DH-SYSC-IV(2020)06REV
19/11/2020

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 drafting proposal and comments received after the 2nd meeting of DH-SYSC-IV (9-11 September 2020) by member States on the Draft CDDH report on the effective processing and resolution of cases relating to inter-State disputes (document DH-SYSC-IV(2020)04)Rev /

Compilation des propositions de rédaction et des commentaires reçus après la 2e réunion du DH-SYSC-IV (9-11 septembre 2020) des États membres sur le Projet de rapport du CDDH sur le traitement et la résolution efficace d'affaires concernant des conflits interétatiques (document DH-SYSC-IV(2020)04Rev)

Note/Introduction

The drafting proposals of delegations are highlighted in yellow and their comments are marked in bold font. Explanatory comments of the Secretariat are marked in italics./

Les propositions de rédaction des délégations sont surlignées en jaune et les commentaires figurent en caractères gras. Les explications du Secrétariat sont indiquées en italique.

TABLE OF CONTENTS / TABLE DES MATIÈRES

ARMENIA / ARMÉNIE

Comments sent on 19 November 2020

Paragraph 14

14. Bearing in mind that several inter-State cases and a number of related individual applications have been dealt with by the Court and/or the European Commission of Human Rights in the first decades of the Convention, the focus of this report lies on the current challenges of the Court's caseload as they have been identified in the Interlaken process and especially in the Copenhagen Declaration. As regards cases that have been dealt with by the Court and/or the European Commission of Human Rights, retrospectively it can be said in a succinct manner that 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 decided by the Court and/or the former Commission throughout the years. Their numbers, as provided for by the Court's registry, are as follows: 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 Nagorno-Karabakh conflict**]** and **[**109 in relation to the conflict in the Transdniestrian region of the Republic of Moldova**]**.

In order to ensure consistency, uniformity and legal certainty, Armenia proposes to keep the original wording. The Azerbaijani proposal on referring to the conflict of Nagorno Karabakh as "the conflict in and around the Nagorno-Karabakh region of the Republic of Azerbaijan" is biased and does not correspond to the language used by the Court. Particularly, in its rulings the Court refers to the conflict as the "Nagorno-Karabakh conflict" (*Chiragov and Others v. Armenia* (no. 13216/05) and *Sargsyan v. Azerbaijan* (no. 40167/06). In the CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, the CDDH mentions the conflict as the "Nagorno-Karabakh conflict". Moreover, the OSCE Minsk Group (*the only internationally mandated mediation format for the settlement of the conflict*) in its statements also refers to the conflict as the "Nagorno-Karabakh conflict". The proposal of naming the conflict as "Armenia-Azerbaijan Nagorno-Karabakh conflict" also differs from the language employed by the Court, the CDDH and the OSCE Minsk Group. Therefore, the proposal on deviating in the current draft report from the wording employed by the Court, the CDDH and the OSCE Minsk Group is inadmissible.

Paragraph 20

20. As regards individual applications related to 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:

- 1110 pending applications concern issues of displaced persons' continued inability to return to their homes and property from which they fled in the years 1988-1993 involving complaints similar to those examined by the Court in the cases of *Chiragov and Others v. Armenia* (no. 13216/05) and *Sargsyan v. Azerbaijan* (no. 40167/06). 608 applications are against Armenia and 502 applications are against Azerbaijan.

- 11 pending applications (3 against Armenia and 8 against Azerbaijan) concerning the detention and alleged torture/killing. All these cases were communicated.

For the reasons exposed above (related to paragraph 14), Armenia proposes to keep the original wording.

Footnote 24

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).

Amendment proposal:

"*In the context of the full-fledged military aggression initiated by Azerbaijan on September 27, 2020 against "the Republic of Nagorno Karabakh" Armenia lodged two separate requests for interim measures against Azerbaijan and Turkey. In a composition of a Chamber of seven judges the ECtHR decided to apply Rule 39 of the Rules of Court in both interstate applications. Another interstate application for interim measures was lodged by Azerbaijan against Armenia.*"

Comment Armenia:

The month of April is correct. Armenia proposes to keep the definition "the line of contact between Azerbaijan and the "Republic of Nagorno-Karabakh". The original wording adds clarity and certainty to the words "line of contact". Moreover, the position of Azerbaijan regarding paragraphs 18 and 20 (stressing the importance of further specifying the definition of the NK conflict and ignoring the wording employed by the Court, the CDDH and the OSCE Minsk Group) and its position on footnote 24 (insisting on avoiding any mention about the parties to which the line of contact relates to) are, at least, contradictory in essence.

As to Azerbaijan's comment on the elimination of the line of contact between Azerbaijan and the NKR, it is important to mention that from the legal perspective, after the full-fledged war initiated by Azerbaijan on September 27, with the assistance of Turkey and the use of foreign terrorist fighters from the Middle East, the current line of contact between the NKR and Azerbaijan has not been defined yet.

Additionally, Armenia proposes to complete the footnote or add a separate footnote on the interstate applications recently lodged by both states.

AZERBAIJAN / AZERBAÏDJAN

Paragraph 14

14. Bearing in mind that several inter-State cases and a number of related individual applications have been dealt with by the Court and/or the European Commission of Human Rights in the first decades of the Convention, the focus of this report lies on the current challenges of the Court's caseload as they have been identified in the Interlaken process and especially in the Copenhagen Declaration. As regards cases that have been dealt with by the Court and/or the European Commission of Human Rights, retrospectively it can be said in a succinct manner that ~~S~~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~~ decided by the Court and/or the former Commission throughout the years. Their numbers, as provided for by the Court's registry, ~~of terminated cases~~ are as follows: 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 conflict in and around the Nagorno-Karabakh region of the Republic of Azerbaijan/Armenia-Azerbaijan Nagorno-Karabakh conflict the Nagorno-Karabakh conflict] and [109 in relation to the conflict in the Transdniestrian region of the Republic of Moldova].

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 of the report AZE 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; Alternatively "Armenia-Azerbaijan Nagorno-Karabakh conflict" can also be used. This will demonstrate which countries are parties to the conflict, showing therefore against which States inter-states applications relate.

Paragraph 20

20. As regards individual applications related to the conflict in and around the Nagorno-Karabakh region of the Republic of Azerbaijan/Armenia-Azerbaijan Nagorno-Karabakh conflict [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:

- 1110 pending applications concern issues of displaced persons' continued inability to return to their homes and property from which they fled in the years 1988-1993 involving complaints similar to those examined by the Court in the cases of *Chiragov and Others v. Armenia* (no. 13216/05) and *Sargsyan v. Azerbaijan* (no. 40167/06). 608 applications are against Armenia and 502 applications are against Azerbaijan.

On "1110 pending applications", AZE commented the following: "should be renewed".

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 first sentence of paragraph 20 of the report AZE 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; Alternatively "Armenia-Azerbaijan Nagorno-Karabakh conflict" can also be used. This will ensure which countries are parties to the conflict, therefore against which States inter-states applications can relate.

- 11 pending applications (~~5 cases against Azerbaijan~~ 3 against Armenia and 8 against Azerbaijan) concerning the detention and alleged torture/killing ~~of Armenian citizens in Azerbaijan.~~ All these cases were communicated.

Cases referred here relate not only to Azerbaijan but also to Azerbaijan. See also comments to the footnotes 24 and 25 :

FN 24: The "four-day war" in [April] **(AZE comment: the month is correct)** 2016, shelling along the line of contact

AZE comment: 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 from bodies like UN, OSCE, Council of Europe and EU concerning the conflict in and around the Nagorno-Karabakh region of the Republic of Azerbaijan. Also we should take into account that due to the effective counter-measures launched since September, 27 following the aggression of Armenia, the line of contact has now been eliminated

FN 25: 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~~was declined on 7 September 2020). 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 on the border between Azerbaijan and Armenia ~~close to the line of contact [between Azerbaijan and the "NKR"]~~ in ~~November~~ December 2016 (all communicated) and 1 case against Armenia concerning shelling and resultant death close to the line of contact in July 2017.

