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11/09/2020

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

(CDDH)

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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)

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DRAFTING GROUP ON EFFECTIVE PROCESSING AND RESOLUTION OF CASES RELATING TO INTER-STATE DISPUTES
GROUPE DE RÉDACTION SUR LE TRAITEMENT ET LA RÉSOLUTION EFFICACE D'AFFAIRES CONCERNANT DES CONFLITS INTERÉTATIQUES

(DH-SYSC-IV)

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Compilation of comments by member States on the Draft CDDH report on the effective processing and resolution of cases relating to inter-State disputes (DH-SYSC-IV(2020)04)/ Compilation des commentaires des États membres sur le Projet de rapport du CDDH sur le traitement et la résolution efficace d'affaires concernant des conflits interétatiques (DH-SYSC-IV(2020)04)

Note/introduction :
This document compiles comments sent with a view to facilitating discussions at the 2nd meeting of DH-SYSC-IV (9-11 September 2020) / Ce document recueille les commentaires qui ont été envoyés en vue de faciliter les discussions et sa finalisation lors de la 2ème réunion du DH-SYSC-IV (9-11 Septembre 2020)

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AZERBAIJAN / AZERBAÏDJAN

1. The Government of Azerbaijan thanks the Secretariat for preparing such a comprehensive and well-written draft report.

2. With regard to the Report at this stage we have following proposals to the text:

   - For the purposes of clarity and consistency, as well as to ensure impartial approach to description of the conflicts mentioned in the draft report, in the third sentence of **paragraph 14** and first sentence of **paragraph 20** of the report we propose to replace the words "Nagorno-Karabakh conflict" with "the conflict in and around the Nagorno-Karabakh region of the Republic of Azerbaijan" in accordance with the UN SC (822, 853, 874, 884) and GA (62/243) resolutions and Resolution 1416 of the PACE;

   - In the **footnotes 20 and 21 to the paragraph 20** of the report we propose deleting words "between Azerbaijan and the "Republic of Nagorno-Karabakh" "NKR"" after the words "line of contact" to follow the generally accepted terminology in international documents concerning the Armenia-Azerbaijan Nagorno-Karabakh conflict.

   - Following the above-mentioned, in the **footnote 21** before the words "of two Azerbaijani nationals" we propose to delete the words "in the "NKR""

   - The numbers in the **4th subparagraph of the paragraph 20 and the footnote 21** do not correspond to each other and the wording of the said subparagraph is confusing. For this reason, we propose to rewrite the 4th subparagraph of the paragraph 20 together with the footnote 21.

3. Taking into account the aforementioned the Government of Azerbaijan proposes the following amendments to paragraphs 14 and 20 of the draft report:

   "14. Starting from the 7th of May 1956 when the first inter-State application was introduced 15 inter-State cases have been resolved by the European Commission of Human Rights and the Court. Thousands of individual applications relating to inter-State disputes have also been resolved throughout the years. The numbers of cases terminated are: 2851 in relation to the conflict in Georgia; 2357 in relation to the conflict in Ukraine; 1715 in relation to the Cyprus issue; 497 in relation to the conflict in and around the Nagorno-Karabakh region of the Republic of Azerbaijan ~~the Nagorno-Karabakh conflict~~ and 109 in relation to the conflict in the Transdniestrian region of the Republic of Moldova [footnotes omitted].

   20. As regards individual applications related to the conflict in and around the Nagorno-Karabakh region of the Republic of Azerbaijan ~~the Nagorno-Karabakh conflict~~, according to the information provided by the Court as of February 2020, there were 1,710 pending individual applications; 1054 of which against Armenia and 655 against Azerbaijan. Of the 1710 applications:"

4. Also, the following amendments are proposed to the footnotes 20 and 21 to the paragraph 20 of the draft report:

> 20. The "four-day war" in April 2016, shelling along the line of contact ~~between Azerbaijan and the "Republic of Nagorno-Karabakh" "NKR"~~ has led to 1057 applications (695 against Armenia and 362 against Azerbaijan) with complaints by civilians on both sides, predominantly regarding damage and destruction of property but a handful of cases also involve the killing of civilians. One application from each side were rejected as inadmissible due to the applicants' failure to substantiate their claims by Chamber decisions in February 2019 and a total of 346 applications (108 against Armenia and 238 against Azerbaijan) were subsequently rejected by Single Judge decisions in November 2019 (on the basis of the Chamber decisions). 147 applications against Armenia were rejected by Single Judge decisions in March 2019 for having been lodged out of time. Consequently, there remain 562 applications in this category (439 against Armenia and 123 against Azerbaijan).
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> 21. One judgment was issued recently, namely *Saribekyan and Balyan v. Azerbaijan* (no. 35746/11, 30 January 2020, a request for referral to the Grand Chamber is pending). Amongst the 11 pending applications there are: 1 case against Armenia concerning the conviction for murder, espionage, etc ~~in the "NKR"~~ of two Azerbaijani nationals (communicated), 4 cases (1 against Armenia and 3 against Azerbaijan) relating to the killing of soldiers close to the line of contact ~~between Azerbaijan and the "NKR"~~ in November 2016 (all communicated) and 1 case against Armenia concerning shelling and resultant death close to the line of contact in July 2017.

CYPRUS / CHYPRE

i. Paragraph 122 third sentence ("Moreover, the appropriateness of fact-finding missions where the event in question had taken place many years before has been raised as a potential issue.") of the draft report does not correctly reflect the comments by Cyprus (CDDH(2019)12). The comments by Cyprus did not relate to the appropriateness of fact-finding missions but to the difficulties encountered by the Court. The third sentence could therefore be rephrased as follows: "Moreover, the difficulties encountered by the Court when investigating facts that have taken place years before the hearing, has been raised as a potential issue."

ii. In relation to para.156 of the draft report the following (indicated in red colour) is proposed to be inserted for clarification purposes -

> 156. As regards individual applications relating to inter-State disputes mention can be made of the pilot judgment in the case of *Xenides-Arestis v. Turkey*. The Court found that the violation of the applicant's rights under Article 8 of the Convention and Article 1 of Protocol No. 1 originated in a widespread problem affecting large numbers of people, namely the unjustified hindrance of her "respect for her home" and "peaceful enjoyment of her possessions" as a matter of "Turkish Republic of Northern Cyprus" ("TRNC") policy,

which the Court found in its judgments in *Loizidou v. Turkey*[1] and *Cyprus v. Turkey*,[2] to be imputable to Turkey. In this connection […].

iii. In relation to para. 157 the following (in red colour) is also proposed to be inserted for clarification purposes.

157. Following the pilot judgment in the *Xenides Arestis* case an Immovable Property Commission (IPC) was set up in the northern part of Cyprus under "TRNC" Law No. 67/2005 on the compensation, exchange or restitution of immovable property. In its inadmissibility decision in *Demopoulos and others v Turkey*, the Court found that Law No. 67/2005 "provides an accessible and effective framework of redress in respect of complaints about interference with the property owned by Greek Cypriots". The Court issued the just satisfaction judgment in the inter-State case *Cyprus v. Turkey* on 12 May 2014. The Cypriot Government requested the Court to adopt a "declaratory judgment" stating: "(i) that Turkey is required by Article 46 to abide by the judgment in *Cyprus v. Turkey* by abstaining from permitting, participating or acquiescing or being otherwise complicit in, the unlawful sale and exploitation of Greek Cypriot homes and property in the northern part of Cyprus; (ii) that this obligation arising under Article 46 is not discharged by the Court's admissibility decision in Demopoulos and Others." The Court considered that it was not necessary **"**to examine the question whether it has the competence under the Convention to make a "declaratory judgment" in the manner requested by the applicant Government since it is clear that the respondent Government is, in any event, formally bound by the relevant terms of the main judgment. It is recalled in this connection that the Court has held that there had been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property, as well as any compensation for the interference with their property rights (Part III, point 4 of the operative provisions of the principal judgment). It thus falls to the Committee of Ministers to ensure that this conclusion, which is binding in accordance with the Convention, and which has not yet been complied with, is given full effect by the respondent Government. Such compliance could not, in the Court's opinion, be consistent with any possible permission, participation, acquiescence or other form of complicity in any unlawful sale or exploitation of Greek-Cypriot homes and property in the northern part of Cyprus. Furthermore, the Court's decision in the case of *Demopoulos and Others*, cited above, to the effect that cases presented by individuals concerning violation-of-property complaints were to be rejected for non-exhaustion of domestic remedies, cannot be considered, taken on its own, to dispose of the question of Turkey's compliance with Part III of the operative provisions of the principal judgment in the inter-State case**."**.

(Note: the reference in quotation marks is an excerpt from paragraph 63 of the Cyprus v. Turkey (just satisfaction) [GC] judgment and should be indicated as such).

iv. In relation to footnote 290, the correct reference is para. 61 (and not 62) of the Cyprus v. Turkey (just satisfaction) [GC] judgment.

[1] Preliminary objections, judgment of 23 March 1995, Series A no. 310; merits, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; Article 50, judgment of 29 July 1998, *Reports* 1998-IV.
[2] [GC], no. 25781/94, ECHR 2001-IV.

GEORGIA / GÉORGIE

1. Georgia submits below their comments on paragraphs 1-168 of the draft CDDH report on the effective processing and resolution of cases relating to inter-State disputes.

2. The footnote with the following text should be added in paragraph 16 of the draft report: “The terms “Abkhazia” and “South-Ossetia” refer to the regions of Georgia which are beyond de facto control of the Georgian Government”. It is noteworthy that 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), *Kulumbegov v. Georgia* (application no. 15213/09, decision of 30 April 2020, footnote 1).

