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STEERING COMMITTEE FOR HUMAN RIGHTS /
COMITÉ DIRECTEUR POUR LES DROITS DE L'HOMME

(CDDH)

COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS /
COMITÉ D'EXPERTS SUR LE SYSTÈME DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME

(DH-SYSC)

Comments on the *Draft additional elements resulting from the Copenhagen Declaration that should be reflected in the future Interlaken follow-up report* (document CDDH-BU(2019)R101 Addendum) /

Commentaires sur le *Projet d'éléments additionnels résultant de la Déclaration de Copenhague qui devraient être reflétés dans le futur rapport de suivi d'Interlaken* (document CDDH-BU(2019)R101 Addendum)

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Introduction

1. It is recalled that following the High Level Conference on the reform of the Convention system held in Copenhagen on 12-13 April 2018[1], the Ministers' Deputies, at their meeting on 30 May 2018, 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, identifying and examining the causes of the influx of cases from States Parties in order to identify the most appropriate solutions at the level of the Court and States Parties;

   (ii) proposals on how to facilitate the expeditious and efficient handling of cases, in particular repetitive cases, which the parties are ready to settle by friendly settlement or unilateral declaration;

   (iii) proposals on how to deal more effectively with cases relating to inter-State disputes, as well as individual applications arising from situations of conflict between States, though without limiting the jurisdiction of the Court, taking into account the specificities of these categories of cases, in particular with regard to fact-finding;

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

2. To this end, the Bureau of the CDDH adopted at its 101th meeting (15-17 May 2019) a document entitled *Draft additional elements resulting from the Copenhagen Declaration that should be reflected in the future Interlaken follow-up report* (document CDDH-BU(2019)R101 Addendum). At its 91st meeting (18-21 June 2019), the CDDH examined and provisionally adopted the Draft additional elements in so far as they concern the above-mentioned points (i), (ii) and (iv). It further had an in-depth exchange of views in so far as they concern point (iii).

3. Comments could be sent on document CDDH-BU(2019)R101 Addendum to the Secretariat by 15 July 2019, in order for them to be taken into account in the preparation of the *Contribution of the CDDH to the evaluation provided for by the Interlaken Declaration*.[2] The present compilation contains these comments.

* * *

[1] 1317th meeting of the Deputies, decisions following-up 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 for this procedure document CDDH(2019)R91, table of deadlines (p. 4) and §§ 25-28.

Introduction

1. Il est rappelé que, faisant suite à la Conférence de haut niveau sur la réforme du système de la Convention qui s'est tenue à Copenhague les 12–13 avril 2018[1], les Délégués des Ministres, lors de leur réunion du 30 mai 2018, ont invité le CDDH à inclure les éléments supplémentaires suivants dans sa future *Contribution à l'évaluation prévue par la Déclaration d'Interlaken* :

   (i) une analyse exhaustive de l'arriéré de la Cour, en identifiant et en examinant les causes de l'afflux d'affaires en provenance des États parties afin d'identifier les solutions les plus appropriées au niveau de la Cour et des États parties ;

   (ii) des propositions sur la manière de faciliter le traitement rapide et efficace des affaires, en particulier des affaires répétitives, que les parties sont prêtes à régler par un règlement amiable ou par une déclaration unilatérale ;

   (iii) des propositions sur la manière de traiter plus efficacement les affaires relatives aux différends interétatiques, ainsi que les requêtes individuelles découlant de situations de conflit entre États, sans pour autant limiter la compétence de la Cour, en tenant compte des spécificités de ces catégories d'affaires, notamment en matière d'établissement des faits ;

   (iv) les questions relatives à la situation des juges de la Cour européenne des droits de l'homme après la fin de leur mandat, mentionnées aux paragraphes 154 et 159 du Rapport 2017 du CDDH sur le processus de sélection et d'élection des juges de la Cour européenne des droits de l'homme (document CM(2018)18-add1).

2. A cette fin, le Bureau du CDDH a adopté à sa 101e réunion (15-17 mai 2019) un document intitulé *Projet d'éléments additionnels résultant de la Déclaration de Copenhague qui devraient être reflétés dans le futur rapport de suivi d'Interlaken* (document CDDH-BU(2019)R101 Addendum). Lors de sa 91e réunion (18-21 juin 2019), le CDDH a examiné et adopté provisoirement le Projet d'éléments additionnels dans la mesure où il concerne les points (i), (ii) et (iv) mentionnés ci-dessous. Il procède également à un échange de vues approfondi sur le point (iii).

3. Les commentaires ont pu être envoyées sur le document CDDH-BU(2019)R101 Addendum au Secrétariat avant le 15 juillet 2019, pour qu'ils soient pris en compte dans la préparation de la *Contribution du CDDH à l'évaluation prévue par la Déclaration d'Interlaken*.[2] La présente compilation contient ces commentaires.

* * *

[1] 1317e réunion des Délégués, décisions faisant suite à la 128e Session du Comité des Ministres tenue à Helsingør (Danemark) les 17–18 mai 2018. Documents de référence : 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] Voir pour cette procédure document CDDH(2019)R91, tableau d'échéances (p. 4) et §§ 25-28.

Member States / États membres

AZERBAIJAN / AZERBAÏDJAN

Azerbaijan's Comments on 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.

1. As agreed at the Steering Committee for Human Rights in its 91st meeting, the Government of Azerbaijan is pleased to provide certain comments and proposals to the CDDH document on Draft additional elements resulting from the Copenhagen Declaration that should be reflected in the future Interlaken follow-up report prepared by its Bureau.
2. We would like to express our deep gratitude to the Bureau for providing comprehensive and detailed analysis of the elements reflected in this important document.

