

59. In the light of the foregoing elements, the CDDH would like to stress at the outset that dispute resolution by friendly settlements is an important part of every judicial system, including the Convention system. It is therefore generally in favour of measures aimed at facilitating friendly settlements, as well as unilateral declarations, in appropriate cases and welcomes the fact that the Court's Registry has taken the initiative to set up and test a new procedure to that end.

60. As regards the specific features and functioning of the new procedure involving a dedicated non-contentious phase of the proceedings, the CDDH follows with interest the application in practice of that procedure. It welcomes that the new procedure allows for more time for the Governments to reach a friendly settlement or to make a unilateral declaration and, if successful, leads to a quicker dispute resolution, in line with the parties' interests. However, in the light of certain hesitations expressed by some Member States notably as regards the number and choice of the cases considered suitable for a friendly settlement and the fixing of the amount payable to the applicant, the CDDH considers it desirable that the Court Registry thoroughly analyses the functioning of the procedure, which has only started

[63] See document CDDH(2019)12 (Estonia).
[64] See document CDDH(2019)12 (France and Portugal).
[65] See document CDDH(2019)12 (Estonia).
[66] See document CDDH(2019)12 (Russian Federation).
[67] See document CDDH(2019)12 (Estonia, Portugal).
[68] See document CDDH(2019)12 (Russian Federation).
[69] See document CDDH(2019)12 (Russian Federation).
[70] See document CDDH(2019)12 (Georgia).
[71] See document CDDH(2019)12 (France).
[72] See document CDDH(2019)12 (France).

some months ago, after the one-year test period, and shares the results of that analysis with the CDDH. It further considers that in the light of that analysis, adjustments, if necessary, should be made to the procedure in close cooperation and dialogue with the parties to the proceedings and, in particular, the Agents of the Government.

C. EFFECTIVE HANDLING OF CASES RELATED TO INTER-STATE DISPUTES

I. Background

61. As shown above in chapter A, the number of inter-State and also individual applications resulting from tensions between two Member States has been rising in recent years. In view of their particular complexity, they constitute another challenge to the Convention system. In the Copenhagen Declaration, the Conference, acknowledging this challenge,[73] invited the Committee of Ministers to finalise its analysis of the prospects of obtaining a balanced case-load also by "*exploring ways to handle more effectively cases related to inter-State disputes, as well as individual applications arising out of situations of inter-State conflict, without thereby limiting the jurisdiction of the Court, taking into consideration the specific features of these categories of cases inter alia regarding the establishment of facts*".[74]

62. Following the mandate given by the Ministers' Deputies, at their 1317th meeting on 30 May 2018 to the CDDH to examine this issue, the participants in the CDDH meetings were invited to comment on this subject. With regard, in particular, to the question of fact-finding, it was suggested that they address, in particular, the **practice of the Court with respect to evidence** (e.g. the required standard ("beyond reasonable doubt"); the burden of proof; the use of presumptions), in particular: (i) a description of the exceptional situations[75] in which the Court itself had to establish the facts instead of the national authorities; (ii) means employed and (iii) difficulties encountered). Moreover, they were invited to comment on the question of fact-finding, in particular the modalities decided by the Court for, *inter alia*, (i) on-site visits; and (ii) the selection and hearing of witnesses.[76] Recent reflections especially at the Seminar on *Evidence before International Courts: Distinct Fora, Similar Approaches?*[77] held in Moscow on 9 October 2018 were equally to be taken into account.

63. The **rules applicable to inter-State cases** partly differ from those applicable to individual applications. The most relevant provisions of the Convention provide:

> **"ARTICLE 33**
> **Inter-State cases**
> Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.
>
> **ARTICLE 34**
> **Individual applications**
> The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

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[73] See the Copenhagen Declaration, *ibid.*, § 45.
[74] See the Copenhagen Declaration, *ibid.*, § 54 c).
[75] Establishment of facts concerning, for example, situations of state of emergency, armed conflict or disputes between an autonomous province and the central government raising the question of the degree of autonomy of the province in relation to control by the State.
[76] See for the methodology document CDDH(2018)30.
[77] A video recording of the speeches given during that Seminar is available on the internet site of the organising International and Comparative Law Research Center in Moscow at http://iclrc.ru/en/events/36.

ARTICLE 35
Admissibility criteria
1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under **Article 34** that
(a) is anonymous; or
(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under **Article 34** if it considers that:
(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings." (*emphasis added*)

"ARTICLE 38
Examination of the case
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."

64. Moreover, both the Convention and the Rules of Court and the Annex to these Rules concerning investigations contain provisions specifically relating to, or particularly relevant, in the context of inter-State cases. These provisions are reproduced in **Appendix I** to the present document. In particular, as for investigative measures, Rule A1 of the Annex to the Rules of Court provides that the Court 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. It may 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. Moreover, it may ask a 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. It may further appoint one or more of the 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.

65. Cases related to inter-State disputes comprise both inter-State applications and individual applications. While the majority of cases arising out of situations of inter-State conflict are individual applications, several inter-State applications have equally been brought before the Court. Since the Court took up its work until May 2019, a total of 24 inter-State applications had been lodged by 12 different Member States[78] against 6 different Member States[79].[80] In particular, since 1 November 1998, when Protocol No. 11 to the Convention entered into force which gave individuals the right to lodge applications directly with the Court themselves, a total of 11 inter-State applications has been lodged by 3 different Member States[81] against 2 different Member States[82]. On 1 January 2019, more than 8,500 individual applications, representing 17 per cent of the total number of

[78] Austria, Cyprus, Denmark, France, Georgia, Greece, Ireland, the Netherlands, Norway, Slovenia, Sweden and Ukraine.
[79] Croatia, Greece, Italy, Russian Federation, Turkey and the United Kingdom.
[80] See the following link to the overview over the inter-State applications brought before the Court on the Court's internet site.
[81] Georgia, Slovenia and Ukraine, see the overview over the inter-State applications brought before the Court on the Court's internet site.
[82] Croatia and the Russian Federation, see *ibid.*

applications pending before the Court, were individual applications arising out of situations of inter-State conflict.[83] The more recent inter-State applications relate to events in Abkhazia and South Ossetia (concerning Georgia and the Russian Federation), Karabakh (concerning Armenia and Azerbaijan) and the Donbass region and Crimea (concerning Ukraine and the Russian Federation).

66. It has been a specific feature of a number of inter-State applications that the national courts had not previously examined the complaints brought before the Court and thus had not established the relevant facts of the case. Therefore, the Court exceptionally had to establish these facts itself. Extracts from the relevant case-law of the Court on fact-finding particularly in inter-State cases have been compiled in **Appendix II** to the present document.

