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Inter – State Applications Under The European Convention On Human Rights

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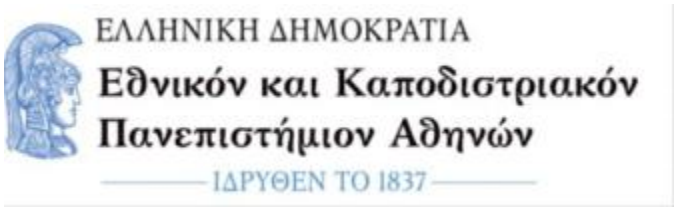

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INTER – STATE APPLICATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract

The mechanism and use of the inter-State application under Article 33 of the European Convention on Human Rights has not been extensively studied. This study aims to contribute to bridge this literature gap; a task which is all the more relevant given the recent revival of inter-State applications under the ECHR. The first part of this study seeks to examine the inter-State application procedure as well as the differences, similarities, and its reciprocal relationship to individual applications. In doing so, it aspires to shed light to the unknown but decisive influence inter-State applications had in the development of the jurisprudence of the ECHR. The second part of this study explores the use of Article 33 by member States and clarify the circumstance under which States resort to this international judicial remedy in order to better understand its potential and manage expectations thereof.

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Abbreviations

And others	a. O.
Article	Art.
Articles	Arts.
Committee of Ministers	CoM
Council of Europe	CoE
European Commission of Human Rights	EComHR
European Convention on Human Rights	ECHR or Convention
European Court of Human Rights	ECtHR
European Treaty Series	ETS
European Union	EU
Grand Chamber	GC
International Court of Justice	ICJ
International Law Commission	ILC
International Organizations	IOs
Irish Republican Army	IRA
International Tribunal for the Law of the Sea	ITLOS
Number	no.
Numbers	nos.
Non-governmental Organizations	NGOs
North Atlantic Treaty Organization	NATO
Organization for Security and Co-operation in Europe	OSCE
Page	p.
Pages	pp.
Permanent Court of Arbitration	PCA
Protocol	Prot.
Resolution	Res
Rules of Court	RoC
Turkish Republic of Northern Cyprus	TRNC
United Nations	UN
United Nations General Assembly	UNGA
United Nations Security Council	UNSC

> 'The CoE has developed a kind of judicial 'culture', making law not only the engine of integration between its members, but also the means of rising above conflicts between national interests. In a "community governed by law", which has a supranational dimension, all technical discussion has a political aspect, but any political crisis also has a judicial element. The role of law is then to "calm things down", to defuse the crisis by using respect for common principles to dampen the violence of the conflict'.[1]

I. Introduction

A. Objectives

As of January 2022, 18 inter-State cases have been resolved or struck out of the list by the EComHR and the ECtHR.[2] Currently 13 inter-State applications are pending before the ECtHR.[3] Six applications were lodged in 2020 and 2 applications were submitted in 2021.

The paucity of inter-State case-law has discouraged extensive research of the unqualified, in the terms of the Steering Committee for Human Rights of the Council of Europe (CoE),[4] right of States to bring an application before the ECtHR. The

[1] Emmanuel Decaux, 'The Future of Inter-State Dispute Settlement within the Council of Europe' (1996) 9 Leiden Journal of International Law 397, 404.

[2] *Greece* v. *the United Kingdom (I)*, no. 176/56, EComHR report of 26 September 1958; *Greece* v. *the United Kingdom (II)*, no. 299/57, EComHR report of 8 July 1959; *Austria* v. *Italy*, no. 788/60, EComHR report of 30 March 1963, Yearbook 6/742; *The Greek case (I)*, no. 3321/67 and 3 others, EComHR report of 5 November 1969; *The Greek case (II)*, no. 4448/70, EComHR report of 4 October 1976; *Ireland v. the United Kingdom (I)* and *(II)*, nos. 5310/71 and 5451/72, EComHR decision of 1 October 1972; *Ireland v. the United Kingdom (I)*, 18 January 1978, Series A no. 25; *Cyprus v. Turkey (I) and (II)*, nos. 6780/74 and 6950/75, EComHR report of 10 July 1976; *Cyprus v. Turkey (III)*, no. 8007/77, EComHR report of 4 October 1983, Decisions and Reports 72; *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR report of 7 December 1985; *Denmark* v. *Turkey*, no. 34382/97, ECHR 2000-IV; *Cyprus v. Turkey (IV)* [GC], no. 25781/94, ECHR 2001-IV; *Georgia* v. *Russia (III)* (dec.), no. 61186/09, 16 March 2010; *Georgia v. Russia (I)* [GC], no. 13255/07, ECHR 2014 (extracts); *Ukraine* v. *Russia (III)* (striking out), no. 49537/14, 1 September 2015; *Latvia v. Denmark* (striking out), no. 9717/20, 16 June 2020; *Slovenia* v. *Croatia* (dec.) [GC], no. 54155/16, 18 November 2020.

[3] *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021; *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, 16 December 2020; *Ukraine and the Netherlands v. Russia*, nos. 43800/14 and 8019/16 and 28525/20; *Ukraine* v. *Russia (VII)* no. 38334/18; *Georgia* v. *Russia (IV)*, no. 39611/18; *Ukraine* v. *Russia (VIII)* no. 55855/18; *Liechtenstein* v. *the Czech Republic*, no. 35738/20; *Armenia* v. *Azerbaijan*, no. 42521/20; *Armenia* v. *Turkey* no. 43517/20; *Azerbaijan* v. *Armenia*, no. 47319/20; *Ukraine v. Russia (IX)*, no. 10691/21; *Russia v. Ukraine*, no. 36958/21.

[4] CoE, Steering Committee for Human Rights, Committee of Experts on the System of the European Convention on Human Rights, Drafting Group on Effective Processing and Resolution of Cases relating to Inter-State Disputes, 'Draft CDDH Report on the Effective Processing and Resolution of Cases relating to Inter-State Disputes' (8 July 2020) DH-SYSC-IV (2020)04, § 3 <https://rm.coe.int/steering-committee-for-human-rights-cddh-committee-of-experts-on-the-s/16809f059e> accessed on 2 November 2021.

variety, complexity, and unique nature of inter-State applications have further added to the difficulties researchers face.[5] However, the recent revival of the inter-State application mechanism under the ECHR[6] necessitates further study of its functions and use by the High Contracting Parties in order to better understand its potential and manage expectations thereof.

This study aims to help the reader understand the dynamics between inter-State and individual applications and the circumstances under which States resort to the former international judicial remedy.

B. Structure

This study firstly introduces the inter-State application mechanism under Art. 33[7] and is then divided into two main sections. The first chapter addresses the differences in the procedural processing of inter-State and individual applications and the interplay and reciprocal influence of inter-State and individual applications that deal with the same events. That being said, there are considerable differences between admissibility requirements of inter-State and individual applications which will be analyzed in the second chapter. In addition, and for the purposes of this study, certain features of the ECtHR require examination either due to the decisive influence inter-State applications had in their development, such as in the cases of interim measures and fact-finding functions of both the EComHR and the ECtHR, or due to the manner individual-centered general principles of the Convention have been applied in inter-State cases, such as the award of just satisfaction under Art. 41 ECHR.

The sixth chapter will proceed to examine, what has been referred to by scholars as, 'disguised inter-State applications'. High Contracting Parties can intervene in individual applications and submit written observations, or even attend hearings, thus playing a major role in the adjudication of the individual application

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[5] To this day only two monographic studies have been published on the subject of inter-State applications under the ECHR: Isabella Risini, *The Inter-State Application under the European Convenion on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement* (Brill Nijhoff 2018); P. Hold von Zürich, *Die Staatenbeschwerde im Rahmen der Europäischen Menschenrechtskonvention – rechtliche und politische Probleme* (1976).

[6] Linos Alexandros Sicilianos, 'The European Court of Human Rights at a Time of Crisis in Europe' (speech at SEDI/ESIL Lecture, Strasbourg, 16 October 201) < https://esil-sedi.eu/wp-content/uploads/2018/04/Sicilianos_speech_Translation.pdf > accessed 20 November 2020.

[7] Article 33 stipulates that 'any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party'.

in question.[8] Third party interventions in individual applications and inter-State applications have been used by States to pursue similar goals. In order to highlight this dimension, particular attention will be placed on third party interventions which deal with the broader subject that has been, or currently is, the subject matter of inter-State applications. The first section will conclude by referring to the ongoing process of reforming the inter-State application procedure put in motion by the Copenhagen Declaration adopted in 2018.

The second section of this study will examine the use of the inter-State application mechanism under the ECHR by the High Contracting Parties. To this end, all final and pending inter-State cases will be analyzed and categorized, in full consciousness of the fact that any rigid classification risks oversimplifying complex international disputes. The Convention is an instrument of human rights protection and for this reason the effects of inter-State cases on the human rights situation on the ground will be briefly mentioned taking into account that such effects cannot be neatly quantified.

C. History and Functions of the Inter-State Application

While inter-State applications have only (re)gained traction recently, they have formed an integral part of the European human rights protection system since its inception. Initially, inter-State applications were the default enforcement mechanism chosen by States to protect the human rights and fundamental freedoms set forth therein.[9] The individual complaint, at the time of the conclusion of the ECHR, was considered to be a more serious encroachment upon national sovereignty in comparison to inter-State applications.[10] Delegations were divided as to whether to accept a right of individual petition.[11] The *travaux préparatoires* indicate that the notion of individual justice was not a central aim of the Convention.[12]

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[8] ECtHR, RoC (as amended in 2021), Rule 44 § 1 (b) and § 3 (a).
[9] William Schabas, *The European Convention on Human Rights: A Commentary* (1st edn, Oxford University Press 2015) 723; Risini (n 5) 24.
[10] Pieter Hendrik Kooijmans, 'Inter-State Dispute Settlement in the Field of Human Rights' (1990) 3 Leiden Journal of International Law 87, 89.
[11] Soren Christian Prebensen, 'Inter-State Complaints under Treaty Provisions - The Experience under the European Convention on Human Rights' in G. Alfresddon and others (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller* (2nd edn, Brill Nijhoff 2009) 441, 445.
[12] Risini (n 5) 18, 24.

Protocol 11, in essence, removed the original compromises made to accommodate the 'voluntarism' of member States by eliminating the system of double optional acceptance in respect of individual applications and the competence of the ECtHR.[13] Protocol 11 can be seen as a turn to compulsory jurisdiction and judicialization of the Convention system by introducing the abolition of the EComHR and limiting the role of the CoM in exercising supervisory functions with respect to the execution of judgments.[14] Nowadays, CoE membership is conditioned upon accession to the Convention and acceptance of the compulsory jurisdiction of the ECtHR. Protocol 11 propelled the utilization of individual applications and established them as a well-known useful legal remedy in the European legal practice.

However, the unwillingness of States to accept the right of individual application is not the only reason why inter-State applications were the default enforcement mechanism chosen. From the perspective of public international law, the objective obligations contemplated in the Convention constitute obligations *erga omnes partes*.[15] The ECHR does not envisage direct rights or obligations between the High Contracting Parties concerned; rather it creates special objective obligations towards persons within their jurisdiction.[16] This network of mutual, bilateral undertakings and objective obligations benefits from 'collective enforcement'.[17] The fourth recital to the preamble of the ECHR reveals the determination of European countries 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration' (of Human Rights). The system of collective enforcement is a central element of the Convention

[13] Prot. No. 11 to the ECHR, restructuring the control machinery established thereby (adopted on 11 May 1994, entered into force 1 November 1998) ETS No. 155.
[14] Cesare P.R. Romano, 'From the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent' (2007) 39 New York University Journal of International Law and Politics 791, 810-1; Risini (n 5) 28-9.
[15] ILC, 'Report of the International Law Commission on the Work of its 53rd Session' (Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries) (23 April – 1 June and 2 July – 10 August 2001) UN A/56/10 ch IV E, 126; Institute of International Law, 'Resolution on Obligations *Erga Omnes* in International Law' in *Yearbook of the Institute of International Law: Krakow Session* (Pedones 2005) Art. 1 (b).
[16] *Cyprus v. Turkey (III)*, no. 8007/77, EComHR decision of 10 July 1978, § 11, Decisions and Reports 13; *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, § 41, Decisions and Reports 35.
[17] *Ireland v. the United Kingdom (I)*, 18 January 1978, § 239, Series A no. 25; *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, § 39, Decisions and Reports 35.

and the ECtHR has acknowledged the preamble's influence when interpreting other provisions of the Convention,[18] in accordance with Art. 31 § 2 VCLT.[19]

In other words, the enforcement mechanisms provided for in the ECHR are founded upon the system of collective guarantee of the rights and freedoms protected by the Convention.[20] The High Contracting Parties act as guarantors of the rights protected by the Convention and its Protocols.[21] *Decaux* has noted that the absence of reciprocity in human rights treaties signifies that all States 'have an interest in acting to secure the "integrity" of the treaty'.[22] The inter-State application allows States to require observance of the ECHR obligations without having to justify an interest deriving, for example, from the fact that a measure taken by another High Contracting Party has prejudiced one of their nationals.[23] For this reason, the inter-State application has been commended as the cornerstone of the system of collective guarantee established to ensure enforcement of ECHR rights.[24] In addition, as the former president of the ECtHR, Judge *Sicilianos*, highlighted, the existence of the inter-State application is a testament to the *erga omnes partes* nature of the obligations prescribed in the Convention.[25]

Simultaneously, the inter-State application mechanism serves the purpose of an international dispute settlement mechanism.[26] Art. 55 ECHR's wording indicates that the Convention itself views this mechanism as a dispute settlement arrangement.[27] The function of Art. 33 as a method of international dispute

[18] *Loizidou v. Turkey* (preliminary objections), 23 March 1995, §§ 41, 70, Series A no. 310.
[19] The ECtHR has clarified that in order to determine the meaning of the terms and phrases used in the ECHR it is guided by the rules of interpretation provided for in Arts. 31 to 33 of the Vienna Convention on the Law of Treaties; *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 65, ECHR 2008.
[20] *Austria v. Italy*, no. 788/60, EComHR decision of 11 January 1961, p 19-20, Decisions and Reports 7; *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, § 40, Decisions and Reports 35.
[21] Decaux (n 1) 407.
[22] Ibid.
[23] *Ireland v. the United Kingdom (I)*, 18 January 1978, § 239, Series A no. 25.
[24] Sicilianos (n 6).
[25] Ibid.
[26] See Kooijmans (n 10); Risini (n 5).
[27] Art. 55 is titled Exclusion of other means of dispute settlement and provides that the High Contracting Parties agree to not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of the ECHR to a means of settlement other than those provided for in the Convention.

settlement is particularly notable in private interest litigation cases where States, in essence, pursue the protection of their own interests[28] or their nationals' interests.[29]

The international dispute settlement function can also be discerned in the use of the friendly settlement procedure. This aspect is particularly important in respect of inter-State applications. Under former Art. 28, the EComHR was under an obligation to 'place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention'.[30] The EComHR extensively described its attempts to achieve a friendly settlement between the applicant and the respondent State in all of its reports on inter-State applications. In its first case, *Greece v. the United Kingdom (I)*, the EComHR highlighted that it had not been conceived as a judicial tribunal; rather its primary task was to exercise a conciliatory function with a view to ensuring the observance of the Convention and the maximum enjoyment of the rights and freedoms guaranteed by it.[31] This function led the EComHR to abstain from providing an opinion regarding legislations and measures that had been revoked after the lodging of the application by Greece and despite the fact the latter had not withdrawn the relevant complaints. It should be highlighted that, at that point in time, the United Kingdom had not committed to permanently repealing the measures involved. The measures included punishment of underage males by whipping as well as various forms of collective punishment such as collective fines imposed on communities or villages and closing of shops and dwelling-houses in a certain area. The dissenting opinions of four Commissioners on this subject have been described as powerful.[32]

However, the EComHR, despite its refusal to give an opinion on whether such measures infringed upon the Convention, took note of their 'seriousness' and

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[28] *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, 18 November 2020; Rüdiger Wolfrum, 'Enforcing Community Interests Through International Dispute Settlement: Reality or Utopia?' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 1140.

[29] *Latvia v. Denmark* (striking out), no. 9717/20, 16 June 2020; *Liechtenstein v. the Czech Republic*, no. 35738/20 (pending).

[30] Compare with current Art. 39 ECHR where the ECtHR '(at any stage of the proceedings) *may* place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto' (emphasis added).

[31] *Greece* v. *the United Kingdom (I)*, no. 176/56, EComHR report of 26 September 1958, § 96.

[32] Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2001) 998.

stressed that the trend of opinion among State Parties of the CoE did not seem sympathetic to corporal punishment as a penal sanction for young persons. The same applied to collective punishment which does not distinguish between the innocent and the guilty.[33] One could well argue that this line of reasoning, namely the existence or not of a common European approach, is the precursor of the notion of consensus in the jurisprudence of the ECtHR and therefore, the living instrument doctrine, one of the most effective tools of the Convention for the protection of human rights.[34]

Most importantly, the EComHR did not repeat this approach in *Ireland v. the United Kingdom (I)* in respect of the use of sensory deprivation techniques during in depth interrogation of detainees by the British security forces.[35] On 2 March 1972, and before the admissibility decision of the EComHR, the Prime Minister of the United Kingdom declared before the Parliament his decision to discontinue the use of such techniques.[36] The EComHR held 'that it was not only competent to express its opinion on the legal issues arising under Art. 3 in connection with the use of these techniques, but that it was bound under the Convention to do so'.[37] The legal basis of this pronouncement was former Art. 19 which established the EComHR in order to 'ensure the observance of the engagements undertaken by the High Contracting Parties'.[38]

Consequently, the inter-State application balances between two seemingly antithetical functions. On the one hand, States are the guarantors of human rights within the context of collective enforcement of human rights and do not need to be affected by the alleged violations in any way. On the other hand, an inter-State application is a remedy through which a State can settle an international human rights dispute and thus exercise almost complete control over the initiation and termination of adjudicatory proceedings. *Risini* has argued that 'the inter-State

[33] *Greece* v. *the United Kingdom (I)*, no. 176/56, EComHR report of 26 September 1958, §§ 203, 235.
[34] Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 German Law Journal 1730, 1732.
[35] More information on the use of these techniques will be provided ch III B 1 (c).
[36] Deirdre E. Donahue, 'Human Rights in Northern Ireland: *Ireland v. the United Kingdom*' (1980) 3 Boston College International and Comparative Law Journal 377, 395.
[37] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, p. 392, Series B no. 23.
[38] Prot. 11 did not alter the substance (nor number) of Article 19 which now only relates to the ECtHR.

application contributes best to the protection of human rights when it integrates certain functions of international dispute settlement and collective enforcement'.[39]

However, as *Decaux* has noted 'human rights treaties are like a "Swiss army knife" with several potential uses'.[40] The heterogeneous inter-State case law indicates that the inter-State procedure has been employed in a variety of ways by the High Contracting Parties in pursuit of a variety of goals. The ECtHR has explicitly acknowledged that an application brought under Art. 33 may contain different types of complaints pursuing different goals.[41] Before this study proceeds to assess the dynamics between the two functions of the inter-State application through its utilization by the High Contracting Parties, it seems prudent to examine the procedural aspects of this revitalized tool.