I. Comprehensive Analysis of the Backlog of Cases before the European Court of Human Rights

3. The issue of the backlog of cases before the Court has always been the crucial matter of concern during the reform process. Immense work has been done in order to reduce the number of applications pending before the Court and we welcome and applaud pursuit of the Court to deal with the issue, as well as, measures adopted at the national level. Both are equally important in order to effectively cope with the backlog problem. As the statistics show, the results appear positive with the number of pending applications reducing significantly over the last decade. Nonetheless, the number persists to be high; the backlog still gives causes for concern and, therefore, there is still much work to be done in order to ensure effective and efficient functioning of the Convention system.
4. With regards to the text we have one remark which was also raised during the 91st meeting of the CDDH. Paragraph 19 states that there are applications resulting from tensions between two Member States, which "relate to events in … Karabakh (concerning Armenia and Azerbaijan)…" We believe that reference to "Karabakh" here is misleading. No such an administrative or territorial division exists. The proper name is "the Nagorno-Karabakh region" as expressed in several resolutions of PACE and UN Security Council Resolutions 822, 853, 874 and 884[1]. Furthermore, the applications before the Court concerning Armenia and

[1] See, for example, Resolution 1416 (2005): "The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference"; Resolution 1553 (2007): "Missing persons in Armenia, Azerbaijan and Georgia from the conflicts over the Nagorno-Karabakh, Abkhazia and South Ossetia regions". UN SC Resolutions referred above use the term "the Nagorno-Karabakh region of Azerbaijani Republic".

Azerbaijan relate not only to the Nagorno-Karabakh region, but also to the occupied surrounding (or adjacent) districts of Azerbaijan.[2]

5. Therefore, for the purposes of clarity we propose to insert "the Nagorno-Karabakh region and the surrounding territories of Azerbaijan" instead of "Karabakh". Alternatively, the expression "the Nagorno-Karabakh region and other adjacent areas of Azerbaijan" is also viable. [3]

II. Prompt and Efficient Handling of Cases, in particular Repetitive Cases Pending before the Court, by Friendly Settlements or Unilateral Declarations

6. The Government of Azerbaijan welcomes the new practice introduced by the Court from 1 January 2019 involving a dedicated, non-contentious phase and a further 12-week observations phase (contentious). The Government believes that this practice is effective in facilitating the prompt and efficient handling of cases and will result in the reduction of the backlog of cases.
7. One of the goals of the new procedure is to prevent the Governments from having to start drafting, as a precaution, observation and a statement of facts at the same time as conducting friendly settlement negotiations. It appears from the Registry's document "Encouraging resolution of the Court's proceedings through a dedicated non-contentious phase of the proceedings" (CDDH(2019)09) that 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. 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.
8. In this context, the recent practice of the Registry with respect to the dedicated non-contentious phase is to send the communication of the application (or part of it), first, to open the FS negotiations and if the parties do not agree, the Government and later the applicant are invited to submit observations.
9. Our point of concern is that there no separate notification is sent by the Registry about the possibility of introducing a UD. It appears that when the friendly

[2] For example, the landmark case of *Chiragov v. Armenia [GC], no. 13216/05, ECHR 2015* concerned applicants from the occupied Azerbaijani district of Lachin which is adjacent to the Nagorno-Karabakh region of Azerbaijan.

[3] The Court in *Chiragov v. Armenia (cited above,* §187) uses the term "the surrounding territories". The wording in the recent PACE resolution 2085 (2016) is slightly different. It states in paragraph 4: "It deplores the fact that the occupation by Armenia of Nagorno-Karabakh and **other adjacent areas of Azerbaijan** creates similar humanitarian and environmental problems for the citizens of Azerbaijan living in the Lower Karabakh valley" (emphasis ours).

settlement proposal is declined by the applicant, the Registry fixes the contentious phase without providing a chance to the Government to introduce a UD within the non-contentious phase. This, in turn, means that the Governments can only introduce a UD during a contentious phase along with its observation, which goes against the goal to prevent the Governments from having to start drafting observation, as a precaution.

10. The Government of Azerbaijan believes that in order to reach the goals envisaged by the introduction of a dedicated, non-contentious phase, it would more effective to receive a separate notification from the Registry during that non-contentious phase about a possibility of introducing a UD, where the applicant is not inclined to accept the friendly settlement.
11. In this connection we also welcome the Registry's proposal to create a Working Group to identify best practices for non-contentious settlements and to rationalise the procedures.

III. Effective Handling of Cases Related to Inter-State Disputes

12. The last sentence of the paragraph 65 is similar to paragraph 19 which was discussed above (paragraphs 4 and 5). Therefore, our comments with regard to paragraph 19 are equally applicable to paragraph 65; thus we propose to change the wording accordingly.

IV. The Post-Mandate Situation of Judges of the Court

13. The Government of Azerbaijan considers that it is fundamental to the independence of the judiciary, and the rule of law, that judges must be able to decide cases without fear of punishment for their legal opinions and rulings. We therefore welcome the CDDH assertion that it is necessary 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.
14. In this connection, we would like to refer to the contribution of Azerbaijan to the Registry's comprehensive research report on the "Recognition of service in international courts in national legislation" (CDDH (2019)07) where it was mentioned that according to recently amended Law on the Constitutional Court the status of the judge elected to the Court is now equal to that of the judge of the Constitutional Court of Azerbaijan.
15. In addition to what was mentioned in the contribution, we believe it is worth mentioning the fact that according to Article 24.2 of the Law on the Constitutional Court, a retired judge of the Constitutional Court cannot be held liable for his activities during the exercise of his powers as the judge of the Constitutional Court, for voting and the opinion expressed during this period, and he cannot be asked for clarification and testimony. In accordance with the recent amendment, this provision equally applies to the judge elected to the Court.