II. The Court's proposals for a more efficient processing of inter-State cases

67. In the context of the discussions on how to handle more effectively cases related to inter-State disputes in the CDDH's follow-up work to the Copenhagen Declaration,[84] the Court provided the CDDH with a redacted version of a report drawn up by the Court's Committee on Working Methods and adopted by the Plenary of the Court on 18 June 2018 on "*Proposals for more efficient processing of inter-State cases*".[85]

68. While inter-State cases may be seen as an essential component of the "collective guarantee" of the rights protected by the Convention, they raise exceptional challenges for the Court as a result of their nature and dimension, in particular when they concern armed conflicts. They often raise complex factual and legal questions and the parties' submissions are usually voluminous, which renders the examination of these cases time-consuming.[86]

69. As for the **contents of an inter-State application**, the Court observed that the formal requirements for lodging an inter-State application laid down in Rule 46 of the Rules of Court were much less strict than those for lodging an individual application in compliance with Rule 47 of the Rules of Court. It considered that these cases could be dealt with more efficiently if its Rules were amended to the effect that parties were requested at the outset to submit translations into one of the official languages of the Council of Europe of all relevant documents to which they refer in their observations.[87]

70. As for the **conduct of the procedure before the Court**, it was noted that the "immediate communication" of inter-State applications to the respondent Government in accordance with Rule 51 § 1 of the Rules of Court, without a summary of the – almost always disputed – facts, helped to deal with these cases more efficiently. Furthermore, having regard to the priority and sensitive nature of inter-State cases, it may speed up the proceedings if the Chamber relinquished jurisdiction in favour of the Grand Chamber as quickly as possible.[88]

71. The **establishment of the facts** has been described by the Court as one of the greatest challenges in inter-State cases. The Court explained that there have usually been no decisions of domestic courts and it therefore acted like a court of first instance in these cases. As regards the rule of exhaustion of domestic remedies, it referred to its case-law in inter-State cases according to which that rule does not in principle apply where "the applicant Government 'complain of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask ... the Court to give a decision on each of the cases put forward as proof or illustrations of that practice' (…). In any event, it does not

[83] See document CDDH(2019)08, p. 7.
[84] See document CDDH(2018)R90, §§ 26–29.
[85] See document CDDH(2019)22.
[86] See document CDDH(2019)22, §§ 3–4 and 25.
[87] See document CDDH(2019)22, §§ 7–10.
[88] See in more detail document CDDH(2019)22, §§ 11–19.

apply 'where an administrative practice, namely, a repetition of acts incompatible with the Convention, and official tolerance by the State, has been shown to exist and is of such a nature as to make proceedings futile or ineffective'".[89]

72. The Court summarised its role in establishing the facts and its criteria for the assessment of evidence as follows:

- In assessing evidence the Court has adopted the standard of proof "beyond reasonable doubt" laid down by it in two inter-State cases (…) and which has since become part of its established case-law;

- 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 unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake;

- 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;

- 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. If the applicant or respondent Governments fail in their duty to provide the Court with all necessary facilities to enable it to establish the facts, it will be for the Court to draw the appropriate conclusions.[90]

73. As regards the different **means to establish the facts of the case**, the Court explained that until now there have always been witness hearings in inter-State cases. While in the cases of *Ireland v. the United Kingdom* and *Cyprus v. Turkey*, for instance, the fact-finding missions by the Commission took place in the countries concerned or in places outside the Court, in *Georgia v. Russia* (I) and (II) the witness hearings took place in Strasbourg on the Court's premises, lasting one and two weeks respectively. The Court stressed that in view of the considerable costs of fact-finding missions in places outside the Court, witness hearings on the Court's premises were a good solution. Moreover, under Article A5 § 6 of the Annex to the Rules of Court, 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.[91]

74. As regards similar applications pending before other international bodies, it must be noted that Article 35 § 2 (b) of the Convention, which provides that the Court must not deal with any individual application where it "has already been submitted to another procedure of international investigation or settlement" does not apply to inter-State cases. The Court should, in its judgment on the inter-State case, therefore remain within the confines of its

[89] *Georgia v. Russia (I)* [GC], no. 13255/07, § 125, ECHR 2014 (extracts); see also Appendix II below.
[90] See *Georgia v. Russia (I)*, cited above, §§ 93–95 with further references (for a full quotation of these paragraphs see Appendix II below); and document CDDH(2019)22, §§ 22–23.
[91] See document CDDH(2019)22, § 24.

jurisdiction and avoid as far as possible encroaching upon that of other international bodies.[92]

75. The Court further noted that the sensitive and political nature of inter-State cases made them both suitable to be resolved by a **friendly settlement** and often for that very nature prevented such a settlement. In the **Article 41 procedure**, it was essential to ask the applicant Government from the outset to submit lists of clearly identifiable individuals, for the benefit of whom just satisfaction was awarded in these cases.[93]

III. The Member States' contributions

76. Three Member States (Cyprus, Georgia and the Russian Federation) provided a reply regarding the substance of the effective handling of cases related to inter-State disputes, including the question of fact-finding.[94] The replies covered both general concerns regarding the procedure in cases related to inter-State disputes and questions regarding the establishment of the facts by the Court in such cases.

1. General questions of procedure

77. First, as to **general questions of procedure in cases related to inter-State disputes**, one State stressed that the CDDH had to remain within the mandate it had been given and therefore exclude any examination of issues which would limit the jurisdiction of the Court.[95]

78. One State considered that there was a **lack of legal certainty in the applicable rules** (notably Articles 33 and 34 of the Convention and Rule 46 of the Rules of Court) regarding the relationship between inter-State and individual applications raising the same issue, which had been the case in all recent inter-State applications lodged with the Court. That State argued that the Convention did not contain any indication that an inter-State application could be lodged for the protection of particular persons with claims on awarding them just satisfaction. It argued that it was problematic that as a result of different admissibility criteria for individual and inter-State applications which are lodged for the protection of individuals (as the requirements in Article 35 §§ 2 and 3 of the Convention do not apply to inter-State applications), the conditions for the protection of the same individual rights were different depending on whether the applicant himself or a State lodged the application.[96]

79. That State considered that, therefore, and in order to avoid a duplication of the processes for the examination of applications, inter-State cases lodged for the protection of the rights of particular persons should **not be accepted for examination** if, in relation to the same events, there are individual applications pending before the Court and there are no obstacles for lodging similar individual applications by other applicants.[97]

80. The same State further argued that, in any event, it should be laid down in the applicable rules that in cases where both inter-State and individual applications had been lodged in respect of the same events, the inter-State application must be examined first as to admissibility and on the merits, while the examination of individual applications, including