AZE comment: the clashes referred here occurred on 29 December 2016 on the border between Azerbaijan and Armenia, close to the Tovuz region of Azerbaijan and Tavush region of Armenia, which is about 300 km away from the line of contact, see in this regard *Gurbanov v. Armenia* (7432/17) http://hudoc.echr.coe.int/eng?i=001-171872)

Paragraph 164

164. Recently, the Court has introduced a number of practices to counter potential risks of duplication or inconsistencies stemming from the processing in parallel of inter-State applications and related individual applications. In particular, where an inter-State case is pending, individual applications raising the same issues or deriving from the same underlying circumstances are, in principle and in so far as practicable, without being put aside, not decided before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case. 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. Also, the Court's methodology to take into account any findings of administrative practice established in inter-State proceedings in related individual applications is conducive to avoiding any potential inconsistencies and duplication. At the same time, gradual and partial processing of individual applications related to the situations of inter-state conflicts can provide further guarantees that the rights of individual applicants in this type of cases are respected. In this regard, gradual communication of the cases to respondent governments in question can both serve as means to reduce backlog of pending applications and allow the Court and the States to continuously process these applications and further contribute to the development of the relevant Court's practice.

AZE proposes to add this paragraph.

NETHERLANDS / PAYS-BAS

Paragraph 15

15. Nonetheless, the number of applications linked to situations of conflict between member States continues to be high in the recent years. There are currently ~~eight~~ thirteen inter-State applications pending before the Court with a great majority of cases linked to situations of conflict between member States[1] as well as numerous related pending individual applications.

According to the Court's overview, there are currently 13 inter-State cases pending. https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf

Paragraph 25

Text proposal added in yellow.

25. The Article 41 procedure is normally very complex. The absence of lists of clearly identifiable individuals by the applicant government, from the outset at the just satisfaction stage, has raised practical questions in terms of awarding just satisfaction in inter-State cases to individual victims.

Paragraph 29

29. The Court acknowledges that an application brought before it under Article 33 of the Convention may contain different types of complaints pursuing different goals. Accordingly, two main categories of complaints can be distinguished. First, an applicant State Party may complain about general issues (systemic problems and shortcomings, administrative practices, etc.) in another State Party. Article 33 empowers the Contracting Parties to bring an inter-State application before the Court regardless of whether the victims of the alleged breach are nationals of the applicant State.[2] In such cases the primary goal of the applicant Government is that of vindicating the public order of Europe ~~[~~within the framework of collective responsibility~~]~~ under the Convention even if the State's own nationals are not concerned. [3] The Court's judgments with regard to such claims may – as in other cases decided by the Grand Chamber – have an indirect ***erga omnes*** effect given that they may serve to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.[4]

According to the Netherlands, this formulation must be retained as it contributes to the (factual) explanation of the types of inter-State complaints that exist. Furthermore, these wordings are directly flowing from the Court's jurisprudence outlining one of the goals of inter-State complaints.

Paragraph 33

[1] See list of inter-State applications is available at https://echr.coe.int/Documents/InterState_applications_ENG.pdf
[2] See also *Austria v. Italy*, quoted above, pg.19.
[3] *Cyprus v. Turkey (just satisfaction) [GC]*, no. 25781/94, § 44, 12 May 2014.
[4] *Ireland v. United Kingdom*, no. 5310/71, § 154, 18 January 1978.

Proposed addition highlighted in yellow.

33. The issue of translating documents appended to the application in an inter-State case raises significant challenges for the Court as well as for the applicant and respondent States. Further reflection is needed to improve the current situation *inter alia* by considering the possibility of reviewing the Rules of Court as envisaged by the Court. A consensus approach may be that Rule 46 prescribes that the applicant State, *at a minimum*, has to submit at the outset the statement of facts, the statement of the alleged violation(s) of the Convention and a statement on compliance with the admissibility criteria in one of the official working languages of the Court. Furthermore, the applicant state has to make sure that any supporting / evidentiary materials are also submitted in one of the official working languages as soon as the inter-State application is communicated to the respondent state. For any other documents, the applicant state must provide the Court with translated summaries on the basis of which the Court can determine whether they have to be translated in full by the applicant State at a stage in the proceedings to be decided by the Court. ~~From the applicant State's perspective it appears that it would be feasible to provide at the outset at least translated summaries of all documents it has submitted pursuant to Rule 46 (g) into one of the official languages of the Court rather than translations of all such documents. The Court would be better placed to determine on the basis of the summaries which documents are relevant to be translated in full and, thereafter, request the applicant State to provide such translations.~~

Please see NL textproposal which is based on the earlier (oral) proposal of the NL during the second meeting of DH-SYSC-IV in September.

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**.[5] The Court has held that an inter-State application does not deprive individual applicants of the possibility of introducing or pursuing their own claims.[6] 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.[7] 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.[8] Depending on the situation, the Court may deem that it is necessary to rule on preliminary questions that have a bearing on all cases first in order to make the best use of the available time. 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.[9]

[5] Ibid; See also the comments of the Russian Federation item 1 contained in document DH-SYSC-IV(2020)05Rev, regarding the possible introduction of a new admissibility criterion for inter-state application.
[6] *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.
[7] 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.
[8] *Lisnyy and others v. Ukraine and Russia* nos. 5355/15, 44913/15 et 50852/15, 5 July 2016.
[9] See Press Release quoted above, note 47.

The Netherlands can support this textproposal *[the referenced text-proposal is the compromise proposal of the Co-rapporteurs, the Chair and the Vice-Chair, see document DH-SYSC-IV(2020)04Rev]***. Practice must show whether this is contributing to the time-efficiency.**

Paragraph 45

NL proposes to mark the phrase "from the outset, at the just satisfaction stage" in track changes; to delete the word "the" in the 4th line and replace with the word "a" and to delete the word "requirement" in the 7th line and replace with the word suggestion.

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~~ a 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.[10] Whilst accepting that such information is necessary for the Court to have before it when dealing with just satisfaction, the suggestion ~~requirement~~ that it be lodged at the beginning of the application places a high threshold requirement on the applicant State.

Paragraph 46

Proposed additions and changes highlighted in yellow.

46. This section looks at ~~T~~the Committee on the Elimination of Racial Discrimination (CERD) which monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) by its State Parties as well as the inter-American system of human rights given that these two human rights bodies have jurisdiction over and experience in dealing with both inter-State cases and individual applications considering alleged human rights violations. The CERD examines both state-to-state complaints (Article 11 of the ~~Convention~~ ICERD) as well as complaints filed by individuals or groups of individuals claiming to be victims of racial discrimination by their State (Article 14 of the ~~Convention~~ ICERD). In 2018 the CERD received for the first time three communications under Article 11, namely *State of Qatar vs. Kingdom of Saudi Arabia; the State of Qatar vs. United Arab Emirates; and the State of Palestine vs. State of Israel.* On 27 August 2019, CERD decided that it has jurisdiction and declared the first two communications admissible. On 12 December 2019, the CERD decided that it has jurisdiction over the third communication. No applications relating to these are filed under Article 14 of the ICERD. Therefore, up until now parallel proceedings of individual and state-to-state complaints have not occurred before the CERD Committee.