II. The Inter-State Application Procedure

A. Procedural Differences of Inter-State and Individual Applications and their Reciprocal Influence

Both individual applications under Art. 34 ECHR and inter-State applications under Art. 33 ECHR are tools that serve the purposes of the Convention, namely the protection of human rights and fundamental freedoms of individuals within the jurisdiction of a Contracting State Party. With the exception of the admissibility criteria, which diverge significantly, both types of applications are assessed in substance in the same manner. The ECtHR receives an application and examines the compatibility of the alleged acts or omissions of the respondent State in accordance with its 'yardstick', the Convention and its jurisprudence; both are applied on the merits in the same way. However, the procedural processing of inter-State and individual applications by the ECtHR entails differences that will be analyzed in this sub-chapter.

Firstly, a significant difference relates to the formalities for lodging an inter-State application,[42] which are less strict than those set out in Rule 47 RoC for individual applications. Secondly, the applicant State enjoys a privilege in that an

[39] Risini (n 5) 170.
[40] Emmanuel Decaux, 'The Potential for Inter-State Conciliation within the Framework of the UN Treaties for the Protection of Human Rights' in Christian Tomuschat and Marcelo Kohen (eds), *Flexibility in International Dispute Settlement* (Brill Nijhoff 2020) 40.
[41] *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, § 43, ECHR 2014.
[42] ECtHR, RoC (as amended in 2021), Rule 46.

inter-State application is automatically communicated to the respondent State.[43] In individual applications a Chamber can declare an application inadmissible and strike it out of the ECtHR's list without communicating the case to the respondent State.[44]

Thirdly, it is noteworthy that an inter-State can only be adjudicated by a Chamber or the Grand Chamber by virtue of Art. 29 § 2 of the Convention. Inter-State applications reach more frequently the Grand Chamber formation of the ECtHR in comparison to individual applications. The competent Chamber has relinquished its jurisdiction in four inter-State applications lodged by Ukraine against Russia.[45] However, this is not an absolute rule for all stages of examination of an inter-State application. In *Georgia v. Russia (I)* and *(II)* the competent Chamber decided on the admissibility of the applications and relinquished its jurisdiction on the merits to the Grand Chamber.[46] Furthermore, while the admissibility and merits of an individual application are, commonly, decided upon through a single judgment or decision, decisions on the admissibility of inter-State applications are usually separate from the judgment on the merits.[47]

The execution of judgments entails further differences in respect of inter-State and individual applications; the effects thereof, however, cannot be clearly defined. Under Rule 9 of the Rules of the CoM, the latter shall consider any communication from the injured party regarding payment of just satisfaction or the implementation of individual measures.[48] This is the only method through which an individual applicant can participate in the execution of an ECtHR judgment. The situation is different in inter-State cases as both applicant and respondent States actively participate in the proceedings before the CoM.[49]

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[43] ECtHR, RoC (as amended in 2021), Rule 51 § 1.
[44] ECtHR, RoC (as amended in 2021), Rule 54 § 1.
[45] ECtHR, Press Release ECHR 173 (2018) issued on 9 May 2018 and available on HUDOC.
[46] *Georgia v. Russia (I)* (dec.), no. 13255/07, 30 June 2009; *Georgia v. Russia (II)* (dec.), no. 38263/08, 13 December 2011; *Georgia v. Russia (I)* [GC], no. 13255/07, ECHR 2014 (extracts); ECtHR, Press Release ECHR 183 (2018) issued on 23 May 2018 and available on HUDOC.
[47] Art. 29 ECHR.
[48] CoE, CoM, Rules of the CoM for the supervision of the execution of judgments and of the terms of friendly settlements (as amended in 2017), Rule 9 § 1.
[49] Krzysztof Wojtyczek, 'Judicial and Non-Judicial Elements in the Enforcement Mechanism of the European Convention on Human Rights' in Paulo Pinto de Albuquerque and Krzysztof Wojtyczek (eds), *Judicial Power in a Globalized World: Liber Amicorum Vincent De Gaetano* (Springer 2019) 669.

Last but not least, until recently, examination of inter-State applications was prioritized by the ECtHR. However, this priority police changed in 2017.[50] The current priority policy does not distinguish between inter-State and individual applications; rather it's based on the urgency of the subject matter and other considerations, including the impact of the application on the effectiveness of the Convention system and whether an application raises an important question of general interest with, potentially, major implications for all or most domestic legal systems of CoE member States.

An important question arises in respect of overlapping or identical individual and inter-State applications. Overlapping individual and inter-State cases have recently become the rule rather than the exception. The ECHR does not address this relationship explicitly. Nevertheless, the EComHR accepted in 1973 that, in principle, inter-State applications and individual applications do not exclude each other as the applicants are different and their respective claims are usually diverse as well.[51] The ECtHR confirmed this approach and clarified that an inter-State application cannot deprive individual applicants of their legal interest in pursuing their claims that relate to the broader subject matter of a pending or final inter-State application.[52]

ECtHR pronouncements in individual applications with an overlapping dimension to an inter-State application have been employed as relevant jurisprudence and *vice versa*. In *Cyprus v. Turkey (IV)*, the ECtHR referred numerous times to both its examination of the preliminary objections and the merits of the *Loizidou* case.[53] The ECtHR explicitly endorsed such an approach regarding broad statements of principle such as Turkey's general responsibility under the Convention for the policies and actions of the 'TRNC' authorities.[54] In *Varnava a. O. v. Turkey*, the Grand Chamber also referred to its findings in the fourth inter-State application of Cyprus against Turkey.[55] With respect to the establishment of a coordinated policy of arrest, detention, and expulsion of Georgian nationals by

[50] ECtHR, Priority Policy < https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf > accessed 27 November 2020.
[51] *Donnelly a. O. v. the United Kingdom* (dec.), nos. 5577-5583/72, § 5, ECHR Collection 43.
[52] *Varnava a. O. v. Turkey* [GC], nos. 16064/90 and 8 others, §§ 118-9, 10 January 2008; *Shioshvili a. O. v. Russia*, no. 19356/07, § 47, 20 December 2016.
[53] *Cyprus v. Turkey (IV)* [GC], no. 25781/94, §§ 61, 75-6, 89, 186-8, ECHR 2001-IV.
[54] *Cyprus v. Turkey (IV)* [GC], no. 25781/94, §§ 77, 79, ECHR 2001-IV.
[55] *Varnava a. O. v. Turkey* [GC], nos. 16064/90 and 8 others, §§ 180, 186-7, 189, 201-2, ECHR 2009.

Russia, the subject matter of *Georgia v. Russia (I)*, the ECtHR considered that it was appropriate to reverse the burden of proof in an overlapping individual application.[56] Consequently, unless the applicants in a related individual application failed to make a *prima facie* case, Russia had to prove that the individuals concerned had not been arrested, detained, and expelled as a result of its established administrative practice. The reciprocal influence of individual and inter-State applications also extends to just satisfaction considerations. In its judgment on Art. 41 ECHR in respect of *Cyprus v. Turkey (IV)*, the ECtHR referred to a general statement regarding non-pecuniary damages in its *Varnava* case as pertinent to any award of damages in an inter-State application.[57]

The reciprocal influence of inter-State and individual applications is not limited to applications with the same subject matter. In *Georgia v. Russia (I)* the ECtHR in order to determine the inadequacy of detention conditions of Georgian nationals took into consideration its pilot judgment in *Ananyev a. O. v. Russia*.[58] In the latter application, the ECtHR noted a recurring structural problem in Russia stemming from a dysfunctional prison system.[59] In its just satisfaction judgment on the abovementioned inter-State case, the ECtHR concluded that the amounts awarded for the benefit of individuals who were victims of violations should be distributed by the applicant State in accordance with the ECtHR's case-law in respect of unlawful detention in conditions contrary to Art 3.[60]

The ECtHR has not yet dealt with the relationship of identical inter-State and individual applications. In *Ukraine v. Russia (III)*, the applicant State complained about the detention and treatment of Mr. *Dzhemilov*, a Ukrainian national belonging to the Crimean Tatars ethnic group, in the context of criminal proceedings brought against him by the Russian authorities. Ukraine informed the ECtHR, on its own motion, that it did not wish to pursue this application as Mr. *Dzhemilov* had lodged an individual application concerning the same subject matter. On 1 September 2015, the ECtHR decided to strike this application from its list of cases in the absence of any special circumstances requiring its examination.[61]

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[56] *Berdzenishvili a. O. v.* Russia, nos. 14594/07 and 6 others, § 49, 20 December 2016.
[57] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, § 56, ECHR 2014.
[58] *Georgia v. Russia (I)* [GC], no. 13255/07, §§ 204, 216, ECHR 2014 (extracts).
[59] *Ananyev a. O. v. Russia*, nos. 42525/07 and 60800/08, §§ 184-240, 10 January 2012.
[60] *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 77, 31 January 2019.
[61] *Ukraine* v. *Russia (III)* (striking out), no. 49537/14, 1 September 2015.

B. Admissibility Requirements of Inter-State Applications

Admissibility requirements for inter-State applications under Art. 33 and individual applications under Art. 34 ECHR vary considerably. The Convention itself explicitly stipulates that some specific requirements only apply in respect of individual applications. Therefore, under Art. 35 § 2 the procedural admissibility requirements related to the anonymity of the application and the condition that an application must not be substantially the same as a matter previously examined by the ECtHR or a matter that has already been submitted to another procedure of international investigation or settlement do not apply in inter-State applications.[62] The same holds true in respect of the grounds under which an application can be declared inadmissible on the merits, which are restricted to individual applications under Art. 35 § 3.[63] The latter rule has been interpreted as excluding any examination of the merits of an inter-State application in the admissibility phase.[64] For this reason, issues relating to the effects of a State's derogation under Art. 15 are also examined on the merits in inter-State applications.[65] However, this practice cannot prevent the ECtHR from establishing at the admissibility stage whether it has any competence at all to deal with the matter brought before it, under the general principles governing the exercise of jurisdiction by international tribunals.[66] In addition, the question of whether an inter-State application can be rejected on the basis of a general principle of international law prohibiting the abusive initiation of proceedings before international tribunals has been left unanswered by the organs of

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[62] *Greece* v. *the United Kingdom (I)*, no. 176/56, EComHR decision of 2 June 1956, p. 3; *Cyprus v. Turkey (III)*, no. 8007/77, EComHR report of 4 October 1983, § 49, Decisions and Reports 72.
[63] *Greece* v. *the United Kingdom (I)*, no. 176/56, EComHR decision of 2 June 1956, p. 3; *The Greek case (I)*, no. 3321/67 and 3 others, EComHR decision of 24 January 1968, p. 12, ECHR Collection 25; *Ireland v. the United Kingdom (I)* and *(II)*, nos. 5310/71 and 5451/72, EComHR decision of 1 October 1972, p. 88; *Georgia v. Russia (I)* (dec.), no. 13255/*07, § 43, 30 June 2009; Ukraine* v. Russia (re Crimea) (dec.) [GC], nos. 20958/14 and 38334/18, § 312, 16 December 2020.
[64] *Cyprus v. Turkey (III)*, no. 8007/77, EComHR decision of 10 July 1978, § 45, Decisions and Reports 13; *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, § 9, Decisions and Reports 35; *Denmark* v. *Turkey* (dec.), no. 34382/97, p. 33, 8 June 1999; *Georgia v. Russia (I)* (dec.), no. 13255/07, § 43, 30 June 2009.
[65] *Greece* v. *the United Kingdom (I)*, no. 176/56, EComHR decision of 2 June 1956, p. 3; *Ireland v. the United Kingdom (I)* and *(II)*, nos. 5310/71 and 5451/72, EComHR decision of 1 October 1972, p. 88; *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, § 46, Decisions and Reports 35.
[66] *Georgia v. Russia (II)* (dec.), No. 38263/08, § 64, 13 December 2011; *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 265, 16 December 2020.

the Convention.[67] However, no application has been declared inadmissible on this ground so far.

Jurisdictional requirements, *ratione temporis*, *ratione loci*, *and ratione materiae*, apply to both inter-State and individual applications.[68] There is only one exception as regards jurisdiction *ratione personae*, and in particular, the victim status of the applicant. This requirement is enshrined in Art. 34 ECHR and therefore, is not applicable in the context of Art. 33.[69] This approach is also consistent with the nature of the High Contracting Parties as guarantors of the rights protected by the Convention and its Protocols. States do not enjoy the rights set forth in the Convention; they are responsible to secure the Convention rights 'to everyone within their jurisdiction' as stipulated in Art. 1 and can refer any alleged breach of the Convention rights by other High Contracting Parties under Art. 33 ECHR.

The notion of an 'alleged breach' has been interpreted by the EComHR and the ECtHR as including two admissibility requirements; the allegation must be genuine and must not be wholly unsubstantiated.[70] Allegations must clearly emanate from the applicant State and cannot simply be 'reported' to the organs of the Convention. The applicant State must believe ('qu' elle croira') in the veracity of the allegations it brings forward.[71] Use of reports by NGOs or IOs can only be adduced in order to support genuine allegations. These two requirements, in practice, have opened a 'back door' to the examination of the merits of an inter-State

[67] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR decision of 31 May 1968, p. 22; *Cyprus v. Turkey (III)*, no. 8007/77, EComHR decision of 10 July 1978, § 56, Decisions and Reports 13. In the latter decision, the EComHR offered as examples of an abusive initiation of proceedings, instances where proceedings under the ECHR have been initiated for other purposes than the protection of human rights or if an inter-State application contains allegations unacceptable due to their form or nature.

[68] Depending on their relationship to the merits, they may be addressed at the admissibility or the merits phase of the application: Jurisdiction *ratione temporis* assessed at the admissibility phase – *Austria* v. *Italy* no. 788/60, EComHR decision of 11 January 1961, p. 13; Jurisdiction *ratione loci* assessed at the admissibility phase – *Cyprus v. Turkey (I) and (II)*, nos. 6780/74 and 6950/75, EComHR decision of 26 May 1975, §§ 7-10, Decisions and Reports 2; Jurisdictional issues joined to the merits of the application: *Georgia v. Russia (II)* (dec.), no. 38263/08, §§ 67-8, 13 December 2011.

[69] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR decision of 31 May 1968, p. 29; *Ireland v. the United Kingdom (I)*, 18 January 1978, § 240, Series A no. 25; *Karner v. Austria*, no. 40016/98, § 24, ECHR 2003-IX.

[70] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, § 12, Decisions and Reports 35; *Denmark* v. *Turkey* (dec.), no. 34382/97, p. 34, 8 June 1999; *Georgia v. Russia (I)* (dec.), no. 13255/07, § 44, 30 June 2009; *Georgia v. Russia (II)* (dec.), no. 38263/08, § 88, 13 December 2011.

[71] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, § 7, Decisions and Reports 35.

application during the admissibility phase. So far, no inter-State application has been rejected under these two admissibility criteria.

The six-month time-limit and the rule of exhaustion of domestic remedies apply in respect of inter-State and individual applications. However, robust exceptions in respect of the second admissibility requirement have been established in the inter-State jurisprudence of the EComHR and the ECtHR. Art. 34 ECHR has been consistently interpreted as excluding complaints *in abstracto* of domestic legislation.[72] The ECtHR has underlined that the Convention does not envisage an *actio popularis* remedy and that individual applicants must be, directly, indirectly or potentially, affected by the implementation of the legislation in question.[73] Nevertheless, a State can lodge an application alleging incompatibility with the Convention of legislative provisions in the respondent's domestic legal order.[74] In such cases, the ECtHR will forgo the rule of exhaustion of domestic remedies.[75] The EComHR clarified that this must be seen as a consequence of the absence, in many countries, of legal remedies against legislation.[76]

In *France, Norway, Denmark, Sweden and the Netherlands* v. *Turkey*, the EComHR considered admissible the applicant States' complaint relating to the Law on the Constitutional Order according to which any appeal seeking the annulment of enactments passed by the National Security Council was prohibited. As the ECtHR clarified in its judgment in *Ireland v. the United Kingdom (I)* this type of alleged violation 'results from the mere existence of a law which introduces, directs or authorizes measures incompatible with the rights and freedoms safeguarded; this is confirmed unequivocally by the *travaux préparatoires*'.[77] However, the law under examination must be couched in sufficiently clear and precise terms in order to make the breach immediately apparent. If a violation cannot be discerned from the text of

[72] *Karner v. Austria*, No. 40016/98, § 24, ECHR 2003-IX.
[73] *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 50, 27 July 2010; *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014; *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015.
[74] *Greece* v. *the United Kingdom (I)*, no. 176/56, EComHR decision of 2 June 1956, p. 3; *The Greek case (I)*, no. 3321/67 and 3 others, EComHR decision of 24 January 1968, p. 12, ECHR Collection 25.
[75] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, p. 384, Series B no. 23.
[76] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, § 15, Decisions and Reports 35.
[77] *Ireland v. the United Kingdom (I)*, 18 January 1978, § 240, Series A no. 25.

the legislation, the Convention institutions must examine the manner in which the respondent interprets and applies *in concreto* the impugned legislative provisions.[78]

The second exception to the rule of exhaustion of domestic remedies lies in the existence of a *prima facie* indication of an administrative practice in breach of the Convention. This exception applies to both individual and inter-State applications.[79] In *Georgia v. Russia (I)*, the ECtHR distinguished between applications where the applicant State does no more than denounce violations allegedly suffered by individuals whose place is taken by the State and applications which relate to an administrative practice.[80] The first category of applications has to comply with the principle of exhaustion of domestic remedies while the latter does not.[81] The primary aim of the latter application is not to seek individual justice, but rather to prevent the recurrence of the administrative practice in question and the ECtHR is not required to give a ruling on individual violations.[82] Individual cases in this category only serve as proof or illustrations, in the words of the EComHR,[83] of the practice.[84] In *Greece v. the United Kingdom (II)*, which related to cases of alleged ill-treatment of Cypriots by British authorities in Cyprus, 20 of the 49 cases were ruled inadmissible due to non-exhaustion of domestic remedies as the EComHR deemed that the application belonged to the former category.[85]

If an administrative practice is based on legislative provisions, the former is considered as evidence of the implementation of the legislation in question and can be regarded as ancillary to the legislative complaint.[86] Examples of combination of administrative practices and legislative measures were reviewed in *Greece v. the United Kingdom (I)* and *Ireland v. the United Kingdom*.

