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STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH)

Encouraging resolution of the Court's non-contentious phase of the proceedings

In the 90th CDDH meeting, the Registry of the Court was invited to submit to the CDDH a document on the new non-contentious stage of the proceedings before the Court for the CDDH's follow-up work to the Copenhagen Declaration. That work shall notably include proposals on how to facilitate the prompt and efficient handling of cases, in particular repetitive cases, which the parties are prepared to settle by means of a friendly settlement or a unilateral declaration (see document CDDH(2018)R90, §§ 26–29).

The present document contains the document sent by the Registry.

February 2019

Encouraging resolution of through a dedicated non-contentious phase of the proceedings

A. Introduction

1. One of the recurring themes in discussions on the future of the Convention system under the Interlaken process has been the idea of shared responsibility for the functioning of that system between the different stakeholders. That notion covers several different aspects, including primarily the duty of States to secure effective implementation of the Convention guarantees at national level in accordance with the principle of subsidiarity. Another important aspect is a sharing of the workload. Thus the Copenhagen Declaration of the IMSI (immediate and simplified communication) initiative, now accepted by the great majority of Governments, entails more extensive input from the Government Agent at the processing stage. The non-contentious resolution of cases is clearly another area where Contracting States could play a greater role, with more frequent recourse to friendly settlements and unilateral declarations. Thus, the Copenhagen Declaration invites the Committee of Ministers, in consultation with the Court, and other stakeholders, to, among other things, explore how to facilitate the prompt and effective handling of cases, particularly repetitive cases, that the parties are open to settle through friendly settlement or unilateral declaration[1].

2. In 2017 the Registry engaged in a broad internal consultation and reflection process. One of the central themes was cooperation with Governments, including how to encourage non-contentious resolution of non-repetitive meritorious cases. Different proposals were made, notably in relation to greater transparency with a view to ensuring that Governments are aware of issues at an early stage.

3. One idea was for the introduction of a dedicated non-contentious phase of the proceedings which would facilitate the conclusion of friendly settlements and ease the workload of both the Registry and Government Agents. This procedure is currently being tested for one year as from 1 January 2019. Firstly, the Registry, acting upon the instructions and/or under the supervision of judges (see the reference to the judicial overview in paragraph 3 below), will make friendly settlement proposals on communication systematically (see below for exceptions) and secondly there will be two distinct phases in the procedure: a friendly settlement/unilateral declaration phase (non-contentious) and an observations phase (contentious).

4. The procedure requires a proactive stance on the part of Section Registrars who must actively engage with Government Agents and ensure that staff working under them follow through with this approach. Secondly, it is important to maintain appropriate judicial oversight, while not affecting the impartiality of possible future contentious proceedings. Thus, while the agreement of the Rapporteur would be necessary, he/she would not be actively involved in the process in such a way as to raise questions of possibly prejudging the outcome of the proceedings. Letters should also specify that the FS proposal is simply

[1]. Copenhagen Declaration, High Level Conference held on 12 and 13 April 2018, at point 54.

what might be considered a basis for reaching an agreement between the parties, should they freely decide to envisage a non-contentious solution of the matter.

B. Current practice

5. Currently, when an application is communicated there are two possible options:

First option: the Registrar/Deputy Registrar proposes to the parties an amount on the basis of which the case could be settled.

Second option: the Government are informed that if they wish to settle the case they can take the initiative and manifest their interest in this regard in a separate letter.

6. The first option is an invitation to the parties, and especially to the Government, to conclude a friendly settlement (FS). In practice, the majority of FS are obtained in this way.

7. However, this option is only used in a limited number of applications, mostly in cases with complaints concerning conditions of detention and length of proceedings[2].

C. The new approach

8. If the aim is to increase the number of FS, then practising the first option (which is currently considered to be an exception) could be expanded to the majority of applications. The table for the application of Article 41 covers all Convention provisions and thus the Registry could easily propose a sum by adapting it to the seriousness of the facts presented by the applicant. That proposal could include the commitment to speed up or re-open the national proceedings or any other commitment which might be prompted by the circumstances of the case (i.e., to provide the applicant with adequate medical care in detention). It goes without saying that by virtue of the judicial oversight (see paragraph 4 above), should the Rapporteur, the national Judge and/or the President prefer to fix a different amount for FS or to formulate the terms of the declarations differently, the Registry would act accordingly.

9. If the Government conclude that there are no grounds for a defence in the contentious procedure, they can choose the non-contentious option, knowing in advance the likely compensation to pay. Furthermore, where the applicant is not inclined to accept the FS, the Government can seek to have the application struck out of the list of cases by introducing a unilateral declaration (UD) reproducing the content of the FS declaration.

10. The new approach will not require amendment of the Rules of Court. Article 39 § 1 of the Convention states that "*At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto*", while the Rules 62 and 62A of the Rules of Court do not contain any provisions precluding systematic formulation of FS proposals[3].

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2. This is explained by the fact that these applications are subject of well-established case-law and the Registry and the Rapporteur are convinced that these complaints are well-founded. This conviction, however, is based solely on the applicant's version of the facts, and the Go the authorities have not committed a violation (e.g. it is not true that the applicant had less than 3 m² personal space or that the prolongation of the proceedings has actually been asked for by the applicant).