Paragraph 51bis

The Netherlands can support this textproposal textproposal *[the referenced text-proposal is the compromise proposal of the Co-rapporteurs, the Chair and the Vice-Chair, see document DH-SYSC-IV(2020)04Rev]* **It is a useful elaboration on the importance of the topic of plurality of international proceedings. The Netherlands remains of the opinion, however, that plurality of international proceedings is a complex issue which goes further than the consideration of inter-State and related individual applications by the Court and the challenges the Court encounters when considering such applications, which is the main focus of the report.**

Paragraph 55

[10] See document CDDH(2019)22, § 31.

55. The Court verifies, as it is the case with the first limb of Article 35 § 2 (b) (see paragraph 42 above), whether the applications to the different international institutions concern substantially the same persons, facts and complaints.[11] If the complainants before the two institutions are not identical, the application to the Court cannot be considered as being "substantially the same as a matter that has been submitted to another procedure of international investigation or settlement".[12] However, the Court has recently held that a complaint brought by a trade union under the ~~a~~ procedure of the International Labour Organisation was substantially the same as an individual application brought under the Convention by officers of the union in their own names. The Court based its findings on the close association of the substance of the proceedings and also the status of the individuals as officers of the trade union. Allowing them to maintain their action before the Court would therefore have been tantamount to circumventing Article 35 § 2 (b) of the Convention.[13]

Paragraph 56bis

56. bis. ~~Despite the relevant provisions of Article 35 § 2 (b) and the relevant jurisprudence explained above a risk is seen for the adoption of contradictory or overlapping decisions leading to legal uncertainty.~~[14]

The Netherlands does not see why this paragraph is contributing to what is stated earlier in this section. Furthermore, the remarks of RF referred to are related to the relation between individual and inter-State cases before the Court while this section is dealing with individual applications before the Court and similar applications submitted to other courts / bodies.

Paragraph 59

59. Article 55, while not entirely excluding the possibility that inter-State disputes involving human rights issues are brought and addressed in other international bodies, creates a barrier for State Parties which are not satisfied with the judgments of the Court in an inter-State case to "appeal" such judgments to another international body. Because of the principle of monopoly established in Article 55 as well as the significance of this provision of the Convention in respect of ensuring the separation between the system of the Convention and other international dispute settlement mechanisms it was necessary to include an interpretation of Article 55 in the "Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms."

The Netherlands prefers that the accession of the EU in not discussed in this report as the negotiations are pending.

Paragraph 63

63. The respondent Party in the ICJ's proceedings did not raise any objections before the ICJ in connection with the parallel proceedings of the case *Georgia v. Russia* before the Court. In its judgment of 1 April 2011 the ICJ ~~considered~~ held that "neither requirement contained in Article 22 has been satisfied. Article 22 of CERD thus cannot serve to found the Court's

[11] *Patera v. the Czech Republic* (dec.), no. 25326/03, 26 April 2007; *Karoussiotis v. Portugal*, no. 23205/08, § 63, 1 February 2011; *Gürdeniz v. Turkey* (dec.), quoted above §§ 41-45; *Pauger v. Austria* (Commission decision), no. 24872/94, 9 January 1995.
[12] *Folgerø and Others v. Norway* (dec.), no. 15472/02, 14 February 2006; *Savda c. Turquie* (French only), no. 42730/05, § 68, 12 June 2012; *Gürdeniz c. Turquie* (dec.) (French only), no. 59715/10, § 37, 18 March 2014; *Kavala v. Turkey*, no. 28749/18, 10 December 2019.
[13] *POA and Others v. the United Kingdom* (dec), quoted above, §§ 30-32.

jurisdiction in the present case." ~~Article 22 of the ICERD could not serve as a basis to find the ICJ's jurisdiction in the case.~~[15] However, in the proceedings before the Court the respondent Government drew the Court's attention to the risk of a conflict of case-law between the Court and the ICJ if the former were to declare the application by Georgia admissible, which would jeopardise the legal foreseeability required under international law.[16] The Court observed that in a judgment of 1 April 2011 the ICJ held that it did not have jurisdiction to entertain the application lodged with it by Georgia on 12 August 2008 under the ICERD. Noting that the procedure before the ICJ had ended and that Article 35 § 2 of the Convention applies only to individual applications the Court dismissed the respondent Government's objection (see also paragraph 48 above).[17]

Remark NL: in the sections on comparative perspectives, "the Court" is often used to refer to several Courts while in the body of the text, "the Court" is used to refer to the ECtHR. This is confusing now and then. For instance, does "the Court" in this paragraph refer to the ICJ? The Netherlands would recommend the co-rapporteurs to use the common abbreviations (ICJ etc) throughout the text. Please double check crossreference *[to paragraph 48 above]*.

Paragraph 82 bis

82. bis. This Chapter approaches these challenges from the perspective of the general principles applied by the Court regarding the assessment of evidence, the State Parties' duty to co-operate with the Court under Article 38 of the Convention (sections 1 to 3) as well as the Court's current fact-finding practice (section 4). As regards the assessment of the evidence and the application of Article 38 the Court does not distinguish principles that apply specifically/ exclusively to inter-State applications or to individual applications. Instead, the principles developed regarding individual applications are applied *mutatis mutandis* to inter-State applications and vice-versa. The references to judgments in individual or inter-State judgments in this Chapter reflects this holistic approach of the Court.

The Netherlands can agree with this textproposal *[the referenced text-proposal is the compromise proposal of the Co-rapporteurs, the Chair and the Vice-Chair, see document DH-SYSC-IV(2020)04Rev]* **and also welcomes the changes made in paragraph 3.3. of this chapter** *[the referenced changes concern the compromise proposal of the Co-rapporteurs, the Chair and the Vice-Chair, see document DH-SYSC-IV(2020)04Rev]***.**

Paragraph 98

*This comment relates to a new paragraph 98 added in the compromise proposal of the Co-rapporteurs, the Chair and the Vice-Chair, see document DH-SYSC-IV(2020)04Rev***.**

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[15] 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.~~The ICJ could not find jurisdiction in the case because of the absence of a dispute relating to matters falling under ICERD prior to 9 August 2008 (that is prior to the day on which Georgia submitted its application with ICJ), the negotiations which took place after that date could not be said to have covered such matters, and were thus of no relevance to the ICJ's examination of the Russian Federation's second preliminary objection regarding non-fulfillment of procedural requirements under Article 22.~~

[16] *Georgia v. Russia* (II) (dec.), quoted above, § 77. The respondent Government stated that "[i]n particular, the complaints lodged under Article 14 taken in conjunction with other provisions of the Convention – concerning alleged discriminatory attacks directed against civilians of Georgian origin – were outside the scope of the present application because they were not based on the Convention and were already the subject of examination by the ICJ. As the Court could not examine those issues, which were important for an understanding of the case as a whole, it should not examine the events related to them."

[17] *Georgia v. Russia* (II) (dec.), quoted above, § 79.

The Netherlands appreciates the efforts to respond to its previous remarks This is a good starting point, mentioning relevant jurisprudence. The Netherlands thinks that it would be useful to mention other examples of judgements on the merits of inter-State cases outlining the principles related to the , such as Cyprus v. Turkey.

Paragraph 130

[…] Also, in the case of *Georgia v. Russia (I)* the Court considered that, *inter alia*, a number of persons included in the list of victims submitted by the applicant government could not be awarded just-satisfaction in that procedure because ~~regarded as such because~~ they had lodged individual applications before the Court.

Textproposal by the Netherlands as the persons were actual victims but could not be awarded just-satisfaction as they had lodged individual applications before the Court (and were awarded just-satisfaction).