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[78] Ibid.
[79] *Donnelly a. O. v. the United Kingdom* (dec.), nos. 5577/72 and 6 others, § 45, ECHR Collection 43; *Aksoy v. Turkey*, no. 21987/93, § 52, Reports of Judgments and Decisions 1996-VI.
[80] *Georgia v. Russia (I)* (dec.), no. 13255/07, § 40, 30 June 2009; *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 363, 16 December 2020.
[81] *Georgia v. Russia (II)* (dec.), no. 38263/08, §§ 84-5, 13 December 2011.
[82] *Ireland v. the United Kingdom (I)*, 18 January 1978, § 159, Series A no. 25; *Georgia v. Russia (I)* [GC], no. 13255/07, § 128, ECHR 2014 (extracts); *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 363, 16 December 2020.
[83] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, p. 272, Series B no. 23.
[84] *Georgia v. Russia (I)* (dec.), no. 13255/07, § 40, 30 June 2009; *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 363, 16 December 2020.
[85] *Greece* v. *the United Kingdom (II)*, no. 299/57, EComHR decision of 12 October 1957, p. 5-6.
[86] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, § 16, Decisions and Reports 35.

The most difficult cases arise when the administrative practice itself is not based explicitly on a legal provision or is not even contrary to national law and the respondent State denies its existence. In such applications, substantial *prima facie* evidence of its existence must be adduced in order for the application to fall within the exception of the rule of exhaustion of domestic remedies.[87] The EComHR and the ECtHR consider that there is *prima facie* evidence of an alleged administrative practice where allegations concerning individual cases are sufficiently substantiated, considered as a whole and in the light of the submissions of both applicant and respondent State.[88] On the other hand, the establishment of an administrative practice on the merits requires full proof of its existence. However, the burden of proof is not borne by either the applicant or the respondent State exclusively. The ECtHR will study all the material before it from whatever source they originate.[89] Scholars have argued that the sheer existence of a large number of individual applications relating to similar issues and lodged against the same State can be used as an indication of an administrative practice with respect to the exhaustion of domestic remedies.[90] However, the ECtHR has not endorsed this approach.

In *Ireland v. the United Kingdom (I)*, a report of a Committee of Inquiry set up by the British government confirming the use of specific techniques during the interrogation of detainees was considered as substantial evidence of an administrative practice potentially in breach of Art. 3 ECHR.[91] In *France, Norway, Denmark, Sweden and the Netherlands* v. *Turkey*, the EComHR considered that the material provided, namely reports from NGOs and IOs, should be viewed in light of Turkey's submissions. Both reports and Turkey's submissions partially confirmed the applicant States' allegations regarding a great number of complaints of torture

[87] *Ireland v. the United Kingdom (I)* and *(II)*, nos. 5310/71 and 5451/72, EComHR decision of 1 October 1972, p. 86; *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, §§ 21-2, Decisions and Reports 35; *Georgia v. Russia (I)* (dec.), no. 13255/07, § 41, 30 June 2009; *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 262, 16 December 2020.
[88] Ibid.
[89] *Georgia v. Russia (I)* [GC], no. 13255/07, § 95, ECHR 2014 (extracts).
[90] Geir Ulfstein and Isabella Risini, 'Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges' (*EJIL:Talk!* 24 January 2020) <https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/> accessed 2 November 2021.
[91] *Ireland v. the United Kingdom (I)* and *(II)*, nos. 5310/71 and 5451/72, EComHR decision of 1 October 1972, p. 86.

or ill-treatment brought by detainees and national judgments which found that torture had caused serious injuries, or even death, to prisoners.[92]

According to the EComHR and the ECtHR an administrative practice consists of two integral elements, repetition and official tolerance. Both constituent elements must be substantially evidenced.[93] If the ECtHR finds that no *prima facie* evidence has been adduced to substantiate the existence of both features of an administrative practice, then the respective claim must be rejected and no other grounds, such as the ineffectiveness of remedies, should be examined.[94] Such a finding in an inter-State application will not prejudice a related application under Art. 34.[95]

Repetition refers to the accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount, not merely to isolated incidents or exceptions, but, to a pattern or system.[96] The link may relate to the time or place the acts occurred as well as the attitude of persons involved. For the purposes of establishing an administrative practice, the EComHR examined various illustrative cases and visited many detention centers throughout Greece and Northern Ireland. In the latter case, the EComHR, in order to verify or not the existence of an administrative practice, examined the treatment of sixteen detainees at eight different detention centers.[97] The ECtHR followed this approach in *Georgia v. Russia (I)*.[98]

The element of official tolerance for both purposes of *prima facie* evidence and the establishment on the merits of an administrative practice may be found to exist on two alternative levels. Tolerance can be present either at the level of direct superiors of those immediately responsible for the acts involved or that of a higher

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[92] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, § 27, Decisions and Reports 35.
[93] *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, §§ 263, 366, 16 December 2020.
[94] *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 366, 16 December 2020.
[95] *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 391, 16 December 2020.
[96] *Ireland v. the United Kingdom (I)*, 18 January 1978, § 159, Series A no. 25; *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, § 19, Decisions and Reports 35; *Cyprus v. Turkey (IV)* [GC], no. 25781/94, § 115, ECHR 2001-IV; *Georgia v. Russia (I)* [GC], No. 13255/07, § 123, ECHR 2014 (extracts); *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 261, 16 December 2020.
[97] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, pp. 272-325, Series B no. 23.
[98] *Georgia v. Russia (I)* [GC], no. 13255/07, § 128, ECHR 2014 (extracts).

authority who knew or ought to have known of the acts in question.[99] If tolerance stems from high levels of the executive, this fact alone is a strong indication that the victims have no possibility of obtaining redress.[100] The level of tolerance is decisive for the applicability or not of the principle of exhaustion of domestic remedies.[101] The EComHR in *Ireland v. the United Kingdom* considered that, when tolerance is alleged to exist on lower levels such as the superiors of those directly responsible, it must ascertain in each case whether available domestic remedies were effective or not; The EComHR was of the opinion that effectiveness must be assumed normally.[102] In any event, the ECtHR in *Georgia v. Russia (I)* affirmed that the administrative practice must be 'of such a nature as to make proceedings futile or ineffective'.[103] The authorities, faced with numerous allegations, must manifest indifference by refusing any adequate investigation of their truth or falsity or deny a fair hearing of such complaints.[104]

Any action taken by higher authorities to combat the administrative practice in question must be on a scale which is sufficient to put an end to the repetition of acts in violation of the Convention or, at the very least, to interrupt the pattern of the respective practice.[105] The existence of an administrative practice in violation of the Convention cannot, from the outset, be excluded on the sole ground that persons guilty of such acts have been punished.[106] The pressing question is whether the higher authorities have been effective in bringing such acts to an end.[107] In *France, Norway, Denmark, Sweden and the Netherlands* v. *Turkey*, the Head of State had issued instructions concerning prevention of torture and ill-treatment of detainees.[108] However, States cannot shelter behind their inability to ensure that their instructions have been respected.

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[99] *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 402, 16 December 2020.
[100] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, p. 385, Series B no. 23.
[101] Ibid 384.
[102] Ibid 385.
[103] *Georgia v. Russia (I)* [GC], no. 13255/07, § 125, ECHR 2014 (extracts).
[104] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR report of 5 November 1969, p. 196; *Georgia v. Russia (I)* [GC], no. 13255/07, § 124, ECHR 2014 (extracts).
[105] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, §§ 19, 30, Decisions and Reports 35.
[106] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, §§ 20, 30, Decisions and Reports 35.
[107] Ibid.
[108] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, § 30, Decisions and Reports 35.

On the merits of an application under the Convention, the notion of administrative practice works in a different manner.[109] A pattern of violations does not constitute a violation separate from individual breaches.[110] A single act contrary to the ECHR is sufficient to establish a violation. However, an administrative practice of violations renders them more serious.[111] The ECtHR has not indicated a specific number of incidents necessary in order to be able to conclude than an administrative practice existed.[112] This is a question left to the ECtHR to assess having regard to the particular circumstances of each case.

In *Ireland v. the United Kingdom* some victims of the administrative practice of detainee ill-treatment had received compensation. However, this did not affect the assessment of the overall practice as contrary to Art. 3.[113] In certain cases, the question of effectiveness and accessibility of domestic remedies may be regarded as additional evidence of whether such a practice exists or not.[114] If an administrative practice allegedly in contravention of the Convention has received publicity, a presumption of tolerance may arise which cannot be rebutted on the grounds of lack of direct evidence.[115] Policy tolerated at the highest echelons of the respondent State may even be understood as tacit approval thereof.[116] Frequent repetition can also evidence tolerance.[117]

The last admissibility hurdle for an inter-State application lies in Art. 55 ECHR which provides that 'the High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention'. The CoM declared in 1970 that member States should only use the inter-State application procedure under Art. 33 ECHR against another Contracting State in order to bring an alleged

[109] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, p. 384, Series B no. 23.
[110] *Ireland v. the United Kingdom (I)*, 18 January 1978, § 159, Series A no. 25.
[111] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, pp. 385, 388, Series B no. 23.
[112] *Georgia v. Russia (II)* [GC], no. 38263/08, § 103, 21 January 2021.
[113] *Ireland v. the United Kingdom (I)*, 18 January 1978, § 153, Series A no. 25.
[114] *Georgia v. Russia (I)* [GC], no. 13255/07, § 126, ECHR 2014 (extracts).
[115] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, p. 386, Series B no. 23.
[116] Ibid 387.
[117] Ibid 386.

violation of a right which is in substance covered by both the ECHR and the ICCPR.[118]

The *travaux préparatoires* reveal that the Convention drafters primarily had the ICJ in mind when drafting Art. 55 ECHR and intended to prevent the 'fragmentation' of international law, even if the notion of fragmentation has only recently gained traction in the international community.[119] However, the ECtHR hasn't had the opportunity, so far, to examine this article and elaborate on its content in the context of an inter-State application.

Turkey relied on this provision (former Art. 62) to claim that Cyprus and Turkey had undertaken to settle their dispute within the framework of the UN and the Committee on Missing Persons.[120] The EComHR considered that this provision establishes the monopoly of the Convention institutions for deciding disputes arising out of the interpretation and application of the Convention. The possibility of withdrawing a case from the jurisdiction of the Convention organs is applicable only under exceptional circumstances and with the consent of both applicant and respondent State. Furthermore, the EComHR pointed out that the parties to the agreements establishing inter-communal talks and the Committee on Missing Persons were formally different from the parties before it as Turkey was not a part of these agreements. Finally, the EComHR highlighted that its performance and functions cannot be hindered by the fact that certain aspects of the circumstances underlying an application were being dealt with, from a different angle, by other international bodies.[121]

The lower admissibility threshold of Art. 33 compared to the individual application under Art. 34 reflect the distinct features of inter-State applications.[122] These features reveal the 'unqualified' nature of the right of a State to bring any

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[118] CoE, CoM Resolution (70) 17 on the UN Covenant on Civil and Political Rights and the European Convention on Human Rights: Procedure for dealing with inter-State complaints (adopted by the CoM on 15 May 1970).
[119] Schabas (n 7) 907-8.
[120] *Cyprus v. Turkey (IV)*, no. 25781/94, EComHR decision of 28 June 1996, p. 28, Decisions and Reports 86-A.
[121] Ibid.
[122] CoE, Steering Committee for Human Rights, Committee of Experts on the System of the European Convention on Human Rights, Drafting Group on Effective Processing and Resolution of Cases relating to Inter-State Disputes, 'Draft CDDH report on the effective processing and resolution of cases relating to inter-State disputes' (8 July 2020) DH-SYSC-IV (2020)04, § 3 <https://rm.coe.int/steering-committee-for-human-rights-cddh-committee-of-experts-on-the-s/16809f059e> accessed on 2 November 2021.

alleged violation of the Convention to the ECtHR and the system of collective guarantee that is most eloquently embodied in the inter-State application.[123]

C. Fact-Finding

Fact-finding in the first inter-State cases was conducted by the now defunct EComHR. Prior to Prot. 11 the establishment of facts was principally the duty of the EComHR. However, exceptionally the ECtHR could make its own assessment.[124] Former Art. 28 stipulated that the EComHR 'shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the EComHR'. Art. 38 ECHR, which replaced former Art. 28, is similarly worded. However, it notably omits to establish an obligation to ascertain the facts under consideration.[125] Scholars have argued that Art. 38 may impose an obligation on the ECtHR, in certain cases, to conduct fact-finding procedures in order to ascertain the relevant facts.[126]

Initially, the EComHR conducted on-the-spot investigations primarily in inter-State cases.[127] However, the fact-finding process is not an exclusive feature of inter-State applications.[128] The majority of recent investigations have taken place in individual applications. Since 1957 more than 90 cases have been subjected to fact-finding procedures by organs of the Convention.[129] Hearings were held in various locations while on-the-spot investigations were undertaken for approximately 20

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[123] Ibid.
[124] *Cyprus v. Turkey (IV)* [GC], no. 25781/94, § 117, ECHR 2001-IV.
[125] Art. 38 stipulates that the ECtHR shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary details.
[126] Philip Leach, Costas Paraskeva and Gordana Uzelac, 'Human Rights Fact-Finding. The European Court of Human Rights at a Crossroads' (2010) 28 Netherlands Quarterly of Human Rights 41, 46-7.
[127] Philip Leach, Costas Paraskeva and Gordana Uzelac, 'International Human Rights & Fact-Finding. An Analysis of the Fact-Finding Missions Conducted by the European Commission and Court of Human Rights' (2009) Report by the Human Rigths & Social Justice Research Institute at London Metropolitan University, 71 < https://www.academia.edu/1315823/INTERNATIONAL_HUMAN_RIGHTS_and_FACT-FINDING >.
[128] Indicatively, *Peers v. Greece*, no. 28524/95, § 70, ECHR 2001-III; *Ipek v. Turkey*, no. 25760/94, § 8, ECHR 2004-II; *Adali v. Turkey*, no. 38187/97, § 10, 31 March 2005.
[129] Leach, Paraskeva and Uzelac (n 127) 24.

cases.[130] Most fact-finding missions have been conducted in order to address allegations of violations of Arts. 2 and 3 ECHR.[131]

The necessity of fact-finding missions depends on various factors and primarily arises when fundamental factual disputes between the parties impede on the ECtHR's ability to render a well-founded judgment. Other factors include the nature or seriousness of the case, the insufficiency of attempts by domestic authorities to fully establish the facts, a *prima facie* indication that the applicant's allegations are true and the potential for a fact-finding mission to render successful results.[132]

The ECtHR machinery depends on objective facts. However, fact-finding missions are resource-demanding and time-consuming.[133] Fact finding in the *Greek Case (I)* used up almost all resources of the EComHR at the time.[134] Researches have argued that the ECtHR has developed a policy to avoid the need to carry out fact-finding missions by focusing on procedural deficiencies or a complete lack of domestic investigation.[135] This factor may have reinforced or complemented the general proceduralization of the ECtHR's jurisprudence which many scholars have observed but primarily attributed to other factors[136].

Fact-finding investigations were a novel concept in the first inter-State cases before the EComHR. Through these first inter-State applications, the EComHR developed its approach in respect of both individual and inter-State applications on the admissibility and evaluation of evidence as well as the burden and standard of proof, including occasions where inferences may be drawn from the conduct of the parties.

In *Greece v. the United Kingdom (I)* delegates from the Sub-Commission interviewed more than 50 witnesses in various locations throughout Cyprus, including Limassol, Nicosia, Famagusta and four villages.[137] The delegates also visited a detention center in Pyla. Their visit to Cyprus lasted 9 days and hearings

[130] Ibid.
[131] Ibid 29.
[132] Ibid 38.
[133] Ulfstein and Risini (n 90).
[134] Ibid.
[135] Leach, Paraskeva and Uzelac (n 126) 48.
[136] See, *inter alia*, Thomas Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019) 68 International and Comparative Law Quarterly 91.
[137] *Greece* v. *the United Kingdom (I)*, no. 176/56, EComHR report of 26 September 1958, §§ 62-3.

were conducted without the presence of agents of the applicant and the respondent State.[138]

Extensive fact-finding was also undertaken for the *Greek case (I)* and has been applauded by scholars.[139] In total, the EComHR heard 88 witnesses while proceedings ran over 20,000 pages.[140] In respect of the allegations relating to Art. 3, the ECtHR held five hearings in Strasbourg and Athens and interviewed 58 witnesses, including medical experts who had examined victims of ill-treatment.[141] During their trip to Greece delegates visited the Security Police Headquarters in Athens and Piraeus.[142] The standard of 'beyond reasonable doubt' in respect of the establishment of a violation of the Convention was endorsed by the EComHR for the first time in the *Greek case (I)*.[143] This standard has been continuously applied to this day.