3. During the discussions at the 1st meeting of DH-SYSC-IV, it was unanimously agreed that the applicant State is required to submit the list of clearly identifiable individuals at the just satisfaction stage of the proceedings. However, the wording given in paragraph 6 of the draft report contains a phrase – “from the outset”. The Government considers that this wording is ambiguous and requires further clarification. Hence, paragraph 6 is proposed to be amended as follows:

> According to the case-law of the Court, it is the individual, and not the State, who is directly or indirectly harmed and primarily injured by a violation of one or several Convention rights. Therefore, the Court’s principle is that just satisfaction in inter-State cases should always be awarded for the benefit of individual victims. Practical difficulties encountered by the Court relate to the identification of victims when large scale violations of human rights are involved, which in turn increases the risk of awarding just satisfaction to individuals who may not be eligible for such an award. Hence, it is important that, as the Court has stated, the applicant State is, from the outset, at the just satisfaction stage, asked to submit a list of clearly identifiable individuals who are victims of the alleged human rights violations. Moreover, there is often a time gap between the judgment on the merits and the one on just satisfaction. In order to avoid undue delays it is important that the parties exchange their observations on just satisfaction within the time that may be fixed to this end in the operative part of the judgment on the merits.

4. Similarly, paragraph 167 of the draft report should be revised in the following manner:

> The Court’s case-law with regard to making an award of just satisfaction under Article 41 of the Convention to individuals regarding violations established on the merits in an inter-State case is well established. The Court bases itself on a determination of a “sufficiently precise and objectively identifiable” group of people whose rights were violated for purposes of awarding just satisfaction in respect of violations found. Submitting a list of clearly

identifiable individuals by the applicant State from the outset, at the just satisfaction stage, as well as the respondent State submitting all the relevant information in its possession, would help reduce the risk of awarding just satisfaction to individuals who are not eligible for such an award. The feasibility of encouraging a formalisation of these practices, notably in the Rules of the Court, would merit further reflection and discussions. Also, the submission of the observations on just satisfaction by the States Parties concerned within the time-limits fixed by the judgment on the merits for the parties' exchange of such observations, would help to handle inter-State cases more efficiently and avoid undue delays between the judgment on the merits and the just satisfaction judgment. The Council of Europe member States should give consideration to the question how to further promote such approaches as principles of cooperation with the Court pursuant to Article 38 of the Convention.

5. Paragraph 45 of the draft report states that "[…] when lodging an inter-State application for the protection of the human rights of specific persons, the applicant State has the obligation to identify the alleged victims and to submit to the Court duly issued documents confirming the declaration of authority by those persons to be represented before the Court by the applicant State […]." The draft report further notes that "the person who is represented before the Court must (i) be aware of the fact that he/she is represented by that State before the Court, (ii) regard him/herself as a victim of violation of the Convention and (iii) be willing for the State represents his/her interests before the Court."

6. In this respect, the Government of Georgia underlines that the applicant State does not bear an obligation to provide duly signed authority documents from the victims of violations in order to submit an inter-state application to the Court. This obligation does not derive from the Convention, the rules of the Court or the Court's previous practice. Admissibility criteria of proving ***victim status*** is, pursuant to Article 35 § 3 (b), applicable only to individual applications not inter-State applications. In fact, the above excerpts are taken from Russia's comments and do not reflect the position of DH-SYSC-IV or the CDDH. Hence, paragraph 45 of the draft report should be amended as follows:

Another set of questions arguably stemming from the lower requirements of admissibility in inter-State cases compared to individual applications points to potential issues of identification and representation of alleged victims of violations of the Convention by the State. Notably when lodging an inter-State application for the protection of the human rights of specific persons, the applicant State has the obligation to identify the alleged victims and to submit to the Court duly issued documents confirming the declaration of authority by those persons to be represented before the Court by the applicant State. The person who is represented before the Court ~~must (i) be aware of the fact that he/she is represented by that State before the Court, (ii) regard him/herself as a victim of violation of the Convention and (iii)be willing for the State represents his/her interests before the Court.~~ As it has been noted above (see paragraph 37) the admissibility criteria of proving victim status is, pursuant to Article 35 § 3 (b), applicable only to individual applications not inter-State applications. With a view to improving

the efficiency of processing inter-State applications the Court has noted that in connection with the application of Article 41 of the Convention to inter-State cases, the applicant State should, from the outset, at the just satisfaction stage, be asked to submit the list of clearly identifiable individuals. This will ensure that if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims. Whilst accepting that such information is necessary for the Court to have before it when dealing with just satisfaction, the requirement that it be lodged at the beginning of the application places ahigh threshold requirement on the applicant State.

REPUBLIC OF MOLDOVA / RÉPUBLIQUE DE MOLDOVA

The Government of the Republic of Moldova disagree with the references made by the Russian Federation in § 53 of the Draft Report, *id est* with the allegation that *"[…] Parallel procedures could result in the adoption of contradictory decisions or overlapping jurisdiction, leading to legal uncertainty",* with the further references included therein, due to the following reasons.

Pursuant to Article 35 § 2 (b) of the European Convention on Human Rights, any application filed with the Court, which is "substantially the same as a matter that has already been submitted to another procedure of international investigation or settlement", shall be declared inadmissible. Namely this provision excludes any potential risk, as alleged by the Russian delegation, of duplication and/or adoption of diverging decisions in respect of substantially the same case that is pending both before the Court and before other international bodies. This provision implies that, in order to be declared inadmissible under Article 35 § 2 (b), a certain case shall deal with the same parties, the same subject-matter and the same cause.

Article 35 § 2 (b) of the Convention not only intends to avoid the situation where several international bodies would be simultaneously dealing with applications which are substantially the same, even when the allegedly violated human rights are secured by two different international legal instruments. It also aims at avoiding situations of international *lis pendens* and, thus, of parallel procedures that might end with different decisions, especially since there is no hierarchy between the international bodies involved in the examination of cases related to protection of human rights. Thus, the Convention, aiming at avoiding multiple international proceedings relating to the same cases, excludes the Court from accepting an application that has already been examined by an international body. However, if the persons who complain to the two institutions are not the same (see *Folgerø and Others v. Norway* (dec.), no. 15472/02, 14 February 2006), the application brought before the Court cannot be accepted as being "substantially the same as a matter (...) already submitted to another procedure of international investigation or settlement (...)".

Analysing the Court's case-law on this matter, it is worthwhile to observe that the access to multiple fora, be it judicial or non-judicial, is not a new phenomenon at all, the Court having dealt with numerous such cases. In the context of individual cases, the Court has been liberal in allowing seemingly similar cases (see *Folgerø and Others v. Norway* [GC], no. 15472/02, 29 June 2007, with respect to the United Nations Human Rights Committee; see also *Neftyanaya*

Kompaniya Yukos v. Russia, no. 14902/04, § 520, 20 September 2011, with regard to various arbitration proceedings, *Mammadov v. Azerbaijan*, no. 81553/12, § 103, 4 February 2016, with respect to the Working Group on Arbitrary Detention of the Human Rights Council of the United Nations). It has declined to look into the merits of a case where a prior decision on the merits existed at the date on which the Court examined the case *Peraldi v. France* (dec.) (no. 2096/05, 7 April 2009), with respect to the Working Group on Arbitrary Detention of the Human Rights Council of the United Nations. The Court has held that it is not the date on which an applicant has applied to another international body regarding the same matter that is decisive, but whether a decision on the merits has already been taken by the time the Court examines the case. The Court has also considered whether an applicant had abused the right of application by concealing the intention to use another international forum, *id est* the International Labour Organization Committee on Freedom of Association (see *National Union of Rail, Maritime and Transport Workers v. The United Kingdom*, no. 31045/10 § 48, 8 April 2014).

Formally the underlying rule of Article 35 § 2 (b) of the Convention applies only to individual cases, not to inter-State applications. Instead, Article 55 of the Convention provides that "the High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention".

In the case of *Cyprus v. Turkey* [GC] (no. 25781/94, §§ 21 and 27, 10 May 2001), the Turkish Government unsuccessfully relied on Article 55 (then Article 62) claiming that the United Nations Commission for Missing Persons would deprive the Commission of its jurisdiction (at § 208).

The Court has been deferential in the case of *Georgia v. Russia (II)* (dec.) (no. 38263/08, 13 December 2011), however without formal recourse to Article 55 ECHR. The parallel proceedings before the ICJ based upon CERD ended in 2011 with a finding of the lack of jurisdiction. Subsequently, the Strasbourg court held the inter-State application admissible (§ 79, without reference to Article 55 ECHR), a judgment on the merits has not yet been rendered.

In the light of the Court's case-law mentioned above, it may be noted that the Court carries out, under Article 35 § 2 (b) of the Convention, at the admissibility phase, a very careful and thorough scrutiny in those cases which seem to have also been submitted by the same individuals or States before other international bodies. Therefore, both the Convention and the Court's case-law are capable of avoiding the existence of parallel procedures, as alleged by the Russian Federation in their comments. Hence, that sentence should be removed from § 53, along with the references included therein, since it lacks any legal support.

In what concerns the arguments brought by the Russian representatives in § 1.3 of the Compilation of the Contributions Received from the Member States (CDDH(2019)12), they may be easily repelled. **The text of the Convention does not specify the sources that the Court must take into account when examining a case. The primary source for the Court is the Convention, being the only binding legal source that shall guide the Court in solving a certain case, which also empowers it with interpretative powers**. In other words, the Court may take into account any other external sources, legal or non-legal, but is not obliged to apply them. At the same time, the Court is not obliged to apply even its previous case-law when it finds that certain social relations in the past have already been obsolete at the time of the examination of a particular case and the need to ensure respect for human rights and fundamental freedoms implies a change of approaches. The only condition that the Court must observe in that regard,

in the interests of respecting the legal certainty, is to present convincing arguments and reasons that led it to change its case-law.