Paragraph 144

144. The proceedings conducted in connection with friendly settlement are confidential. If a friendly settlement is reached and the Court decides to strike the case out of its list by means of a decision, the latter will be confined to a brief statement of the facts and the solution reached. The decision is transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision. Normally in individual applications,~~T~~the Registrar of the Court enters into contact with the parties with a view to securing a friendly settlement once an application has been declared admissible.

Textproposal by the NL. To what extent is this practice applicable to inter-State applications? To what extent is it reasonable that the Court initiates a friendly settlement procedure in inter-State cases?

Paragraph 145

Addition of the word "individual"

145. In 2019, 1688 individual applications were struck out of the list by a Chamber or a Committee, in a decision, following a friendly settlement which represents a 23% decrease compared to 2018 (2185).

Paragraph 152

152. The Court considers that, under certain circumstances, it may be appropriate to strike out an application under Article 37 § 1 (c) of the Convention on the basis of a unilateral declaration by the respondent Government. […]

See NL text proposal above, is this also the practice with respect to inter-State cases?

Paragraph 153

153. The number of unilateral declarations in 2019 was 1 511, representing an increase by 75% compared to 2018, with 865 declarations.

Remark NL: from how many (individual / inter-State) complaints in total?

Paragraph 155

155. Some authors argued that the method of pilot judgment should be used also in the context of inter-State applications, which address systemic human rights violations.[18] The pilot judgment approach allows addressing large-scale human rights violations through managerial methods, thus, in a cooperative and sovereignty-preserving manner rather than with sanctions. It is argued that a constructive legal dialogue is a worthwhile option and thus should be open to the Court in inter-State cases. This methodology should not be the only means for the Court to resolve the dispute. So, far no pilot judgment has been adopted in connection with an inter-State case.

Comment on the words "pilot judgment" in the 1st line: **The NL would like to have a discussion on how the system of pilot judgments could be helpful to solving inter-State cases by the Court. What exactly is meant with the method of pilot judgement other than judging one key case and other related cases to follow suit and isn't that the current intended practice with inter-state cases and related individual applications?**

Paragraph 163

163. Processing inter-State cases and the high number of individual applications when they concern inter-State conflicts raises exceptional challenges for the Court, as these cases are particularly time-consuming for Judges and Registry Staff and complex as a result of their nature and dimension. The Court has already taken a number of measures to ensure an effective processing of these cases.

Which measures are meant besides the prioritization of inter-State cases above individual cases related to the same facts and legal questions? *(see document DH-SYSC-IV(2020)05REV)*

Paragraph 164

164. Recently, the Court has introduced a number of practices to counter potential risks of duplication or inconsistencies stemming from the processing in parallel of inter-State applications and related individual applications. In particular, where an inter-State case is pending, individual applications raising the same issues or deriving from the same underlying circumstances are, in principle and in so far as practicable, without being put aside, not decided before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case. 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. Also, the Court's methodology to take into account any findings of administrative practice established in inter-State proceedings in related individual applications is conducive to avoiding any potential inconsistencies and duplication.

Comment on the 3rd sentence: **"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."** *(see document DH-SYSC-IV(2020)05REV)*

Paragraph 167

[18] L. Wildhaber, Pilot judgment in cases of structural or systemic problems on the national level in R Wolfrum, U Deutsch, the European Court of Human Rights Overwhelmed by applications; P Leach, Responding to systemic human rights violations: an analysis of pilot judgments of the European Court of Human Rights and their impact at national level; A Buyse, "Airborne or Bound to Crash? The rise of pilot judgment and their appeal as a tool to deal with the aftermath of conflict.

Comment on the words "undue delays" in the 13th line: **"The Netherlands thinks that a discussion on this issue is still relevant and that this is an aspect to be covered by proposals that SYSC-IV will formulate at a later stage."**

Paragraph 168

Comment on the word "practice" in the 1st line: **"See remark above on the application of the pilot judgment procedure to inter-State applications in line with our earlier remark below."**

RUSSIAN FEDERATION / FÉDÉRATION DE RUSSIE

Paragraph 1

1. A growing number of cases linked to inter-State disputes which are pending before the European Court of Human Rights (the Court) have brought the question how to ensure their effective processing and resolution including to the forefront of last years' debates on tackling the caseload of the Court. The processing of inter-State cases and of the high number of individual applications, which relate to inter-State conflicts raises exceptional challenges for the Court and States-parties to the dispute, as these cases are particularly time-consuming ~~for Judges and Registry staff~~ and complex as a result of their nature and dimension. Such cases also necessitate detailed and careful consideration by the Court of various aspects of the future judgement, including possible implications at the stage of its execution. States-parties experience difficulties due to lack of concrete procedural rules of the Court that would specifically address issues relating to the processing of inter-State cases, especially establishment of facts and burden of proof. Moreover, the Convention lacks provisions regarding the issues of correlation~~s~~ between an inter-State case and individual applications raising the same issues that had been raised in the inter-State case.

Paragraph 3

3. In analysing the challenges that the processing in parallel of inter-State applications and individual applications related to inter-State cases or conflicts may create this [draft] report takes a close look at the differences in procedural requirements applicable to these two types of applications. The lower admissibility requirements applicable to the inter-State application reflect the distinct features of this application which are enshrined in the Convention and established by the Court in its case-law. These include notably the unqualified right of a State to bring any alleged breaches of the Convention to the Court as well as the particular quality of the inter-State procedure as an expression of the system of the collective guarantee of the Convention. Despite complexities of the parallel processing of inter-State applications and individual applications relating to inter-State conflicts, the Court's recent practice of prioritising inter-State applications without putting aside the examination of individual applications seems to be aimed ~~can help~~ at ensur~~e~~ing the effective processing of these cases and avo~~i~~ds~~i~~ng duplication or conflicting judgments. This part of the [draft] Report also highlights how the Court addresses the relationship between inter-State cases and individual cases on a substantive level, notably in respect of establishing the existence of an administrative practice in contravention of the Convention.

Paragraph 4

4. The examination of inter-State cases or individual cases relating to conflicts in parallel by the Court and other international bodies may potentially result in contradictory results concerning human rights obligations set forth in the Convention and other international human rights instruments, as well as general international law on State responsibility. Ultimately this would lead to uncertainty for States as to how they can fulfill their international human rights obligations and for individuals as regards the exact scope of their rights. It may also potentially threaten the coherence of human rights law and the credibility of human rights institutions. ~~Nevertheless,~~ ~~a~~An analysis of the relevant case-law of the Court as well as a comparative outlook over the case-law of other international bodies reveals that in ~~practice~~ insofar few cases relating to inter-State disputes and concerning the same events or subject-matter have been brought in parallel before the Court and other international bodies or have in fact led to diverging or conflicting decisions. However such risks exist in the future and should be mitigated.

Paragraph 6

6. In accordance with the Convention, just satisfaction is afforded to the injured party. 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 a large number of individuals is ~~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.

Paragraph 14

14. Bearing in mind that several inter-State cases and a number of related individual applications have been dealt with by the Court and/or the European Commission of Human Rights in the first decades of the Convention, the focus of this report lies on the current challenges of the Court's caseload as they have been identified in the Interlaken process[19] and especially in the Copenhagen Declaration.[20] As regards cases that have been dealt with by the Court and/or the European Commission of Human Rights, retrospectively it can be said in a succinct manner that ~~S~~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.[21] These include **[INSERT PROPER STATISTICS ON ALL INTER-STATE CASES.]** Thousands of individual applications relating to inter-State disputes have also been ~~resolved~~ decided by the Court and/or the former Commission throughout the years. Their numbers, as provided for by the Court's registry, ~~of terminated cases~~ are as follows: 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 Nagorno-Karabakh conflict] ~~and [109 in relation to the conflict in the Transdniestrian region of the Republic of Moldova].~~

Paragraph 14bis

14-bis. At the moment, 14 inter-state cases have been adjudicated by the Court and/or the Commission. These decisions form a basis for interpretation of Court practice in this field.