BELGIUM / BELGIQUE

[…]

98. Concernant **la possibilité pour les titulaires de fonctions judiciaires d'interrompre leur carrière pour travailler pour une organisation internationale** sans pour autant mettre un terme à leur relation d'emploi au niveau national, la majorité des Etats Membres offre une telle possibilité[4]. Cependant, il y a 14 Etats dans lesquels il n'y a pas de disposition pour permettre aux juges d'interrompre leur carrière à l'échelle nationale afin de travailler dans une organisation internationale et de regagner ensuite leur fonction antérieure, à la fin de leur mandat international[5].

[…]

[4] Allemagne, Andorre, Autriche, Belgique, Bulgarie, Croatie, Danemark, Estonie, Finlande, France, Grèce, Hongrie, Island, Italie, Liechtenstein, Lituanie, Luxembourg, Malte, Monaco, Norvège, Pologne, Portugal, Roumanie, Serbie, Slovaquie, Slovénie, Espagne, Suède, Suisse, Macédoine du Nord, Royaume-Uni, République Tchèque et Turquie.

[5] Albanie, Arménie, Azerbaïdjan, Bosnie et Herzégovine, Chypre, Géorgie, Irlande, Lettonie, Moldavie, Monténégro, les Pays-Bas, la Fédération de Russie, Saint Marin et Ukraine.

BOSNIA AND HERZEGOVINA / BOSNIE-HERZEGOVINE

MINISTRY OF HUMAN RIGHTS AND REFUGEES
AGENT OF THE COUNCIL OF MINISTERS OF BOSNIA AND HERZEGOVINA BEFORE THE EUROPEAN
COURT OF HUMAN RIGHTS
IN STRASBOURG

No. 11 – Uz - 21/19 - ______ /19

Sarajevo, 15 July 2019

Comment to the document CDDH-BU(2019)R101 Addendum of 12 June 2019

- in relation to the prompt and efficient handling of cases by friendly settlements or unilateral declarations -

The authorities of Bosnia and Herzegovina welcome development of new procedures before the Court with an aim of enhancing the efficiency of the Court and the reduction of the backlog. We recognize that new procedures are needed primarily to address the influx of numerous clearly inadmissible applications. Also, we recognise the need to set up adequate proceedings to handle the applications raising issues which are the subject of well-established case-law of the Court, in a grouped manner which will take less judicial time. In that respect, IMSI and all varieties of WECL procedures have so far proved efficient in handling the applications against the Respondent Bosnia and Herzegovina.

Non-contentions phase of the proceedings was introduced so far in few cases communicated to Bosnia and Herzegovina, which concern novel issues that have never been examined by the Court, but also, some issues that are the subject of well-established case-law of the Court and accordingly supervised by the Committee of Ministers in the execution process for years.

The Court has not proposed any term for friendly settlement in this phase of the non-contentions proceedings. In that situation, as the cases relate to novel issues, or some systemic issues deeply rooted in domestic legal system, domestic authorities had no clear path to follow regarding the required standards which are necessary to fulfil their

obligations under the Convention. Domestic authorities have not proposed any terms at all. Our authorities accordingly do not consider that the obligatory non-contentious proceedings is efficient for the cases revealing novel issues that have not been subject of the well-established case-law in relation to the particular Respondent Party, nor cases raising issues with clear violation of the international human rights standards, which are not suitable for friendly settlement for any other reason. In such situation, additional time have been spent, the capacities and the resources of the Court and the Respondent States have been invested in this phase with no prospect of success.

Belma Skalonjić

Acting Agent of the Council of Ministers of Bosnia and Herzegovina before the European Court of Human Rights
Head of the Office

GEORGIA / GEORGIE

Proposals of Georgia with respect to the draft additional elements resulting from the Copenhagen Declaration that should be reflected in the future Interlaken follow-up report

1. Georgia presents below comments on paragraphs 61-91 of Draft additional elements resulting from the Copenhagen Declaration that should be reflected in the future Interlaken follow-up report (CDDH-BU (2019) R101 Addendum).

2. At the outset, Georgia reiterates that the CDDH shall remain within its mandate and work in line with the wording given by the Copenhagen Declaration. Pursuant to paragraph 54 of the Copenhagen Declaration, the Committee of Ministers was invited, in consultation with the Court, and other stakeholders, to finalize 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: *c) 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.* As a follow-up, the Ministers' Deputies, at their meeting of 30 May 2018, invited the CDDH to include this issue in its future report Contribution to the evaluation provided for by the Interlaken Declaration.

3. Therefore, the working group should not exceed the scope determined by the Copenhagen Declaration and the Ministers' Deputies and should not address the matters that would in any manner limit the Court's jurisdiction, *inter alia* by providing interpretations on the substantive legal issues.

4. As noted by the representatives of Georgia during the 91st CDDH meeting the footnote with the following text should be added in para. 65 of *CDDH-BU (2019) R101 Addendum*: "The terms "Abkhazia" and "South-Ossetia" refer to the regions of Georgia which are beyond de facto control of the Georgian Government". The very proposed wording has already been used by the Court in various previous decisions: Abayeva and Others v. Georgia (applications nos. 52196/08, 52200/08, 49671/08, 46657/08 and 53894/08, decision of 23 March 2010, footnote 1), Khetagurova and Others v. Georgia (applications nos. 43253/08 43254/08 43255/08 and 1548 other applications, decision of 14 December 2010, footnote 1) and Georgia v. Russia (II) (application no. 38638/08, decision of 13 December 2011, footnote 3). CDDH asked the Secretariat to check the wording used by the Court in its decisions and add the footnote accordingly.

5. Paragraph 86 of *CDDH-BU (2019) R101 Addendum* is proposed to be formulated as follows:

> "The CDDH considers that inter-State conflicts and tensions between two Member States, triggering inter-State and individual applications, constitute a considerable challenge to the effectiveness of the Convention system ~~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."