Referring specifically to the "effective control" doctrine, invoked by the Russian Federation in their comments, and bearing in mind the above-mentioned principles, the Court should not be bound in its assessment of a certain case by any case-law or test performed therein by other international courts or bodies. Moreover, the "effective control" doctrine developed by the Court in its case-law regarding the protection of human rights in the Transdniestrian region of the Republic of Moldova continues to be totally valid in the current state of affairs and should continue to be applied by the Court in the recently communicated cases as well.

NETHERLANDS / PAYS-BAS

Comments sent on 3 September 2020

In addition to the specific comments provided for in the report, [please see below] the Netherlands wishes to submit the following general comments on the Draft CDDH report:

- In general, the report lacks specific insight into the specific problems the Court encounters with inter-State applications. Some of the problems identified, such as the high case load, seem only to apply to individual applications. Furthermore, the report could, in our view, elaborate more specific on the problems the Court encounters when considering inter-State cases. For instance: what problems are encountered with respect to the political nature of some of the disputes? What are the exact reasons for the fact that inter-State applications are pending for a long time before the Court? The Netherlands would invite the authors of the report (and the Court) to be specific as possible about the type and gravity of the problems. This in order to enhance the discussions and to ensure that appropriate proposals and (practical and legal) solutions may be proposed.
- The report would benefit from a methodology section in (the beginning of the report or of each chapter) in which it is explained why certain alternative dispute settlement mechanisms, such as other courts and human rights bodies, were selected per specific chapter to provide for comparative elements and why others are not.
- Throughout the report, there are many references to case law on individual applications, without explaining whether and how certain aspects of the cited judgments do apply in the same way to inter-State applications. It would benefit the structure of the report (and the discussions on the report) if some attention is paid to this aspect.

The following comments of the Netherlands were submitted in track changes in the text of the draft Report. They have been reproduced below.

Paragraph 6

Comment on the phrase: "Hence, it is important that, as the Court has stated, the applicant State is, after the judgment on the merits and from the outset of the procedure on just satisfaction, asked to submit a list of clearly identifiable individuals who are victims of the alleged human rights violations" as it follows: "This could be formulated more precise as it is the Court's jurisprudence

to request the parties from the outset of the procedure on just satisfaction to submit lists with victims."

Paragraph 7

Comment on the phrase: "exchanges of views amongst independent experts" as it follows: "The way in which this paragraph formulated assumes that the high-level conference will only deal with the friendly settlement procedure. A suggestion is to start a new paragraph to (better) introduce the high-level conference."

Paragraph 9

NL proposes to reformulate this paragraph to ensure that it is more in line with the CDDH report and the actual discussions that took place.

"had an in-depth exchange of views on the Draft elements resulting from the Copenhagen Declaration concerning inter-State applications which will be reflected in the Contribution of the CDDH to the evaluation provided for in the Interlaken Declaration and decided to take up this point again at its next meeting in the light of the proposals of its Committee of experts on the system of the European Convention on Human Rights (DH-SYSC);"

It was not really an in-depth exchange of views on the content but more a discussion on the process and lead to the decision to take up this point at its next meeting in the light of the proposals of its Committee of experts on the system of the European Convention on Human Rights (DH-SYSC).

Paragraph 15

On the last phrase: "According the Court's overview, there are currently 10 inter-State applications pending, including the new inter-state complaints submitted by the Netherlands against the Russian Federation and Liechtenstein v. the Czech Republic."

Paragraph 19

End of paragraph: "NL suggests to introduce a separate paragraph about the individual complaints submitted by the relatives of the victims of the downing of Flight MH17."

Paragraph 21

Comment on the second sentence: "It should be recalled that the concern about the high number of applications brought before the Court has been the central focus of the process of reforming the system of the Convention from the outset" as it follows: 'As far as the NL is concerned, the high number of applications is a problem that the Court particularly encounters when considering individual applications. In general the NL would suggest that rapport, as far as is possible, more concretely outlines the particular problems that the Court is struggling with when considering inter-State applications."

Comment on third sentence, the term "of applications" as it follows: "Until the Copenhagen Declaration, inter-State applications were not mentioned in the instruments on the reform process of the Court. Also, in the Copenhagen Declaration, the specific role of inter-State applications is limited besides the specific reference in paragraph 45 of the Copenhagen Declaration."

Paragraph 45

Comment on the second phrase “the applicant State has the obligation to identify the alleged victims and to submit to the Court duly issued documents confirming the declaration of authority by those persons to be represented before the Court by the applicant State. The person who is represented before the Court must (i) be aware of the fact that he/she is represented by that State before the Court, (ii) regard him/herself as a victim of violation of the Convention and (iii) be willing for the State represents his/her interests before the Court[55]”, as it follows: “These requirements do not find their basis in existing jurisprudence of the Court. The NL can therefore not agree with this formulation assuming that these are part of the Court’s jurisprudence.”

Paragraph 53

On the first phrase: “Potential risks of duplication and/or diverging decisions in respect of substantially the same case may arise in situations when there are inter-State and individual applications pending before the Court and cases pending before other international bodies which may, at least, in part concern the same subject-matter and relate to the same individuals” as it follows: “The Netherlands misses the connection with inter-State applications submitted to the ECtHR here. It flows from Article 35 and the case law (Georgia v. Russia (I)) that this Article is not applicable to inter-State applications. The Netherlands therefore doubts whether this theme must be included in the rapport. It might be appropriate to do more research on the applicability of Article 35 to inter-State applications.”

Paragraph 57

Comment on the second phrase: “The Netherlands follows the theoretical discussion as outlined in this section but doubts whether this really leads to duplication of inter-state applications submitted to the Court and other means of dispute settlement.”

Paragraph 73

Comment on the third phrase: “These conclusions relate to individual applications only. The report would benefit from an analysis on In how far these conclusions are applicable to inter-State applications.”

Section 3. The Court’s practice with regard to the standard of proof

“This section only refers to case law relating to individual applications. For the structure of the rapport and for the subsequent discussions during our next meeting, it would be useful to consider whether all the mentioned aspects in this chapter also automatically and in the same way apply to inter-State cases.

Paragraph 131

Addition on the first phrase of “of the procedure on just-satisfaction” to read as follows: The Court has observed that it was very important that the applicant State was, from the outset of the procedure on just-satisfaction, asked to submit the list of clearly identifiable individuals.

Paragraph 163

Comment on the word 'number' in the last phrase: "Which measures are meant besides the prioritization of inter-State cases above individual cases related to the same facts and legal questions?"

Paragraph 164

Comment on the phrase: "A formalisation of this practice by the Court to the extent that this would not have collateral effects on the Court's discretion and flexibility to deal with each particular case on its own, would promote a sense of legal certainty amongst the governments of Council of Europe member States", as it follows: "The Netherlands supports this practice, however, it would help the effective consideration if the Court can be transparent when a decision on the overarching issues can be expected and when the individual applicants may expect a decision on the merits."

Paragraph 165

Insertion on the phrase "with respect to individual applications" in the sentence: "Situations of diverging or conflicting jurisprudence between the Court and other international bodies in cases involving the same or similar subject matter have occurred in practice with respect to individual applications raising concerns about legal certainty for States Parties on how to fulfil their obligations, and for individuals as regards the scope of their rights, as well as potentially undermining the coherence of human rights law and/or the credibility of human rights institutions.

Paragraph 166

Deletion of the phrase "when the domestic authorities have not adequately established the facts" in the 1st sentence :

Comment on the phrase: "Also, in some cases relating to complex situations there are logistical and practical difficulties which may ultimately influence the Court's ability to ensure that its proceedings are fair to all the parties", as it follows "This sentence requires some elaboration in the sense that it is not clear what complex situations are meant and what the logistical and practical difficulties are."

Paragraph 167

Comment on the phrase: "Submitting a list of clearly identifiable individuals by the applicant State from the outset, as well as the respondent State submitting all the relevant information in its possession, would help reduce the risk of awarding just satisfaction to individuals who are not eligible for such an award" as it follows: See the textproposal in paras 6 and 131 above.

Comment on the words "undue delays" in the 5th sentence, as it follows: The rapport does not mention the (often) long period of time between the submission of an inter-State complaint and the judgement. Examples are the inter-State case of Ukraine v. Russia which was submitted in 2014 and a Court hearing is still not planned. Furthermore, the consideration of the merits of the Inter-State case Georgia v. Russia (II) took place ten years after its submission and after the hearing in May 2018 there have been no developments.

"From all the inter-State cases that were submitted to the Court in this century , the Court delivered its judgement in only one case whereas two judgements were struck out of the list. It is apparent

that the Court is struggling with the inter-State applications as the period between the application and the judgement is long, however, there are indications as to why the cases need such a long time and as to how this process could be speeded up."

Paragraph 168

Comment on the 3rs sentence, the phrase "the application of the pilot judgment procedure in individual applications related to inter-State disputes may hold potential for facilitating their resolution through friendly settlement" as it follows: "The report does not explain how the pilot judgement procedure is contributing to friendly settlement."

Comments submitted on 7 August 2020

The comments of the Netherlands were submitted in track changes in the text of the draft Report. They have been reproduced below.

Comment on Heading 4 on page 17 "Comparative elements": "What is the reason that this paragraph only considers the CERD and the IACH(t)H and no other courts such as African Court of Human and Peoples' rights and/or the International Court of Justice?"

Paragraph 74, 75 and 77, specifying ICERD instead of CERD.

Paragraph 85

Comment on the phrase: "could be the Court's location which is remote from the places where the incidents in question took place" as it follows: "The formulations of this phrase suggests that the location of the Court is a principle reason for the Court to take a flexible approach as regards evidence. I think that the subsidiary role of the Court, and the primary role of the national court (as mentioned later) is more important than its location. My suggestion would be to mention this as principle reason. "

Paragraph 98

1st sentence, remove the word 'rigidly' from where it is and place between the words "to" and "apply".