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[19] See Contribution of the CDDH to the evaluation provided for by the Interlaken Declaration, CDDH(2019)R92Addendum2, paragraph 122.

[20] See paragraph 45 of the Copenhagen Declaration which acknowledges in the broader context of the caseload challenge, the challenges posed to the Convention system by situations of conflict and crisis in Europe. Also, the High Level Conference meeting in Copenhagen invited the Committee of Ministers, in consultation with the Court, and other stakeholders, to finalise its analysis, as envisaged in the Brighton Declaration, before the end of 2019, of the prospects of obtaining a balanced case-load, *inter alia,* by exploring ways to handle more effectively cases related to inter-State disputes, as well as individual applications arising out of situations of inter-State conflict, without thereby limiting the jurisdiction of the Court, taking into consideration the specific features of these categories of cases inter alia regarding the establishment of facts, see Copenhagen Declaration, paragraph 54 (c).

[21] The full list of inter-State applications is available at https://echr.coe.int/Documents/InterState_applications_ENG.pdf

[INSERT INFORMATION ON ADOPTED DECISIONS OF COURT AND COMMISSION IN RELATION TO INTER-STATE CASES]

Paragraph 19

- ~~5,590 of the 6,490 applications concerned Eastern Ukraine. 4,500 of those 5,590 applications were lodged against Ukraine and 40 of them were lodged against the Russian Federation. The remaining 1,050 applications were lodged against both countries. On 5 May 2020 the Court decided to strike out of the list 327 applications.~~[22] **[NO RELATION TO CONFLICT BETWEEN STATES]**

- ~~The remaining 900 of the 6,490 applications concerned Crimea. 770 of those 900 applications were lodged against the Russian Federation and 10 applications were lodged against Ukraine. 120 applications were lodged against both countries.~~ **[NO RELATION TO CONFLICT BETWEEN STATES]**

~~19.ter. [90 individual applications are pending before the Court in relation to the Cyprus issue. 50 individual applications are pending in relation to the events in the Transdniestrian region of the Republic of Moldova.][INSERT OTHER RELEVANT SPECIFICS TO BE PROVIDED BY THE REGISTRY OF THE COURT]~~ **[NO RELATION TO CONFLICT BETWEEN STATES]**

Paragraph 21

21. Processing inter-State cases and the high number of related individual applications as described above, raises exceptional challenges for the Court and the State Parties to the cases, as these cases are particularly time-consuming ~~for Judges [and Registry Staff]~~ and complex as a result of their nature and dimension.[23] The Convention does not specifically deal with the issue of the correlation between interstate cases and individual applications. Against this background the Court has developed its practice and established guiding principles. However, this is not sufficient due to the fact that States-Parties experience difficulties because of the lack of concrete procedural rules that would specifically address issues relating to the processing of inter-State cases and individual applications. 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 stated in the Copenhagen Declaration, improving the Convention system's ability to deal with the increasing number of applications has been a principal aim of the current reform process from the very beginning. It is in connection with the need for further action to address the caseload challenges that the Copenhagen Declaration stated that "[t]he challenges posed to the Convention system by situations of conflict and crisis in Europe must also be acknowledged".[24]

Paragraph 21bis

21-bis. A fundamental challenge lies in the discrepancies between the case-law of the Court and other international courts and tribunals, such as the International Court of Justice, with regard to rules on establishing a State's responsibility for violation of its international obligations. As an example, in some of its decisions – though not in others – the Court adopted less stringent criteria of responsibility, such as the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State, than those used

[22] ~~*Yuldashev and others v. Russia and Ukraine*, no. 35139/14, 5 May 2020~~
[23] See document CDDH(2019)22 § 4.
[24] See the Copenhagen Declaration, § 45.

under the case-law of the ICJ and other international courts (tribunals), as well as those in the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission.[25] This creates legal uncertainty *vis-à-vis* both general international law and the Court's own (inconsistent) practice.

III-BIS. QUESTIONS REGARDING THE APPLICATION OF THE INTERNATIONAL LAW OF STATE RESPONSIBILITY

[THIS NEW SECTION SHOULD ADDRESS THIS IMPORTANT CHALLENGE THAT UNDERMINES THE EFFECTIVENESS OF THE COURT IN INTER-STATE CASES. INSPIRATION MAY BE DRAWN FROM THE CDDH REPORT ON THE ECHR'S PLACE IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER.]

Paragraph 29

29. The Court acknowledges that an application brought before it under Article 33 of the Convention may contain different types of complaints pursuing different goals. Accordingly, two main categories of complaints can be distinguished. First, an applicant State Party may complain about general issues (systemic problems and shortcomings, administrative practices, etc.) in another State Party. Article 33 empowers the Contracting Parties to bring an inter-State application before the Court regardless of whether the victims of the alleged breach are nationals of the applicant State.[26] In such cases the primary goal of the applicant Government is that of vindicating the public order of Europe [within the framework of collective responsibility] under the Convention even if the State's own nationals are not concerned. [27] ~~The Court's judgments with regard to such claims may – as in other cases decided by the Grand Chamber – have an indirect ***erga omnes*** effect given that they may serve to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.~~[28]

Paragraph 30

30. The second category of inter-State cases involves complaints where the applicant State denounces systemic violations by another State Party of the basic human rights of its nationals. In fact such claims ~~are~~ may be ~~substantially~~ somewhat 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** that is, "invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility".[29] However, application of rules of general international law concerning diplomatic protection, including those relating to compensation, may not contravene the norms of the Convention, which are to be considered *lex specialis*, Taking also into account the **discrepancy between**

[25] CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, document CDDH(2019)R92 Addendum 1, paragraph 167.
[26] See also *Austria v. Italy*, quoted above, pg.19.
[27] *Cyprus v. Turkey (just satisfaction) [GC]*, no. 25781/94, § 44, 12 May 2014.
[28] *Ireland v. United Kingdom*, no. 5310/71, § 154, 18 January 1978.
[29] *Cyprus v. Turkey (just satisfaction) [GC]*, no. 25781/94, § 45, 12 May 2014.

the Court's approach to State responsibility and rules of general international law on this matter, drawing parallels with diplomatic protection becomes difficult.

Paragraph 45

45. 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 and has, therefore, led to certain comments.[30] ~~.~~ 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.[31] 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.[32] ~~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 a high threshold requirement on the applicant State.~~

Paragraph 63bis

Proposal to restore the text of this paragraph which was proposed to be deleted in the compromise proposal of the Co-rapporteurs, the Chair and the Vice-Chair, see document DH-SYSC-IV(2020)04Rev.