In *Ireland v. the United Kingdom (I)* the EComHR heard more than 100 witnesses[144] and held multiple witness hearings in Strasbourg and other locations, including a military base in Norway.[145] The hearings were conducted in accordance with the common law adversarial system which was familiar to both States.[146] When the application reached the ECtHR, the latter clarified that it would examine all materials before it, whether originating from the EComHR, the Parties or other sources, and, if necessary, it would obtain such material *proprio motu*.[147] Furthermore, the ECtHR, while confirming the standard of proof as 'beyond reasonable doubt', concluded that 'proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact'.[148] In this context, the ECtHR will take into account the

[138] Ibid § 58.
[139] James Becket, 'The Greek Case Before the European Human Rights Commission' (1970) 1 Human Rights 91, 110-1; Rosalyn Higgins, 'The European Convention on Human Rights' in T. Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Oxford University Press 1984) 498, 512; Menno T. Kamminga, 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?' (1994) 12 Netherlands Quarterly of Human Rights 153, 155.
[140] Becket (n 139) 105.
[141] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR report of 5 November 1969, pp. 189-191.
[142] Ibid 192.
[143] Ibid 196; Leach, Paraskeva and Uzelac (n 127) 15.
[144] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, p. 224, Series B no. 23.
[145] Ibid pp. 110, 114, 115, 117, 122.
[146] Leach, Paraskeva and Uzelac (n 126) 59.
[147] *Ireland v. the United Kingdom (I)*, 18 January 1978, § 160, Series A no. 25.
[148] Ibid § 161.

conduct of both Parties in respect of providing or assessing evidence.[149] All of these rules in respect to the admissibility and evaluation of evidence apply to this day.[150]

Furthermore, the EComHR conducted extensive fact-finding in Cyprus's multiple applications against Turkey. In *Cyprus v. Turkey (I) and (II)* delegates interviewed more than 25 witnesses, including refugees from Northern Cyprus, visited refugee camps, and were presented with, *inter alia*, audiovisual material.[151] In *Cyprus v. Turkey (III)* the EComHR held a hearing in Strasbourg and interviewed 13 witnesses in order to establish the fate of numerous missing persons.[152] In *Cyprus v. Turkey (IV)* the EComHR held hearings in Strasbourg, London, and Cyprus and heard 27 witnesses.[153] Delegates of the EComHR also visited, for the first time, various localities in northern Cyprus and heard statements from officials and other persons they encountered. With respect to recent cases, the ECtHR appears to be avoiding on-the-spot investigations but has conducted witness hearings in Strasbourg for both *Georgia v. Russia (I)*[154] and *(II)*. In the latter case a delegation of judges heard 33 witnesses in Strasbourg.[155]

From the beginning of the history of the inter-State application, respondent States did not fully comply with their obligation under former Art. 28 and present Art. 38 'to furnish all necessary facilities' for the examination of the case in question. The EComHR experienced great difficulties in establishing the relevant facts of the *Greek case* as Greece deliberately attempted to suppress such evidence.[156] Some witnesses living in Greece were not allowed, or were impeded on technical grounds like passport revocation, to provide their testimonies.[157] The junta also denied to delegates of the EComHR access to the Averoff prison and detention camps on the island of Leros. On these grounds, the Sub-Commission decided to terminate its visit to Greece.

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[149] Ibid.
[150] *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, §§ 256-7, 16 December 2020.
[151] *Cyprus v. Turkey (I) and (II)*, nos. 6780/74 and 6950/75, EComHR report of 10 July 1976, §§ 66-75.
[152] *Cyprus v. Turkey (III)*, no. 8007/77, EComHR report of 4 October 1983, §§ 91, 94-5, Decisions and Reports 72.
[153] *Cyprus v. Turkey (IV)* [GC], no. 25781/94, §§ 37, 51, 107, ECHR 2001-IV.
[154] ECtHR Press Release ECHR 101 (2011) issued on 4 February 2011 and available on HUDOC.
[155] *Georgia v. Russia (II)* [GC], no. 38263/08, §§ 23-4, 21 January 2021; ECtHR Press Release ECHR 211 (2016) issued on 17 June 2016 and available on HUDOC.
[156] Becket (n 139) 97.
[157] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR report of 5 November 1969, pp. 190-1.

In *Ireland v. the United Kingdom (I)*, the respondent State actively pursued a policy of delaying the proceedings in any way possible.[158] The United Kingdom disagreed with some of the hearings taking place in Strasbourg, refused to produce witnesses from the policy-making level of the government, and ordered witnesses not to testify on certain subjects.[159] The EComHR had explicitly requested witnesses who could verify the source of the policy authorizing certain techniques which were used during the interrogation of detainees and which the applicant alleged contravened Art. 3 ECHR.[160] The respondent admitted that such orders came from a 'high level';[161] nevertheless, the fact that the policy was endorsed at a ministerial level was deliberately concealed.[162] The EComHR referred to the United Kingdom's tactics as an 'embargo on evidence'.[163] On a normative level and through teleological interpretation, the ECtHR held that States have a duty to cooperate with the Convention institutions under former Art. 28.[164] However, the ECtHR only noted that it regretted the attitude of the United Kingdom and limited itself to highlighting the fundamental importance of the principle enshrined in former Art. 28.[165]

Turkey as a respondent in Cyprus's applications refused to participate in any procedure which implied recognition of the 'Greek Cypriot Administration' as the legitimate government of the whole island.[166] On this basis, Turkey only submitted observations on the admissibility of the applications and did not participate during the merits stage of the proceedings before the EComHR in the first, second,[167] and

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[158] *Ireland v. the United Kingdom* (revision), no. 5310/71, § 114, 20 March 2018; David Bonner, 'Of Outrage and Misunderstanding: *Ireland v United Kingdom* - Governmental Perspectives on an Inter-State Application under the European Convention on Human Rights' (2014) 34 Legal Studies 47, 55.
[159] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, pp. 119, 396, Series B no. 23; *Ireland v. the United Kingdom* (revision), no. 5310/71, § 116, 20 March 2018; Bonner (n 158) 58.
[160] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, p. 119, Series B no. 23.
[161] *Ireland v. the United Kingdom (I)*, 18 January 1978, § 97, Series A no. 25.
[162] *Ireland v. the United Kingdom* (revision), no. 5310/71, §§ 114-5, 20 March 2018; Bonner (n 158) 71.
[163] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, p. 396, Series B no. 23.
[164] *Ireland v. the United Kingdom (I)*, 18 January 1978, § 148, Series A no. 25.
[165] Ibid.
[166] *Cyprus v. Turkey (I) and (II)*, nos. 6780/74 and 6950/75, EComHR decision of 26 May 1975, p. 5, Decisions and Reports 2; *Cyprus v. Turkey (III)*, no. 8007/77, EComHR decision of 10 July 1978, p. 19, Decisions and Reports 13; *Cyprus v. Turkey (IV)*, no. 25781/94, EComHR report of 4 June 1999, § 23.
[167] *Cyprus v. Turkey (I) and (II)*, nos. 6780/74 and 6950/75, EComHR report of 10 July 1976, § 64.

third[168] application against it as well as before the ECtHR in respect of *Cyprus v. Turkey (IV)*.[169] However, in the latter case, Turkey participated in the examination of the complaints for the purposes of the issuance of a report by the EComHR. Turkey also participated in the proceedings regarding Cyprus's just satisfaction claim in *Cyprus v. Turkey (IV)*.

The ECtHR found a violation of Art. 38 for the first time in the history of inter-State applications in 2014; it took 36 years for the ECtHR to effectuate its *in fine* interpretation of the binding character of Art. 38 ECHR. In *Georgia v. Russia (I)*, the ECtHR was called upon to deal with the persistent refusal of Russia to provide copies of two circulars which could prove or disprove the existence of an administrative practice of targeting Georgian nationals for expulsion. Russia maintained that the circulars were a 'State secret'. However, the ECtHR highlighted that a circular by its nature has to be brought to the attention of a large number of public officials at various administrative levels in order to be implemented.[170] Consequently, the ECtHR found a violation of Art. 38 as Russia refused to 'furnish the necessary details' and it noted that, in accordance with Rule 44 (c), it could draw such inferences as it deemed relevant with respect to the well-foundedness of Georgia's allegations on the merits.[171] A violation of Art. 38 was also established in *Georgia v. Russia (II)*.[172]

D. Just Satisfaction

The applicability of Art. 41 ECHR in inter-State applications was first mentioned by the ECtHR in *Ireland v. the United Kingdom (I)*.[173] The President requested Ireland to confirm his assumption that they had not invited the ECtHR to afford just satisfaction in accordance with former Art. 50 ECHR. Ireland clarified that, while not wishing to interfere with the *de bene esse* jurisdiction of the ECtHR, they did not invite it to award monetary compensation to any individual victim of a breach of the Convention.[174]

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[168] *Cyprus v. Turkey (III)*, no. 8007/77, EComHR report of 4 October 1983, § 81, Decisions and Reports 72.
[169] *Cyprus v. Turkey (IV)* [GC], no. 25781/94, §§ 12, 58, ECHR 2001-IV.
[170] *Georgia v. Russia (I)* [GC], no. 13255/07, §§ 106-7, ECHR 2014 (extracts).
[171] *Georgia v. Russia (I)*, [GC], no. 13255/07, §§ 109-10, 140, ECHR 2014 (extracts).
[172] *Georgia v. Russia (II)* [GC], no. 38263/08, §§ 345-6, 21 January 2021.
[173] *Ireland v. the United Kingdom (I)*, 18 January 1978, § 244, Series A no. 25.
[174] Ibid § 245.

To date the ECtHR has awarded just satisfaction in two inter-State cases. The just satisfaction awards were issued within approximately 5 years from either the issuance of the judgment which found violations of the Convection[175] or the date the applicant State submitted the respective claim.[176] The distinction between the merits and just satisfaction phases is envisaged in Rule 75 § 1 RoC and applies to both individual[177] and inter-State applications under the condition that the ECtHR considers that the question of just satisfaction is not ready for decision at the time it delivers its judgments on the merits.

In its just satisfaction judgment in *Cyprus v. Turkey (IV)*, the ECtHR explicitly accepted that Art. 41 applies to inter-State cases and elaborated on the notion of just satisfaction and its application in the context of Art. 33 ECHR. The notion of just satisfaction, as intended by the drafters of the ECHR, derives its general logic from the principles of public international law on State liability.[178] Despite the special character of the Convention as an instrument for the protection of human rights and due to the status of Art. 41 as *lex specialis* in relation to the general rules and principles of international law, the overall logic of just satisfaction is not substantially different from the logic of reparations in public international law.

The ECtHR, however, clarified that in inter-State cases an award of just satisfaction will have to be assessed and considered justified, or not, on a case by case basis.[179] The criteria by which the ECtHR will determine the need for such an award include the type of complaint, the possibility of identifying victims, and the main purpose of an application.[180] Just satisfaction may not be appropriate when the applicant State complaints about general issues such as systemic problems and shortcomings in another Contracting Party.[181] Such applications primarily aim to the vindication of the public order of Europe within the framework of collective

[175] *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, 31 January 2019.
[176] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, ECHR 2014.
[177] *Papamichalopoulos a. O. v. Greece* (Article 50), 31 October 1995, Series A no. 330-B issued a couple of years after *Papamichalopoulos a. O. v. Greece*, 24 June 1993, Series A no. 260-B.
[178] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, § 40, ECHR 2014; *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 21, 31 January 2019.
[179] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, § 43, ECHR 2014; *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 21, 31 January 2019.
[180] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, § 43, ECHR 2014; *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, §§ 22, 27, 31 January 2019.
[181] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, § 44, ECHR 2014; *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 21, 31 January 2019.

responsibility established by the Convention.[182] On the other hand, when a member State denounces violations of individual human rights of its nationals or other victims, an award of just satisfaction may be justified depending on the circumstances.[183]

In accordance with Art. 41 ECHR, both individual and inter-State applications always relate to alleged interferences with rights and freedoms of human beings. Therefore, even if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims.[184] The ECtHR in *Cyprus v. Turkey (IV)* awarded 60.000.000 for non-pecuniary damage suffered by the enclaved Greek Cypriot residents of the Karpas peninsula in northern Cyprus and 30.000.000 for pecuniary damage suffered by the surviving relatives of missing persons.[185] In *Georgia v. Russia (I)*, the ECtHR awarded a lump sum of 10.000.000 Euros in respect of non-pecuniary damages suffered by a group of at least 1.500 Georgian nationals. This sum is to be distributed by Georgia to the individual victims with 2.000 Euros for each victim of a violation of the prohibition of collective expulsion and approximately 10.000 to 15.000 Euros to victims of a violation of Art. 5 § 4 and 3 ECHR. The specific amount to be afforded in the latter category will have to depend on the length of the respective periods of detention in accordance with the ECtHR's jurisprudence.[186]

The ECtHR has clarified that the group of people for whom just satisfaction is sought in inter-State cases must be sufficiently precise and objectively identifiable.[187] A general numerical framework may be enough for the ECtHR to verify the existence of an administrative practice. However, this is not the case when awarding just satisfaction under Art. 41 ECHR.[188] The ECtHR stressed that *Georgia v. Russia (I)* was distinguishable from *Cyprus v. Turkey (IV)*. The latter case involved

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[182] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR decision of 31 May 1968, p. 22; *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, § 40, Decisions and Reports 35; *Cyprus v. Turkey (IV)* [GC] (just satisfaction), no. 25781/94, § 44, ECHR 2014.
[183] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, § 45, ECHR 2014; *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, §§ 21, 27, 31 January 2019.
[184] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, § 46, ECHR 2014; *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 26, 31 January 2019.
[185] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, § 58, ECHR 2014.
[186] *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 77, 31 January 2019.
[187] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, § 47, ECHR 2014; *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 28, 31 January 2019.
[188] *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 53, 31 January 2019.

violations which were not based on individualized administrative decisions. On the other hand, Russia's violations took place through individual administrative decisions effectuating the arrest, detention and expulsion of Georgian nationals. Georgia and Russia, therefore, should be in a position to easily identify Georgian nationals concerned and to furnish such information to the ECtHR.[189] Georgia produced a list with 1,795 alleged victims of Russia's coordinated policy of arresting, detaining and expelling Georgian nationals. The ECtHR invited Russia to submit the expulsion orders and court decisions in its possession in order to precisely identify the victims. However, the respondent State limited itself to commenting on the list produced by Georgia. Approximately 300 names were removed from the list for various reasons. The ECtHR assumed that the final list of alleged victims produced by the applicant State was correct and held that the burden of proof in respect of the veracity or not of the list lied with Russia as the violations had taken place on its territory.[190]

The ECtHR is not a first instance court; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large number of cases which require the finding of specific facts or the precise calculation of monetary compensation.[191] Just satisfaction requests submitted in inter-State cases are inherently distinguishable from individual applications with multiple applicants as, in the latter type of cases, the specific circumstances of each individual are ascertained in the judgment.[192]

However, the underlying considerations for the assessment of the amount of damages do not appear to differ between individual and inter-State applications. The ECtHR applied in *Cyprus v. Turkey (IV)* the principles of the *Varnava a. O.* v. *Turkey* case regarding the purpose and guiding principles behind the assessment of non-pecuniary or moral damages.[193] The ECtHR clarified that non-pecuniary or moral damages do not lend themselves to precise calculation. The guiding principle in such claims is equity which involves flexibility and an objective consideration of what is

[189] Ibid §§ 56-7.
[190] Ibid § 69.
[191] Ibid § 65.
[192] Ibid § 66.
[193] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, § 56, ECHR 2014.

just, fair, and reasonable under the circumstances of each case, including the overall context of the breach and the position of the applicant.[194]

Both judgments confirmed that just satisfaction is possible in inter-State applications but retains its individual-oriented nature. In both just satisfaction judgments, the ECtHR entrusted the applicant States with the establishment of an effective mechanism to distribute the sums awarded as non-pecuniary damages to the individual victims under the supervision of the CoM.[195]

E. Interim Measures

Interim measures have become an important tool for the ECtHR to quickly address highly probable violations of human rights by CoE member States. Interim measures are exceptional measures which can be applied at any stage of the proceedings and the individual concerned must face a real risk of serious and irreversible harm.[196] According to Rule 39, the ECtHR can indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings.[197] The purpose of Rule 39 is to maintain the *status quo* in order to avoid rendering an application before the ECtHR devoid of purpose.[198]

However, the competence of the ECtHR to indicate interim measures is not explicitly based on a provision of the Convention. The *travaux préparatoires* do not mention the possibility of provisional measures, while the CoM rejected a proposal to that effect in the Draft European Convention.[199] Nevertheless, the EComHR, early on, developed a practice to address interim measures to respondent States in respect of death penalty and extradition cases. This practice was codified in its Rules of Procedure in 1974 in language very similar to current Rule 39.[200]

A long debate had ensued in respect of the binding nature, or not, of the interim measures. In *Mamatkulov and Askarov v. Turkey*, the Grand Chamber, for

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[194] Ibid.
[195] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, § 59, ECHR 2014; *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 79, 31 January 2019.
[196] *Mamatkulov and Askarov. v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 103-4, ECHR 2005-I.
[197] ECtHR, RoC (as amended in 2021).
[198] *Mamatkulov and Askarov. v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 106, 125, ECHR 2005-I.
[199] Clara Burbano Herrera and Yves Haeck, 'Letting States off the Hook? The Paradox of the Legal Consequences Following State Non-Compliance with Provisional Measures in the Inter-American and European Human Rights Systems' (2010) 28 Netherlands Quarterly of Human Rights 332, 337.
[200] Ibid 338.

the first time, held that the failure of the respondent to abide by the interim measures it had indicated constituted a violation of the right of individual application; the applicants had been hindered in the effective exercise of their right under Art. 34 and their extradition had rendered their application nugatory.[201] Only in 2006 did the ECtHR, in Chamber formation, explicitly recognize the binding force of measures indicated under Rule 39 regardless of its actual effects on the applicant's rights under Art. 34.[202]

Interim measures can be applied in both individual and inter-State applications. The first indication of an interim measure to a High Contracting Party took place during the first inter-State application. Upon request by Greece, the Sub-Commission requested the United Kingdom to stay the execution of Nicolas Sampson until it had been fully informed of the facts of the case and had the opportunity to provide its opinion.[203] Nicolas Sampson had been acquitted for murder but sentenced to death under the emergency legislation for carrying a firearm.[204] The request was made during the proceedings of the first application but Nicolas Sampson was also included as a case of ill-treatment by British authorities in *Greece v. the United Kingdom (II)*. The request of the Sub-Commission was based on the need to avoid an irreparable act. The respondent was under no obligation to satisfy the request of the Sub-Commission. However, the United Kingdom acquiesced, and Nicolas Sampson lived to be the president of Cyprus for a few days right after the *coup d' etat* in 1974 which triggered Turkey's invasion to the island. The effects of Turkey's invasion prompted Cyprus to lodge four inter-State applications under the Convention.