RUSSIAN FEDERATION / FÉDÉRATION DE RUSSIE

To our deepest regret, after reading the draft Report of the Steering Committee for Human Rights (CDDH) on the effective processing and resolution of cases relating to inter-State disputes (the draft Report) one significant question is left unanswered, namely: what is the purpose of the Report?

The Declaration adopted by the High Level Conference meeting in Copenhagen on 12 and 13 April 2018 (the Copenhagen Declaration) invited the Committee of Ministers (CM), in consultation with the European Court of Human Rights (the Court), and other stakeholders, to explore ways to handle more effectively cases related to inter-State disputes, as well as individual applications arising out of situations of inter-State conflict. Following the Copenhagen Declaration, the Ministers' Deputies, at their 1317th meeting (30 May 2018), invited the CDDH to include in its report among other elements *proposals* on how to handle more effectively cases related to inter-State disputes, as well as individual applications arising from situations of conflict between States. However, with a single exception (see paragraph 33 of the draft Report), the draft Report does not contain any proposals on optimisation of work with this category of applications, it rejects (without any convincing arguments whatsoever) the concrete proposals put forward by the Russian Federation in this area, and it actually states in a descriptive manner the existing practice of the Court for examination of such cases, only acknowledging the wide-known difficulties faced by this regional court in its attempts to take up the burden that it has not initially been designed for, namely to examine inter-State applications.

These observations are focused on the problematic issues of examination of inter-State applications mentioned by the Russian Federation in its earlier comments and left without due analysis and resolution in the draft Report, as well as on one proposal of the draft Report and on the new difficulty in work with this category of applications which Russia faced when another inter-State application had been communicated.

1. The draft Report expressly acknowledges (see paragraph 38) that the existing system of lodging and examination of applications lodged under Articles 33 and 34 of the European Convention on Human Rights (the Convention), as interpreted by the Court, provides *different conditions* for protection of the rights and freedoms of individual applicants before the Court, depending on whether the application is lodged by individuals or by a State for their protection. The significant difference in the conditions for obtaining protection and restoration of rights appears exactly in connection with the incomparably different list of admissibility criteria for individual and inter-State applications, as justly noted in the observations of the Russian Federation. Essentially, the States, which have a whole range of means for collecting evidence and preparing a well-reasoned application, have been provided significant and baseless indulgencies, while individual applicants are forced to prove the feasibility of their claims while being deprived of such opportunities. This leads to distortion of the objective of the Conventional mechanism that is called to provide *equal* protection to *all* persons.

Paragraph 41 of the draft Report mentions the proposal of the Russian Federation to put a limitation on lodging an inter-State application may be permitted to be lodged if individual applications in the connection with the same events are pending before the Court. However, further reasoning does not contain any analysis of this proposal and conclusions as to its viability. Instead, in this paragraph (while the discussion is not continued anywhere further) it is reported

that an inter-State application does not deprive individual applicants of the possibility of introducing or pursuing their own claims and it is also emphasised that the Court does not put these cases aside.

It appears that the essence of the Russian Federation's proposal has been left without due consideration.

Given special nature of inter-State applications, especially the significantly decreased requirements as to their admissibility in comparison to individual applications, as well as the timing budgets and other resources needed for examination of applications lodged under Article 33 of the Convention (including those due to the need to hold hearings on admissibility and on the merits), **it appears appropriate to introduce a new condition and new admissibility criterion for inter-State applications.**

In particular, an inter-State application may be lodged only under the condition that **the applicant State has reasonably explained why the affected individuals or legal entities cannot apply to the Court independently.** Practical implementation of this condition may include a requirement for the applicant State to provide written statements from the affected persons containing a request to apply to the Court in their interests and an explanatory report as to why these persons cannot apply themselves.

As regards the new admissibility criterion, **an inter-State application or a part thereof must be declared inadmissible if at least one similar application from a concrete affected person is pending before the Court**. The mere fact that whichever person affected by a violation of the Convention has lodged an application with the Court evidences availability of this international remedy and means absence of any obstacle for resorting thereto, as well as to establishing all necessary circumstances within individual proceedings. At the same time, one cannot exclude the fact that absence of individual applications with regard to whichever events often demonstrates absence of real victims or absence of their striving for protection of their rights and freedoms. In this connection, such "involuntary" protection on the part of the State lodging an application with the Court, generally, in respect of an indefinite number of persons (given that the State always has at its disposal all necessary means for identification of victims) should not be encouraged by the Court that is called to protect specific rights and freedoms of concrete victims rather than study some abstract submissions regarding alleged violations of the Convention in respect of unidentified persons.

2. The absence in the draft Report of the analysis of this proposal of the Russian Federation is closely linked with another problem, namely identification of victims. Thus, in paragraph 45 of the draft Report, without providing any convincing arguments, Russia's proposal as regards the need to identify victims at the stage of lodging of an application is refused by simply referring to the fact that it would place a high burden on the applicant State.

It is absolutely obscure why this will become an excessive burden at the stage of lodging an application, if the applicant State is obliged to submit the list of clearly identifiable individuals at the stage of resolving the just satisfaction issue. In *Cyprus v. Turkey* and *Georgia v. Russia (I)* the Court expressly indicated that application of Article 41 of the Convention required identification of victims; therefore there are no doubts that such work should be done at the stage of preparation of an application, and an inter-State application lodged in violation of this condition should be declared inadmissible or struck out at the outset.

Above all, an inter-State application is anyway lodged for protection of rights and freedoms of particular persons. It is not important how it is classified by researches - as the one lodged for protection of the general European order or for protection of particular persons: in any case the need to lodge an application under Article 33 may be caused only by violation of human rights and freedoms. Any other purpose is not covered by the Convention.

The conclusion made in the draft Report is especially bizzare given the nature of the rights and freedoms protected by the Convention. The Court's abstract reflection regarding, for example, violation of Article 5 of the Convention in respect of an indefinite number of persons, without finding out perticular circumstances of deprivation of liberty and identification both of each person deprived of his or her liberty and the person who has deprived them of their liberty, at least for finding out whether the *ratione personae* criterion has been complied with, appears inconceivable.

The existing procedure of application of admissibility criteria and examination of inter-State applications creates for a respondent State an endless circle, while the current practical means of the Court do not allow to escape from it. In particular, an applicant State lodges an application against another equal and sovereign State accusing it of violating human rights and freedoms, while not being laden with the need to provide convincing evidence with low standard of proof, as well as with the need to clearly explain which particular persons' rights and freedoms have been violated. At the same time, a number of important admissibility criteria, including the victim status, are not used in respect of such an application. Consequently, as of the moment of lodging such an application, in reality no person may need protection, as either their rights and freedoms have not been violated (and that would be clarified in the course of a thorough check conducted as per the victims list), or the infringed rights and freedoms have already been restored. A respondent State must have an opportunity to contest accusations based on facts and evidence concerning concrete persons, rather than struggle against abstract and unfounded allegations as regards violation of Conventional provisions.

As shown by the practice of proceedings in inter-State cases, the Court in this or that way faces the need to demand an applicant State to identify the victims of a violation of the Convention. Regretfully, the experience of the proceedings in the first Georgian application demonstrated that against the background of low requirements to admissibility of inter-State applications it is the process of compiling the list of victims that can lay open the weakness of a number of allegations made by an applicant State. At the same time, careless attitude towards preparation of an inter-State application, expressed in absence of a list of concrete persons affected by the violations of the Convention stated in such application significantly procrastinates the proceedings in the case. In this context it would be sufficient to note that, as found out by the Court, a number of persons presented by the Georgian side as victims not only did not believe themselves to be victims but, on the contrary, had obtained Russian nationality and moved for permanent place of residence to Russia.

In this context **the introduction of the requirement to draw up a list of the identified victims as of the moment of lodging the application is needed**.

3. Unfortunately, another proposal put forward by the Russian Federation did not receive due attention - namely, the proposal with regard to reinforcement of top-priority examination of an inter-State case on admissibility and merits if any inter-State and individual applications concerning the same violations of the Convention are pending before the Court (if the aforementioned proposal in paragraph 2 of these observations is not accepted).

In particular, the draft Report stipulates simultaneous examination of such applications. However, it is this aspect that kills the timing budgets and the very possibility for optimisation in examination of such applications, due to the following reasons.

Thus, now pending before the Court is the inter-State application *Ukraine v. Russia (re Eastern Ukraine)*, concerning the allegation that starting from 27 February 2014 the Russian Federation has been actually exerting "effective control" in the territory of South-Eastern Ukraine where regular violations of the rights guaranteed by the Convention take place. The proceedings on this application are in the active stage of exchange of stances. The Court is simultaneously communicating dozens of individual applications with regard to the same events and forces the parties to exchange their respective stances thereon before delivering a decision on admissibility and a judgment on the merits of the inter-State case. This approach is counterproductive.

First of all, the Court will have to decide on the principal issue of jurisdiction. Admissibility of all individual applications, namely whether they are in conformity with the *ratione personae* and *ratione loci* criteria, will depend on its decision. The Court's decision on admissibility of an inter-State application, and more often – its judgment on the merits of the case, can significantly influence the parties' position and widen or narrow the circle of respondent States in individual applications; consequently, there is no need to conduct the procedure of exchanging written stances on individual applications before the issue of admissibility of an inter-State case is resolved.