[92] See document CDDH(2019)22, §§ 26–27.
[93] See document CDDH(2019)22, §§ 28–31.
[94] See document CDDH(2019)12.
[95] See document CDDH(2019)12 (Georgia).
[96] See document CDDH(2019)12 (Russian Federation).
[97] See document CDDH(2019)12 (Russian Federation).

their communication to the respondent Government, should be **suspended** during that period.[98]

2. The establishment of the facts of the case

81. As regards, second, the issue of the **establishment of the facts of the case** by the Court in cases related to inter-State disputes, it must be noted at the outset that one Member State argued that in view of the fact that there were inter-State cases pending at the moment in which the Court will have to elaborate on its standards for fact-finding, with regard to evidence and the burden of proof (in particular the case of *Georgia v. Russian Federation (II)* [GC], no. 38263/08), the CDDH should not currently address this issue.[99]

82. The practice of the Court with regard to fact-finding under its case-law as it stands was described by one Member State as follows:

> - In the proceedings before the Court, there are no procedural barriers to the **admissibility of evidence** or predetermined formulae for its assessment. The Court adopts the conclusions that are, in its view, supported by the **free evaluation of all facts**, including such inferences as they flow from the facts and the parties' submissions (*Georgia v. Russia (I*), § 94). (…)
>
> - **Proof** may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (*Georgia v. Russia (I)*, § 94).
>
> - The **standard of proof** adopted by the Court when evaluating the available material is proof "beyond reasonable doubt", it being noted that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions (*Cyprus v. Turkey*, § 112). This standard should not however be equated to the standard applied in criminal proceedings in the common law system. It has an independent meaning and content, reflecting the fact that the Court's role is not to rule on criminal guilt or civil liability but on Contracting States' responsibilities under the Convention (*Georgia v. Russia (I)*, § 94).
>
> - As regards the establishment of the existence of **administrative practices**, the Court does not rely on the concept that the burden of proof is borne by one or the other of the two Governments concerned. Rather it examines all the material before it, irrespective of its origin (*Cyprus v. Turkey*, § 113).
>
> - The Court may **draw inferences** from the conduct of the parties in relation to the Court's efforts to obtain evidence (see Rule 44C "the Court may draw such inferences as it deems appropriate", *Ilascu and others v. Moldova and Russia*, § 14).
>
> - It seems that the Court may adopt **investigative measures** and on-the-spot investigations in the absence of clear facts, which are indispensable for the determination of the case (Rule A1(1)), or in order to determine which State has jurisdiction (see *Ilascu and others v. Moldova and Russia*, § 12).
>
> - The essential criterion for **selecting** a particular **witness** is the likely relevance of his or her testimony.[100]

83. The responding Member States mentioned **several difficulties** and concerns related to the establishment of the facts by the Court. Two Member States referred to problems arising from the **lack of cooperation** of the respondent State with the Court in the establishment of the facts of the case.[101] Two States pointed to the fact that the Court in these cases was repeatedly called upon to establish the facts of a case which has not been

[98] See document CDDH(2019)12 (Russian Federation).
[99] See document CDDH(2019)12 (Georgia).
[100] See document CDDH(2019)12 (Cyprus).
[101] See document CDDH(2019)12 (Cyprus and Georgia).

subject to examination by the national courts and in which it therefore had to act, and was confronted with the same difficulties, as a **court of first instance**.[102]

84. A number of **further difficulties** for the Court in establishing the facts in such cases were reported. One State submitted, in particular, that the relevant facts might have taken place years before the hearing before the Court. Difficulties further arose from the fact that the Court did not have direct and detailed knowledge of the conditions obtaining in the region or from the number of alleged violations of the Convention in respect of which the relevant facts had to be established. As for **witnesses**, difficulties arose from the fact that witnesses summoned by the Court, whose testimony was considered highly relevant, failed to appear and the Court did not have the power to compel such witnesses to attend the hearing. With regard to witnesses appearing before the Court, an issue might arise when the Court needed to assess depositions obtained with the help of interpreters. Moreover, there might be witnesses who would need protection.[103]

85. One State voiced further concerns as regards the establishment of facts by the Court in these cases. It argued that the standard of proof "beyond reasonable doubt" applied by the Court even if the case had not been examined by the national courts was not sufficiently rigid. Moreover, there were no clear, precise and predictable criteria on the relevance and the admissibility of evidence. That State further submitted that the Court often went beyond the framework of the evidence submitted by the parties in an inter-State case and took into consideration also material and data obtained independently (including publications in the media and reports of NGOs), notwithstanding its source and without sufficiently examining the reliability of the respective documents. As a result of its free evaluation of evidence, the Court's conclusions could therefore be based on speculations and non-refuted presumptions. That State suggested that criteria be developed to ensure that the Court's conclusions in inter-State applications were based on thoroughly checked, relevant, admissible and undeniable evidence.[104]

IV. The CDDH's view

86. The CDDH considers that inter-State and individual applications resulting from tensions between two Member States, both because of the important number of such cases pending before the Court and because of their particular factual and legal complexity, constitute a considerable challenge to the effectiveness of the Convention system which needs to be addressed. It notes that the Court shares this assessment.

87. At the present stage, in the light of the material before it, the CDDH identifies the following main challenges which are specific to inter-State cases and individual applications resulting from tensions between two Member States. These comprise the proper establishment of the facts notably in situations in which the Court has to act as a court of first instance for lack of a prior examination of the cases concerned by the national courts. Elements to consider in this respect cover, in particular, the challenges related to obtaining the necessary evidence *inter alia* by fact-finding missions and witness hearings, the different sources of information and the assessment of the evidence before the Court.

88. Moreover, the CDDH agrees that the differences in the formal requirements and admissibility criteria of inter-State applications and individual applications concerning the same subject-matter and relating partly to the same individuals might raise an issue.

89. Furthermore, the fact that inter-State and individual applications pending before the Court and cases pending before other international bodies may at least in part concern the

[102] See document CDDH(2019)12 (Cyprus and Russian Federation).
[103] See document CDDH(2019)12 (Cyprus).
[104] See document CDDH(2019)12 (Russian Federation).

same subject-matter and relate to the same individuals may equally pose a risk of double and/or diverging decisions in respect of substantially the same case.

90. The CDDH takes the view that these issues require a more in-depth examination. It therefore considers it useful that the CDDH / DH-SYSC conduct work leading to proposals to ensure the effective processing and resolution of cases relating to inter-State disputes. In its view, this subject-matter should therefore be included in the terms of reference for the CDDH / DH-SYSC for next biennium (2020/2021). Subject to the availability of the necessary resources, a Working Group should be set up to examine this topic; it should also consult the Court on the issues raised in relation to the effective treatment of these cases.