[63bis. 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).[33]]

Paragraph 73

73. The CDDH has already analysed in depth issues related to overlapping jurisdiction of the Court and the UN treaty bodies, one or possibly several of them, as a case may easily fall under both the comprehensive treaties (the Convention and the ICCPR), but also under

[30] See comments of the Russian Federation contained in document CDDH(2019)12, § 3.2.
[31] See comments of the Russian Federation contained in document CDDH(2019)12, § 3.2.
[32] See document CDDH(2019)22, § 31.
[33] CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, document CDDH(2019)R92 Addendum 1, paragraphs 69 and 167.

subject-specific UN conventions.[34] Whilst it has noted that the existence of parallel human rights protection mechanisms was often a source of enrichment and enhancement of the universal protection of human rights, it could also lead to certain problems in respect of individual applications. These include the potential for duplication and/or conflicting findings; forum shopping; as well as the legal uncertainty for State parties on how to best fulfill their human rights commitments under the Convention and other international instruments (see paragraph 63.bis above regarding the CDDH's conclusions. [The CDDH has concluded that it is important that the Court continues to endeavor to interpret the Convention in harmony with other international rules for the protection of human rights in particular those binding upon the Council of Europe member States, such as the (majority of) the UN conventions, and seeks to avoid the fragmentation of international law. ~~More consistent reference by the UN treaty bodies to regional courts, and in-depth discussion of the latter's jurisprudence would facilitate the development of consistent international human rights principles.~~]The intensification of encounters between the members of the Court and the UN treaty bodies is also underlined as a way to increase interaction between the systems of the Court and the UN system of human rights protection.[35]

Paragraph 82bis

82. bis. This Chapter approaches these challenges from the perspective of the general principles applied by the Court regarding the assessment of evidence, the State Parties' duty to co-operate with the Court under Article 38 of the Convention (sections 1 to 3) as well as the Court's current fact-finding practice (section 4). As regards the assessment of the evidence and the application of Article 38 the Court does not distinguish principles that apply specifically/ exclusively to inter-State applications or to individual applications. Instead, the principles developed regarding individual applications are applied *mutatis mutandis* to inter-State applications and vice-versa. ~~The references to judgments in individual or inter-State judgments in this Chapter reflects this holistic approach of the Court.~~

Paragraph 83

83. Neither the Convention nor the Rules of the Court seek to regulate how evidence is to be admitted or assessed by the Court.[36] 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 responsibility for 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 evaluation of such evidence. One of the first steps on the way to creating clear standards of proof is refusal to accept references to the media[37] and reports by non-governmental organisations as the sole evidence of existence of whichever event alleged to be a violation of the Convention. ~~The Court examines all the material before it, whether originating from the parties or other sources, and, if necessary, obtains material *proprio motu*.[38] There are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment; the Court adopts the conclusions that are, in its view, supported~~

[34] See CDDH(2019)R92Addendum1 Report on the place of the European Convention of Human Rights in the European and international legal order. See section III, pg 109.

[35] CDDH(2019)R92Addendum1 §346-355

[36] This is without prejudice to the fact that the Rules of the Court contain detailed provisions concerning investigatory measures and the obligations of the parties in this respect, see Annex 1 to the Rules of the Court.

[37] In particular, according to the Rule 40 (Admissibility of Applications) of the African Court On Human and peoples' rights: «applications to the Court shall comply with the following conditions: … 4) not be based exclusively on news disseminated through the mass media»…;

[38] *Ireland v. United Kingdom*, no. 5310/71, § 160, 18 January 1978.

~~by the free evaluation of all evidence including such inferences as may flow from the facts and the parties' submissions.~~[39]

Paragraph 83bis

83 bis. A lamentable example of consideration of an inter-State application without definite standards 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-governmental 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 applying, standards of proof led to the situation where the administrative practice had been established without admissible evidence (and even, as was 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 position 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".

Paragraph 83bis 2

83 bis. 2 The Court examines all the material before it, whether originating from the parties or other sources, and, if necessary, obtains material *proprio motu*.[40] There are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment; the Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence including such inferences as may flow from the facts and the parties' submissions.[41]

Paragraph 93

93. The standard of proof is not explicitly addressed in the provisions of the Convention or in the Rules of the Court. In its first inter-State cases the Court has adopted the standard of proof "beyond reasonable doubt" which has become part of its established case-law. This standard is not to be equated with the same standard applied in criminal proceedings[42] but it has a rather independent meaning assigned to it by the Court which reflects the Court's core role under Article 19 of the Convention that is to ensure the observance by the Contracting States of their engagement to secure the fundamental rights and freedoms set out in the Convention. Thus, 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.[43]

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.

[39] *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, § 147, 6 July 2005, ECHR 2005-VII.
[40] *Ireland v. United Kingdom*, no. 5310/71, § 160, 18 January 1978.
[41] *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, § 147, 6 July 2005, ECHR 2005-VII.
[42] See in detail: Seibert-Fohr, Human Rights Law Journal, 38 (2018) 8 (12).
[43] *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, § 147, 6 July 2005, ECHR 2005-VII; *Georgia v. Russia* (I), quoted above, § 94.

Such unfounded inter-State applications, generally lodged for protection of abstract victims, divert the Court from individual applications lodged by concrete existing and identified victims.
Development of clear and foreseeable (in terms of their application) standards of proof will help filter out unfounded inter-State applications, thus it will relieve the Court of its caseload and will incentivise the States who wish to resort to the Conventional mechanism of protection or rights to carefully prepare their applications with the Court.

Paragraph 98

Proposal to restore the text of this paragraph which was proposed to be deleted in the compromise proposal of the Co-rapporteurs, the Chair and the Vice-Chair, see document DH-SYSC-IV(2020)04Rev.

98. The Court's approach not to rigidly apply the burden of proof rigidly is also demonstrated by the fact that it has on occasions accepted to shift the burden of proof from the applicant to the respondent Government. This applies to cases when the Court notes difficulties for an applicant to obtain the necessary evidence in support of his/her allegations that is in the hand of the respondent Government which fails to submit relevant documents. When the applicant makes a *prima facie* case and the Court is prevented from reaching factual conclusions by the absence of such documents, it is for the respondent Government to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants or to provide a satisfactory and convincing explanation of how the event in question occurred. The burden of proof is thus shifted to the Government.[44] In cases involving situations of injuries sustained in detention the Court has shifted the burden on the respondent Governments and has not accepted in principle the argument that for a violation of the Convention to be found, it was necessary for ill-treatment to be proved beyond reasonable doubt.[45]

Paragraph 99

Proposal to restore the text of this paragraph which was proposed to be deleted in the compromise proposal of the Co-rapporteurs, the Chair and the Vice-Chair, see document DH-SYSC-IV(2020)04Rev.

99. Similarly, in cases involving deaths during a military operation in areas under the exclusive control of the authorities of the respondent Government, the Court has shifted the burden of proof to the respondent Government, in circumstances where the non-disclosure of crucial documents in the exclusive possession of the respondent Government prevented the Court from establishing the facts. It was, therefore, for the Government either to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred.[46] Also, in situations where persons are found injured or dead, or who have

[44] *Tangiyeva v. Russia*, quoted above, §81.
[45] Among others see *Salman v Turkey*, no. 21986/93, 27 June 2000, § 100. See *Ribitsch v Austria,* no. 18896/91, Commission Report, 4 July 1994 § 104 "[T]he authorities exercise full control over a person held in police custody and their way of treating a detainee must, therefore, be subjected to strict scrutiny under the Convention. Thus where injuries occurred in the course of police custody, it is not sufficient for the Government to point at other possible causes of such injuries, but it is incumbent on them to produce evidence showing facts which cast doubt on the account given by the victim, in particular if supported by medical evidence." See also *Ribitsch v Austria,* no. 18896/91, 4 December 1995 § 34 where the Court concluded that the Government have not satisfactorily established that the applicant's injuries were caused otherwise than - entirely, mainly, or partly - by the treatment he underwent while in police custody.
[46] *Akkum and Others v Turkey*, no. 21894/93, § 211, 24 March 2005; *Aslakhanova and Others. v Russia*, no. 2944/06 *and 8300/07, 50184/07, 332/08, 42509/10*, 18 December 2012 § 97.

disappeared, in an area within the exclusive control of the authorities of the State and there is *prima facie* evidence that State agents may be involved, the burden of proof may also shift to the respondent Government since the events in issue may lie wholly, or in large part, within the exclusive knowledge of its authorities. If they then fail to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation, strong inferences may be drawn.[47]

Proposal to delete new paragraph 98 which was added in the compromise proposal of the Co-rapporteurs, the Chair and the Vice-Chair, see document DH-SYSC-IV(2020)04Rev.

