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STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH)

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Proposals for a more efficient processing of inter-State cases

Following the 90th CDDH meeting, the Registry of the European Court of Human Rights submitted to the CDDH the present document on a more efficient processing of inter-State cases for the CDDH's follow-up work to the Copenhagen Declaration. That work shall notably include 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 (see document CDDH(2018)R90, §§ 26–29).

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Redacted version of the report adopted by the Plenary of the Court on 18 June 2018

#5573902
5 June 2019

COMMITTEE ON WORKING METHODS

PROPOSALS FOR MORE EFFICIENT PROCESSING OF INTER-STATE CASES

I. Remit

1. In view of the growing number of inter-State cases pending before the Court, the Bureau entrusted the Committee on Working Methods with the task of making proposals to ensure that they are processed more efficiently and within a reasonable time[1].

2. As a general principle, the inter-State application is provided for in the Convention, Article 33, which reads as follows:

> "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."

3. According to certain authors, the inter-State application represented, from the outset, an essential component of the "collective guarantee" of the rights protected by the Convention, and it has had a decisive influence on the very structure of international law[2].

4. In practice, the processing of inter-State cases, as a result of their nature and dimension, raise exceptional challenges for the Court, in particular when they concern armed conflicts, and it is the Court's responsibility to address them by dealing with such cases as efficiently as possible and within a reasonable time.

5. The objective of this reflection document is thus to set out various proposals, taking account of the specific questions raised by the processing of inter-State cases, but also the related individual cases, in the light of the experience in several inter-State cases lodged with the Court.

6. These questions concern in particular:

(a) the content of an inter-State application and the procedure before the Court (II);

(b) the establishment of the facts (III);

[1] A sub-group was set up to look into this question.
[2] See the article by Judge Linos-Alexandre Sicilianos, "The European Court of Human Rights at a Time of Crisis in Europe", pp. 131-133, *European Human Rights Law Review*, 2016, and the decision of the former Commission in *Austria v. Italy*, no. 788/60, 11 January 1961.

(c) the fact that on an external level applications similar to inter-State cases are sometimes pending before other international bodies or that investigations are being pursued by the latter (V);

(d) other procedural and practical aspects (VI).

II. Content of an inter-State application and procedure

A. Content of an inter-State application

7. The relevant provision is Rule 46 of the Rules of Court, which reads as follows:

> Rule 46 – Contents of an inter-State application
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> Current wording:
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> **"**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;
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> (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 [to be deleted]; 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**.**"**

8. **Comment**: the formalities for the lodging of an inter-State application are much less strict than those set out in Rule 47 for individual applications.

9. However, as these cases are brought by States, it is appropriate to request at the outset that translations be submitted of all the relevant documents to which the parties refer in their observations (see in particular Rule 46 (g) above as regards the applicant State) in one of the two official languages of the Court, thus saving both time and resources.

10. Rule 46 (g) could thus be amended accordingly, by asking the Rules Committee to come up with a concrete proposal which would help to determine, in particular, which documents should be translated by the parties. States should certainly be informed that it is not for the Court to carry out this translation work and be warned that it might not be possible to take into consideration any untranslated documents submitted.

B. Procedure before the Court

11. Article 29 § 2 of the Convention reads as follows:

> "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."

12. **Comment**: Article 29 § 2 of the Convention provides that for inter-State applications the rule is that the decision on admissibility must be taken separately and that only in

exceptional cases will the admissibility and merits be dealt with at the same time. Nevertheless, this possibility is not ruled out.

13. This principle is reflected in Rules 51 and 58, which also provide for separate procedures on admissibility and on the merits. Those Rules read as follows:

> Rule 51[3] – Assignment of applications and subsequent procedure
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> "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.
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> 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.
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> 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.
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> 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.
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> 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."
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> Rule 58[4] – 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. "

14. **Comment**: the "immediate communication" of the applicant Government's application to the respondent Government, with the submission of observations as provided for in Rules 51 §§ 1 and 2, is a good thing. A summary of the facts at that stage would moreover not be useful, as almost all the facts are disputed.