In the *Greek case (I)*, the Secretary General of the CoE requested during the proceedings the postponement of the execution of Mr. Panagoulis and Greece complied.[205] In *Ireland v. the United Kingdom (I)*, the former requested from EComHR to indicate interim measures in the form of an undertaking by the respondent State to discontinue ill-treatment of detainees and to accept observers nominated by the EComHR at detention centers. In March 1972, the EComHR

[201] *Mamatkulov and Askarov. v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 127-9, ECHR 2005-I.
[202] *Olaechea Cahuas v. Spain*, no. 24668/03, § 81, ECHR 2006-X (extracts); *Aoulmi v. France*, no. 50278/1999, § 111, ECHR 2006-I (extracts).
[203] *Greece* v. *the United Kingdom (I)*, no. 176/56, EComHR report of 26 September 1958, § 41.
[204] Simpson (n 32) 973-4.
[205] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR report of 5 November 1969, p. 417.

decided that it did not have the power, consistent with its functions under the Convention, to meet the request made.[206]

On 11 August 2008 Georgia submitted a request for interim measures to the ECtHR against Russia. The next day the President of the ECtHR decided to apply Rule 39 of the RoC and called upon both States to honor their commitments under the ECHR, particularly with respect to Arts. 2 and 3.[207] The President also requested both States to provide information on measures taken to ensure that the ECHR was fully complied with.[208] The application of Rule 39 was extended several times by the President.[209]

In 2009 Georgia submitted a request, in the context of *Georgia v. Russia (III)*, requesting the release of four Georgian minors in custody of the proxy regime in South Ossetia. Following two visits by the Human Rights Commissioner of the CoE, five Georgian minors were released in December 2009. On 21 December 2009, the President informed both parties that there was no need to rule on Georgia's request for interim measures.

Ukraine has also submitted requests for interim measures in the context of its multiple pending inter-State applications against Russia. In 2014 Ukraine submitted a request under Rule 39 RoC for an interim measure indicating to Russia, *inter alia*, that the latter should refrain from measures that might threaten the life and health of the civilian population in the territory of Ukraine. The President of the Third Section called upon both States to refrain from taking any measures, in particular military actions, which might entail the breach of Convention rights of the civilian population.[210] The interim measure was lifted through the admissibility decision rendered in 2020.[211] Ukraine and Russia repeatedly ignored the ECtHR's interim order.[212]

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[206] *Ireland v. the United Kingdom (I)* and *(II)*, nos. 5310/71 and 5451/72, EComHR decision of 1 October 1972, p. 8.
[207] *Georgia v. Russia (II)* [GC], no. 38263/08, § 5, 21 January 2021.
[208] *Georgia v. Russia (II)* (dec.), no. 38263/08, § 5, 13 December 2011.
[209] *Georgia v. Russia (II)* [GC], no. 38263/08, § 6, 21 January 2021; ECtHR Press Release ECHR 169 (2018) issued on 2 May 2018 and available on HUDOC.
[210] *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 5, 16 December 2020; ECtHR, Press Release ECHR 073 (2014) issued on 13 March 2014 and available on HUDOC.
[211] *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 238, 16 December 2020.
[212] See Julia Koch, 'The Efficacy and Impact of Interim Measures: Ukraine's Inter-State Application Against Russia' (2016) 39 Boston College International and Comparative Law Review 163.

Ukraine submitted a further request for interim measures in the context of *Ukraine v. Russia (III)* which concerns the abduction of three groups of Ukrainian orphan children and children without parental care, and several adults accompanying them. The groups were allegedly abducted by armed representatives of the separatist forces in Eastern Ukraine and subsequently transported to Russia. Following diplomatic efforts by Ukrainian authorities the children and adults were returned to the territory of Ukraine. After the first group was returned, the ECtHR lifted the interim measure.[213]

On 25 November 2018, three Ukrainian naval vessels, two artillery boats and a tugboat, were seized and their 24 servicemen were arrested and detained by Russian authorities. The incident took place in the Black Sea near the Kerch Strait. The ECtHR indicated to Russia by way of interim measure that it should ensure the administration of appropriate medical treatment to the captive Ukrainian naval officers who required it and to anyone who had been wounded in the naval incident.[214]

In 2020 the ECtHR issued two interim measures in respect of *Armenia v. Azerbaijan*, *Armenia v. Turkey*, and *Azerbaijan v. Armenia*. The interim measures relate to the conflict of Nagorno-Karabakh and were indicated to all States concerned. As press releases on the content of the interim measures are the main source of information on the respective applications, their content will be discussed in chapter III B 2 (h) of this study.

In principle, interim measures do not appear to apply in a different manner in respect of individual and inter-State applications. The application of Rule 39 in the context of the applications of Georgia and Ukraine against Russia as well as in the three recent applications relating to the Nagorno-Karabakh conflict are addressed to both parties. However, this may be primarily due to the armed conflict dimension of these applications. Interim measures have also been addressed to the applicant in individual applications.[215] Nevertheless, there does seem to be a difference in the breadth and specificity of interim measures indicated in the context of inter-State

[213] ECtHR, Press Release ECHR 345 (2014) issued on 26 November 2014 and available on HUDOC.
[214] ECtHR, Press Release ECHR 421 (2018) issued on 4 December 2018 and available on HUDOC.
[215] *Ilascu a. O. v. Moldova and Russia* [GC], no. 48787/99, § 11, ECHR 2004-VII.

applications.[216] In individual applications interim measures are, by their nature, specified to certain acts while recent interim measures against Georgia, Ukraine, Russia, Armenia, Azerbaijan, and Turkey are rather broad. Consequently, it is more difficult for the ECtHR to assess whether such measures have been complied with.

During the 1960s and 70s there was a clear practice of respect for interim measures indicated by the EComHR with respect to both inter-State and individual applications.[217] Unfortunately, recently States have increasingly begun to ignore interim measures. Recalcitrant States include five of the ten founding 'fathers' of the CoE (Belgium, France, Italy, the Netherlands, Sweden and the United Kingdom).[218] The new trend of State indifference to interim measures seems to apply in respect of both types of applications.

F. 'Disguised' Inter-State Applications

Action by one State against another State may be direct through the use of Art. 33 ECHR but may also be indirect when individual applications are supported by means of third-party interventions. The latter route can be more effective and discreet than a frontal attack by a State.[219] Many States which have brought inter-State applications under the Convention have also pursued the legal avenues provided by Art. 36 ECHR. Such third-party interventions may take place concurrently to an inter-State application, prior, or after an inter-State application and can either be based on Art. 36 § 1 or § 2 of the same article. *Leach* has gone so far as to categorize individual applications the outcome of which is so important to a State that the latter decides to submit a third-party intervention as a type of inter-State application.[220]

Art. 36 § 1 has been described as a relic of diplomatic protection.[221] In *I v. Sweden*, the ECtHR clarified that this provision offers a member State the right to support its nationals whose rights and interests may have been injured by another

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[216] Philip Leach, 'Ukraine , Russia and Crimea in the European Court of Human Rights' (*EJIL:Talk!*, 19 March 2014) < https://www.ejiltalk.org/ukraine-russia-and-crimea-in-the-european-court-of-human-rights/ > accessed 7 November 2021.
[217] Herrera and Haeck (n 199) 338.
[218] Yves Haeck, Clara Burbano Herrera and Leo Zwaak, 'Strasbourg's Interim Measures Under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?' [2011] European Yearbook of Human Rights 28.
[219] Decaux (n 1) 406.
[220] Philip Leach, 'On Inter-State Litigation and Armed Conflict Cases in Strasbourg' (2021) 2 European Convention on Human Rights Law Review 27, 30.
[221] Schabas (n 9) 788.

member State. It does not entail a State's rights to defend itself and it does not apply in cases where the applicant claims that expulsion or extradition back to his/her country of nationality would violate his/her Convention rights.[222] States which intervene to support their national can only submit written comments and take part in hearings.[223] They do not become parties to the case *stricto sensu*.[224] Under Rule 44 RoC, States do not require an authorization by the ECtHR in order to intervene in favor of their national.

Cyprus has intervened in four individual applications lodged against Turkey before the ECtHR.[225] All cases relate to property rights of Greeks Cypriots in northern Cyprus. In *Loizidou v. Turkey*, and prior to the entry into force of Protocol 11, Cyprus did not intervene but brought the case in its own right before the ECtHR under former Art. 48 (b) which provided for this possibility following a decision on the admissibility of an application by the EComHR.[226]

Armenia and Azerbaijan lodged inter-State applications against each other in 2020. Their applications relate to their long-standing conflict over Nagorno-Karabakh. Both States have previously intervened in individual applications relating to the conflict. Their interventions in *Chiragov a. O. v. Armenia* and *Sargsyan v. Azerbaijan*, for which the Grand Chamber delivered its judgments in 2015, have been described as 'disguised' inter-State applications by *Risini*.[227] The Netherlands is also a third party intervener in individual applications concerning the same subject matter as *The Netherlands v. Russia* inter-State application which will be discussed in more detail in chapter III C 2 (a).[228] The legal basis of the Netherlands's third party intervention has not been released. A significant number of the applicants in

[222] *I v. Sweden*, no. 61204/09, §§ 44-5, 5 September 2013.
[223] ECtHR, RoC, Rule 44 (b).
[224] David Harris and others, *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2014) 152.
[225] *Eugenia Michaelidou Developments LTD and Michael Tymvios v. Turkey*, no. 16163/90, 31 July 2003; *Demades v. Turkey*, no. 16219/90, 31 July 2003; *Varnava a. O. v. Turkey* [GC], nos. 16064/90 and 8 others, ECHR 2009; *Demopoulos a. O. v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, ECHR 2010.
[226] *Loizidou v. Turkey* (merits), 18 December 1996, Reports of Judgments and Decisions 1996-VI.
[227] Isabella Risini, '*Armenia v Azerbaijan* before the European Court of Human Rights' (*EJIL:Talk!*, 1 October 2020) < https://www.ejiltalk.org/armenia-v-azerbaijan-before-the-european-court-of-human-rights/ > accessed 7 November 2021.
[228] Isabella Risini and Geir Ulfstein, 'The Netherlands' Inter-State Application against Russia Six Years after MH 17' (*EJIL:Talk!*, 14 August 2020) < https://www.ejiltalk.org/the-netherlands-inter-state-application-against-russia-six-years-after-mh-17/ > accessed 7 November 2021.

both individual cases are Dutch nationals. Therefore, the Netherlands may have intervened either under Art. 36 §1 or § 2 of the same article.

Under Art. 36 § 2, a State can also intervene in cases which do not involve its nationals. Intervening States under this article are not equated to the parties of the application in question[229] and their interventions require an explicit authorization by the President of the Chamber in accordance with Rule 44 § 3 (a) RoC. However, in practice, it is highly unlikely that States will be denied the right to intervene under Art. 36 § 2.[230] Interventions under Art. 36 § 2 are rare and a rather recent development. States primarily intervene in the most important cases and usually in applications referred to the Grand Chamber formation.[231]

Cyprus intervened in *Adali v. Turkey* after acquiring permission from the President in accordance with Art. 36 § 2 ECHR.[232] Adali, a Turkish national living in the 'TRNC' alleged that her husband had been killed by the Turkish and/or 'TRNC' authorities and the national authorities had failed to carry out an adequate investigation into his death.

Art. 36 § 2 has been described as a compromise between the ECtHR's normative function and States' exclusivity as law-makers in international law.[233] This approach takes into consideration the *de facto erga omnes* effect of the ECtHR's jurisprudence,[234] or, in other words, the *res interpretata* effects[235] of judgments.[236] States are often critical of the ECtHR and frequently express their disagreement with its previous findings through Art. 36 § 2.[237] Most State

[229] CoE, Explanatory Report to Prot. No. 11 to the ECHR, restructuring the control machinery established thereby (adopted on 11 May 1994, entered into force 1 November 1998) ETS No. 155, § 91.
[230] Harris and others (n 224) 153.
[231] Lize R. Glas, 'State Third-Party Interventions before the European Court of Human Rights: The "What" and "How" of Intervening'(2016) 5 Journal européen des droits de l'homme - European Journal of Human Rights 539, 545.
[232] *Adali v. Turkey*, no. 38187/97, § 11, 31 March 2005. Note: The ECtHR conducted a fact-finding mission in this case under Art. 38 ECHR due to the parties' disputes over the facts of the case. Delegates heard witnesses in Strasbourg and Nicosia.
[233] Nicole Bürli, *Third-Party Interventions before the European Court of Human Rights* (Intersentia 2017) 135-6.
[234] Pere Pastor Vilanova, 'Third Parties Involved in International Litigation Proceedings. What Are the Challenges for the ECHR?' in Paulo Pinto de Albuquerque and Krzysztof Wojtyczek (eds), *Judicial Power in a Globalized World: Liber Amicorum Vincent De Gaetano* (Springer 2019) 382.
[235] Glas (n 231) 557.
[236] *Ireland v. the United Kingdom (I)*, 18 January 1978, § 154, Series A no. 25; *Rantsev v. Cyprus and Russia*, no. 25965/04, § 197, ECHR 2010 (extracts); CoE, Interlaken Declaration (Interlaken, Switzerland adopted on 18-19 February 2010), Action Plan, § 4 (c); CoE, Brussels Declaration (Brussels, Belgium adopted on 17 March 2015), Action Plan, § B(1)(d).
[237] Glas (n 231) 554.

interventions in this category favor the respondent State and aim to defend the latter due to similarities in judicial practices or legal orders.[238] In essence, member States intervene with the intent of reinforcing their sovereignty[239] and third party interventions constitute, more often than not, a means to pursue their 'self-interest'.[240] States have used the inter-State application under Art. 33 ECHR in a similar manner.[241]

G. Proposals for Reformation of the Inter-State Application Procedure

In April 2018, the High-Level Conference of foreign ministers of the 47 State Parties to the ECHR adopted the Copenhagen Declaration. The declaration acknowledged the challenges imposed on the Convention enforcement mechanism by inter-State disputes as well as individual applications arising out of inter-State conflict.[242] Such cases are particularly time-consuming due to their nature and dimension. In 2019, the CoM mandated the Steering Committee for Human Rights to develop proposals to improve the effective processing and resolution of cases relating to inter-State disputes.[243]

The Steering Committee noted the importance of the smooth functioning of the inter-State application as an intrinsic part of the shared responsibility of States and of the ECtHR in order to ensure the viability of the Convention.[244] The subject-matter of inter-State applications tends, albeit not exclusively, to relate to particularly serious situations, often where large-scale violations of the Convention are alleged.[245] Both the Steering Committee and the Plenary formation of the ECtHR have also recognized the sensitive and political nature of recent inter-State cases.[246]

One of the main challenges to the effective processing of inter-State cases relates to the establishment of facts.[247] The ECtHR in cases of inter-State conflict

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[238] Vilanova (n 234) 381.
[239] Bürli (n 233) 137.
[240] Glas (n 231) 554, 556.
[241] See ch III B of this study.
[242] CoE, Copenhagen Declaration (Copenhagen, Denmark adopted on 12-13 April 2018), § 54 (c).
[243] CoE, Steering Committee for Human Rights (n 4).
[244] Ibid § 2.
[245] Ibid.
[246] ECtHR, Committee on Working Methods, Proposals for more efficient processing of inter-State cases (adopted by the Plenary formation on 18 June 2019) #5573902, § 28; CoE, Steering Committee for Human Rights (n 4) § 24.
[247] CoE, Steering Committee for Human Rights (n 4) § 5.

has to act as a court of first instance.[248] The Plenary formation recommended that hearing of witnesses and experts should be held, if possible, in Strasbourg in respect of cases concerning armed conflict in order to complement reports by IOs and NGOs.[249] On-the-spot investigations were not explicitly encouraged as a method of establishment of the facts. In addition, the Plenary formation of the ECtHR considered that it should be able to take into account decisions or investigation results of other international bodies.[250]

Moreover, the Plenary formation opined that the Chamber should relinquish as quickly as possible inter-State cases to the Grand Chamber.[251] The ECtHR should also have the flexibility to adjust the processing of inter-State applications, if need be, according to geographical or time criteria or in relation to the legal questions raised in order to ensure more efficient and speedier processing.[252] This was the case in *Ukraine v. Russia (re Crimea)*. The original application concerned events in Crimea and the relevant events in Eastern Ukraine from March 2014 until the date of the submission of the application. However, the ECtHR decided to divide it geographically. All complaints related to the events in Crimea up to September 2014 remained in the original application while complaints relating to the events in Eastern Ukraine and Donbass up to September 2014 were joined under *Ukraine* v. *Russia (re Eastern Ukraine)*. Complaints made under *Ukraine* v. *Russia (IV)* and relating to Crimea were also joined to *Ukraine v. Russia (re Crimea)*.[253]

Furthermore, both the Plenary formation of the ECtHR and the Steering Committee consider that the applicant State should provide, from the outset, lists of clearly identifiable individuals who are victims of the alleged human rights violations.[254] However, this may be counterproductive as the main advantage of the inter-State procedure is precisely the fact that it does not require proof of an individual victim and allows applications against legislation and administrative practices. This may be the case particularly when States complain of violations of individuals who are not their nationals like the *Greek case*. The Steering Committee

[248] ECtHR, Committee on Working Methods (n 246) § 21; CoE, Steering Committee for Human Rights (n 4) § 81.
[249] ECtHR, Committee on Working Methods (n 246) § 25.
[250] Ibid §§ 41-50.
[251] Ibid § 19.
[252] Ibid § 27.
[253] ECtHR Press Release ECHR 173 (2018) issued on 9 May 2018 and available on HUDOC.
[254] ECtHR, Committee on Working Methods (n 246) § 31; CoE, Steering Committee for Human Rights (n 4) § 6.

has recognized that this may set a high threshold requirement on the applicant State.[255] This requirement appears to correspond more to the purposes of just satisfaction claims rather to the admissibility and merits of an inter-State application. As the ECtHR noted in an individual application, in the context of *Cyprus v. Turkey (IV)*, it was not necessary to specify which individuals were included in the 'many persons' shown by the evidence to have been detained by Turkish or Turkish Cypriot forces at the time of their disappearance.[256]

Another proposed reform relates to a *sui generis* pilot judgment procedure. Where an inter-State application is pending, individual applications raising the same issues or deriving from the same underlying circumstances should, in principle and in so far as practicable, not be decided, without being put aside, before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case.[257] The ECtHR has already received thousands of applications from individuals who have raised complaints against Ukraine or Russia or both countries in relation to the conflict in Eastern Ukraine. The ECtHR decided that after receiving the observations of the respondent, in respect of cases which have not been declared inadmissible or been struck out, it will adjourn all cases until a judgment on the inter-State case.[258]

However, this is not the first time the organs of the Convention have resorted to this method. In *X, Y, and Z v. the United Kingdom*, the applicants had been interned by virtue of the same legal basis as the legislation under consideration in *Ireland v. the United Kingdom (I)*. The individual applications were adjourned until a judgment on the merits of the inter-State case.[259] The ECtHR also followed this approach for individual applications which related to *Georgia v. Russia (I)*.[260] In *Berdzenishvili a. O. v. Russia*, the ECtHR also reserved the determination of the claim under Art. 41 as the application of the same article in respect of *Georgia v.*

[255] CoE, Steering Committee for Human Rights (n 4) § 45.
[256] *Varnava a. O. v. Turkey* [GC], nos. 16064/90 and 8 others, § 181, ECHR 2009.
[257] CoE, Copenhagen Declaration (Copenhagen, Denmark adopted on 12-13 April 2018), § 45.
[258] ECtHR, Press Release ECHR 432 (2018) issued on 17 December 2018 and available on HUDOC.
[259] *X, Y and Z v. the United Kingdom* (dec.), nos. 5727/72, 5744/72 and 5857/72, EComHR decision of 12 July 1978, p. 6, Decisions and Reports 14.
[260] *Shioshvili a. O. v. Russia*, no. 19356/07, § 6, 20 December 2016; *Berdzenishvili a. O. v. Russia*, Nos. 14594/07 and 6 others, § 4, 20 December 2016.