3. The relevant parts of the Rules 62 and 62A of Rules of application has been declared admissible, the Registrar, acting on the instructions of the Chamber or its President, shall enter into contact with the parties with a view to securing a friendly settlement of the matter in accordance with Article 39 § 1 of the Convention. The Chamber shall take any steps that appear appropriate to facilitate such a settlement. (a) Where an applicant has refused the terms of a friendly-settlement proposal made pursuant to Rule 62, the Contracting Party concerned may file with the Court a request to strike the application out of the list in accordance with Article 37 § 1 of the Convention. (b) Such request shall be accompanied by a declaration clearly acknowledging that there has been a violation of the Convention in the applicant's case together with an undertaking to pr Rule 62A § 1 and 2): " 1

D. Exceptions to the proposed practice

11. Exceptions to the rule of making a concrete FS proposal are as follows:

- when an application appears to be a "bor
jurisprudence of the Court;
- when an application raises new issues never before examined by the Court;
- when an application is a politically and/or a media sensitive one;
- when it is difficult to fix a FS amount in view of the potential existence of pecuniary damage, the level of which can only be assessed with complex and/or speculative calculations;
- in all other cases where for specific reasons, notably where respect for human rights so requires, the Rapporteur, the President or the Chamber do not wish a concrete FS proposal to be made.

E. Separation of the non-contentious and contentious phases

12. Currently in applications where the FS procedure is not set into motion by the Registry, the FS negotiations and the exchange of observations take place in parallel. The Government are invited to inform the Registry within the same time-limit of their position concerning the FS and to present their observations on the admissibility and merits of an application (and, in the IMSI procedure, also the Statement of Facts). In other words, there is no separation between the non-contentious and contentious procedures.

13. At the same time, these observations (and the Statement of Facts) no longer serve a useful purpose if an FS is concluded, and the work carried out by the Government in drafting them and the administrative work of the Registry in processing the receipt of these submissions and sending them to the applicant is simply wasted. Therefore, in the new procedure these two phases (non-contentious and contentious) will be distinguished more clearly as follows:

- the communication of the application (or part of it), first, to open the FS negotiations (in most of the cases with a proposal for an offer from the Registry);

- and, only if the parties do not agree, the Government and later the applicant are invited to submit observations.

14. To separate the two phases it is necessary to fix two different time-limits:

- one for both parties for the FS negotiations;
- another one for the Government for the submission of their observations[4].

15. The first phase would last 12 weeks, which, in the light of experience, would appear to provide the parties with reasonable time to ref
decision to accept it or not. It would also allow the Government Agents to contact the relevant authorities in order to gather necessary documents/information and to obtain the authorisations which might be needed to conclude a FS.

16. The second time-limit would be fixed for at least an additional 12 weeks (which means in total 8 weeks longer than the time-limit currently fixed for the exchange of the observations).

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to take necessary remedial measures. (c) The filing of a declaration under paragraph 1 (b) of this Rule must be made in public and adversarial proceedings conducted separately from and with due respect for the confidentiality of any friendly-settlement proceedings referred to in Article 39 § 2 of the Convention and Rule 62 § 2. 2. Where exceptional circumstances so justify, a request and accompanying declaration may be filed with the Court even in the absence of a prior attempt to reach a fri

[4]. This practice is already followed in some instances, especially for classic WECL type of cases, where the Registry presents an assessed offer to parties.

17. Although it is true that if no FS is concluded, the conclusion of the contentious phase will be delayed for about two months, the fact remains that in the majority of cases when applications are "ready", it takes a few months or a decision report due to its workload.

18. It may be concluded that the separation between the non-contentious and contentious phases presents more advantages than inconveniences and that in the majority of cases it enables "saving" a significant amount of work carried out by the Registry and especially by the Governments. In this respect, it is worth recalling that with the possible expansion of the IMSI procedure, the work of the Governments at the contentious phase will not be limited to the drafting of the observations on the admissibility and merits of the applications but also to preparing precise and detailed Statements of Facts.

19. Moreover, it appears that the Government Agents themselves have expressed dissatisfaction over setting the same time-limit both for the observations and FS proposals. In point 3.1 of their report following the Prague meeting on 13 October 2017 they indicated as follows (emphasis added): *"When the Court communicates an application under well-established case-law procedure, it* ***may be counterproductive to ask for both observations and position on the possibility of a friendly settlement*** *since writing observations may dissuade national authorities from seriously considering a friendly settlement"*.

20. Fixing the same time-limit for both the observations and FS proposals may result in a situation where even if they strongly wish to reach an easily achievable non-contentious solution, the Agents are constrained, as a precaution, to draft observations in all cases, sometimes even complex and voluminous ones.

F. Implications for the Rules of Court

21. The terms of the Convention and the Rules of Court (see the Rules 62 and 62A partially reproduced above) do not appear to conflict with the temporal distinction between non-contentious and contentious phases which *de facto* makes the former the antecedent of the latter. In the context of discussions on cooperation with the Governments, the idea of "mediation" is evoked on many occasions. In national judicial systems this is often a precondition necessary for introducing the dispute before the courts as it aims precisely to **avoid** the contentious phase.

G. Conclusion

22. This project encourages recourse to non-contentious resolution of cases and is hoped to ease the workload of the Registry and Government Agents. It was presented to the Government Agents at a meeting with them on 26 November 2018, to NGOS on 30 November 2018, and to the Registry staff in December. The procedure outlined will take effect from 1 January 2019 for an initial test period of one year.