91. While the CDDH finds it useful to build on the experience recently gathered at the Seminar on *Evidence before International Courts: Distinct Fora, Similar Approaches?*[105] held in Moscow on 9 October 2018, it would consider it necessary to further develop the reflections on the main challenges the Convention system in particular is facing. These reflections, to which a conference or seminar organised in cooperation with the CDDH could substantially contribute, should take into account also the experiences made within other international fora.

[105] A video recording of the speeches given during that Seminar is available on the internet site of the organising International and Comparative Law Research Center in Moscow at http://iclrc.ru/en/events/36.

D. THE POST-MANDATE SITUATION OF JUDGES OF THE COURT

I. Background

92. On 22 January 2013 the Parliamentary Assembly of the Council of Europe (PACE) adopted its Resolution 1914 (2013), in which it called on Member States to strengthen legal guarantees of independence of the Court's judges by:

> "a) securing that, after the replacement of a judge on the Court, the former judge be entitled to a similar position, if he or she has not yet reached retirement age;
>
> b) including a judge's term of office at the Court in his or her national employment record in judicial or other occupations;
>
> c) securing that, when the former judge reaches retirement age, he or she is entitled to a pension equivalent to that of judges of the highest courts or that of State agents of a similar position."[106]

93. Following a letter of the Court's President of 22 November 2013 voicing concerns about the post-mandate situation of judges of the Court, the subject was taken up by the Committee of Ministers (CM), which in its decisions adopted on 19 and 20 March 2014 called on the Member States "*to address appropriately the situation of judges of the Court, once their term of office has expired, by seeking to ensure, to the extent possible within the applicable national legislation, that former judges have the opportunity to maintain their career prospects at a level consistent with the office they have exercised.*" The CM also invited the Member States to provide any relevant information on the follow-up given to this decision.[107]

94. In its Resolution 2009 (2014), adopted on 27 June 2014, the PACE stated the following concerning the post-mandate situation of judges of the Court:

> "[…] in so far as the status of judges at the end of their term of office is concerned, to ensure that improvements to the present situation are made at national level. Appropriate measures should be considered by member States to assist former Court judges to find employment upon the expiration of their term of office. These measures may differ depending on the position that the person had occupied before election as a judge to the Court."[108]

95. In 2017 the CM adopted the CDDH Report on the selection and election of judges of the European Court of Human Rights, in which questions relating to the post-mandate situation of judges of the Court were mentioned.[109] It was stated in this report, in particular:

> *"ii) Aspects relating to the situation of judges after the end of their mandate*
>
> *Post-mandate immunity*
>
> 154. According to the Court and in light of Resolution 1914 (2013) of the Parliamentary Assembly, [(...)] it was necessary to explore all possible means to ensure that former judges are protected from the **risk of** disguised **reprisal** they may face after the end of their mandate. The CDDH noted that a diplomatic immunity for life was a too far reaching proposal. However, as noted by the Court, the idea behind this proposal appears to be that former judges should be afforded protection against retaliatory acts that might be taken against them by the domestic authorities through the introduction of a procedural safeguard. In essence, this would mean that it would not be possible to prosecute or subject to legal process a former judge unless the plenary Court was satisfied that

[106] Point 7.6 of the Resolution on "*Ensuring the viability of the Strasbourg Court: structural deficiencies in State Parties*": http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19396&Language=EN.

[107] CM/Del/Dec(2014)1195/4.3. As of January 2018, only 4 states had provided information in response to the Committee of Minister's invitation.

[108] Point 4.3 of the Resolution on "*Reinforcement of the independence of the European Court of Human Rights*", http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21086&lang=en.

[109] CDDH Report on the selection and election of judges of the European Court of Human Rights, document CM(2018)18-add1, §§ 154, 159.

any such action was not related to the exercise of his or her mandate at the Court. The CDDH agreed that the question should be further explored, based on practical experience, so as to ensure that former judges would not be subject to prosecution or other legal process after their mandate that is in practice a response to opinions taken when they served at the Court. This work could lead to a further revision of Resolution (2009)5 of the Committee of Ministers on the status and conditions of service of judges of the European Court of Human Rights.

(…)

Recognition of service as a judge of the Court and post-mandate employment

(…)

156. **The question of recognition of service as a judge is key for the attractiveness of the post** of judge at the Court. As noted by the then President of the Court,[(…)] "it is clear that the most qualified potential candidates, and in particular those who already hold high judicial office in the domestic system, may be deterred by the prospect of uncertainty after a term on the European Court". However, certain contributions received noted that a former judge at the Court would easily find suitable re-employment. This issue is **also** essential **for the independence of the Court** for "where a judge is not provided with any guarantee regarding his or her future employment their independence can be undermined".[(…)] There is a need to guarantee that judges in office do not fear their conditions of return (see also § 154 above).

157. It is recalled that the question of recognition of service as a judge was being discussed by the Committee of Ministers (CM/Del/Dec(2014)1195/4.3), following the concerns voiced by the then President of the Court in his letter of 22 November 2013. The Ministers' Deputies have accordingly called on the States parties to address in an appropriate way the situation of the Court's judges upon the expiry of their term of office, by seeking to ensure that, to the extent possible under the applicable domestic law, former judges have the opportunity to maintain their career prospects at a level consistent with the office they have held. The Ministers' Deputies invited the member States to provide any relevant information on the follow-up given to this decision and decided to resume consideration of this matter before 31 December 2015, especially in the light of the information contained in the comparative survey provided by the Court[(…)] and any other information that member States may provide on the issue.[(…)] To date, four States have provided updated information in response to the Committee of Ministers' invitation.[(…)]

158. The question has also been raised in the CDDH report[(…)] as to whether a national system consisting of automatically nominating a judge of the Court whose term of office has expired for the next vacant position at the Constitutional Court or one of the highest national courts or tribunals could help increase interest among possible candidates.[(…)] It was however noted that, in some States, this is constitutionally impossible. Following the adoption of the CDDH report, it was decided by the Committee of Ministers that the issue would be examined in the context of the follow-up that would be carried out by the CDDH and the DH-SYSC.

159. During the 1st meeting of the Drafting Group, it was decided to consider whether the data in the above-mentioned study of the Court are still valid and update them as appropriate (see also the meeting report, doc. DH-SYSC-I(2016)R1, § 6). With a view to assisting the Drafting Group in its work on that question, the Secretariat prepared a distinct working document (doc. DH-SYSC-I(2017)018) containing three tables[(…)] based on the comparative survey DD(2013)1321 and subsequent follow-up information by member States concerning the recognition of service as a judge of the Court. This document could serve as basis for any follow-up work conducted. This **follow-up work** could be considered **in order to secure an appropriate response by member States to this matter.** Any follow-up to this question could take place within the existing structures, possibly leading to a Committee of Ministers' recommendation. This work should take into account the diversity of legal, constitutional and political systems. In this context and as noted by the Court, consideration could be given to the possibility for the relevant authorities of the Council of Europe to establish sufficiently early communication with the State concerned as regards the future situation of the judge whose term of office at the Court is approaching its end. Consideration could also be given to different ways of using the expertise of former judges."