Russia (I) was still pending before the Grand Chamber.[261] A formalization of this practice, to the extent that it would not have collateral effects on the ECtHR's discretion and flexibility, would promote a sense of legal certainty.[262]

Last but not least, the Steering Committee considered that inter-State proceedings under the ECHR cannot be viewed in isolation from the constellation of inter-State dispute settlement mechanisms or litigation before international bodies which function independently of each other in the framework of international treaties on specific human rights matters.[263] Both Georgia and Ukraine have lodged applications against Russia before the ICJ and other international *fora*.[264] Scholars have stressed that there is an inherent danger in such cases that the ECtHR will 'depart' from the confines of its jurisdiction.[265] The ECtHR is conscious of the fact that it does not exist in legal vacuum and makes constant use of general international law with the presumption that the Convention rights should be read in harmony with it.[266] The reformation procedure has proven that the Plenary formation of the ECtHR is acutely aware of the need to avoid encroaching upon the jurisdiction of other international bodies.[267] This long-standing principle is all the more important in respect of recent inter-State applications which relate to an underlying conflict regarding the sovereign status of a territory.[268]

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[261] *Berdzenishvili a. O. v. Russia* (just satisfaction), nos. 14594/07 and 6 others, § 6, 20 December 2016.
[262] CoE, Steering Committee for Human Rights (n 4) § 164.
[263] Ibid § 50.
[264] This phenomenon is analyzed in ch III B 3.
[265] See, *inter alia*, Marko Milanović and Tatjana Papić, 'The Applicability of the ECHR in Contested Territories' (2018) 67 International and Comparative Law Quarterly 779; Marko Milanović, 'Does the European Court of Human Rights Have to Decide on Sovereignty over Crimea? Part I: Jurisdiction in Article 1 ECHR' (*EJIL: Talk!*, 23 September 2019) <https://www.ejiltalk.org/does-the-european-court-of-human-rights-have-to-decide-on-sovereignty-over-crimea-part-i-jurisdiction-in-article-1-echr/> accessed on 9 November 2021; Marko Milanović, 'Does the European Court of Human Rights Have to Decide on Sovereignty over Crimea? Part II: Issues Lurking on the Merits' (*EJIL: Talk!*, 24 September 2019) <https://www.ejiltalk.org/does-the-european-court-of-human-rights-have-to-decide-on-sovereignty-over-crimea-part-ii-issues-lurking-on-the-merits/> accessed on 9 November 2021.
[266] ILC, 'Report of the Study Group on Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law' (13 April 2006) A/CN.4/L.682 §164.
[267] ECtHR, Committee on Working Methods (n 246) § 27.
[268] Ulfstein and Risini (n 90).

III. The Use of the Inter-State Application by States as a Judicial Remedy of International Law

A. Introductory Remarks

In principle, individual applications aim to individual justice and deal with violations of Convention rights of named individuals who must prove their victim status while inter-State applications aim to collectively enforce human rights with a view to addressing widespread human rights issues.[269] Consequently, and at least on a normative level, individual applications affect a small number of individuals and States have no influence in respect of the applicant side. The opposite appears to be the case for inter-State applications.

Occasionally, however, this distinction between individual and inter-State cases is challenged; inter-State applications can be employed as a means of diplomatic protection and therefore, the rights of one individual could become the matter of an inter-State case, while individual applications can be triggered by States acting covertly, with political and legal assistance.[270] In the context of the dispute between Georgia and Russia, lawyers from South Ossetia, supported by Russia, have lodged more than 3.300 individual applications against Georgia on behalf of Russian soldiers.[271]

Overall, the inter-State case-law under the ECHR has been rather heterogeneous. Scholars have concluded that the inter-State procedure in international human rights law can be used in three contexts: in a State's own economic or political interests, in the interests of a State's own nationals and as an *actio popularis* where the motivation for the complaint goes beyond self-interest.[272] This appears to have been, and continues to be, the case in respect of Art. 33 ECHR.

However, it should be stressed that the vast majority of cases do not exclusively fall within one category. The three categories should be viewed as a spectrum ranging from a means to air or settle complaints primarily related to a political dispute to purely humanitarian motivations as the guiding force of High

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[269] *Cyprus v. Turkey (IV)*, no. 25781/94, EComHR report of 4 June 1999, § 84.
[270] Decaux (n 40) 40.
[271] Bjorn Arp, '*Georgia v. Russia (I)*' (2015) 109 Americal Journal of International Law 167, 171.
[272] Scott Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10 Human Rights Quarterly 249, 256; Wolfrum (n 28) 1140; Leach (n 220) 29–30.

Contracting Parties. For the purposes of this study inter-State applications will be analyzed and classified under one of the three main categories. Nevertheless, motivations or aspects of inter-State applications which reveal characteristics, in principle or in practice, affiliated with a different category will be briefly mentioned.

A further clarification must be made regarding the term political dispute or political dimension for the purposes of this study. This term will be utilized in accordance with Lauterpacht's interpretation of a political dispute as involving an important matter relating to a State's vital interests[273] and with regard to the motivation of the applicant State seeking judicial determination whereby the motive is to promote certain political objectives rather than to resolve a genuine legal human rights controversy.[274]

B. Inter-State Conflicts with an Underlying Political Dimension

This category encompasses applications that are politically motivated; the inter-State application is primarily used as a tool to air or settle a complaint with overt political overtones rather than out of 'pure' concern for its human rights facet.[275]

1. Inter-State applications for which a final judgment or decision has been issued

a) *Greece v. the United Kingdom (I) and (II)*

The first and second inter-State applications concerned the British colonial regime of Cyprus. The island of Cyprus had become a crown colony in 1925[276] but soon tensions arose due to various factors, the most influential of which was the Greek Cypriot nationalist movement seeking self-determination.[277] The Government of Cyprus had enacted, and continued to enact during the proceedings, emergency legislations in order to counter what they considered to be an insurrection movement.

In its first application Greece alleged violations of Arts. 3, 5, 6, 8, 9, 10, 11, and 15 of the ECHR by military, police, and civilian subordinates of the British administration in Cyprus through the means of a generalized administrative practice.

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[273] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford Clarendon Press 1933) 153.
[274] Rosalyn Higgins, *Themes and Theories* (Oxford University Press 2009) 31.
[275] Kooijmans (n 10) 89; Leach (n 220) 30.
[276] Simpson (n 32) 885.
[277] UNGA Res 814 (IX) 'Application, under the auspices of the UN, of the principle of equal rights and self-determination of peoples in the case of the population of the island of Cyprus' (17 December 1954) UN Doc A/RES/814(IX).

The application also concerned legislative measures issued by the Governor of Cyprus by virtue of the emergency powers vested on him. These legislative measures and administrative practices included corporal punishment, various occasions of collective punishment, abusive imposition of curfews, widespread use of detention without trial for indefinite periods of time, arrest without warrant, deportation, home searches without warrant, school closings, prohibition of public processions, meetings and assemblies as well as jamming of radio broadcasts from Greece. The United Kingdom had derogated from the Convention in accordance with Art. 15. The EComHR concluded that the activities of EOKA, a well-organized and powerful movement of armed resistance fighting for union with Greece, constituted a danger within the meaning of Art. 15 § 1 ECHR. The EComHR opined that all measures taken by the respondent State were compatible with the ECHR.[278]

The EComHR in many communications with the applicant and respondent State, as well as at the end of its report on *Greece v. the United Kingdom (I)*, concluded that the full enjoyment of human rights in Cyprus was closely connected with the solution of the wider political problems relating to the constitutional status of the island.[279] The CoM issued a resolution on 20 April 1959 deciding that no further action was needed given the final settlement of the Cyprus question.[280] The Zurich and London Agreements through which Cyprus attained independence had been signed on 19 February 1959.

Greece v. the United Kingdom (II) related to 49 cases of alleged torture as well as degrading and inhuman treatment of individuals by the police, security, and military forces in Cyprus. The complaint further focused on legislation imposing an obligation to obtain the Attorney-General's consent for prosecutions of members of the administration or security forces. This legislation entered into force after the trial of two British officers for ill-treatment of detainees during interrogation.

The application was ruled admissible in respect of 29 cases and inadmissible due to non-exhaustion of domestic remedies in respect of the remaining 20 cases.[281] On 12 May 1959, both governments communicated their request to the EComHR to terminate proceedings. Termination of proceedings in such a way was not explicitly

[278] *Greece* v. *the United Kingdom (I)*, no. 176/56, EComHR report of 26 September 1958, §§ 136, 149, 158, 287, 297, 318, 337, 363, 375, 382, 388, 395, 401, 407.
[279] Ibid § 409.
[280] CoE CoM, Res DH (59) 12, 20 April 1959.
[281] *Greece* v. *the United Kingdom (II)*, no. 299/57, EComHR decision of 12 October 1957, p. 6.

envisaged under the ECHR. The EComHR concluded that such a step was calculated to contribute to the restoration of the full and unfettered enjoyment of human rights. While it was clear that the circumstances 'did not appear to fall exactly within the terms either of Article 30 or of Article 31 of the ECHR' [282] the EComHR decided that it would be acting in accordance with the spirit of former Arts. 30 and 31, if it produced a summary account of the proceedings in question to be forwarded to the CoM.[283] The latter issued a resolution on 14 December 1959 deciding that no further action was needed given the final settlement of the Cyprus question which had since been achieved.[284]

Both applications have been viewed as manifestations of a general policy of Greece to internationalize its claim over Cyprus.[285] Contemporary official documents show that the British considered the applications as politically motivated.[286] At the same time, Strasbourg functioned as a *forum* for kin-State litigation in the present case.

b) *Austria v. Italy*

The dispute which arose between Austria and Italy related to the situation of the German speaking minority in South Tyrol. Following the peace treaty of *Saint-Germain en Laye* in 1919, South Tyrol was annexed to Italy against the will of the majority of its population.[287] Initially, the German speaking minority was offered no protection. On 5 September 1946, within the context of the Paris Peace Agreements, Austria and Italy signed a bilateral agreement granting certain rights to the minority

[282] Under former Article 30 the EComHR was obliged, in the event of a friendly settlement, to draw up a report which would be sent to the CoM, the Secretary General of the CoE and the States concerned. Under former Article 31, if a solution was not reached, the EComHR had to draw up a report on the facts and state its opinion as to whether the facts disclosed a breach of the ECHR. The report had to be transmitted to the CoM and to the States concerned which were prohibited from publishing it.
[283] *Greece* v. *the United Kingdom (II)*, no. 299/57, EComHR report of 8 July 1959, pp. 1, 24.
[284] CoE CoM, Res DH (59) 32, 14 December 1959.
[285] Simpson (n 32) 924.
[286] Ibid 933-4.
[287] Venice Commission, 'Report on the Preferential Treatment of National Minorities', (22 October 2001) CDL-INF (2001)019, 3. At that time, and until today, the majority of the population of South Tyrol was the German speaking population which is referred to as a minority in relation to the general population of Italy.

of South Tyrol.[288] Tensions did not subside and the UN General Assembly recommended in 1960 the use of methods of peaceful dispute settlement.[289]

The case concerned criminal proceedings against six Italian nationals and members of the German minority in South Tyrol relating to the murder of an Italian customs officer. Austria complained that Italy had violated its obligation under Arts. 6 and 14 of the ECHR. The EComHR issued its report on 30 March 1963 and examined them under Arts. 6 § 3 (d), 6 § 2, 6 § 1, and 14 ECHR.[290] The EComHR did not consider that the facts indicated any violations of the ECHR. Nevertheless, it encouraged Italy to grant amnesty to the six young men on the grounds of humanitarian reasons and their youth.[291]

Austria, in practice, utilized the Convention and the EComHR as a *forum* for kin-State litigation. Austria was planning on lodging a second application against Italy under Article 33 ECHR; the application was never lodged due to negotiations between the two States.[292]

c) *Ireland v. the United Kingdom (I) and (II)*

These applications concerned the situation in Northern Ireland, a semi-autonomous province of the United Kingdom with a heterogeneous society. The population of Northern Ireland is divided in two groups based on religion, social, economic, and political differences. One community, which accounts for approximately two-thirds of the total population, is of Protestant religion and is primarily descended by settlers who emigrated from Britain during the seventeenth century. The remaining population is Catholic. The Protestant community has consistently opposed the idea of a united Ireland, and thus independence from the United Kingdom, whereas the Catholic community has traditionally supported it. The EComHR recognized that the whole political system in Northern Ireland was fraught with inherent bias against the Catholic Republican minority and exacerbated the antagonisms between the two communities.[293]

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[288] Also known as the *Gruber-De Gasperi* Agreement.
[289] UNGA Resolution 1497 (XV) 'The status of the German-speaking element in the Province of Bolzano (Bozen), implementation of the Paris agreement of 5 September 1946' (31 October 1960) UN Doc A/RES/1497.
[290] Certain allegations had been declared inadmissible in *Austria* v. *Italy*, No. 788/60, EComHR decision of 11 January 1961 due to non-exhaustion of domestic remedies.
[291] *Austria* v. *Italy*, no. 788/60, EComHR report of 30 March 1963, § 216, Yearbook 6/742.
[292] Risini (n 5) 82.
[293] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, p. 213, Series B no. 23.

The conflict in Northern Ireland, known as the Troubles, began to develop in the late 1960s when a civil rights movement gained traction among Catholics. Manifestations for and against the movement developed into serious rioting and violent incidents. Violence was instigated and maintained by quasi-military organizations like the IRA on the one side and the UVF (Ulster Volunteer Forces) and UDA (Ulster Defense Association) on the other side. In August 1971, the Northern Ireland government, with the support of the United Kingdom government, decided to employ emergency legislation for detention and internment purposes. In 1972, the British Parliament passed temporary legislation that enabled the United Kingdom government to exercise direct executive and legislative powers over Northern Ireland

On 16 December 1971 Ireland lodged a complaint against the United Kingdom alleging violations of Arts. 1, 2, 3, 5, 6, and 14 ECHR. The EComHR held all claims of an alleged administrative practice in breach of the ECHR admissible with the exception of Art. 2 ECHR.[294] The EComHR considered that extraordinary powers of arrest and derogation were only applied to the extent strictly required by the exigencies of the situation as stipulated in Art. 15 ECHR.[295] The EComHR found that the authorities did, in fact, make a distinction regarding IRA and Loyalists forces.[296] However, the distinction was justified due to the difference in the extent of death, injury, and destruction caused by the IRA compared to the Loyalists in 1970-1, despite the fact that this had not been the case in previous years.[297] The main threat, at that time, to the constitutional order came from the IRA. The EComHR did not consider Arts. 1, 5, 6, and 14 to have been infringed upon.

With respect to Art. 3, the EComHR examined the physical and psychological effects of the use of five techniques of sensory deprivation[298] used by the British security forces when interrogating detainees and considered that their combination was designed to put severe mental and physical stress on a person in order to obtain information. The EComHR concluded that the use of the five

[294] *Ireland v. the United Kingdom (I)* and *(II)*, nos. 5310/71 and 5451/72, EComHR decision of 1 October 1972, pp. 91-2.
[295] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, p. 99, Series B no. 23.
[296] Ibid pp. 211-2.
[297] Ibid p. 212.
[298] The five techniques consisted in hooding, exposure to white noise, wall-standing, deprivation of sleep, and subsistence on a bread and water diet.

techniques should be classified as torture.[299] Regarding Ireland's allegations of an administrative practice of other forms of ill-treatment the EComHR examined some illustrative cases[300] and opined that they constituted inhuman treatment.[301]

Ireland referred the case to the ECtHR as the United Kingdom had recognized the jurisdiction of the latter. *Ireland v. the United Kingdom (I)* was the first inter-State application to reach the ECtHR. The Chamber formation considered that the case raised serious questions affecting the interpretation of the ECHR and relinquished its jurisdiction in favor of the Plenary formation. The ECtHR agreed with most of the findings of the EComHR with one notable exception. The application of the five techniques undoubtedly qualified as inhuman and degrading treatment. However, their use did not occasion suffering of the particular intensity and cruelty implied by the word torture.[302] The ECtHR's deviation from the EComHR's opinion was met with contemporary disapproval.[303]

On 4 December 2014, Ireland requested a revision of the abovementioned judgment to the effect that the use of the five techniques amounted to torture. The basis for this request lied with certain documents which might have had a decisive influence on the merits of the issue under Art. 3 and which had not been known to the ECtHR at the time it had delivered its judgment as they had been deliberately withheld by the United Kingdom.