6. In line with the paragraph 54(c) of the Copenhagen Declaration and the Court's proposals submitted to the CDDH for a more efficient processing of inter-State cases (CDDH(2019)22) (hereinafter – Court's proposals), paragraph 86 of *CDDH-BU (2019) R101 Addendum* should underscore that primary challenge for the Court system are the inter-State tensions and armed conflicts rather than applications related to these conflicts. The violations in the context of such tensions/conflicts generate thousands of individual applications, **while the inter-State mechanism under the Convention provides the Court with an effective tool for the reduction of the number of individual applications arising from the same tensions/conflicts.**

7. Paragraphs 88-89 of *CDDH-BU (2019) R101 Addendum* should be deleted as the CDDH has never discussed this issue in depth. Conclusions/positions from the CDDH should be made only after comprehensive examination as suggested in paragraph 90 of this document. Arguments in this regard will be presented below.

A. Inter-State and individual applications related to the same subject matter

8. Paragraphs 88-89 of *CDDH-BU (2019) R101 Addendum* state that the differences in the formal requirements and admissibility criteria of inter-State applications and individual applications concerning the same subject-matter or the same individuals might raise an issue.[6] Furthermore, inter-State and individual applications pending before the Court and cases pending before other international bodies may at least in part concern the same subject-matter and relate to the same individuals. This fact may equally pose a risk of double and/or diverging decisions in respect of substantially the same case.[7]

9. In this respect, it is noteworthy that the Court has not raised these issues in its proposals on more efficient processing of inter-State cases (CDDH(2019)22) with the exception of similar applications pending before other international bodies.[8]

10.We consider that these paragraphs should be deleted as the Court has already adopted a practice of adjourning the examination of the individual applications pending the outcome of parallel inter-State proceedings in order to avoid diverging decisions on the cases involving similar subject matter. This was confirmed in *Berdzenishvili and Others v. Russia*:

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[6] Draft additional elements resulting from the Copenhagen Declaration that should be reflected in the future Interlaken follow-up report, CDDH-BU (2019) R101 Addendum, 12 June 2019, para. 88

[7] Draft additional elements resulting from the Copenhagen Declaration that should be reflected in the future Interlaken follow-up report, CDDH-BU (2019) R101 Addendum, 12 June 2019, para. 89.

[8] Proposals for more efficient processing of inter-State cases, Redacted version of the report adopted by the Plenary of the Court on 18 June 2018.

> *"The applications were allocated to the former Fifth Section of the Court. On 9 February 2010 a Chamber of the former Fifth Section decided to communicate the applications to the Government for information and to adjourn their examination pending the outcome of the proceedings in the inter-State case Georgia v. Russia (I) [GC] (no.13255/07)."*[9]

11. Similarly, in the case of Ukraine v. Russia (re Eastern Ukraine) (application no. 8019/16), the Court **decided to adjourn** some individual application on Eastern Ukraine pending Grand Chamber judgment in related inter-State case:

> *"To save as much time as possible, the Court has decided that any related individual applications which are not declared inadmissible or struck out at the outset will be communicated to the appropriate respondent Government or Governments for observations in parallel with the inter-State case. After receiving the Governments' and applicants' observations in reply, the Court intends to record an adjournment for each case, pending a judgment in the inter-State case, with a view to having the files complete and ready for decision or judgment as soon as possible thereafter."*[10]

12. Parallel inter-State and individual applications related to the same subject matter are not a challenge to the Convention system. In fact, this concern was raised only by the Russian Federation.[11] The Court has not identified this issue in its proposals on more efficient handling of inter-State cases (CDDH(2019)22)[12] since, as described above, the Court has already found a solution by devising a strategy in multiple cases on how to deal with thousands of individual applications that concern the same subject matter as inter-State applications pending before it.

13. In connection with the similar applications or investigations pending before other international bodies, we share the Court's view that it should remain within the confines of its jurisdiction and as far as possible avoid encroaching upon that of other international bodies.[13]

B. Different admissibility criteria of inter-State cases compared to individual applications

14. The scope of an inter-State application is larger than that of an individual application. The Court "has the power to examine the conformity with the Convention of legislative measures and administrative practices as such, and even if there is no identifiable individual victim."[14] In contrast with the individual applicant, who must show a legal interest as a victim, be it direct, indirect, or potential, a State is not required to demonstrate any particular legal interest when it files an application against another

[9] *Berdzenishvili and Others v. Russia*, nos. 14594/07 and 6 others, 20 December 2016, para. 4.
[10] Press Release issued by the Registrar of the Court, ECHR 432 (2018), 17 December 2018.
[11] Compilation of the contributions received from the member states, CDDH (2019)12, 25 April 2019, para. 3.2.
[12] Proposals for more efficient processing of inter-State cases, Redacted version of the report adopted by the Plenary of the Court on 18 June 2018.
[13] Proposals for more efficient processing of inter-State cases, Redacted version of the report adopted by the Plenary of the Court on 18 June 2018, paras. 26-27.
[14] Cyprus v. Turkey (IV), no. 25781/94, Commission report of 4 June 1999, § 313.

State. The application is admissible because of "the general interest attaching to the observance of the Convention".[15] The inter-State application serves to address the protection of "the public order of Europe".[16]

15. In this regard, it should be noted that Article 35 § 1 applies to both individual and inter-State applications, while Article 35 § 2 and § 3 only governs the admissibility of individual applications. The differences in admissibility criteria between inter-State and individual applications do not raise issues to be considered within the CDDH. The Court has not addressed these topics in its proposals on more efficient processing of inter-State cases (CDDH(2019)22). Only the Russian Federation introduced these matters as a challenge before the Convention system.[17] It is important to note that the different admissibility criteria was adopted by the drafters of the Convention to ensure that the Court's caseload would be balanced between individual and inter-State applications. Amendment of these rules will adversely affect the Court's already overburdened caseload as long as limitation of inter-State applications will significantly raise number of individual applications.