15. It should further be noted that inter-State cases often raise important legal questions on admissibility, concerning in particular the exhaustion of domestic remedies or the jurisdiction of the respondent State.

16. If the admissibility questions are closely related to the merits, it may be appropriate to examine them at the same time as the merits. Therefore, a preliminary procedure with an exchange of written observations and a hearing solely on admissibility, followed by

[3] In the Rules of Court, this Rule comes under **Chapter IV – Proceedings on Admissibility**
[4] In the Rules of Court, this Rule comes under **Chapter V** - **Proceedings after the Admission of an Application**

proceedings on the merits with a fresh round of observations and a hearing on the merits, might represent a considerable loss of time.

17. By contrast there may also be situations where it would be preferable to deal with the admissibility questions and the merits separately. In order to be more efficient, it would thus be wise for the Court to remain flexible where it wishes to deal with questions of admissibility and the merits at the same time, taking account in each case of the legal issues raised in terms of admissibility.

18. In order to clarify that the Chamber is not bound by a request from the parties to hold an admissibility hearing, Rule 51 § 5 could be amended accordingly, taking account of Article 29 § 2 of the Convention.

19. In addition, having regard to the priority and sensitive nature of inter-State cases, it may be appropriate for the Chamber to relinquish the case as quickly as possible to the Grand Chamber.

III. Establishment of the facts

A. The Court's methodology

20. One of the greatest challenges in inter-State cases is **the establishment of the facts**. Given the extent of the alleged violations, the Court has usually examined whether the existence of an "**administrative practice**" within the meaning of Convention can be established, the definition of which has most recently been set out in *Georgia v. Russia* (I) ([GC], no. 13255/07, ECHR 2014):

> "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).
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> 123. As to "repetition of acts", the Court describes these as "an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected not to amount to merely isolated incidents or exceptions but to a pattern or system" (see *Ireland v. the United Kingdom*, cited above, § 159, and *Cyprus v. Turkey*, cited above, § 115).
>
> 124. By "official tolerance" is meant that "illegal acts are tolerated in that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied". To this latter element the Commission added that "any action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system" (see *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, cited above, ibid.). In that connection the Court has observed that "it is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected" (see *Ireland v. the United Kingdom*, cited above, § 159)."

There has been a situation where the Court's examination concerned a particular incident (see *Denmark v. Turkey* (no. 34382/97, ECHR 2000-IV).

21. Moreover, there have usually been no decisions of domestic courts and the Court thus acts like a court of first instance. As regards the rule of the **exhaustion of domestic**

remedies, in *Cyprus v. Turkey* ([GC], no. 25781/94, ECHR 2001-IV) the Court examined the existence of effective remedies for each of the alleged violations (§§ 98-102), and in *Georgia v. Russia* (I) it examined this question as additional evidence to ascertain whether or not an administrative practice existed. The relevant passage of the latter judgment reads as follows:

> "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).
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> 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).
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> 127. The Court considers that an examination of this question jointly with the question of the existence of an administrative practice is particularly appropriate in the present case."

22. As regards the Court's role in **establishing the facts and the criteria for the assessment of evidence**, the relevant passage of that same judgment reads as follows:

> "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).
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> 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).
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> 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.)."

It can be noted that in inter-State cases, the parties' observations and annexes may be lengthy[5].

23. Lastly, in order to establish the facts and obtain evidence, the Court often has to request documents or information from the parties under Article 38 of the Convention. The general principles have been set out in particular in the judgment *Janowiec and Others v. Russia* ([GC], nos. 55508/07 and 29520/09, § 202, ECHR 2013), then restated in *Georgia v. Russia* (I) cited above (§ 99):

> "... 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 ..."