The ECtHR held that the documents produced did not unequivocally prove that the medical professional had consciously misled the EComHR in his testimony regarding the (lack of) long-term effects of the use of the five techniques due to the uncertainty regarding such effects in the contemporary medical field. The ECtHR also concluded that there was no indication in the original judgment that long term psychiatric effects would have played an important role in qualifying the five techniques as torture.[304] Legal certainty constitutes a fundamental element of the rule

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[299] *Ireland v. the United Kingdom (I)*, no. 5310/71, EComHR report of 25 January 1976, p. 402, Series B no. 23.
[300] Ibid pp. 409 -457.
[301] Ibid p. 473.
[302] *Ireland v. the United Kingdom (I)*, 18 January 1978, §§ 167-8, Series A no. 25.
[303] Kamminga (n 139) 156.
[304] Scholars have argued that the use of the five techniques would now be categorized as torture by the ECtHR see: Iulia Padeanu, 'Why the ECHR Decided Not to Revise Its Judgment in the *Ireland v. The United Kingdom* Case' (*EJIL:Talk!* 5 April 2018) <https://www.ejiltalk.org/why-the-echr-decided-not-to-revise-its-judgment-in-the-ireland-v-the-united-kingdom-case/> accessed 2 November 2021; Michael O' Boyle, 'Revising the Verdict in *Ireland v. UK*: Time For a Reality Check ?' (*EJIL:Talk!* 6 April 2018) <https://www.ejiltalk.org/revising-the-verdict-in-ireland-v-uk-

of law and, where doubts remain as to whether new facts would have had a decisive influence in the original judgment, legal certainty must prevail.[305]

Ireland v. the United Kingdom (II) was struck out of the list as the applicant accepted the Attorney-General's assertion that no one would be held guilty for an act or omission that did not constitute a criminal offence at the time it was committed pursuant to the relevant legislation in question.[306]

Contemporary British senior officials considered that Ireland lodged its applications for propaganda purposes.[307] Scholars have convincingly argued that this case emerged out of a wider political dispute rather than purely humanitarian considerations.[308] That being said, there was heartfelt concern and a sense of moral outrage among members of the Irish population. It was difficult for the contemporary Irish government to ignore calls for an inter-State application concerning the situation in Northern Ireland due to public and media pressure.[309] Ireland could neither use military force to support its aims, and protect its minority community, nor deploy economic sanctions.[310] The applicant therefore seized the EComHR and the ECtHR as a means to a raise the issue of their minority and the division of the island. The application functioned as kin-State litigation.

d) *Cyprus v. Turkey (I), (II), (III) and (IV)*

Following a *coup d' etat* by Greek officers on 15 July 1974, Turkey invaded Cyprus and commenced military operations by means of air, land, and sea forces. By mid-August 1974 Turkey had occupied approximately 40% of the territory of Cyprus. Turkey has consistently argued that it acted in its capacity as a State that guaranteed the independence of Cyprus under the Treaty of Guarantee of 1960.

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time-for-a-reality-check/> accessed 2 November 2021. For a concise and comprehensive analysis on how this discrepancy has developed the case-law of Art. 3 in respect of the notion of inhuman and degrading treatment which was considered even by the drafters of the Convention as too difficult to define see: Elaine Webster, 'A Positive Take on the Legacy of the 1978 Judgment in *Ireland v. United Kingdom*' (*EJIL:Talk!* 7 February 2019) <https://www.ejiltalk.org/a-positive-take-on-the-legacy-of-the-1978-judgment-in-ireland-v-united-kingdom/> accessed 2 November 2021.

[305] *Ireland v. the United Kingdom (I)* (revision), no. 5310/71, §§ 122, 136-7, 20 March 2018.

[306] *Ireland v. the United Kingdom (I)* and *(II)*, nos. 5310/71 and 5451/72, EComHR decision of 1 October 1972.

[307] *Ireland v. the United Kingdom (I)* (revision), no. 5310/71, § 42, 20 March 2018.

[308] Bonner (n 158) 74.

[309] William Schabas and Aisling O'Sullivan, 'Politics and Poor Weather: How Ireland Sued the United Kingdom under the European Convention on Human Rights' (2007) 2 Irish Yearbook of International Law 3, 39.

[310] Bonner (n 158) 74.

On 13 February 1975, a constituent assembly set up by the Turkish Cypriot community declared the area north of the island to constitute the 'Turkish Federated State of Cyprus'. In 1983, the Turkish Cypriot community declared its independence and the establishment of the 'Turkish Republic of Northern Cyprus' ('TRNC'). The UN Security Council held that the declaration was invalid and called for its withdrawal.[311] As of 2022 Turkey is the only State that has recognized the 'TRNC'.

In 1974 and 1975 Cyprus filed two applications alleging violations of Arts. 1, 2, 3, 4, 5, 6, 8, 13, and 17 ECHR as well as Art. 1 Prot. 1 and Art. 14 ECHR in conjunction with all aforementioned articles. The first application involved events during the military operations while the second application alleged violations of the respective articles of the ECHR at a time when no military operations, or any kind of fighting, took place. The EComHR decided to join the two applications.

The EComHR considered that its competence *ratione loci* was established as the armed forces of Turkey exercised authority and control over persons and property affected by the acts or omissions thereof. Therefore, Turkey's responsibility was engaged.[312] Turkey's invasion led to voluntary and forced displacement of approximately 200.000 Greek Cypriots from northern Cyprus. The EComHR considered that Art. 8 was violated as Greek Cypriots were prevented from returning to their homes and families were seperated.[313] According to the EComHR, Art. 5 had also been breached due to the deportation and detention, either in northern Cyprus or in prisons in Turkey, of Greek Cypriots civilians and military personnel.[314] Moreover, Art. 2 was infringed upon on account of killings committed by Turkish soldiers.[315] However, the EComHR refrained from expressing an opinion on a potential Convention violation with respect to more than 2.000 missing persons.

The EComHR further opined that incidents of rape, ill-treatment, and the detention conditions of Greek Cypriots attained the threshold level of Art. 3 and constituted inhuman treatment.[316] Deprivation of possessions of Greek Cypriots on a large scale, the exact extent of which could not be determined, was also

[311] UNSC Res 541 (18 November 1983) UN Doc S/RES/541.
[312] *Cyprus v. Turkey (I) and (II)*, nos. 6780/74 and 6950/75, EComHR decision of 26 May 1975, §§ 8, 10, Decisions and Reports 2.
[313] *Cyprus v. Turkey (I) and (II)*, nos. 6780/74 and 6950/75, EComHR report of 10 July 1976, §§ 208-211.
[314] Ibid §§ 309-10.
[315] Ibid §§ 350, 353-5.
[316] Ibid §§ 374, 393-4, 405, 410.

established.[317] Last but not least, the EComHR did not find any evidence of available effective remedies[318] and concluded that Art. 14 had also been violated as all aforementioned acts were exclusively directed against members of one of the two communities, namely the Greek Cypriot community.[319]

The CoM held that enduring protection of human rights in Cyprus could only be achieved through the re-establishment of peace and confidence between the two communities and urged both parties to resume inter communal talks under the auspices of the UN. Through this resolution the CoM completed its consideration of the first and second case of *Cyprus v. Turkey* without pronouncing on the findings of the EComHR.[320]

Cyprus submitted its third complaint on 6 September 1977 claiming that, since the adoption of the EComHR's report on its previous applications, Turkey continued to commit breaches of the same articles and added a complaint under Art. 2 Prot. 1. The EComHR considered that, in so far as the complaints concerned a permanent state of affairs, they were admissible.[321] The EComHR re-examined the issue of missing persons on the basis of fresh evidence and concluded that an indefinite number of Greek Cypriots were in Turkish custody in 1974. This created a presumption of Turkish responsibility for the fate of these persons and the EComHR was of the opinion that Art. 5 had been violated.[322] The EComHR further decided that the displacement of persons and their subsequent separation from their families continued to constitute a violation of Art. 8.[323] Regarding deprivation of movable and immovable property, the 'Law to Provide for the Housing and Distribution of Land and Property of Equal Value' consolidated earlier occupation of immovable property and constituted a violation of Art. 1 Prot. 1.[324] The EComHR also found violations of Art. 13 and 14 ECHR. The CoM issued its resolution on 2

[317] Ibid 486.
[318] Ibid § 501.
[319] Ibid § 503.
[320] CoE, CoM Resolution DH (79) 1, 20 January 1979.
[321] *Cyprus v. Turkey (III)*, no. 8007/77, EComHR decision of 10 July 1978, §§ 44, 46, Decisions and Reports 13.
[322] *Cyprus v. Turkey (III)*, no. 8007/77, EComHR report of 4 October 1983, § 123, Decisions and Reports 72.
[323] Ibid §§ 135-6.
[324] Ibid § 155.

April 1992 deciding to make public the EComHR's report.[325] It found that the publication of the report completed its consideration of the case.

Cyprus lodged a fourth application against Turkey on 24 November 1994 alleging violations of Arts. 1, 2, 3, 4, 5, 6, 8, 9, 11, and 13 ECHR as well as Arts. 1, 2, 3 Prot. 1 and Arts. 14 and 17 in conjunction with all aforementioned articles. Cyprus maintained that these violations occurred after 4 October 1983. Most complaints related to the same issues, namely missing persons, displacement of Greek Cypriots, organized settlement of the occupied area by settlers from Turkey, and the treatment of the remaining Greek Cypriots in the occupied parts of the island. Cyprus also complained of violations of rights of the Turkish Cypriots living in the occupied area.

Cyprus's fourth applications reached the ECtHR. The ECtHR found a continuing violation of the procedural aspect of Art. 2 due to the lack of effective investigation into the fate of the missing persons,[326] and a procedural breach of Art. 5 regarding persons for whom there was an arguable claim that they were in Turkish custody at the time they disappeared.[327] The ECtHR further confirmed, with respect to the relatives of the missing persons, that the silence of the authorities of Turkey regarding the whereabouts and status of their loved ones attained the necessary level of severity and categorized their inaction as inhuman treatment.[328] With respect to displaced Greek Cypriots' right to their property and home in the occupied area of northern Cyprus the ECtHR found continuing violations of Arts. 8 and 13 ECHR, and Art. 1 of Prot. 1.[329]

The ECtHR also examined the living conditions of the Greeks Cypriots residing in northern Cyprus and held that they infringed upon Arts. 9 and 10 ECHR as well as Art. 1 of Prot. 1 in respect of their inability to bequeath their properties to relatives living in the southern part of the island.[330] In addition, the ECtHR found violations of Art. 2 of Prot. 1 due to lack of access to secondary education and Art. 8 with respect to both private and family life.[331] The discriminatory treatment of the

[325] CoE, CoM Resolution DH (92) 12, 2 April 1992.
[326] *Cyprus v. Turkey (IV)* [GC], no. 25781/94, § 136, ECHR 2001-IV.
[327] Ibid § 150-1.
[328] Ibid §§ 157-8
[329] Ibid §§ 174-5, 189, 194.
[330] Ibid §§ 245-6, 254, 270.
[331] Ibid §§ 280, 296.

Greek Cypriot community also amounted to a breach of Art. 3.[332] Last but not least, the ECtHR found a violation of Art. 6 regarding the impartiality of military courts competent to examine cases of civilians in respect of the Turkish Cypriot community.[333] In 2010, the Grand Chamber awarded 90.000.000 Euros for non-pecuniary damages to the enclaved residents of the Karpas peninsula in northern Cyprus and to the relatives of the missing persons.[334] As of 2022, this amount has not been paid.

Scholars have argued that one of the aims of Cyprus, when submitting its first and second inter-State applications, was to influence the policy of the U.S. towards Turkey by appealing to the U.S. Congress as, potentially, more responsive to its cause than the executive branch.[335] Commentators have further claimed that the findings of the EComHR and the ECtHR, by attributing human rights violations to Turkey, weakened the Turkish Cypriot leadership's claims to independent statehood.[336] On the other hand, there can be no doubt that Cyprus's applications also aimed at the discovery of the fate of the missing persons and were also motivated by a genuine belief that the human rights of Greek Cypriots who were displaced or remained in northern Cyprus had been infringed upon. The application can also be viewed as a quest for some form of redress of these violations.

Turkey's submissions during the proceedings appear to have been largely based on political arguments.[337] The same seems to apply, to a lesser extent, to Cyprus. In general, the ECtHR proceedings concerning property-related cases in respect of northern Cyprus have been regarded by both sides as an arena for political battle.[338] Even the ECtHR has acknowledged the political dimension of the Cyprus problem. In *Demopoulos a. O. v. Turkey*, the Grand Chamber considered that it 'was faced with cases (in the context of the Cyprus problem) with a political, historical and factual complexity flowing from a problem that should have been resolved by

[332] Ibid §§ 310-1.
[333] Ibid § 359.
[334] *Cyprus v. Turkey (IV)* (just satisfaction) [GC], no. 25781/94, § 58, ECHR 2014.
[335] Van Coufoundakis, 'Cyprus and the European Convention on Human Rights: The Law and Politics of *Cyprus v. Turkey*, Applications 6780/74 and 6950/75' (1982) 4 Human Rights Quarterly 450, 454.
[336] Frank Hoffmeister, 'Cyprus v. Turkey, No. 25781/94' (2002) 96 Americal Journal of International Law 445, 452.
[337] Kudret Özersay and Ayla Gürel, 'Property and Human Rights in Cyprus: The European Court of Human Rights as a Platform of Political Struggle' (2008) 44 Middle Eastern Studies 291, 318.
[338] Ibid.

all parties assuming full responsibility for finding a solution on a political level'.[339] It is evident that the unlawful occupation of northern Cyprus is beyond the competence of the ECtHR to resolve.

e) *Georgia v. Russia (I)*

Despite historical, cultural, and economic ties between Georgia and Russia, their relationship has been quite turbulent, and tensions have amounted to a long-standing political problem with various sources. The armed conflict which took place in 2008 and the consequences thereof on Georgia's territory and civilian population are the subject of several pending applications lodged by Georgia against Russia which will be discussed in the following sub-section.

This application concerned the deliberate and organized policy of harassment of Georgian nationals in Russia by the Russian authorities. Tensions between the two countries came to a head in 2006 after four Russian officers were arrested by Georgia on suspicion of espionage. The officers were released by an act of clemency on 4 October 2006. By that time, however, Russia had suspended all aerial, road, maritime, railway, postal, and financial links with Georgia. The application brought forward complaints of an administrative practice involving the arrest, detention, and collective expulsion of Georgian nationals from the Russian Federation in the autumn of 2006.

The ECtHR concluded that the sheer number of expulsion orders and the coordination between administrative and judicial authorities showed that the expulsions were collective in nature and did not provide for a reasonable and objective examination of each particular case. Thus, Art. 4 of Prot. 4 as well as Arts. 5 § 4 and 13 taken in conjunction with Art. 5 § 1 ECHR had been violated.[340] The ECtHR further held that Arts. 3 and 13 had been infringed upon due to the detention conditions of Georgian nationals prior to their expulsion.[341] In 2019, the ECtHR awarded a lump sum of 10.000.000 Euros in respect of non-pecuniary damages suffered by a group of, at least, 1.500 Georgian nationals.[342] As of January 2022, Russia has not fulfilled its obligations under Art. 41 ECHR.

[339] *Demopoulos a. O. v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 85, ECHR 2010.
[340] *Georgia v. Russia (I)* [GC], no. 13255/07, §§ 178, 188, 214, ECHR 2014 (extracts).
[341] Ibid § 216.
[342] *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, §§ 76-7, 31 January 2019.

f) *Georgia v. Russia (II)*

The case relates to the outbreak of the brief armed conflict between Georgia and Russia on 8 August 2008. Cessation of hostilities was achieved eight days later through mediation of the EU. Georgia alleged that Russia allowed or caused an administrative practice to develop in violation of Arts. 2, 3, 5, 8, and 13 ECHR, Arts. 1 and 2 of Prot. 1, and Art. 2 of Prot. 4 through indiscriminate attacks against civilians and their property in the two autonomous regions of Georgia, Abkhazia and South Ossetia, by the Russian army and/or separatist forces under Russia's control.

The ECtHR issued its decision on the admissibility of the application on 13 December 2011. The ECtHR took into account reports from organs of the OSCE, the EU, and the CoE and considered that Georgia's allegations were not wholly unsubstantiated or lacking the requirement of a genuine allegation in the sense of Art. 33 ECHR. The application complied with the six-month time-limit.[343] Based on the close relation between admissibility requirements and the existence of an administrative practice, the ECtHR joined to the merits the issue of compliance with the rule of exhaustion of domestic remedies[344] and followed the same approach in respect of the compatibility *ratione loci* of the application.[345] The ECtHR also dismissed the respondent State's objection that the application was substantially similar to the application lodged by Georgia against Russia before the ICJ on the grounds of the ICERD[346] as the latter had already been rejected. The Grand Chamber held a hearing on the merits of the application on 23 May 2018.[347]

The judgment on the merits of the application was published on 21 January 2021.[348] The ECtHR first addressed Russia's jurisdiction under Art. 1 ECHR. The Court considered that a distinction should be made between military operations conducted during the active phase of hostilities and other complaints it was required to examine in the context of the international armed conflict. The chaos that ensued during the 'five-day war', namely the active phase of hostilities, excluded the level of control Russia had to exercise under Art. 1 ECHR for its extra-territorial

[343] *Georgia v. Russia (II)* (dec.), no. 38263/08, §§ 100-1, 13 December 2011.
[344] Ibid §§ 93-4.
[345] Ibid §§ 68.
[346] International Convention on the Elimination of Racial Discrimination (adopted on 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).
[347] ECtHR Press Release ECHR 169 (2018) issued on 2 May 2018 and available on HUDOC.
[348] *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021.

jurisdiction to be engaged.[349] However, for the purposes of the procedural limb of Art. 2 and in accordance with the principle that a jurisdictional link can be established if a State has initiated an investigation or proceedings in respect of a death that had occurred outside of its territorial jurisdiction, the ECtHR held that Russia's investigations of murders committed during the active phase of hostilities did not satisfy the requirements of Art. 2 ECHR.[350]

Furthermore, the ECtHR held that Russia exercised effective control over South Ossetia, Abkhazia, and the buffer zone after the cessation of hostilities due to the substantial Russian military presence and the economic, military, and political support it granted to the separatists.[351] On the merits, the ECtHR found that an administrative practice contrary to Arts. 2, 3 and 8 of the ECHR and Art. 1 of Prot. 1 had been established. The Russian authorities officially tolerated campaigns of violence and looting against ethnic Georgians by South Ossetian militia. Moreover, Russia was responsible for the detention of approximately 160 elderly or frail Georgian civilians by South Ossetian forces in inhuman and degrading conditions while another violation of Art. 3 related to the ill-treatment inflicted on Georgian prisoners of war which amounted to torture due to the special protected status the latter enjoy under international humanitarian law.[352] The Court also established a violation of Art. 2 of Prot. 4 with respect to more than 20.000 ethnic Georgians' inability to return to their homes in South Ossetia and Abkhazia.[353]

Finally, the ECtHR held that Russia had violated Art. 38 ECHR as it had withheld important documents that would enable the former to establish the facts of the case and considered that the question of just satisfaction was not ready for decision.[354] The ECtHR based its findings on reports of NGOs, the OSCE, and the EU Fact-Finding Mission as well as witnesses it heard at a Strasbourg hearing.