Second, the Court, at least in cases against Russia, suspends examination of individual applications before delivering a decision on admissibility and a judgment on the merits in an inter-State case, however it still requires an exchange of stances (that is, in fact, the suspension concerns only postponing the delivering of decisions and judgments on individual applications), consequently, during the period of examination of the inter-State case the individual situations of the concrete affected persons who have lodged applications under Article 34 of the Convention may change drastically. Thus, new domestic remedies can become available for them, or the existing remedies can be subjected to reform or can be declared effective by the Court in the course of examination of another case (for example, in a number of applications concerning the events in the South-Eastern Ukraine the Court found that the applicants had had to resort to the Ukrainian national remedies outside that Ukrainian region). Applicants can lose their victim status, they also can lose interest in the proceedings before the Court or change their nationality (as was the case with the first Georgian application). Changing of an individual situation will require additional exchange of stances meaning additional time and other expenses that might be avoided if a stance on an individual application is prepared taking into account the valid changes after completion of proceedings on an inter-State application.

It is for this very reason that it is necessary not only to prioritize delivering of judgments in inter-State cases before individual applications but also **to shift the stage of exchange of stances on individual applications for the period following delivering of a judgment in an inter-State case.**

4. The draft Report contains no feedback on the proposal of the Russian Federation as regards the standard of proof.

As expressly recognised in the Court practice, during proceedings before this Court there are no procedural obstacles for admissibility of evidence or a pre-determined procedure for its evaluation. The Court's main error is that it believes that "it is not the Court's role to rule on guilt under criminal law or on civil liability but on Contracting States' responsibility under the Convention". In fact, bringing a State to international liability for violation of human rights and

freedoms is similar, in terms of its gravity and consequences, to bringing a person to criminal or civil liability – meaning that litigation resulting in recognition of a State's guilt of violating rights and freedoms must have the same guarantees and remedies against unjust and unfounded decisions. It can be achieved only by building a clear system of proving the evaluation of such evidence.

The existing principles of justification of an inter-State application constitute an excessively low "standard of proof", thereby opening an uncontrolled opportunity for States to lodge non-reasoned applications and applications not backed up by objectively adequate evidence, rather resolving political objectives in this way than pursuing the aims of protection of rights and freedoms of population of whichever State.

Such unfounded inter-State applications, lodged as a rule for protection of abstractly existing victims, divert the Court from individual applications lodged by concrete, really existing and identified victims.

Development of clear and foreseeable (in terms of their application) standards of proof will favour filtration of unfounded inter-State applications, thus it will relieve the Court of its load and will encourage the States wishing to resort to the Conventional mechanism of protection of rights to carefully prepare their applications with the Court.

One of the first steps on the way to creating clear standards of proof is refusal to accept references to the media and reports by non-government organisations as the sole evidence of existence of whichever event alleged to be a violation of the Convention.

In particular, in this connection the Court should look at the experience of its counterpart that is more progressive in this respect – the African Court on Human and Peoples' Rights. Thus, the Rules of the aforementioned regional court contain a provision expressly forbidding to base an application on reference to news disseminated in the media; any application or any part thereof, backed up solely by reference to the media as proof shall be declared inadmissible (see Rule 40).

A sad example of consideration of an inter-State application without definite standard of proof is *Georgia v. Russia (I)* where the process of examination of witnesses, in particular of the author of the report by a non-government organisation, referred to by the applicant State, strikingly demonstrated that most of the allegations were manifestly ill-founded. In the same application, absence of foreseeable, in terms of their application, standards of proof led to the situation where the administrative practice had been established without admissible evidence (and even, as found out later, not based on the only "standard" of proof of the Court – "beyond reasonable doubt"), and the Court declared that violations of the Convention had been committed in respect of over 4,600 Georgian nationals, while at the stage of awarding just satisfaction the number of victims decreased threefold, and the Court expressly stated that its phrase in the judgment on the merits that "there is nothing enabling it to establish that the applicant Government's allegations are not credible", does not, however, affirm that they are proved "beyond reasonable doubt".

5. Paragraph 33 of the draft Report suggests that applicant States, instead of providing at the outset a complete translation of materials attached to an application into one of the official languages, should limit themselves to sending a summary of evidence content, in order for the Court to determine, based on such summaries, a list of documents that need to be translated in full for subsequent proceedings.

The Russian Federation strongly objects to putting this proposal into practice of lodging and examination of inter-State applications. It is quite obvious that such approach directly contradicts the principles of equality of arms and adversarial proceedings. A respondent State must have a full-fledged opportunity to study all evidence submitted as confirmation of the accusations put forward against it. To give to the Court the exclusive right to decide which evidence is relevant to the case and which is not means to make the Court deliver its decision as to the essence of the accusations even before the start of adversarial proceedings, as it is possible to decide on value of evidence only in the process of examination of a case based on both parties' observation. Moreover, the Court is not in possession of sufficient resources for evaluation of admissibility of whichever evidence (for example, the Court is not authorised to appoint medical expert examinations and other special research). In this connection **a respondent State must have access to all submitted evidence and be able to comment thereon**.

6. In this context, most noteworthy was the recent communication to the Russian Federation of the inter-State application lodged by the Netherlands. Some materials attached thereto were not translated into the official language of the Council of Europe, as required by the Rules of the Court. Meanwhile, the application has been communicated as fast as five days after it had been lodged.

Indeed, the Rules of the Court require immediate notification of a respondent State about an inter-State application lodged against it. However, in practice low requirements to lodging such applications led to a situation where the Russian Government, though notified about lodging such an application, did not receive information either on the composition of the Chamber or on the time-limits for submitting its stance on the application, and – most importantly – did not receive comprehensive information about the evidence submitted by the Netherlands, as part of such evidence was drawn up in the language that was not an official language of the Council of Europe.

7. The sense of singling out into a separate category inter-State applications related to inter-State disputes in paragraph 31 of the draft Report is not fully evident.

First, the Court is competent to decide on the issue of compliance by a Member State of the Council of Europe with only the provisions of the Convention, but not on compliance with any other international acts, though it actively tries to do so using international humanitarian law. Interstate disputes as such are not included into the sphere of the Court authority.

Second, even in case of an inter-State dispute the Court is authorised, and will decide on solely the issue of possible violation of human rights and freedoms during or as a result of this conflict. In this connection, researchers have singled out such type of inter-State application as the one lodged for the protection of persons' rights and freedoms.

Third, singling out into a separate category inter-State applications related to inter-State disputes - leaving alone violation of the subject of classification – as appears, secures unjustified expansion of the Court jurisdiction in the very name of the category and rather evidences that applications have been lodged for political purposes rather than for the sake of protection of rights and freedoms.

Comment submitted on 10 September 2020

Paragraph 39

39. This question ~~does not~~ appear to have emerged in proceedings before the Court ~~or to have been addressed in the case-law of the Court~~. **Essentially, the States, which have a whole range of means for collecting evidence and preparing a well-reasoned application, have been provided significant and baseless indulgencies, while individual applicants are forced to prove the feasibility of their claims while being deprived of such opportunities.** ~~However, reference could be made to the distinct inherent features of Article 33 of the Convention (see section IV/1 above), notably the fact that it is an expression of the system of collective guarantee of the Convention and that the right of State Parties to refer alleged breaches of the Convention to the Court is enshrined in this provision of the Convention in unqualified terms.~~

Paragraph 41

41. Another set of procedural questions points to various aspects of the relationship between inter-State applications and individual applications. Firstly, a question is raised whether an inter-State application may be permitted to be lodged if individual applications in the connection with the same events are pending before the Court.[3] **Given the special nature of inter-State applications, especially the significantly decreased requirements as to their admissibility in comparison to individual applications, as well as the timing budgets and other resources needed for examination of applications lodged under Article 33 of the Convention (including those due to the need to hold hearings on admissibility and on the merits), it appears appropriate to introduce a new condition and new admissibility criterion for inter-State applications.**

In particular, an inter-State application may be lodged only under the condition that the applicant State has reasonably explained why the affected individuals or legal entities cannot apply to the Court independently. Practical implementation of this condition may include a requirement for the applicant State to provide written statements from the affected persons containing a request to apply to the Court in their interests and an explanatory report as to why these persons cannot apply themselves.

As regards the new admissibility criterion, an inter-State application or a part thereof must be declared inadmissible if at least one similar application from a concrete affected person is pending before the Court. The mere fact that whichever person affected by a violation of the Convention has lodged an application with the Court evidences availability of this international remedy and means absence of any obstacle for resorting thereto, as well as to establishing all the necessary circumstances within individual proceedings. At the same time, one cannot exclude the fact that absence of individual applications with regard to whichever events often demonstrates absence of real victims or absence of their wish for protection of their rights and freedoms. In this connection, such "involuntary" protection on the part of the State lodging an application with the Court, generally, in respect of an indefinite number of persons (given that the State always has at its disposal all the necessary means for identification of victims) should not be encouraged by the Court that is called to protect concrete rights and freedoms of concrete victims rather than study some abstract submissions regarding alleged violations of the Convention in respect of unidentified persons. The Court has held that an inter-State application does not deprive

[3] Ibid.

individual applicants of the possibility of introducing or pursuing their own claims.[4] It is the Court's recent prioritisation practice, where an inter-State case is pending, that individual applications raising the same issues or deriving from the same underlying circumstances are, in principle and in so far as practicable, not decided before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case.[5] This does not mean that the Court puts these cases aside. The Court instead identifies and examines in a systematic manner individual applications relating to inter-State cases in parallel with inter-State cases as well as individual applications relating to inter-State conflicts (in the absence of inter-State cases) and may make decisions it considers appropriate such as declaring inadmissible those which are manifestly ill-founded.[6] Recently the Court also decided that any individual applications related to inter-State cases which were not declared inadmissible or struck out at the outset were to be communicated to the appropriate respondent Government or Governments for observations in parallel with the inter-State case.[7]

Meanwhile the parallel examination of such applications appears counterproductive as killing the timing budgets and the very possibility for optimisation in examination of such applications, due to the following reasons.