C. Reference to the Seminars

16. The CDDH should not build on the experience of one specific seminar as this will undermine the document's credibility and flexibility. Rather, it is recommended that a general reference is made to the conferences or seminars that have dealt with the issues raised in the present document. Accordingly, reference to Seminar entitled *Evidence before International Courts: Distinct Fora, Similar Approaches?* organized by the Russian Federation on 9 October 2018 should be deleted in paragraphs 62 and 91 of *CDDH-BU (2019) R101 Addendum.*

17. The CDDH is meant to reflect neutral views and should not depict as a good practice only views voiced at the conference organized by one member state which is the respondent in most ongoing inter-State cases and therefore has biased opinion on this matter.[18]

18. In case the CDDH decides that the reference should be made to particular seminars/conferences, there are many neutral and impartial seminars and conferences that have examined the issues on the efficient processing of inter-State and conflict-related cases, such as the *Joint Public Seminar of the European Court of Human Rights and Inter-American Court of Human Rights: Optimization of a Methodology in Adjudicating Large-Scale Human Rights Violations* held on 9 November 2018.[19] The Seminar concerned the issues related to adjudication of large-scale human rights violations, including fact-finding, cooperation with the Respondent

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[15] Karner v. Austria, no. 40016/98, Judgment of 24 July 2003, § 24.

[16] Austria v. Italy, no. 788/60, Commission decision of 11 January 1961, p. 138.

[17] Compilation of the contributions received from the member states, Comments of the Russian Government, CDDH (2019)12, 25 April 2019, para. 3.2.

[18] Compilation of the contributions received from the member states, Comments of the Russian Government CDDH (2019)12, 25 April 2019, para. 3.4.

[19] Program of the *Joint Public Seminar of the European Court of Human Rights and Inter-American Court of Human Rights: Optimization of a Methodology in Adjudicating Large-Scale Human Rights Violations* held on 9 November 2018, available at: https://www.echr.coe.int/Documents/Seminar_Inter_American_Court_20181109_ENG.pdf; Video of the Seminar available at: https://vodmanager.coe.int/coe/webcast/coe/2018-11-09-1/lang

Governments, assessment of evidence, relevance of independent third party reports, inter-State cases and etc.

19. Among the speakers of the Seminar were the Judges of the European Court of Human Rights, International Court of Justice, Inter-American Court of Human Right, scholars of international law and university professors, including Eduardo Ferrer Mac-Gregor Poisot (President of Inter-American Court of Human Right), Guido Raimondi (President of the European Court of Human Rights), Antônio Augusto Cançado Trindade (Judge of the International Court of Justice, Former Judge of Inter-American Court of Human Rights), Branko Lubarda (Judge of the ECHR), Krzysztof Wojtyczek (Judge of the ECHR), Pere Pastor Vilanova (Judge of the ECHR) Ganna Yudkivska (Judge of the ECHR), Patricio Pazmiño Freire (Judge of the IACtHR), Ricardo Pérez Manrique (Judge of the IACtHR), Lətif Hüseynov, (Judge of the ECHR), Humberto Sierra Porto (Judge of the IACtHR), Dmitry Dedov (Judge of the ECHR), Mykola Gnatovskyy (President of the Council of Europe Antitorture Committee (CPT)), Dr Marie-Christine Fuchs (Konrad Adenauer Foundation), Anja Seibert-Fohr (Professor at University of Heidelberg), Laurence Burgorgue-Larsen (Professor at Université de Paris 1 Panthéon-Sorbonne).

20. Moreover, the speech delivered by the former President of the ECHR, Dean Spielmann *"The European Court of Human Rights as guarantor of a peaceful public order in Europe"* should be also taken into account on the issues related to the examination of inter-State cases and their significance for upholding a European public order.[20]

D. Establishment of Facts

21. With respect to paragraph 87 of *CDDH-BU (2019) R101 Addendum*, we acknowledge that the proper establishment of facts, especially in the situations when the Court has to act as a court of first instance, is a challenge for inter-State cases. However, at the current stage, there are inter-State applications arising from the situations of armed conflict between the member States that are pending before the Court and in these cases the Court will need to elaborate on numerous legal issues, including fact-finding, burden of proof, etc. In particular, the Court is in the process of deliberation with respect to the inter-State case Georgia v. Russia (II). All the written and oral procedures are finalized and the respective judgment is awaited. Thus, until the Court has to determine its approach on evidentiary standards in inter-State conflicts, inter alia regarding the establishment of facts, it is too early to address the issue within the CDDH. Otherwise, the CDDH will encroach upon the Court's jurisdiction and prejudge the Court's methodology on the establishment of facts. Hence, at this stage, the CDDH should not make conclusions on establishment of facts. In case, it is still decided to address the procedural aspects of this matter, we recommend that paragraph 87 to be amended as follows:

> "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

[20] Available at: https://www.echr.coe.int/Documents/Speech_20141107_Spielmann_GraysInn.pdf

> 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, due to non-cooperation of parties, inter alia by fact-finding missions and witness hearings~~, the different sources of information and the assessment of the evidence before the Court.”~~

22.We believe that the establishment of facts and the criteria for the assessment of evidence, in particular the standard of proof “beyond reasonable doubt” and the free assessment of all evidence without procedural barriers, are substantive legal issues that should not be addressed by the CDDH (not to interfere with the Court’s jurisdiction).