96. At their meeting on 30 May 2018, the Ministers' Deputies charged the CDDH with examining "*questions relating to the situation of judges of the European Court of Human Rights after the end of their mandate, mentioned in paragraphs 154 and 159 of the 2017 CDDH Report on the process of selection and election of judges of the European Court of Human Rights (document CM(2018)18-add1)*." In the 90th CDDH meeting, the Registry of the Court was invited to submit to the CDDH an updated report on the situation of judges of

the European Court of Human Rights after the end of their mandate for the CDDH's work in this respect.[110] The participants in the CDDH meetings were invited to submit written contributions in this respect also on the basis of the Registry's analysis.[111]

II. Information provided by the Court on the recognition of service in international courts in national legislation

97. The Registry of the Court provided the CDDH with a comprehensive research report on the "*Recognition of service in international courts in national legislation*".[112] The report distinguishes between the situation of holders of judicial office, on the one hand, and public officials and university professors, on the other hand.

1. Holders of judicial office

a) The possibility to interrupt one's national career in order to work at the international level and then regain their previous status

98. Regarding the **possibility for holders of judicial office to interrupt their career in order to work for an international organisation** without terminating their relationship of employment at the national level, the majority of Member States provide for such a possibility.[113] However, there are 14 States in which there are no provisions for allowing a judge to interrupt his/her national career to work in an international organisation and to regain their previous status after the end of their international mandate.[114]

99. Most of the arrangements allowing a judge to interrupt his/her national career are applicable to the election of national judges to the Court. The arrangements can take different forms, such as special or unpaid leave[115], suspension of the mandate[116], missions or secondment[117].

- In *Bulgaria*, for example, judges, prosecutors and investigators are entitled to receive remuneration for participation in European and international programmes and projects by the recent amendment to the Judiciary Act in August 2017.[118]
- In *Finland*, judges may apply for unpaid leave but it is the employing authority which decides whether to grant the leave or not.[119]
- In *Hungary*, national judges are dismissed from service if they work at the international level to perform there judicial or judiciary-related activities. However, they can regain their former positions upon request and the time spent in international institutions counts for their career advancement and public pension rights. Similarly, in *Poland*, national judges are required to resign from their mandate but have the right to return to their previous judicial office after the expiry of their term of office. This does not however necessarily apply to judges of the Constitutional Court, for whom the issue is not regulated.

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[110] Document CDDH(2018)R90, § 27.
[111] See for the methodology document CDDH(2018)30.
[112] Document CDDH(2019)07.
[113] Andorra, Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, North Macedonia, the United Kingdom and Turkey.
[114] Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Cyprus, Georgia, Ireland, Latvia, Moldova, Montenegro, the Netherlands, Russian Federation, San Marino and Ukraine.
[115] Andorra, Austria, Belgium, Bulgaria, Croatia, Denmark, Finland, Germany, Greece, Iceland, Luxembourg, Malta, Norway, Poland Portugal, Spain, Sweden (except for judges of the Supreme Court and the Supreme Administrative Court) and Turkey.
[116] Estonia, the Czech Republic, North Macedonia, Slovakia, Slovenia and the United Kingdom.
[117] France, Monaco, Romania (until 30 June 2019) and Serbia.
[118] Section 195, subsection 2(2) of the Judiciary Act 2007.
[119] Section 23 of the State Public Service Act.

100. However, in some cases it is not possible for national judges to interrupt their career in order to work for an international organisation.

- In the *Czech Republic*, judges other than those of the Constitutional Court may be temporarily allocated or released in order to work at the international level. However, a judge of the Constitutional Court may need to resign in order to accept a position at the international level, as the Constitutional Court Act does not contain any specific provisions concerning a temporary allocation or temporary release of a judge in order to work at the international level. Similar provisions apply to judges in *Austria* and *Poland*.
- In *Sweden*, judges of the Supreme Court and the Supreme Administrative Court cannot obtain a leave of absence for the purpose of working at international level, and thus have to resign. They are not able to regain their previous position after the end of their international mandate.

101. Regarding the **possibility for judges to regain their former or equivalent position** after the end of their international mandate, in several States judges have the right to regain their former post according to the law.[120] In addition, in some States, although there is no explicit legal provision to that effect, judges are or at least appear to be entitled to regain their former judicial office, in some cases upon request.[121] In many States, judges have the right to return to the same service or court, or a different court, even though they may not have the right to the exact same post they held before their international mandate.[122]

- In *Lithuania*, former judges of the ECtHR may be appointed without an exam and selection procedure to the post of a judge in the Supreme Court of Lithuania, the Supreme Administrative Court, the Appeal Court, regional courts, regional administrative courts and district courts.[123]

102. In a few States, there is a maximum limit of six years for the authorised duration of the international mandate of a national judge.[124]

b) The possibility to have the time spent in the international jurisdictions or bodies counted for career advancement purposes or pension rights

103. Regarding **career advancement**, judges' service in the international jurisdictions or bodies is generally expressly recognised in legislation as work which counts for career advancement purposes.[125]

- In *Estonia*, persons who have served as judges in the European Court of Human Rights, the General Court of the European Union or the European Court of Justice for at least three years can be admitted to the Bar Association as a sworn advocate without having to pass an exam or fulfil some other requirements, provided that an application for admission is made within five years from the end of the international mandate.[126]
- In *France*, magistrates who exercised international functions under the "*mise en disponibilité pour convenances personnelles*" procedure do not benefit from career advancement rights, in contrast to magistrates who were appointed to their international functions under other procedures.

104. Nevertheless, several States do not appear to recognise judges' service in international institutions for career advancement purposes, although such service will in practice count as professional experience.[127]

[120] Andorra, Belgium, Bulgaria, Croatia, the Czech Republic (except for judges of the Constitutional Court), Denmark, Greece, Finland, Iceland, Italy, Spain, Serbia, Sweden (except for judges of the Supreme Court and the Supreme Administrative Court) and the United Kingdom.
[121] Austria, Germany, Hungary, Malta, Poland, Romania and Slovenia.
[122] Estonia, France, Lithuania, Liechtenstein, Luxembourg, Monaco, North Macedonia, Portugal, Slovakia, Switzerland and Turkey.
[123] Article 60 of the Law on Courts (as amended in 2013).
[124] Iceland, Greece, Liechtenstein, Romania, Serbia and Switzerland.
[125] Austria, Belgium, Bulgaria, Croatia, Estonia, France (except magistrates under the "mise en disponibilité pour convenances personnelles" procedure), Germany, Hungary, Italy, Liechtenstein, Luxembourg, Monaco, Poland, Portugal, Romania, Slovakia, Spain, Switzerland and Turkey.
[126] Article 26, Section 31 of the Bar Association Act (as amended in 2018).
[127] Andorra, Denmark, Finland, Iceland, Serbia, Slovenia and Sweden.