~~98. In certain specific circumstances the Court has accepted to shift the burden of proof from the applicant to the respondent Government. In the judgment on just satisfaction in the case of Georgia v. Russia the Court held that "[h]aving regard to the general numerical framework on which the Court relied in its principal judgment to conclude that there had been violations of the Convention (see paragraph 48 above), it proceeds on the assumption that the people named in the applicant Government's list can be considered victims of violations of the Convention for which the respondent Government have been held responsible. Having regard to the fact that the findings of a violation of Articles 3 and 5 § 1 of the Convention and of Article 4 of Protocol No. 4 concern individual victims and are based on events which occurred on the territory of the respondent Government, the Court considers that in the particular circumstances of the present case the burden of proof is on the respondent Government to convincingly show that the individuals appearing in the applicant Government's list do not have victim status. Accordingly, where the preliminary examination has enabled the Court to satisfactorily conclude that a person has been the victim of one or more violations of the Convention, and the respondent Government have failed to show that the person in question did not have victim status, that person will be included in the final internal list for the purposes of determining the total sum to be awarded in just satisfaction (see paragraph 71 below)."[48]~~

Paragraph 115

115. On-site visits are carried out by the full bench of the ICJ on the basis of a decision by the ICJ. As such they are to be distinguished from unofficial visits or visits by experts. This practice has an incidence on the number of on-site visits cases which are rare in practice. One example is the visit made in the *Gabčikovo* case during which the agent of Slovakia invited the Court to "visit the locality to which the case relates and there to exercise its functions with regards to the obtaining of evidence, in accordance with Article 66 of the Rules of the Court".[49] Notably, both parties co-organized the visit, and the members of the ICJ held meetings with the representatives and experts from both sides on the objects that were situated in Slovakia and Hungary. Hence, both parties were given equal opportunities and time to present their position and organize their part of the visit of the ICJ.

Paragraph 123

123. ~~Despite certain differences, the strongest similarities with the European system of human rights protection, in terms of fact-finding missions, can be found in the Inter-American system of human rights protection.~~[50] The ACHR provides the IACHR with formal powers to carry out

[47] *Varnava and others v. Turkey*, quoted above, § 184.

[48] *Georgia v. Russia* (I) (just satisfaction), no. 13255/07, § 69, 31 January 2019

[49] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J Reports 1997, p. 7*

[50] The IACHR with functions similar to the UN treaty-monitoring bodies and the former European Commission of Human Rights, monitors the situation of human rights in the various member States, conducts on-site visits, handles complaints alleging human rights violations and hosts several thematic rapporteurs. The IACHR also brings cases

investigations to verify the facts of a submitted complaint.[51] On the site, a Special Commission appointed for that purpose will carry out the investigation.[52] A member of the IACHR who is a national or who resides in the territory of the State in which the onsite observation is to be conducted is unequivocally disqualified from participating in it.[53] Once the IACHR has obtained the consent of the State for an on-site observation, the latter is "governed by broad rules of inquiry".[54] The IACHR can specifically interview witnesses, government officials, etc. or perform on-site visits. The State will furnish to the IACHR all necessary facilities for carrying out its mission. Moreover, the State shall commit itself not to take any reprisals of any kind against any persons or entities cooperating with or providing information or testimony to the IACHR.[55]

Paragraph 127

127. The Court has already held that just satisfaction as enshrined in Article 41 of the Convention is applicable to inter-State cases. In the case of *Cyprus v. Turkey*[56] the Court, for the first time, made an award of just satisfaction to individuals regarding violations established on the merits in an inter-State case The Court derived its approach from the principles of public international law relating to state liability, the *travaux préparatoires* of the Convention as well as the International Law Commission Draft Articles on Diplomatic Protection.[57] The Court has noted, "according to the very nature of the Convention, 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, if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims."[58] However, as previously noted (see par.31), applicability of rules of general international law regarding diplomatic protection is a) without prejudice to provisions of the Convention which form *lex specialis*, and b) reliant upon application of rules of general international law on State responsibility.

Paragraph 130

130. 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 and the criteria to be applied for an award of just satisfaction for non-pecuniary damage.[59] In the case of *Georgia v. Russia (I)* the Court, in accordance with Rule 60 § 2 of the Rules of Court, invited the applicant Government to submit a list of its nationals who had been victims of the "coordinated policy of arresting, detaining and expelling Georgian nationals" put in place in the Russian Federation in the autumn of 2006.[60] It also asked the respondent Government to submit all relevant information and documents (in particular expulsion orders and court decisions) concerning Georgian nationals who had been victims of that policy during the period in question.[61] In this case the respondent Government asked the Court to identify each of the individual victims of the violations it found

to the IACtHR, as was done by the former European Commission of Human Rights in the Convention system prior to Protocol no. 11

[51] Article 48 (1)(d) of the ACHR.

[52] Article 53 of the Rules of Procedure of the IACHR on Human Rights.

[53] Ibid, Article 54.

[54] IACHR on Human Rights, Regulations Regarding On-Site Observations, Oas Doc.OEA /Ser.L/V/II.35.

[55] Articles 56 and 57 of the Rules of Procedure of the IACHR on Human Rights.

[56] *Cyprus v. Turkey (just satisfaction) [GC]*, no. 25781/94, 12 May 2014.

[57] Ibid., §§ 40-46.

[58] Ibid., §§ 43-45, 12 May 2014. See also *Georgia v. Russia* (I) (just satisfaction), no. 13255/07, § 22, 31 January 2019

[59] Ibid. § 28.

[60] In the principal judgment the Court held that in the autumn of 2006 a "coordinated policy of arresting, detaining and expelling Georgian nationals" had been put in place in the Russian Federation "which amounted to an administrative practice for the purposes of Convention case-law", see *Georgia v. Russia (I)*, cited above, § 159.

[61] *Georgia v. Russia* (I) (just satisfaction), quoted above § 58.

in adversarial proceedings, on the ground that the task of establishing the facts fell within the exclusive power of the Court. In this respect the Court noted that the parties had exchanged observations on the question of just satisfaction in compliance with the adversarial principle. Moreover, the Court observed that in cases concerning systematic violations of the Convention it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court to adjudicate on large numbers of cases which require the finding of specific facts or the calculation of monetary compensation – both of which should as a matter of principle and effective practice, be the domain of domestic jurisdictions.[62] Meanwhile the lack of establishment of the specific facts namely the victims and violations concerned or the calculation or monetary compensation evidently hinders the execution process. Also, in the case of *Georgia v. Russia (I)* the Court considered that, *inter alia*, a number of persons included in the list of victims submitted by the applicant government could not be regarded as such because they had lodged individual applications before the Court.

2.3 The Articles on Responsibility of States for Internationally Wrongful Acts

142 bis

Paragraph 154 and 155

~~154. The potential of the pilot judgment procedure in cases relating to inter-State disputes as a means of facilitating their friendly settlement is an area of inquiry worth exploring further. The pilot judgment procedure was developed and is employed by the Court where the facts of an application reveal the existence of a structural or systemic problem or other similar dysfunction in the State concerned which has given rise or may give rise to similar applications.[63] In a pilot judgment, the Court's task is not only to decide whether a violation of the Convention occurred in the specific case but also to identify the systemic problem and to give the Government clear indications of the type of remedial measures needed to resolve it. A key feature of the pilot procedure is the possibility of adjourning, or "freezing," related cases for a period of time on the condition that the Government act promptly to adopt the national measures required to satisfy the judgment. The Court can, however, resume examining adjourned cases whenever the interests of justice so require.~~

~~155. Some authors argued that the method of pilot judgment should be used also in the context of inter-State applications, which address systemic human rights violations.[64] The pilot judgment approach allows addressing large-scale human rights violations through managerial methods, thus, in a cooperative and sovereignty-preserving manner rather than with sanctions. It is argued that a constructive legal dialogue is a worthwhile option and thus should be open to the Court in inter-State cases. This methodology should not be the only means for the Court to resolve the dispute. So, far no pilot judgment has been adopted in connection with an inter-State case.~~

Paragraph 163

[62] Ibid., §§63-65.