23. The Court has never raised these matters in its proposals (CDDH(2019)22).[21] Only the Russian Federation, which is the respondent in most ongoing inter-State cases, brought this to the attention of the CDDH.[22]

24. The Russian Federation has suggested in its comments that *“the ECHR applies a general and quite unspecific standard ‘beyond reasonable doubt’, that nowadays serves as the basis for its case-law but does not provide for sufficient filter for screening out inadmissible evidence.”*[23] Russia argued that the Court does not check reliability of the respective materials and examines all materials submitted to it and obtained independently, notwithstanding their source, and does not require direct or irrefutable evidence for recognizing the State guilty of violation of the provisions of the Convention. Russia further noted that the *“publications in the media and reports of non-governmental organizations may not be included into the body of evidence in interstate applications by reason of simple trust to such information on the part of the European Court.”*[24]

25. This is an attempt of the Russian Federation to advance its litigation arguments into the CDDH’s report. It needs to be emphasized that the Court already has a well-established case-law on all the matters raised by the Russian Federation, including the standards related to the establishment of facts in inter-State cases, which do not require any further reassessment by a party to the case or by a non-judicial body:

> *“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).*

[21] Proposals for more efficient processing of inter-State cases, Redacted version of the report adopted by the Plenary of the Court on 18 June 2018.
[22] Compilation of the contributions received from the member states, Comments of the Russian Government, CDDH (2019)12, 25 April 2019, para. 3.3.
[23] Compilation of the contributions received from the member states, CDDH (2019)12, 25 April 2019, para. 3.3.
[24] *Ibid.*

*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)."*[25]

26. This approach fully takes into account the complex issues related to obtaining evidence in inter-State cases, which is to a large extent caused by the non-cooperation of the parties, such as the Russian Federation in Georgia v. Russia (I). It is the non-cooperation of States which necessitates the evaluation of evidence from all available sources, including the independent fact-finding reports and media sources, in order to fill the gaps and establish the truth in an interstate case. Therefore, the Court is correct in its determination that if the applicant or respondent fails to provide the Court with all necessary facilities, it will be for the Court to draw the appropriate conclusions.[26]

27. Russia further noted that the Court's findings are based on unchecked and unreliable sources and pointed to the NGO reports in Georgia v. Russia (I) as an illustration of this practice.[27] In this connection, we refer to the judgment of Georgia v. Russia (I), where the Court defined precise criteria for the assessment of reliability and probative value of the reports of the NGOs and came to the conclusion, after careful examination of the materials, that the reports were reliable:

"The respondent Government disputed the probative value of the information contained in the reports by these organisations. However, the Court would reiterate that, being "master of its own procedure and its own rules, it has complete freedom in assessing not only the admissibility and relevance but also the probative value of each item of evidence before it" (see Ireland v. the United Kingdom, cited above, § 210 in fine). It has often attached importance to the

[25] Georgia v. Russia (I), Application no. 13255/07, judgment of 3 July 2014, paras. 93-94.
[26] Georgia v. Russia (I), Application no. 13255/07, judgment of 3 July 2014, paras. 109-110.
[27] Compilation of the contributions received from the member states, CDDH (2019)12, 25 April 2019, para. 3.3.

information contained in recent reports from independent international human-rights-protection associations or governmental sources (see, mutatis mutandis, Saadi v. Italy [GC], no. 37201/06 , § 131, ECHR 2008; NA. v. the United Kingdom, no. 25904/07, § 119, 17 July 2008; M.S.S. v. Belgium and Greece [GC], no. 30696/09, §§ 227 and 255, ECHR 2011; and Hirsi Jamaa and Others v. Italy [GC], no. 27765/09, § 118, ECHR 2012). ***In order to assess the reliability of these reports, the relevant criteria are the authority and reputation of their authors, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and whether they are corroborated by other sources*** *(see, mutatis mutandis, Saadi, cited above, § 143; NA., cited above, § 120; and Sufi and Elmi v. the United Kingdom, nos. 8319/07 and 11449/07, § 230, 28 June 2011).* ***In the instant case, having regard to the thoroughness of the investigations by means of which these reports were compiled and the fact that in respect of the points at issue their conclusions tally and confirm the statements of the Georgian witnesses, the Court does not see any reason to question the reliability of these reports."***[28]

28. Hence, all these arguments that the Russian Federation is raising before the CDDH, have been already examined by the Court and dismissed. Therefore, the matters already resolved by the Court, should not be reexamined by the CDDH.

[28] Georgia v. Russia (I), Application no. 13255/07, judgment of 3 July 2014, paras. 137-139.

NETHERLANDS / LES PAYS-BAS

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)

Comments and drafting proposals by the Netherlands

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

Comments
In this regard, the Netherlands would like to note that the introduction of the Single-Judge formation has been a successful instrument in handling the Court's caseload. While welcoming an expeditious processing of cases, the need was felt by states (and applicants) for more reasoned decisions by the Single Judge and the Court expressed its willingness to do so. So far, it is not clear to us whether the Court has introduced an overall system to provide brief reasons for the inadmissibility decisions of a Single Judge following the Brussels Declaration. Not all Single-Judge decisions are sent to the Government, but we have not been able to detect a consistent practice of brief reasoning. In our opinion the analysis should indicate what the overall practice is in this respect and, if there is a practice of providing (brief) reasons, whether this had any impact on the number of cases dealt with by the Single Judge, and possibly also on the influx of cases that are clearly inadmissible.

Drafting proposal in section MS contributions
One member state would welcome clarity about the Court's practice with regard to providing reasons for inadmissibility decisions of Single Judges and the impact of such practice.

Comments
Paragraph 43 in the draft report (part of CDDH conclusions) seems to put the dialogue with States Parties by the Court and the Execution Department on the same line. The Netherlands is of the opinion that the Court's dialogue with State Parties takes place at the level of the proceedings and the judgment and therefore takes a different form than the dialogue of the Execution Department with the States Parties in the context of the supervision of the Court's judgment. In this respect, the Netherlands wonders what exactly is meant by '*the Court should strengthen the dialogue with the SP in order to find solutions for systemic problems at the national level'*. Should this be seen as a reference to the NCP in which a friendly settlement proposal could contain a commitment to that effect? Would this be a realistic course?
In any case, the Netherlands is of the opinion that in this context the Court and the Execution Department should not be mentioned at the same time in view of their different roles.