105. Most of the States which have no specific provisions for interruption of career for service in international courts also do not acknowledge the time spent at the international level for career advancement.[128]

106. Regarding the right to **pension**, many States appear to count international service for national pension purposes without further conditions.[129]

- In *Lithuania*, judges' service in international courts entails a right to the judicial state pension on conditions, including a minimum of five years of service as a judge and residence in Lithuania.[130]

107. In several States, judges appointed or elected to international institutions are entitled to pension provided that contributions are paid to a pension scheme during the international mandate.[131]

108. In some States, no national pension accumulates during a judge's international mandate if he/she benefits from the pension scheme of an international organisation.[132]

- In *Germany*, although international service of judges counts for pension rights, the pension paid by the state may be subject to deduction in case the judge is also entitled to a pension from the international organisation. A lack of transparency in the deduction procedure has however been reported by returning judges of international courts and other officials.

109. In some States, no specific provisions exist concerning the pension rights of judges returning from work in international jurisdictions or bodies.[133] However, in some of these States a right to such pension may nevertheless be agreed upon.[134]

110. Finally, most of the States which have no specific provisions for interruption of career for service in international courts also do not acknowledge the time spent at the international level for pension rights.[135]

- In *Armenia*, *Azerbaijan* and *Moldova,* the period of international judicial service is taken into account for career advancement and/or pension rights, although there are no provisions allowing a judge to interrupt his national career to take up an international post.

2. Other public servants[136] and university professors[137]

111. Most States which allow national judges to interrupt their career in order to work for an international organisation without terminating their relationship of employment at the national level generally also authorise this for public servants such as diplomats, prosecutors

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[128] Albania, Bosnia and Herzegovina, Cyprus, Georgia, Ireland, Latvia, Montenegro, the Netherlands, Russia and San Marino.

[129] Austria, Belgium, the Czech Republic (for temporarily released or allocated judges), Estonia, France (except magistrates under the "*mise en disponibilité pour convenances personnelles*" procedure), Hungary and Spain (for social security).

[130] Articles 1 and 3 under the Law on the Judicial State Pension.

[131] Bulgaria, Croatia, Greece, Italy, Liechtenstein, Malta, Monaco, Portugal, Slovakia, Slovenia and Switzerland.

[132] Denmark, Finland, Germany and Luxembourg.

[133] Andorra, Iceland, North Macedonia, Romania, Serbia and Sweden.

[134] Andorra, Iceland and Sweden.

[135] Albania, Bosnia and Herzegovina, Cyprus, Georgia, Ireland, Latvia, Montenegro, the Netherlands, Russian Federation and San Marino.

[136] Information regarding the situation of public servants was provided with respect to 39 countries to the Court's Registry.

[137] Information regarding the situation of university professors was provided with respect to 22 countries to the Court's Registry.

or civil servants.[138] In addition, some States which do not recognise national judges' work in international organisations nevertheless recognise such work of civil servants.[139]

112. For university professors, only a few States have specific rules concerning the recognition of their service in international courts.[140] Instead, university professors are included in several cases in the regulations concerning civil servants,[141] private (labour) law,[142] university regulations[143] or specific arrangements with the employer.[144]

113. Persons who did not, prior to their mandate at the Court, hold any judicial position at national level do generally not have a right of access to such positions after their international mandate. However, in a small number of States, such a right exists, although in most of these cases the usual appointment procedures are still followed.[145]

III. The Member States' contributions

114. Five Member States sent written contributions concerning the question of the post-mandate situation of judges of the European Court of Human Rights (Estonia, France, Portugal, the Russian Federation and the United Kingdom).[146]

115. All States referred to the conclusions already adopted by the CDDH in its 2017 Report on the process of selection and election of judges of the European Court of Human Rights.[147]

116. One State was of the opinion that the guidance given to the States in the Guidelines on the selection of candidates for the post of judge at the Court[148], setting down a set of reasonable procedural requirements and selection criteria, was sufficient for the time being, and questions on the situation of judges should not be re-opened at this stage.[149]

117. Two States considered that the CDDH and the Court could conduct a more in-depth analysis of the issue of the risk of disguised reprisals or legal proceedings that could be directed against judges of the Court after the end of their mandate by national authorities on the basis of opinions taken when they served at the Court.[150] One State suggested that a reinstatement, at the international level, of the importance of respect of the independence and authority of the judiciary by the national authorities or a revision of Resolution (2009)5 of the Committee of Ministers on the status and conditions of service of judges of the European Court of Human Rights[151] could be considered.[152]

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[138] Andorra, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary (only for public prosecutors), Italy, Liechtenstein, Lithuania, Luxembourg, Monaco, Montenegro, Norway, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland and Turkey.

[139] Armenia, Cyprus, Ireland, Moldova, the Netherlands, Russian Federation, San Marino and Ukraine.

[140] Belgium, Greece, Italy and Romania.

[141] Luxembourg, Portugal, Spain and Turkey.

[142] Armenia, Austria, Croatia, Lithuania, Montenegro and Serbia.

[143] Cyprus and Malta.

[144] Russian Federation, Slovakia and Slovenia.

[145] Lithuania, Ireland and Latvia. Since October 2013, former Lithuanian judges of the Court can be appointed without the usual selection procedure to the national courts of all levels.

[146] See the Compilation of the contributions received from the Member States, document CDDH(2019)12.

[147] CDDH Report on the selection and election of judges of the European Court of Human Rights, document CM(2018)18-add1.

[148] Document CM(2012)40.

[149] See document CDDH(2019)12 (Estonia).

[150] See document CDDH(2019)12 (France, Russian Federation).

[151] See Resolution CM/Res(2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights, a*dopted by the Committee of Ministers on 23 September 2009 at the 1066th meeting of the Ministers' Deputies.*

[152] See document CDDH(2019)12 (United Kingdom).

118. Furthermore, one State deemed it necessary that the question of including the period of their service at the Court in their employment record is further reviewed both at the CDDH level and at the national level by Member States, taking into consideration the specificities of their national legal systems.[153]

119. Moreover, one State expressed support to the conclusion of the CDDH in its 2017 Report dismissing any suggestion to confer upon the judges of the Court a life-long diplomatic status after expiry of their mandate.[154]

IV. CDDH proposals

120. The CDDH considers that the findings it has made notably in §§ 154 and 159 of its 2017 Report on the Selection and election of judges of the European Court of Human Rights still remain valid and that a proper follow-up to the aspects relating to the situation of judges of the Court after the end of their mandate should be ensured.