[63] Rule 61§1 of the Rules of the Court.

[64] L. Wildhaber, Pilot judgment in cases of structural or systemic problems on the national level in R Wolfrum, U Deutsch, the European Court of Human Rights Overwhelmed by applications; P Leach, Responding to systemic human rights violations: an analysis of pilot judgments of the European Court of Human Rights and their impact at national level; A Buyse, "Airborne or Bound to Crash? The rise of pilot judgment and their appeal as a tool to deal with the aftermath of conflict.

163. The Convention lacks provisions regarding the issues of correlation between inter-State case and individual applications raising the same issue that had been raised in the inter-state case. Processing inter-State cases and the high number of individual applications when they concern inter-State conflicts raises exceptional challenges for the Court and States-Parties to the dispute, as these cases are particularly time-consuming ~~for Judges and Registry Staff~~ and complex as a result of their nature and dimension. The Court has already taken a number of measures to ensure an effective processing of these cases.

Paragraph 164

164. ~~Recently, the Court has introduced a number of practices to counter potential risks of duplication or inconsistencies stemming from the processing in parallel of inter-State applications and related individual applications. In particular,~~ ~~w~~Where an inter-State case is pending, individual applications raising the same issues or deriving from the same underlying circumstances are, in principle and in so far as practicable, ~~without being put aside~~, not decided before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case~~. 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. Also, the Court's methodology to take into account any findings of administrative practice established in inter-State proceedings in related individual applications is conducive to avoiding any potential inconsistencies and duplication.~~

Paragraph 164bis

164 bis 1 However, this is not sufficient due to the fact that States-Parties experience difficulties because of the lack of concrete procedural rules that would specifically address issues relating to the processing of inter-State cases, especially establishment of facts and burden of proof.

164 Bis 2 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 time 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. 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.

Paragraph 165

165. In practice few inter-State cases relating to the same events or subject-matter have been brought in parallel before the Court and other international bodies or have raised questions regarding the possibility of diverging or conflicting decisions. However such risks exist in the future and should be mitigated. In respect of individual applications, there are a number of points of convergence with respect to admissibility requirements regarding plurality of international proceedings between the Court and other international bodies. The approach taken by the UN treaty bodies, notably the Human Rights Committee, with respect to

admissibility may lead to situations overlapping competence of international human rights bodies over the same case or very similar ones. 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. Hence, the Court should continue to ensure, to the extent possible, a harmonious interpretation of substantive rights under the Convention with other international human rights protection regimes and continue its judicial dialogue with other international bodies.

165 Bis 1 Neither the Convention nor the Rules of the Court seek to regulate how evidence is to be admitted or assessed by the Court.

165 Bis 2 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 responsibility for 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 evaluation of such evidence. One of the first steps on the way to creating clear standards of proof is refusal to accept references to the media[65] and reports by non-governmental organisations as the sole evidence of existence of whichever event alleged to be a violation of the Convention.

Paragraph 166

166. According to ~~T~~tThe Court's case law the latter may decide to hold fact-finding hearings or on-the-spot investigations when the domestic authorities have not adequately established the facts. The tendency of the Court in recent years is not to carry out on-the-spot investigations due to the fact that they are time consuming and expensive. 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. With particular regard to on-the-spot investigations, challenges arise as a result of the reluctance of national authorities to support and facilitate the activities of the Court's delegation. Consideration should be given to the question how member States can improve the ways they fulfil their obligation to cooperate with the Court under Article 38 of the Convention in this regard. One of the key issues arising during fact-finding hearings is that a number of witnesses summonsed fail to attend the hearing. While the Court approaches this issue in terms of assessing whether the respondent State has met its co-operation obligations and drawing, where appropriate, adverse inferences, member States should consider the question of what steps they need to take to ensure the attendance of witnesses at the Court's hearings pursuant to Article 38 of the Convention.

Paragraph 167

167. 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 seems not to be 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. Rules of general international law regarding compensation should be applied to the extent they do not

65 In particular, according to the Rule 40 (Admissibility of Applications) of the African Court On Human and peoples' rights: «applications to the Court shall comply with the following conditions: … 4) not be based exclusively on news disseminated through the mass media»…;

contravene the provisions of the Convention. Furthermore, these rules are inseparable from other rules on international responsibility of States, which have formed in general international law and are reflected, particularly, in the practice of the International Court of Justice.

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 violation of the Convention. 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 slows down the proceedings in the case. Submitting a list of clearly identifiable individuals by the applicant State from the outset of the proceedings, ~~at the just satisfaction stage,~~ as well as the respondent State submitting all the relevant information in its possession, would also 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~~. is required Also, t**T**he 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.

SLOVENIA / SLOVÉNIE

III. Introduction – 1. Statistics

Comment on the indication to update the official statistics:

Slovenia supports the proposal and encourages the inclusion of all (even recently lodged interstate) cases before the Court to ensure accurate presentation and proper analysis of statistical data.

Paragraph 19.ter

Slovenia kindly asks for the information on possible available data on the number (if any) of individual applications that may be pending before the Court concerning the inter-State application Liechtenstein v. the Czech Republic and - in the affirmative - to include such data in the text of the report. If no such cases have been lodged, please disregard our comment.

Paragraph 31

Proposed additions are highlighted in yellow.

As per our comment from 8 September [66], we propose an amendment to this paragraph to read as follows: "Moreover, applications relating to situations of inter-state conflicts and property protection disputes…"

In the alternative, we propose an **additional para**: 31bis: "Applications relating to breaches of property rights (or peaceful enjoyment of property) have emerged as a distinct category in recent years."

Paragraph 33

Slovenia is not in favour of the new wording that is of general nature and as such in our view even a slight step back from the original text. We would prefer explicit and stronger wording. To that purpose, we reiterate our reasoning for such a proposal:

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.

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.

[66] Comment sent on 8.9.2020 (document DH-SYSC-IV(2020)05REV): "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."

We would kindly ask the delegations to reconsider the proposal for a stronger wording. Should there be no consensus for such a proposal, we would ask the co-rapporteurs to revert to the original wording as it nevertheless offers concrete guidance.

Paragraph 38

Proposed additional paragraph to be added as para. 38bis (highlighted in yellow):

"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 and their complex nature, it appears to be necessary to properly distinguish between the procedural right of a State under Article 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) on the one hand and on the other hand the victim status of an applicant for the purposes of an individual application under Article 34 (standing under Article 34 of the Convention).

In this regard it is worth noting that the ambiguous determination of the protection of an individual victim of the violations of the Convention through the inter-State application procedure raises doubts concerning the question of whether the victims of the violations that fall outside of the categories of petitioners mentioned in Article 34 and therefore cannot lodge an individual application before the Court in may enjoy substantive rights under the Convention."

Paragraph 92

Following the initial comment sent on 8 September [67], Slovenia proposes the following wording to be added as paragraph 92bis:

"It appears 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. Further reflection is needed to improve the current situation inter alia by considering the possibility of reviewing the Rules of Court as envisaged by the Court."

[67] Comment sent on 8.9.2020 (document DH-SYSC-IV(2020)05REV): "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."