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

Comments
The Netherlands welcomes new working methods and procedures that facilitate a prompt and efficient handling of cases. With regard to the dedicated non-contentious phase of the proceedings (NCP) that has been recently introduced and at present is used for almost 80% of the cases the Netherlands would like to make the following comments. For the Netherlands a large majority of cases before the Court concerns asylum and immigration. In practice, it appears to be unclear for the applicant what is expected of him/her in the NCP. This leads to the undesirable situation that the applicant contacts the national immigration authorities to state his/her willingness to reach a friendly settlement. The Netherlands is aware that there will be an evaluation of the NCP after a year, but such undesirable effects need to be corrected as soon as possible. The Netherlands is of the opinion that the NCP as used at present is not very suitable for cases concerning asylum and immigration.

In the new approach with regard to the NCP (described in the Court's contribution - document CDDH(2019)09) under C - and reflected in paragraphs 51 and 52 of the draft report), it is assumed that, in case the friendly settlement proposal is not accepted by the applicant, the content of the proposed FS declaration is reproduced in the unilateral declaration by the government. The Netherlands has some concerns with regard to such an approach since a friendly settlement proposal can introduce terms, which may not be offered once the government acknowledges a violation. Moreover, in view of the requirement of strict confidentiality in respect of the friendly settlement negotiations, it cannot be stated upfront that the unilateral declaration will reproduce the content of the friendly settlement proposal.

The Netherlands also wishes to note that exchanging observations after a UD did not result in the case being struck out of the list, does not seem a very realistic option for the government since by its UD it has already admitted to a violation.

Finally, with regard to the suggestion in the Court's contribution that a friendly settlement proposal could include the commitment to speed up or re-open national proceedings, the Netherlands wishes to emphasize that this can never include judicial proceedings, since it is only for the judiciary to take such a decision.

Drafting proposals in section MS contributions
It was noted that asylum and immigration cases are not very suitable for the dedicated non-contentious phase of the proceedings (NCP). If the Court was to continue the practice in this type of cases, it should rethink its presentation to the parties as soon as possible.

It was also pointed out that it cannot be stated upfront that a unilateral declaration reproduces the content of a friendly settlement proposal, since in a UD the state acknowledges a violation and may therefore not need to offer the same terms of the friendly settlement proposal. Furthermore, such approach runs counter to the requirement of strict confidentiality regarding friendly settlement negotiations.

With regard to possible commitments by the government to speed up or re-open national proceedings, it was noted this can only concern proceedings within the government's sphere of competence and therefore could never include judicial proceedings.

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

Comments

The issue of post-mandate situation of judges has been addressed on several occasions, most recently in the CDDH report on the selection and election of judges of the European Court of Human Rights. The Netherlands considers it vital that judges can do their work at the Court without fear of reprisals in their national states at the end of their mandate. Independence of the judiciary is one of the most fundamental principles of the rule of law. In the Netherlands there is no legislation guaranteeing the return of judges to their previous or to a similar post after having served at the Court, but in practice there are no problems for former Court judges to continue their career in the Netherlands.* Given the studies already done in this respect, the Netherlands does not deem further exploration of this issue necessary. However, if serious cases of reprisals occur, concern should be raised through appropriate means, such as statements by the Committee of the Ministers. To draw specific attention to the post mandate situation of judges of the Court in general it would be possible to address this by underlining the independence of the judiciary. In this regard, the Netherlands supports the CDDH proposal for a Declaration by the Committee of Ministers.

Drafting Proposal in section MS contributions
It was also noted that given the recent studies already done in respect of the post-mandate situation of judges, further exploration is not deemed necessary. If serious cases of reprisals occur, concern could be raised through appropriate means, such as statements by the Committee of the Ministers. Specific attention to the post-mandate situation of judges of the Court in general could addressed in a more general statement underlining the independence of the judiciary.

*Note for the Secretariat: with regard to document CDDH (2019)07 *Recognition of service in international courts in national legislation*, the Netherlands kindly requests to replace its contribution by a corrected version that is sent together with the present document.

RUSSIAN FEDERATION / FEDERATION DE RUSSIE

МИНИСТЕРСТВО ЮСТИЦИИ РОССИЙСКОЙ ФЕДЕРАЦИИ (МИНЮСТ РОССИИ)

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10.07.2019 № 10-1964-19

На № ____________ от ______________

SECRETARIAT

HUMAN RIGHTS INTERGOVERNMENTAL COOPERATION DIVISION

DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW – DGI

Dear Sir or Madam,

Please find attached written comments of the Russian Government on the document, concerning effective handling of cases related to inter-state disputes.

Attachment: on 18 pp.

Yours faithfully,

Head of the Office of the Representative of the Russian Federation at the European Court of Human Rights – Deputy Minister of Justice of the Russian Federation

Andrey Fedorov

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,[1] 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*".[2]

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[3] 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.[4] Recent reflections especially at the Seminar on *Evidence before International Courts: Distinct Fora, Similar Approaches?* [5] held in Moscow on 9 October 2018 were equally to be taken into account.

The examination of the correlation between individual applications and interstate applications lodged on behalf of individuals shall be based on the consistent position that the right to individual application is a cornerstone of the Convention system and the collective guarantee tool[6]. These approaches have been set forth in judgments of the European Court of Human Rights[7], documents of the Committee of Ministers of

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[1] See the Copenhagen Declaration, *ibid.*, § 45.
[2] See the Copenhagen Declaration, *ibid.*, § 54 c).
[3] 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.
[4] See for the methodology document CDDH(2018)30.
[5] 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.
[6] **See paragraph 1 of the memorandum of the Court's President concerning the preparation for the Interlaken Conference in 2009.**

[7] ***See Mamatkulov and Askarov v. Turkey, § 102 and Mukhitdinov v. Russia, § 91.***

the Council of Europe[8], as well as political documents adopted under the Interlaken proceedings, including the Copenhagen Declaration[9].