121. As regards the necessity to protect former judges from the risk of disguised reprisals after the end of their mandate and to prevent, in particular, that they are subject to prosecution or other legal process after their mandate which are in reality a response to opinions taken when they served at the Court, the CDDH stresses that it was important to safeguard the independence of the Court by preventing such reprisals. However, the CDDH does not have before it any material warranting the conclusion that this is a recurrent problem in many Member States. It therefore considers that, instead of a Recommendation by the Committee of Ministers, a Declaration of the latter underlining the importance of preventing disguised reprisals would be suitable to address this issue.

122. As for the question of the recognition of service as a judge of the Court, the CDDH stresses that such recognition was equally important in order to guarantee both the attractiveness of the Court for highly qualified candidates and the independence of the Court, which may be affected if a judge had to fear not finding an adequate post in his country following the expiry of his or her term of office at the Court. The CDDH therefore considers it desirable to reflect this issue in the above-mentioned Declaration of the Committee of Ministers. That Declaration on the situation of judges after the end of their mandate should respect the diversity of the constitutional systems in the Member States and therefore not impose on Member States to guarantee a particular post to a judge of the Court after the end of his or her mandate. However, the importance for Member States to thoroughly examine the situation of judges at the Court in their respective country as regards, in particular, the possibility to interrupt their national career and to regain their former or an equivalent position after the end of their term of office at the Court, and as regards the recognition of the time of service at the Court for career advancement purposes and pension rights could be stressed. Mention could further be made of the good practices in respect of the recognition of service of judges at the Court in other Member States as they emanate from the comprehensive research report on the "*Recognition of service in international courts in national legislation*" provided by the Court's Registry.[155]

[153] See document CDDH(2019)12 (Russian Federation).
[154] See document CDDH(2019)12 (Russian Federation).
[155] Document CDDH(2019)07.

Appendix I

Particular provisions in the Convention and the Rules of Court relevant for inter-State applications

A. The Convention

(…)

ARTICLE 29

Decisions by Chambers on admissibility and merits

1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of **individual** applications submitted under Article 34. The decision on admissibility may be taken separately.

2. A Chamber shall decide on the admissibility and merits of **inter-State** applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

(emphasis added)

B. The Rules of Court

(…)

Title II – Procedure

Chapter I – General Rules

(…)

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.

(…)

Chapter II – Institution of Proceedings

Rule 46 – Contents of an inter-State application

Any Contracting Party or Parties intending to bring a case before the Court under Article 33 of the Convention shall file with the Registry an application setting out

(a) the name of the Contracting Party against which the application is made;

(b) a statement of the facts;

(c) a statement of the alleged violation(s) of the Convention and the relevant arguments;

(d) a statement on compliance with the admissibility criteria (exhaustion of domestic remedies and the six-month rule) laid down in Article 35 § 1 of the Convention;

(e) the object of the application and a general indication of any claims for just satisfaction made under Article 41 of the Convention on behalf of the alleged injured party or parties; and

(f) the name and address of the person or persons appointed as Agent;
and accompanied by
(g) copies of any relevant documents and in particular the decisions, whether judicial or not, relating to the object of the application.

Chapter III – Judge Rapporteurs

Rule 48 – Inter-State applications

1. Where an application is made under Article 33 of the Convention, the Chamber constituted to consider the case shall designate one or more of its judges as Judge Rapporteur(s), who shall submit a report on admissibility when the written observations of the Contracting Parties concerned have been received.
2. The Judge Rapporteur(s) shall submit such reports, drafts and other documents as may assist the Chamber and its President in carrying out their functions.

Rule 50 – Grand Chamber proceedings

Where a case has been submitted to the Grand Chamber either under Article 30 or under Article 43 of the Convention, the President of the Grand Chamber shall designate as Judge Rapporteur(s) one or, in the case of an inter-State application, one or more of its members.

Chapter IV – Proceedings on Admissibility
Inter-State applications

Rule 51 – Assignment of applications and subsequent procedure

1. When an application is made under Article 33 of the Convention, the President of the Court shall immediately give notice of the application to the respondent Contracting Party and shall assign the application to one of the Sections.
2. In accordance with Rule 26 § 1 (a), the judges elected in respect of the applicant and respondent Contracting Parties shall sit as *ex officio* members of the Chamber constituted to consider the case. Rule 30 shall apply if the application has been brought by several Contracting Parties or if applications with the same object brought by several Contracting Parties are being examined jointly under Rule 42.
3. On assignment of the case to a Section, the President of the Section shall constitute the Chamber in accordance with Rule 26 § 1 and shall invite the respondent Contracting Party to submit its observations in writing on the admissibility of the application. The observations so obtained shall be communicated by the Registrar to the applicant Contracting Party, which may submit written observations in reply.
4. Before the ruling on the admissibility of the application is given, the Chamber or its President may decide to invite the Parties to submit further observations in writing.
5. A hearing on the admissibility shall be held if one or more of the Contracting Parties concerned so requests or if the Chamber so decides of its own motion.
6. Before fixing the written and, where appropriate, oral procedure, the President of the Chamber shall consult the Parties.

Chapter V – Proceedings after the Admission of an Application

Rule 58 – Inter-State applications

1. Once the Chamber has decided to admit an application made under Article 33 of the Convention, the President of the Chamber shall, after consulting the Contracting Parties concerned, lay down the time-limits for the filing of written observations on the merits and for the production of any further evidence. The President may however, with the agreement of the Contracting Parties concerned, direct that a written procedure is to be dispensed with.
2. A hearing on the merits shall be held if one or more of the Contracting Parties concerned so requests or if the Chamber so decides of its own motion. The President of the Chamber shall fix the oral procedure.

Annex to the Rules (concerning investigations)

(Inserted by the Court on 7 July 2003)

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.

Appendix II

Extracts from the Court's case-law on fact-finding in inter-State applications

- **States have an obligation to furnish all necessary facilities to the Court for fact-finding investigations and examination of applications**
- **Duty to cooperate with the Court and failure to comply or participate effectively (Rules 44 A-C of the Rules of Court)**

Georgia v. Russian Federation (I)[156]

"99. The Court reiterates the following general principles that it has developed regarding individual applications and 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 *Tanrıkulu 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.)"

"104. The Court reiterates that "in cases in which there are conflicting accounts of the events, the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court. When, as in the instant case, the respondent Government have exclusive access to information capable of corroborating or refuting the applicant [Government]'s allegations, any lack of co-operation by the Government without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant [Government]'s allegations (see *Imakayeva v. Russia*, no. 7615/02, § 111, ECHR 2006-XIII (extracts))."