Thus, now pending before the Court is the inter-State application Ukraine v. Russia (re Eastern Ukraine), concerning the allegation that starting from 27 February 2014 the Russian Federation has been actually exerting "effective control" in the territory of South-Eastern Ukraine where regular violations of the rights guaranteed by the Convention take place. The proceedings on this application are in the active stage of exchange of stances. The Court is simultaneously communicating dozens of individual applications with regard to the same events and forces the parties to exchange their respective stances thereon before delivering a decision on admissibility and a judgment on the merits of the inter-State case. This approach is counterproductive.

First of all, the Court will have to decide on the principal issue of jurisdiction. Admissibility of all individual applications, namely whether they are in conformity with the ratione personae and ratione loci criteria, will depend on its decision. The Court's decision on admissibility of an inter-State application, and more often - its judgment on the merits of the case, can significantly influence the parties' position and widen or narrow the circle of respondent States in individual applications; consequently, there is no need to conduct the procedure of exchanging written stances on individual applications before the issue of admissibility of an inter-State case is resolved.

Second, the Court, at least in cases against Russia, suspends examination of individual applications before delivering a decision on admissibility and a judgment on the merits in an inter-State case, however it still requires an exchange of stances (that is, in fact, the suspension concerns only postponing the delivering of decisions and judgments on individual applications), consequently, during the period of examination of the inter-State case the individual situations of the concrete affected persons who have lodged applications under Article 34 of the Convention may change drastically. Thus, new

[4] *Varnava and others v. Turkey*, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, §§ 118 and 119, 18 September 2009.
[5] See Copenhagen Declaration, § 45. See also *Berdzenishvili and Others v. Russia*, nos. 14594/07 and 6 others, § 4, 20 December 2016; and Press Release issued by the Registrar of the Court in respect of the case of *Ukraine v. Russia*, ECHR 432 (2018), 17 December 2018.
[6] *Lisnyy and others v. Ukraine and Russia* nos. 5355/15, 44913/15 et 50852/15, 5 July 2016.
[7] See Press Release quoted above, note 47.

domestic remedies can become available for them, or the existing remedies can be subjected to reform or can be declared effective by the Court in the course of examination of another case (for example, in a number of applications concerning the events in the South-Eastern Ukraine the Court found that the applicants had had to resort to the Ukrainian national remedies outside that Ukrainian region). Applicants can lose their victim status, they also can lose interest in proceedings before the Court or change their nationality (as was the case with the first Georgian application). Changing of an individual situation will require additional exchange of stances meaning additional time and other expenses that might be avoided if a stance on an individual application is prepared taking into account the valid changes after completion of proceedings on an inter-State application.

It is for this very reason that it is necessary not only to prioritize delivering of judgments in inter-State cases before individual applications but also to shift the stage of exchange of stances on individual applications for the period following delivering of a judgment in an inter-State case.

Comment submitted on 11 September 2020

Addition of a new paragraph between para.51 and 52 as it follows:

Furthermore, legal certainty as regards the applicable rules concerning the interpretation of the ECHR, and its relationship with other rules of international law, for example on State responsibility or international humanitarian law, is of great importance for the States Parties. As the ECtHR itself found on many occasions, as follows from Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, the ECHR cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights.[8]

Addition of a new paragraph between para.63 and 64 as it follows:

The ECtHR pronounced that the Court must endeavor to interpret and apply the ECHR in a manner which is consistent with the framework under international law delineated by the International Court of Justice. (par.56) At the same time the Court regularly stresses "the special character of the Convention as an instrument of European public order (ordre public) for the protection of individual human beings". It may be noted that the necessary degree of control of a State over an entity, defined in some ECtHR decisions, is less stringent than the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State under the case-law of the ICJ and ICTY. (par.154).[9]

[8] CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, DH-SYSC-II(2019)R7 Addendum, §427

[9] CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, DH-SYSC-II(2019)R7 Addendum, §§56, 154

SLOVENIA / SLOVÉNIE

2nd meeting of DH-SYSC-IV (9-11 September 2020)

The draft report in our view reflects a comprehensive and well-written analysis of the inter-State application under Article 33 of the Convention.

The main objective of Slovenia's comments, presented in two parts below, is to render focus on the important reform considerations of inter-State proceedings. The first part addresses proposals for improvements to the text of the draft report, while the second part takes on the general issues of examination of inter-State applications. Comments on the latter are submitted with a view to contribute to the improvement of the effective processing and resolution of inter-State cases, deriving from Slovenia's own experience in this regard, notably with a certain lack of clarity and simplicity of the procedural requirements in inter-State proceedings.

1. Reflections with proposed amendments to the draft report

With regard to the text of the draft report Slovenia has the following observations/proposals:

A. Categories (identification of the nature) of the inter-State cases

- *Para 31. (Chapter IV) / comments*

As stated in §29 of the draft report, an application under Article 33 of the Convention may contain different types of complaints pursuing different goals. Its object and purpose appear not to be clearly defined through the Convention and Rules of the Court, or in the draft report.

Regarding §31 and the third category of inter State cases that have emerged, those relating to inter-State conflicts – Slovenia suggests caution when defining its scope.

In the context of inter-State cases, the Court's mission is to ensure the High Contracting Parties' adherence to the Convention, and not to act predominantly as an international conflict resolution forum (albeit the statistics in section III/1 are a clear sign of a need to find the solution to effectively process a growing number of such cases). Admittedly, a great majority of inter-state cases concern situations of fundamental breaches of the Convention against individuals in such conflicts. The core of each case related to an inter-State conflict is however the same as in any other inter-State case, i.e. the protection of the Convention rights.

Slovenia proposes further discussion when addressing new categories of cases that ought to reflect other important areas of concern, such as those of economic, social and cultural origin. Some of the recently lodged inter-State applications attest to that as they concern the breaches of property rights of individuals and legal persons in relation to a breach of the right to a fair trial. Since the Convention confers rights not only on natural, but also on legal persons, all member States are deemed to have a legal interest in their protection through inter-State mechanism. Further considerations of such categories, i.e. property protection through inter-State application, would therefore be beneficial to their effective handling.

Translation of submitted documentation (official language)

- *Para. 32 and 33 (Chapter IV.) / comments*

Regarding §32 of the draft report, Slovenia strongly supports the proposed amendment to the Rule 46 (g). Slovenia considers it is crucial that the Court requests, at the outset, that copies of any relevant documents, to which the parties refer in their observations, are submitted in one of the two official languages of the Court.

Receiving relevant documents, translated into an official language of the Court, would also enable the parties and the Court in inter-State cases to avoid delays connected with translating the documents and would thereby lead to more efficient and timely preparation of any observations by the parties, as well as more efficient processing of cases by the Court.

Regarding §33 of the draft report Slovenia considers the translation of entire documents, on which the parties rely, as a key component in enabling the parties to prepare their observations more efficiently. It should be noted that translations of complete documentation are necessary in inter-State cases due to their complexity. A complete translation of relevant documentation would also ensure legal certainty and foreseeability of the whole inter-State proceeding.

B. Public character of documentation

- *Para. 92 (Chapter VI.) / comments*

Regarding §92 of the draft report, Slovenia would like to broaden this issue (confidentiality or security considerations) to include documents submitted to the Court, not subject to being state secrets or classified documents, that could nevertheless be detrimental to inter-State proceedings, if accessible to the public.

Slovenia proposes that all documents submitted to the Court by the parties in an ongoing inter-State proceeding should not be released to third parties, without asking both parties for observations on this matter.

Slovenia deems that inter-State proceedings are, by their very nature, legally and politically sensitive. Some documents obtained by third parties from the Court could be misinterpreted or otherwise harm an inter-State proceeding (especially the chances of a friendly settlement) and legal (economic, safety, foreign policy etc.) interests of one or another party, if they were released to the public by the Court.

Rule 33 would need to be amended accordingly.

2. General issues of examination of inter-State applications

With regard to the draft report Slovenia has the following general proposals:

A. Procedural questions: Standing (who is entitled to lodge an inter-State application / who is the victim)?

- *Para 45. (Chapter IV.) / requirements of admissibility in inter-State cases compared to individual applications points to potential issues of identification and representation of alleged victims of violations of the Convention by the State*

Taking into account that draft report focuses on the relation between the status of the victim in inter-State and individual cases (§3 of the draft report), Slovenia proposes that the question concerning the differences regarding standing between inter-State and individual application before the Court form a part of the discussion reflected in the draft report.[10]

Given the special nature of the mechanism under Article 33 of the Convention and with a view of considering different types of inter-State applications, it also appears to be necessary to distinguish between the procedural right of a State under Article of 33 to lodge an inter-State application for the violations of the substantive rights of the Convention of particular victim(s) (*standing under Article 33 of the Convention*) and the issue of standing for the purposes of an individual application under Article 34 (*standing under Article 34 of the Convention*). In other words: can a victim, that itself cannot lodge an individual application before the Court, be protected through inter-State proceedings and enjoy rights under the Convention?

B. Just Satisfaction Claim

- *Para. 127 – 133 (Chapter VII.)*

Regarding the rules for timely introduction of claims for just satisfaction in inter-State applications, Slovenia observes the need for their further clarification.

Rule 60(2) provides that the applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time limit fixed for the submissions of the applicants' observations on the merits unless the President of the Chamber directs otherwise.

Slovenia considers it essential that the exact timing of the just satisfaction claim is predictable for all parties in inter State proceedings, first and foremost to ensure legal certainty and secondly, to make the inter-State proceedings more efficient. We see no justified reason for a just satisfaction claim to be submitted already in an admissibility stage as can be directed by the President of the Chamber. The above-mentioned proposal should be recognised as a part of a broader initiative to reformulate Article 41 ECHR, *inter alia* in a manner that clarifies its applicability in the context of inter-State applications.

Slovenia also notes that under the current design of the Convention there is no legal entitlement to a remedy under Article 41. Neither is the award of damages under Article 41 as transparent as it could be. Further transparency could be achieved if the Court were to render its reasoning for an award in a more explicit manner. An additional sentence in Article 41 could stipulate that the Court should further clarify its just satisfaction award.