However, the Convention does not contain regulations that would settle the issues of correlation of such interstate case to individual applications raising the same issue that had been raised in the interstate case.

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.
>
> **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*)

Thus, the Convention provides for significantly different admissibility criteria for imdividual and interstate applications lodged on behalf of individuals and with respect to the same events.

The Convention contains neither provisions pointing to the fact that an interstate case may be initiated with the aim to protect the rights of particular persons and be accompanies with claims for compensation, nor stipulating the procedure for lodging

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[8] **See report on securing the long-term effectiveness of the system of the ECHR, § 42(129the session of the CMCE, Helsinki 2019), report on securing the long-term effectiveness of the supervisory mechanism of the ECHR, § 56 (128th session of the CMCE, Elsinore 2018).**

[9] **See Copenhagen Declaration, § 1, Interlaken Declaration, § 1, Preamble of the Brussels Declaration, Brighton Declaration, § 2, Izmir Declaration, § 1.**

and examination of such interstate applications. At the same time, Rule 46 of the Rules of the European Court, approved by the Court itself without the involvement of the Member States, provides that an interstate application, along with statement of facts and list of the violated Convention provisions, should, inter alia, state the subject of the application and general description of any claims for just satisfaction on behalf of an alleged victim.
Thus, the Rules establish a new provision and allow an interstate application to be lodged on behalf of victims and be accompanied with claims for just satisfaction.

> **"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[10] against 6 different Member States[11].[12] 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[13] against 2 different Member States[14]. On 1 January 2019, more than 8,500 individual applications, representing 17 per cent of the total number of applications pending before the Court, were individual applications arising out of situations of inter-State conflict.[15] 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 ***act***

[10] Austria, Cyprus, Denmark, France, Georgia, Greece, Ireland, the Netherlands, Norway, Slovenia, Sweden and Ukraine.
[11] Croatia, Greece, Italy, Russian Federation, Turkey and the United Kingdom.
[12] See the following link to the overview over the inter-State applications brought before the Court on the Court's internet site.
[13] Georgia, Slovenia and Ukraine, see the overview over the inter-State applications brought before the Court on the Court's internet site.
[14] Croatia and the Russian Federation, see *ibid.*
[15] See document CDDH(2019)08, p. 7.

as a first-instance court and 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,[16] 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*".[17]

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.[18]

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.[19]

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.[20]

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 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'".[21]

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

[16] See document CDDH(2018)R90, §§ 26–29.
[17] See document CDDH(2019)22.
[18] See document CDDH(2019)22, §§ 3–4 and 25.
[19] See document CDDH(2019)22, §§ 7–10.
[20] See in more detail document CDDH(2019)22, §§ 11–19.
[21] *Georgia v. Russia (I)* [GC], no. 13255/07, § 125, ECHR 2014 (extracts); see also Appendix II below.

- 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.[22]

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.[23]

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 jurisdiction and avoid as far as possible encroaching upon that of other international bodies.[24]

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

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[22] 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.
[23] See document CDDH(2019)22, § 24.
[24] See document CDDH(2019)22, §§ 26–27.

applicant Government from the outset to submit lists of clearly identifiable individuals, for the benefit of whom just satisfaction was awarded in these cases.[25]

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.[26] 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.[27]

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.[28] ***In practice, it leads to the situation where many interstate applications lodged for the protection of particular citizens, contain mostly declarative, abstract and even absurd statements, while the Applicant State does not bother itself with providing sufficient facts and evidence in support of the respective statements.***

79. That State considered that, therefore, and in order to avoid a duplication of the processes for the examination of applications, ***a State lodging an interstate application for the protection of the rights of particular persons shall explain why those persons were unable to lodge applications with the Court themselves;*** 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.[29]

The imposition on an applicant State of the obligation to identify alleged victims of the Convention is another issue to be further regulated. A person represented by a State before the Court shall evidently be aware of this fact and shall regard himself or herself as a victim.

[25] See document CDDH(2019)22, §§ 28–31.
[26] See document CDDH(2019)12.
[27] See document CDDH(2019)12 (Georgia).
[28] See document CDDH(2019)12 (Russian Federation).
[29] See document CDDH(2019)12 (Russian Federation).

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 their communication to the respondent Government, should be **suspended** during that period.[30]

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.[31]

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.[32]

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.[33] Two States pointed to the fact that the Court in

[30] See document CDDH(2019)12 (Russian Federation).
[31] See document CDDH(2019)12 (Georgia).
[32] See document CDDH(2019)12 (Cyprus).
[33] See document CDDH(2019)12 (Cyprus and Georgia).

these cases was repeatedly called upon to establish the facts of a case which has not been 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**.[34]

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.[35]

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.[36]

IV. The CDDH's view

The examination of the proportion between individual applications and interstate applications lodged on behalf of individuals shall be based on the consistent position that the right to individual application is a cornerstone of the Convention system and the collective guarantee tool.

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 lack of proper Convention regulation of the correlation between interstate and individual applications raising the same issues,*** 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*

[34] See document CDDH(2019)12 (Cyprus and Russian Federation).
[35] See document CDDH(2019)12 (Cyprus).
[36] See document CDDH(2019)12 (Russian Federation).

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, ***including different requirements for the protection of individual rights depending on an applicant, and simultaneous examination by the Court of the same requirements.***

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 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?* [37] 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.

[37] 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.

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)**

<u>*Georgia v. Russian Federation (I)*</u>[38]

"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**

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

"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."

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[38] [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"**

Ireland v. United Kingdom[39]

"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."

Cyprus v. Turkey[40]

"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). [...]"

Georgia v. Russian Federation (I)

"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)."

[39] 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.

[40] [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**

Georgia v. Russian Federation (I)

"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**

Ireland v. the United Kingdom
"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."

Cyprus v. Turkey
"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)."

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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.)."

- **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)."