- **The Court establishes the facts based on the parties' observations and documents submitted by them, witnesses' statements and reports from international governmental and non-governmental organisations**

Georgia v. Russian Federation (I)

"83. In order to establish the facts the Court has based itself on the parties' observations and the many documents submitted by them and on the statements of the witnesses heard in Strasbourg.

84. It has also had regard to the reports by international governmental and non-governmental organisations such as the PACE Monitoring Committee, HRW, the FIDH and the annual report of 2006 of the Human Rights Commissioner of the Russian Federation (Russian Ombudsman). Some of the documents submitted by the applicant Government also appear in these reports."

[156] [GC], Application no. 13255/07, 3 July 2014. This case essentially concerned the alleged existence of an administrative practice involving the arrest, detention and collective expulsion of Georgian nationals from the Russian Federation in the autumn of 2006.

- **Standard of proof "beyond reasonable doubt"**

<u>*Ireland v. United Kingdom*</u>[157]

"161. The Commission based its own conclusions mainly on the evidence of the one hundred witnesses heard in, and on the medical reports relating to, the sixteen "illustrative" cases it had asked the applicant Government to select. The Commission also relied, but to a lesser extent, on the documents and written comments submitted in connection with the "41 cases" and it referred to the numerous "remaining cases" (see paragraph 93 above). As in the "Greek case" (Yearbook of the Convention, 1969, The Greek case, p. 196, para. 30), the standard of proof the Commission adopted when evaluating the material it obtained was proof "beyond reasonable doubt". […] The Court agrees with the Commission's approach regarding the evidence on which to base the decision whether there has been violation of Article 3 (art. 3). To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account."

<u>*Cyprus v. Turkey*</u>[158]

"112. The Court also observes that in its assessment of the evidence in relation to the various complaints declared admissible, the Commission applied the standard of proof "beyond reasonable doubt" as enunciated by the Court in its Ireland v. the United Kingdom judgment of 18 January 1978 (Series A no. 25), it being noted that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (ibid., pp. 64-65, § 161).

113. The Court, for its part, endorses the application of this standard, all the more so since it was first articulated in the context of a previous inter-State case and has, since the date of the adoption of the judgment in that case, become part of the Court's established case-law (for a recent example, see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII). […]"

<u>*Georgia v. Russian Federation (I)*</u>

"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)."

[157] Application no. 5310/71, 18 January 1978. The case concerned a request by Ireland to revise a 1978 judgment and find that men detained by the United Kingdom during Northern Ireland's civil strife suffered torture, not just inhuman and degrading treatment.

[158] [GC], Application no. 25781/94, 10 May 2001. The case relates to the situation that has existed in northern Cyprus since the conduct of military operations there by Turkey in July and August 1974 and the continuing division of the territory of Cyprus.

- **The Court's role is not to rule on criminal guilt or civil liability but on States' responsibilities under the Convention**
- **There are no procedural barriers to the admissibility of evidence or predetermined formulae for the Court's assessment**
- **Proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact**

<u>*Georgia v. Russian Federation (I)*</u>

"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 unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (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)."

- **In establishing the existence of an administrative practice, the Court studies all the material before it, irrespective of its origin, and, if necessary, obtains material *proprio motu***
- **Conduct of the parties in relation to the Court's efforts to obtain evidence may be taken into account**

<u>*Ireland v. the United Kingdom*</u>
"160. In order to satisfy itself as to the existence or not in Northern Ireland of practices contrary to Article 3 (art. 3), the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned. In the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material proprio motu."

<u>*Cyprus v. Turkey*</u>
"113. […] Moreover, as regards the establishment of the existence of administrative practices, the Court does not rely on the concept that the burden of proof is borne by one or the other of the two Governments concerned. Rather, it must examine all the material before it, irrespective of its origin (see the above-mentioned *Ireland v. the United Kingdom* judgment, p. 64 § 160)."

<u>*Georgia v. Russian Federation (I)*</u>

"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*, cited above, ibid.). 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*, cited above, ibid.)."

- **The existence of an administrative practice and the rule of exhaustion of domestic remedies**

Georgia v. Russian Federation (I)

"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, § 19, DR 35, and *Cyprus v. Turkey*, cited above, § 99).

[…]

125. With regard to the rule on exhaustion of domestic remedies, the Court reiterates that, according to its case-law in inter-State cases, the rule does not in principle apply where the applicant Government "complain of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask ... the Court to give a decision on each of the cases put forward as proof or illustrations of that practice" (see *Ireland v. the United Kingdom*, cited above, § 159). In any event, it does not apply "where an administrative practice, namely, a repetition of acts incompatible with the Convention, and official tolerance by the State, has been shown to exist and is of such a nature as to make proceedings futile or ineffective" (see *Ireland v. the United Kingdom*, cited above, ibid; *Akdivar and Others v. Turkey*, 16 September 1996, § 67, *Reports of Judgments and Decisions* 1996-IV; and *Cyprus v. Turkey*, cited above, § 99).

126. However, the question of effectiveness and accessibility of domestic remedies may be regarded as additional evidence of whether or not such a practice exists (see, in particular, *Cyprus v. Turkey*, cited above, § 87)."

- **Assessment of documents classified "secret" as evidence**

Georgia v. Russian Federation (I)

"105. Furthermore, as it has already indicated in cases relating to documents classified "State secret", the respondent Government cannot base themselves on provisions of domestic law to justify their refusal to comply with the Court's request for the production of evidence (see, mutatis mutandis, *Davydov and Others*, cited above, § 170; *Nolan and K. v. Russia*, no. 2512/04, § 56, 12 February 2009; and *Janowiec and Others*, cited above, § 206).

106. Lastly, the Court notes in the instant case that the respondent Government have failed to provide a specific explanation for the secrecy of the circulars in question. It thus has serious doubts as to that classification since even if they were internal documents, in order to be implemented the circulars had to be brought to the attention of a large number of public officials at various administrative levels.

107. The Court reiterates that one of the criteria it has adopted in assessing the secrecy of a document is whether it was known to anyone outside the secret intelligence and the highest State officials (see, mutatis mutandis, *Nolan and K.*, cited above, § 56, and *Janowiec and Others*, cited above, § 206).

108. Even assuming that the respondent Government had legitimate security interests in not disclosing the circulars in question, it should be pointed out that the Court had drawn their attention to the possibilities provided for in Rule 33 § 2 of the Rules of Court of limiting public access (see, mutatis mutandis, *Shamayev and Others v. Georgia and Russia*, no. 36378/02, §§ 15-17, 246 and 362, ECHR 2005-III, where the President of the Chamber had given assurances of confidentiality of certain documents submitted by the Russian Government)."