Initially, Rule 60 should be amended accordingly.

[10] Standing refers to the right to appear as a party. The differences regarding standing between inter-State and individual application are illustrated in Risini, Isabella: The Inter-State Application under the European Convention on Human Rights, Between Collective Enforcement of Human Rights and International Dispute Settlement, 2018, p. 51 – 53.

SWITZERLAND / SUISSE

The comments of Switzerland were submitted in track changes in the text of the draft Report. They have been reproduced below.

Paragraph 14

Proposal to replace the phrase: “been resolved throughout the years. The numbers of cases terminated are:” with the phrase: “been decided the Court and/or the former Commission throughout the years. Their numbers are as follows: »

Comment :

« Les termes "resolved"/"terminated" sont ambigus puisque potentiellement s'étendant à l'exécution des arrêts. Certes, ces procédures devant la Cour sont terminées. Dans de nombreux cas, la surveillance de l'exécution des arrêts ne l'est cependant pas. Même si l'exécution des arrêts ne doit pas être traitée en profondeur dans le rapport, il nous paraît donc très important de signaler, au moins implicitement, cet aspect. »

Paragraph 17 and paragraph 20

Comment :

« Les affaires terminées concernant les conflits dans la partie nord de Chypre et en Transnistrie étant mentionées au para. 15), il convient de quantifier également le restant des requêtes individuelles pendantes liées à ces deux conflits. »

“please complete: Pending cases in relation to the **Cyprus** issue; please complete: Pending cases in relation to the conflict in the **Transdniestrian region** of the Republic of Moldova.”

Paragraph 45

Comment on the phrase: “the applicant State has the obligation to identify the alleged victims and to submit to the Court duly issued documents confirming the declaration of authority by those persons to be represented before the Court by the applicant State. The person who is represented before the Court must (i) be aware of the fact that he/she is represented by that State before the Court, (ii) regard him/herself as a victim of violation of the Convention and (iii) be willing for the State represents his/her interests before the Court.[11]”

“Is this an existing rule or a proposal? The reference to the observations submitted by the Russian Federation in FN55 does not seem to support such an affirmation, as it explicitly calls for further regulation of this matter.”

Comment on the phrase: “This will ensure that if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims.”

“It could be useful to include a separate paragraph dealing with questions of just satisfaction arising in the case of parallel processing of individual and inter-state applications (here or under Ch.VII). Inter alia, the following points could be addressed: Is there a rule preventing ‘double recovery’, meaning that both the State and the individual are awarded just satisfaction in relation

[11] See comments of the Russian Federation contained in document CDDH(2019)12, § 3.2.

to the same injury? If yes, how does the Court determine which claim prevails? In accordance with the above-mentioned 'prioritisation policy', it would seem logical that the State's claim has priority. Does this mean that a State also has the right to settle, waive or otherwise "extinguish" claims on behalf of its nationals, for example through a friendly settlement? In this context, a possible rule requiring States to show that they legally represent their nationals would seem highly important and it could be useful to expand on this point, also in light of the comment made in relation to FN55."

Paragraph 63

Proposal to change the 2nd sentence from "[i]n its judgment of 1 April 2011 the ICJ considered that Article 22 of the ICERD could not serve as a basis to find the ICJ's jurisdiction in the case." to "In its judgment of 1 April 2011 the ICJ held that "that neither requirement contained in Article 22 has been satisfied. Article 22 of CERD thus cannot serve to found the Court's jurisdiction in the present case."

Proposal to delete the content of footnote 92 and include the following text: "CASE CONCERNING APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (GEORGIA V. RUSSIAN FEDERATION), PRELIMINARY OBJECTIONS, JUDGMENT OF 1 APRIL 2011, § 184. For the requirements contained in Article 22 ICERD (or Article 30 CAT) see also *supra*, para. 51."

Comment: « Il convient de préciser que la CIJ a conclu qu'aucune des conditions énoncées à l'art. 22 CIEDR n'était remplie en l'espèce (cf. § 181 ss. de l'arrêt de la CIJ, https://www.icj-cij.org/files/case-related/140/140-20110401-JUD-01-00-BI.pdf). »

TURKEY / TURQUIE

Introduction

We would like to thank for the opportunity to provide comments on the draft CDDH report on the effective processing and resolution of cases relating to inter-State disputes with a view to facilitating discussions and its finalization at the 2nd meeting of DH-SYSC-IV (9-11 September 2020).

1. **Identification of the nature of the inter-State cases in the initial phases of the application process:**

1.1 The European Court acknowledged that an application brought before it under Article 33 of the Convention may contain **different types of complaints** pursuing different goals.[12] Accordingly, two main categories can be distinguished; either the applicant State complains about general issues (systemic problem and shortcomings, administrative practices etc.) in another State Party or the applicant State denounces systemic violations by another State Party of the basic human rights of its nationals. According to the Court, the latter category involves claims substantially similar not only to those made

[12] See DH-SYSC-IV(2020)04 (draft report), § 29.

in an individual application under Article 34 of the Convention, but also claims filed in the context of diplomatic protection.[13]

1.2 The nature of the complaints made and the purpose of bringing the proceedings to the extent it can be discerned from the initial application have been listed as relevant factors, along with the criteria of whether the victims can be identified, to determine whether granting just satisfaction to the applicant State has been justified.[14]

1.3 The determination of the **nature of complaint** made, however, should not be left at the very end of the proceedings i.e. at the just satisfaction stage but should be set out in the application form and decided upon by the Court during the merits stage of the application at the latest.

1.4 In the case of "Cyprus v. Turkey", the applicant complained of acts, laws and administrative practices which, allegedly, constituted continuing violations of the Convention. In its submission of 22 November 1994, for example, the applicant complained about breaches of numerous Articles of the Convention following the adoption of the Report by the European Commission of Human Rights.[15] The applicant acknowledged that the object of the inter-State case as opposed to one brought by individuals in the case of *Varnava* was that in the "inter-State" case, it wanted to establish the existence of a violation of the Convention, illustrated by particular cases, and not to determine the existence of the violation in particular cases.[16] The European Commission on Human Rights also concluded that the content of the said application was the consequence of legislative measures and of administrative practices in the northern part of Cyprus."[17] Also, in the case of *Varnava v. Turkey*, the Grand Chamber noted "… *that the findings in the fourth inter-State case did not specify in respect of which individual missing persons they were made*."[18]

1.5 Given the indication in the application and in the absence of a determination by the Court until the just satisfaction stage, these facts led the respondent State to consider that "Cyprus v. Turkey" case did not fall into the category of cases warranting the granting of just satisfaction. The respondent State was of the view that Article 41 would not be applicable to inter-State cases save those cases that are motivated by the applicant's self-interest. It was at the just satisfaction judgment that the Court found that just satisfaction was not sought ".. *with a view to compensating the State for a violation of its rights but for the benefit of individual victims*" and proceeded to hold that the applicant was entitled to make a claim under Article 41 of the Convention, and that granting just satisfaction would be justified.[19]

1.6 In order to ensure legal certainty and foreseeability in applications of inter-State nature in the future, therefore, it is important to ask the applicant State at the outset the kind of application they are introducing and the Court to make a judgment on the nature early on.

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[13] Draft report, § 30.
[14]"Cyprus v. Turkey", (just satisfaction)[GC], no. 25781/94, §§ 43-45, 12 May 2014.
[15] The letter of introduction is quoted in full as "original submissions by the admissibility decision fo the Commission of 28 June 1996 in "Cyprus v. Turkey".
[16] Para. 64 of Greek Cypriot memorial.
[17] Para. 85-84 of the Commission Report.
[18] *Varnava and others v. Turkey,* applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, §133.
[19]"Cyprus v. Turkey", (just satisfaction), §47.

2. Potential risks of duplication and inconsistencies:

2.1 Determination of the nature of application at the early stages of the proceedings is also important for evidential purposes, the lack of which carries **the potential risk of duplication and inconsistencies** between individual and inter-State applications.

2.2 As set out in paragraph 41 of the draft report, the Court considers that introducing an inter-State application does not deprive individual of the possibility of introducing, or pursuing, their own claims, with reference to the *Varnava* judgment.

2.3 Also, the draft report sets out the Court's findings in *Varnava* that for an application to be substantially the same as another which has already been examined by the Court or other procedure of international investigation or settlement for the purposes of Article 35 § 2 (b), it must concern substantially not only the same facts and complaints but be introduced by the same persons.[20]

2.4 However, while the Court may be more lenient in terms of admitting or assessing evidence when it comes to examining individual examples with a view to identifying whether there are systemic problems and shortcomings or administrative practices in an inter-State case, it has to apply more strict criteria in cases of claims filed in the context of diplomatic protection where the exact injury caused to a natural or legal person has to be well-established through concrete evidence by the applicant State. The Court has also considered claims brought on behalf of victims in inter-State cases to be substantially similar to those made in an individual application under Article 34 of the Convention,[21] from which we can conclude that evidence has to be similar to those in individual applications.

2.5 Concerning the "missing persons" cluster of "Cyprus v. Turkey", examples were put forth before the Court to establish administrative practices, leading the Court in its judgment on the merits to find, *inter alia*, that there has been a continuing violation of Article 5 of the Convention by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of the Greek Cypriot missing persons in respect of whom there was an arguable claim that they were in Turkish custody at the time of their disappearance.[22]

2.6 In the case of *Varnava*, on the other hand, the Court proceeded to apply its usual evidentiary standards and did not find Article 5 violation for seven out of nine missing persons who also fell within the category of "missing persons" in "Cyprus v. Turkey".[23] In other words, while there has been a finding of violation in relation to Article 5 concerning all Greek Cypriot missing persons in "Cyprus v. Turkey", a later judgment of the Court held there was no violation for seven among them upon examination by the Court within the context of *Varnava*. This resulted in an inconsistency in "Cyprus v. Turkey" and the individual cases in *Varnava* case.