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 (see, in particular, *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978, §§ 148 and 161, Series A no. 25, *Janowiec and Others*, cited above, § 216, *Georgia v. Russia* (I), cited above, §§ 109-110, and *Ireland v. the United Kingdom* (revision), no. 5310/71, § 14, ECHR 2018).

B. Witness and expert hearings

24. The holding of witness and expert hearings may also complement the information contained, in particular, in the reports by governmental and non-governmental organisations. The hearing of experts may prove particularly useful. The decision should lie with the relevant formation on the proposal of the Judge Rapporteurs. 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*, 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. This is a good solution, because it is very expensive to arrange travel for delegations of judges and Registry staff. Moreover, it is noteworthy that Article A5 § 6 of the Annex to the Rules of Court (concerning investigations) provides in particular that "[w]here 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".

C. Adjustment of inter-State case processing according to geographical or time criteria or to the legal questions raised

25. The fact that the parties' submissions in inter-State cases are usually voluminous renders the examination of the cases time-consuming. In addition to the complexity of the

[5] In *Georgia v. Russia* (II), the file runs to about 30,000 pages.

facts mentioned above, there are often complex legal questions involved or requests by the parties for the extension of time-limits.

V. Similar applications or investigations pending before other international bodies

26. It should 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.

27. In such situations, the Court should, in its judgment on the inter-State case, remain within the confines of its jurisdiction and as far as possible avoid encroaching upon that of other international bodies.

VI. Other procedural and practical aspects

A. Friendly settlement

28. It may be assumed that inter-State cases are cases which, by their sensitive and political nature, could suitably be resolved by friendly settlement. On the other hand, it is precisely the sensitive and political nature of those cases which often prevents friendly settlement.

B. Article 41 of the Convention

29. Once the judgment on the merits has been delivered, that leaves the question of Article 41, which is applicable in inter-State cases as made clear in *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, ECHR 2014.

30. In order to avoid a situation where the period between the judgment on the merits and the just satisfaction judgment extends to a lengthy period, it is important, in the operative part of the judgment on the merits, to fix a time-limit for the parties' exchange of observations.

31. The Article 41 procedure is normally very complex. It is important to ask the applicant Government from the outset to submit lists of clearly identifiable individuals, because "if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims" (*Cyprus v. Turkey* (just satisfaction), § 46).

VII. Conclusions and recommendations

32. Having regard to the findings of this report, the Committee on Working Methods makes the following main recommendations:

1. Content of an inter-State application and procedure before the Court

- provide for the submission at the outset by the Contracting Parties of translations of the documents to which they refer in their respective observations in one of the Court's two official languages and amend Rule 46 (g) accordingly (paragraphs 10 and 11 of the report);

- considering that the “immediate communication” of an inter-State case, as provided for in Rule 51 §§ 1 and 2, is positive, avoid preparing a summary of the facts at this stage (paragraph 15 of the report);

- ensure that the Court remains flexible if it wishes to handle questions of admissibility and the merits, where they are closely linked, at the same time;

- possibly foresee the rapid relinquishment of the case by the Chamber to the Grand Chamber (paragraph 20 of the report).

2. Establishment of the facts

- hold a witness and expert hearing if possible – preferably in Strasbourg, especially in cases concerning armed conflicts – in order to complement the information in the reports of international organisations (paragraph 25 of the report);

- adjust the processing of inter-State cases, if need be, according to geographical or time criteria or to the legal questions raised, in order to ensure more efficient and speedier processing (paragraph 27 of the report).

3. Similar applications or investigations pending before other international bodies

- take account of the decisions or investigation results of other international bodies (paragraphs 41 to 50 of the report);

- remain within the confines of the Court’s jurisdiction and avoid, as far as possible, encroaching upon that of other international bodies (paragraphs 46 and 50 of the report).

4.°°Other procedural and practical aspects

- Article 41 of the Convention: set a time-limit for the exchange of the parties’ observations in the operative part of the judgment, and ask the applicant Government at the outset to submit clearly identifiable lists of victims (paragraphs 56 and 57 of the report).