2.7 This discrepancy could have been explained if the Court proceeded to find that the applicant was only complaining about an administrative practice in "Cyprus v. Turkey". However, the Court's consideration of the application in "Cyprus v. Turkey" as if it

[20] *Ingebjørg Folgerø and Others v. Norway* (dec.), no. 15472/02, 14 February 2006; *Malsagova and Others v. Russia* (dec.), no. 27244/03, 6 March 2008.
[21] "Cyprus v. Turkey", (just satisfaction), §45.
[22] "Cyprus v. Turkey" [GC], no. 25781/94, ECHR 2001-IV, §150.
[23] *Varnava*, operative part 6.

contained claims as "*… substantially similar not only to those made in an individual application under Article 34 of the Convention, but also to claims filed in the context of diplomatic protection*" in its just satisfaction judgment made it difficult to otherwise explain the inconsistencies in "Cyprus v. Turkey" and *Varnava* judgments.

3. Identification of alleged victims of violation:

3.1 In cases when the applicant State opts to pursue an application (or part thereto) that is substantially similar to those made in an individual application under Article 34 of the Convention or claims filed in the context of diplomatic protection, it is important that the applicant State also proves the identity of the alleged victims and the specific violations committed against them.

3.2 Unfortunately, in "Cyprus v. Turkey", the Court did not have an assessment on the alleged victims. The European Commission did not even consider it appropriate to mention the number of persons who fell into the category of "missing persons".[24] Also, in the case of *Varnava v. Turkey*, the Grand Chamber noted "… *that the findings in the fourth inter-State case did not specify in respect of which individual missing persons they were made*."[25] Yet, the Court found this group to be "sufficiently precise and objectively identifiable group of persons" in its just satisfaction judgment.[26]

3.3 It appears that the Court has also identified this to be a problem following its judgment in "Cyprus v. Turkey" and highlighted in its report that it was very important that the applicant State was, from the outset, asked to submit the list of clearly identifiable individuals.[27]

3.4 The draft report also considers that submitting a list of clearly identifiable individuals by the applicant State would help reduce the risk of awarding just satisfaction to individuals who are not eligible for such an award and the feasibility of encouraging a formalisation of these practices, notably in the Rules of Court, are steps in the right direction.[28]

3.5 It must be added that the current practice of the Court to delegate the responsibility of overseeing the setting up of a mechanism to distribute the sums awarded to the individual victims in inter-State cases, on the other hand, is problematic. With this approach, the Court delegates a responsibility onto the Committee of Ministers without making a finding on who the victims are per se. As mentioned above, this also contradicts the approach of the Court that considered claims brought for victims and claims filed in the context of diplomatic protection similar to those applications filed by individuals.[29] In the case of individual applications, however, not only the personality of the applicants has to be clear, but they have to prove their victim status, as well as the exact amount and nature of damage incurred for purposes of just satisfaction. While the Committee of Ministers is to supervise judgments, it is not clear how the Committee of Ministers will have clear guidelines in supervising judgments when the Court does not have findings on victims.

[24] "Cyprus v. Turkey" [GC], no. 25781/94, ECHR 2001-IV, §120.
[25] *Varnava*, §133.
[26] "Cyprus v. Turkey", (just satisfaction), §47.
[27] See document CDDH(2019)22, para. 31.
[28] DH-SYSC-IV(2020)04, dated 08/07/2020, para. 167.
[29] "Cyprus v. Turkey", (just satisfaction), §45.

4. Circumventing Court's rulings:

4.1 The parallel running of inter-State and individual applications deriving from the same facts and complaints, as the Court considers that introducing an inter-State application does not deprive individual of the possibility of introducing, or pursuing, their own claims, do not prevent potential risks of duplication and inconsistencies in the evolving case-law of the Court. The door is also left open for applicants, be they individual or State, to circumvent judgments of the Court delivered in inter-State or individual cases.

4.2 In "Cyprus v. Turkey", the Commission joined to the merits the determination of the six-month rule and neither the applicant nor the respondent Government had made any submissions on the point before the Court in "Cyprus v. Turkey".[30]

4.3 In the case of *Varnava*, the Court held that in cases concerning missing persons in Cyprus, the Court found that the applicants should have applied to the Court by January 1990, and all applicants other than those in *Varnava* failed to act, in the special circumstances of their cases, with reasonable expedition for the purposes of Article 35 § 1 of the Convention. The Court therefore found the applications of individuals that were part of the *Varnava* case to be admissible, but proceeded to find applications introduced after the end of 1990 inadmissible due to temporal provisions of Article 35 of the Convention.[31]

4.4 It was only after the Court's introduction of the temporal limit in the *Varnava* judgment preventing individual applications regarding missing persons that the applicant in "Cyprus v. Turkey" decided to proceed with the just satisfaction judgment, nine years after the Court's judgment on merits, to make claims concerning the application of Article 41 of the Convention. The award of the Court aggregate sums of EUR 30,000,000 for non-pecuniary damage for the surviving relatives of Greek Cypriot missing persons in that judgment led to the circumvention of yet another Grand Chamber judgment delivered early on, resulting in the temporal provisions introduced in *Varnava* to continue to bar the applications concerning the disappearances of Turkish Cypriot missing persons introduced by the relatives of Turkish Cypriot missing persons only.[32]

5. The timely introduction of claims for just satisfaction in inter-State applications:

5.1 Rule 60(2) of the Rules of Court regulates that the applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant's observations on the merits, unless the President of the Chamber directs otherwise. In the case of "Cyprus v. Turkey", the applicant did not submit any claims for just satisfaction in the course of procedure on the merits of the case. The claims of the applicant for just satisfaction on the missing persons cluster of the judgment, which were introduced after the Court brought temporal provisions to the introduction of missing persons application to the Court in the *Varnava* judgment, came after 9 years and on Karpaz cluster even later, 11 years after the judgment on merits. Until the just satisfaction judgment was introduced, the supervisory proceedings before the Committee of Ministers continued. While the Court accepted that there may be "prejudice" to the procedural interests of the respondent Government due

[30] *Varnava,* §159.
[31] *Karefyllides and Others v. Turkey*, application no. 45503/99 and in 49 applications *v. Turkey.*
[32] *"Emin and Others v. Cyprus",* applications nos. 59623/08, 3706/09, 16206/09, 25180/09, 32744/09, 36499/09 and 57250/09, partial decision as to admissibility, 3 June 2010.

to delay, in the just satisfaction judgment of "Cyprus v. Turkey", the Court put the burden of proof on the respondent Government and then found it had not been met.[33]

5.2 The Court proceeded to consider the applicant's claims for just satisfaction, as late as eleven years after the merits judgment, not belated and dismissed the Turkish Government's objection to that end in the "Cyprus v. Turkey" judgment.[34] The problems faced in this pratice must have been acknolwedged also by the Court which now advises to include, in the operative part of the judgment on the merits, to fix a time-limit for the parties' exchange of observations on just satisfaction in order to handle these cases more efficiently and to avoid undue delays between the judgment on the merits and the just satisfaction judgment.[35]

5.3 Paragraph 167 of the draft report mentions that the submission of the observations on just satisfaction by the States Parties concerned within the time-limits fixed by the judgment on the merits for the parties' exchange of such observations, would help to handle inter-State cases more efficiently and avoid undue delays between the judgment on the merits and the just satisfaction judgment. The draft report adds that the Council of Europe member States should give consideration to the question how to further promote such approaches as principles of cooperation with the Court pursuant to Article 38 of the Convention.[36]

6. No discussion on execution of judgments:

6.1 While not finding jurisdiction to make a ruling on the "declaratory judgment" asked by the applicant, the just satisfaction judgment in "Cyprus v. Turkey" also included comments of the Court concerning the relevant part of the merits judgment dealing with property rights of displaced Greek Cypriots that has been pending before the Committee of Ministers.

6.2 In line with the understanding that the draft report would not include parts concerning execution of judgments, it is not clear why a paragraph that includes the Court's comments in the just satisfaction judgment has been inserted in the draft report under the heading "IV. Friendly Settlement, 1. The practice of the Court."[37]

6.3 As it can be recalled, the role of Committee of Ministers concerning the supervision of the execution of a judgment where supervision is ongoing excludes the intervention of the Court unless the Court is seized by the Committee of Ministers. This is clear from Articles 46§3 (to give a ruling on interpretation) and 46§4 (where a Contracting Party refuses to abide by a final judgment) of the European Convention of Human Rights which enable referral to the Court for a judgment pending before the Committee of Ministers only by a qualified majority of two thirds of the representatives entitled to sit on the

[33] "Cyprus v. Turkey", (just satisfaction), §26.
[34] "Cyprus v. Turkey", (just satisfaction), §29.
[35] See document CDDH(2019)22, § 30.
[36] DH-SYSC-IV(2020)04, dated 08/07/2020, para. 167.
[37] DH-SYSC-IV(2020)04, dated 08/07/2020, para. 157.

Committee. The Court's case-law is also clear that there is no other way for the Court to directly assert jurisdiction to verify compliance with the Court's judgments.[38]

6.4 In line with the above, the Court could not find jurisdiction to rule on the applicant's demand for a "declaratory judgment" in a way that would be binding on the Committee of Ministers. As such, the operative part of the just satisfaction judgment did not (and could not) include any indication to the Committee of Ministers as to the kind of measures it needs to supervise.

[38] See *Oberschlick v. Austria*, nos. 19255/92 and 21655/93, Commission decision of 16 May 1995, Decisions and Reports 81-A, p. 5, and *Mehemi v. France* (no. 2), no. 53470/99, § 43, ECHR 2003 IV).