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[349] Ibid §§ 126, 136-7, 144. For a detailed analysis of the ECtHR's jurisdictional pronouncements see Marko Milanovic, '*Georgia v. Russia No. 2*: The European court's Resurrection of Bankovic in the Contexts of Chaos' (*EJIL:Talk!*, 25 January 2021) < https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/> accessed on 10 January 2022.
[350] Ibid §§ 336-7.
[351] Ibid §§ 174-5.
[352] Ibid §§ 252, 256, 278-9, 281.
[353] Ibid § 299.
[354] Ibid §§ 346, 349.

g) *Georgia v. Russia (III)*

On 16 November 2009, Georgia seized the ECtHR in the form a request for interim measures. The applicant State requested prompt and unconditional release of four Georgian minors in custody of the proxy regime in South Ossetia. Following two visits by the Human Rights Commissioner of the CoE, five Georgian minors were released in December 2009. On 16 March 2010 the ECtHR decided to strike the application out of its list of cases in the absence of any special circumstances regarding respect for the rights guaranteed under the ECHR.[355]

h) *Ukraine v. Russia (III)*

Ukraine complained about the detention and treatment of Mr. *Dzhemilov*, a Ukrainian national belonging to the Crimean Tatars ethnic group, in the context of criminal proceedings brought against him by Russian authorities. Ukraine informed the ECtHR that it did not wish to pursue this application as Mr. *Dzhemilov*'s individual application was pending before the ECtHR. On 1 September 2015 the ECtHR decided to strike the application from its list of cases in the absence of any special circumstances requiring its examination.[356]

Both *Georgia v. Russia (I)* and *(III)* as well as *Ukraine v. Russia (III)* could, in principle, be categorized as a means of diplomatic protection for Georgian and Ukrainian nationals respectively who were injured by Russia's internationally wrongful acts.[357] However, given the wider context of the related conflicts it seems more appropriate to classify them as applications arising primarily in the context of a political dispute. This approach will be further substantiated in the following sub-section regarding pending applications by both States against Russia before the ECtHR. Former president of the ECtHR, Judge Sicilianos, has also stressed the highly political nature of cases such as *Cyprus v. Turkey*, *Georgia v. Russia*, and *Ukraine v. Russia*.[358]

i) *Slovenia v. Croatia*

The case concerns actions of the Croatian judiciary and executive branches with respect to legal claims brought by the bank *Ljubljanska banka d.d* concerning the fate of assets and receivables following the disintegration of the former Socialist

[355] *Georgia* v. *Russia (III)* (dec.), no. 61186/09, 16 March 2010.
[356] *Ukraine* v. *Russia (III)* (striking out), no. 49537/14, 1 September 2015.
[357] ILC, 'Report of the International Law Commission on the Work of its 58th Session' (Draft Articles on Diplomatic Protection) (1 May-9 June and 3 July-11 August 2006) UN A/61/10 ch IV E.
[358] Sicilianos (n 6).

Federal Republic of Yugoslavia. *Ljubljanska banka* has previously brought proceedings before the ECtHR. The case was declared inadmissible in 2015 as the bank is controlled by the government and has no standing to lodge an application before the ECtHR.[359]

According to Slovenia, between 1991 and 1996, *Ljubljanska banka* and its Zagreb branch initiated proceedings against Croatian companies before Croatian courts seeking the repayment of debts contracted mainly in the 1980s. The application concerns 48 of over 80 legal cases which, at the time of the submission of the application, were either still pending, denied on the basis of lack of *locus standi* of *Ljubljanska banka*, or could not be enforced even if favorable to the latter. Slovenia alleged a violation of Art. 6 § 1 in respect of *Ljubljanska banka*'s right to legal certainty, equality before the law, and adversarial proceedings. Slovenia also complained about the length of proceedings and claimed a violation of the right to an impartial and independent tribunal due to interference by Croatian executive authorities.[360] The Grand Chamber held a hearing in respect of the admissibility of the application on 12 June 2019.[361] On 18 November 2020 the ECtHR declared Slovenia's application inadmissible as it found that Art. 33 does not allow an applicant Government to vindicate the rights of a legal entity which would not qualify to submit an application under Art. 34.[362]

2. Pending inter-State applications

a) *Georgia v. Russia (IV)*

The application concerns Georgia's claims that the human rights situation has deteriorated along the administrative boundary lines between Georgian-controlled territory and Abkhazia and South Ossetia, namely the regions of Georgia which are beyond the *de facto* control of the Georgian government. Georgia alleges that Russia has engaged, and continues to engage, in an administrative practice of

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[359] *Ljubljanska banka d.d. v. Croatia* (dec.), no. 29003/07, 12 May 2015.
[360] See also Igor Popović, 'For Whom the Bell of the European Convention on Human Rights Tolls ? The Curious Case of *Slovenia v. Croatia*' (*EJIL:Talk!* 5 December 2019) <https://www.ejiltalk.org/for-whom-the-bell-of-the-european-convention-on-human-rights-tolls-the-curious-case-of-slovenia-v-croatia/> accessed 2 November 2021.
[361] ECtHR Press Release ECHR 215 (2019) issued on 12 June 2019 and available on HUDOC.
[362] *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, §§ 70, 79, 18 November 2020. See also Myrto Stavridi, '*Slovenia v. Croatia*: A New Admissibility Criterion for Inter-State Applications under the ECHR?' (*EJIL:Talk!*, 6 January 2021) < https://www.ejiltalk.org/slovenia-v-croatia-a-new-admissibility-criterion-for-inter-state-applications-under-the-echr/ > accessed on 15 January 2022.

harassment, unlawful arrests, detention, torture, murder, and intimidation of ethnic Georgians trying to cross, or living next to the administrative boundary lines. The applicant further maintains that Russia failed to conduct adequate investigations and complains about the deprivation of liberty, torture, and murder of three Georgian nationals.

b) *Ukraine v. Russia (re Crimea)*

The application concerns the events in Crimea in 2014 and its subsequent annexation by Russia. Ukraine maintains that Russia has been exercising effective control since 27 February 2014 over the self-proclaimed Autonomous Republic of Crimea and the city of Sevastopol, formerly integral parts of Ukraine. The Grand Chamber held a hearing on 11 September 2019 in respect of the admissibility of the application[363] and rendered its admissibility decision on 16 December 2020.[364]

The ECtHR, after coherently recapitulating its principles on the assessment of evidence, considered that the complaint encompassed a genuine allegation in the terms of Art. 33 and its jurisprudence.[365] It then continued to examine Russia's jurisdiction. With respect to the period from 27 February to 18 March 2014 the ECtHR, bearing in mind the increase of Russia military forces in Crimea, their technical, military, and qualitative superiority to the Ukrainian forces, the lack of cooperation between Russia and Ukraine as required by the relevant bilateral agreements, the conduct of the Russia military forces, and official statements by high-ranking officers, including President Putin, concluded that Russia exercised effective control over the respective territory and jurisdiction *ratione loci* was established.[366] With respect to the period after the referendum the ECtHR considered that, while it lacked the competency to determine whether and to what extent the Accession Treaty of 21 March 2014 changed the sovereign territory of Russia and Ukraine, it had to determine the nature of Russia's jurisdiction over Crimea for the purposes of examining, in its future judgment on the merits, some of the complaints. The ECtHR reviewed the territory of the applicant and respondent State at the time they ratified the Convention and took into consideration the relevant UNGA resolutions and the fact that several States and IOs refused to accept any changes to

[363] ECtHR Press Release ECHR 309 (2019) issued on 11 September 2019 and available on HUDOC.
[364] *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, 16 December 2020.
[365] Ibid § 275.
[366] Ibid §§ 315-336.

Ukraine's territorial integrity. The ECtHR concluded that Russia's jurisdiction over Crimea should continue being categorized as that of effective control over an area rather than territorial jurisdiction.[367]

Ukraine's complaint regarding an administrative practice of killing and shooting was dismissed. However, the ECtHR found *prima facie* evidence of both repeated incidents and official tolerance in respect of disappearances and lack of effective investigation into the latter.[368] A complaint regarding an administrative practice in breach of Arts. 3 and 5 in respect of Ukrainian soldiers, ethnic Ukrainians, Tatars, and journalists was also held admissible.[369] The ECtHR further considered that the regulatory nature of certain measures the respondent instituted, including the extension of Russian procedural and substantive laws in Crimea, the automatic imposition of Russian and consequently loss of Ukrainian citizenship, the expropriation without compensation of property of Ukrainian civilians and private enterprises, the suppression of non-Russian media, and the suppression of the Ukrainian language in schools, by their very nature constituted an administrative practice and the relevant complaints were admissible.[370]

In addition, the ECtHR accepted *prima facie* evidence of an administrative practice of arbitrary raids of private houses and places of worship as well as a pattern of intimidation and harassment of religious leaders not conforming to the Russian Orthodox faith.[371] Under Art. 11, claims concerning a general government policy effectuating a discriminatory prohibition of public gatherings and manifestations of support for Ukraine and the Tatar community as well as intimidation and arbitrary detention of organizers of demonstrations were held admissible.[372] The ECtHR further considered admissible a complaint under Art. 2 of Prot. 4 that concerned restrictions to freedom of movement between Crimea and mainland Ukraine resulting from the *de facto* transformation by the respondent of the administrative border line into a State border between Russia and Ukraine and complaints under Art. 14 in conjunction with various other substantive articles of the Convention

[367] Ibid §§ 342-349.
[368] Ibid §§ 401-4, 411.
[369] Ibid §§ 416-9.
[370] Ibid §§ 427, 439, 466, 484-5, 493-5.
[371] Ibid §§ 449, 455-8.
[372] Ibid §§ 477-8.

regarding discriminatory legal and administrative measures specifically targeting the Tatar population.[373]

Finally, the ECtHR decided to give notice to the respondent of a complaint that was brought forward by Ukraine in its memorial before the GC and to join Ukraine's application 38334/18, *Ukraine v. Russia (VII)*, as it significantly overlaps with the former complaint. The admissibility and merits of these complaints will be examined at the same time as the merits stage of *Ukraine v. Russia (re Crimea)*.[374]

c) *Ukraine v. Russia (II)*

The application was lodged on 13 June 2014 and concerns the abduction of three groups of Ukrainian orphan children or children without parental care, and several adults accompanying them. The groups were allegedly abducted by armed representatives of the separatist forces in Eastern Ukraine and subsequently transported to Russia. Following diplomatic efforts by Ukrainian authorities, all children and adults were returned to the territory of Ukraine. This application was joined to *Ukraine v. Russia (re Eastern Ukraine)*.[375]

d) *Ukraine v. Russia (re Eastern Ukraine)*

This case relates to events in Eastern Ukraine and Donbass. The applicant alleges that Russia has violated, through an administrative practice, Arts. 2, 3, 5, 6, 8, 9, 10, and 11 ECHR as well as Arts. 1 and 2 of Prot. 1 and Art. 2 of Prot. 4.[376] Ukraine claims that Russia exercised *de facto* effective control over these areas through separatists and armed groups. According to Ukraine, civilian and military deaths occurred almost daily due to the use of force by armed groups controlled by Russia while incidents of torture also took place. In addition, the applicant maintains that Ukrainian TV channels could no longer operate, and freedom of journalists was restricted due to compulsory registration of all media. The applicant further complains about the use of derogatory expressions in respect of Ukraine and its nationals. Schooling in Ukrainian and Crimean Tatar language was allegedly hindered, and Ukrainians can no longer participate in the elections of the Ukrainian Parliament.

[373] Ibid §§ 502, 509.
[374] Ibid §§ 443-6.
[375] ECtHR Press Release ECHR 354 (2020) issued on 4 December 2020 and available on HUDOC.
[376] ECtHR Press Release ECHR 173 (2018) 9 May 2018 and available on HUDOC.

f) *Ukraine v. Russia (VII)*

The case concerns the arrest, prosecution, and, in some cases, convictions of Ukrainian nationals by Russia on charges of participation in organizations banned by Russian law, but lawful under Ukrainian law, and incitement to hatred and violence. The applicant State maintains that Russia adopted an administrative practice of suppressing the expression of political views by Ukrainian nationals who favor a return to the pre-2014 borders. This application was joined to *Ukraine v. Russia (re Crimea)* in 2020.[377]

g) *Ukraine v. Russia (VIII)*

On 29 November 2018, Ukraine lodged an application against Russia alleging violations of the rights of 24 Ukrainian sailors. On 25 November 2018 three Ukrainian naval vessels, two artillery boats and a tugboat, were seized and their servicemen were arrested and detained by Russian authorities. The incident took place in the Black Sea near the Kerch Strait. Ukraine complains of the attack, wounding of the sailors, and their illegal placement in detention facilities as well as their criminal prosecution given that they enjoy the status of prisoners of war.

h) *Armenia v. Azerbaijan, Armenia v. Turkey and Azerbaijan v. Armenia*

These three cases were lodged in September and October 2020. Comprehensive details regarding their content have not been released yet. However, their broad context can be extracted by requests for interim measures submitted by Armenia and Azerbaijan and the ECtHR's response.

The applications concern the long-standing conflict between Armenia and Azerbaijan regarding the self-proclaimed Republic of Nagorno-Karabakh which declared its independence in 1991. Nagorno-Karabakh is *de jure* part of Azerbaijan but is mostly populated by ethnic Armenians. The ECtHR has previously dealt with individual applications regarding hostilities in the region and their disastrous results to the population.[378] More than one thousand individual applications have been

[377] *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 446, 16 December 2020.
[378] See, *inter alia*, *Saribekyan and Balyan v. Azerbaijan*, no. 35746/11, 30 January 2020; *Amrahov v. Armenia* (dec.), no. 49169/16, 26 February 2019; *Chiragov a. O.* v. *Armenia* [GC], no. 13216/05, ECHR 2015; *Sargsyan a. O.* v. *Azerbaijan* [GC], no. 40167/06, ECHR 2015.

lodged by persons displaced during the Nagorno-Karabakh conflict and are currently pending before the ECtHR.[379]

On 28 September 2020, Armenia submitted a request for interim measures. Armenia requested an indication to Azerbaijan to cease military attacks towards civilian settlements along the entire line of contact of the armed forces of Armenia and Artsakh, to stop indiscriminate attacks, and to stop targeting civilian population, objects, and settlements.[380] On the following day, the ECtHR, with a view to preventing serious violations of the Convention, called upon both States to refrain from taking any measures, particularly military action, which might risk civilian population. The ECtHR explicitly referred to Arts. 2 and 3 ECHR. The ECtHR also requested both Parties to inform it, as soon as possible, of the measures taken to comply with their obligations under the ECHR.[381]

Within the context of *Armenia v. Turkey* the ECtHR, after a request from Armenia, and taking into account the escalation of the conflict, decided to apply Rule 39 RoC again. The ECtHR called upon all States, directly or indirectly involved in the conflict, including Turkey, to refrain from actions that contribute to breaches of the Convention rights of individuals, and to respect their obligations under the ECHR.[382] On 7 October 2020, Turkey addressed a request to the ECtHR to the effect that the interim measure should be lifted in so far as it was directed against Turkey. The ECtHR refused to lift the interim measure and stated that 'the decision of 6 October 2020 was taken on the basis of the evidence then available which indicated that certain Contracting States were, directly or indirectly, involved in the conflict. It was not addressed solely to Turkey, but to all States concerned.'[383]

On 27 October 2020 the ECtHR received a request for interim measures by Azerbaijan against Armenia. The applicant State requested an indication to Armenia to stop shell and missile attacks on residential areas, public premises, cemeteries, and other civil infrastructure in the territory of Azerbaijan. In addition, Azerbaijan included a request for Armenia to stop military, political, financial, and other support

[379] ECtHR, Press country profile on Armenia, last updated on October 2020 and available at https://www.echr.coe.int/Documents/CP_Armenia_ENG.pdf accessed 15 November 2020.
[380] ECtHR Press Release ECHR 264 (2020) issued on 28 September 2020 and available on HUDOC.
[381] ECtHR Press Release ECHR 265 (2020) issued on 30 September 2020 and available on HUDOC.
[382] ECtHR Press Release ECHR 276 (2020) issued on 6 October 2020 and available on HUDOC.
[383] ECtHR Press Release ECHR 290 (2020) issued on 14 October 2020 and available on HUDOC.

to criminal authorities, to withdraw its existing armed forces, and to refrain from sending new armed forces and military equipment. Azerbaijan further requested that the ECtHR indicated to the respondent State to abstain from pursuing a policy of hatred towards Azeri nationals.[384]

On 4 November 2020 the ECtHR published a statement to the effect that the existing interim measures were not lifted and therefore, the content of new inter-State requests for interim measures was already covered by previous applications of Rule 39 RoC. In addition, the ECtHR pointed out that it has received numerous requests concerning individual captives either by their relatives or by the States concerned. The ECtHR requested further information from the relevant States and undertook to keep these requests under review. The ECtHR further noted the existence of international mechanisms for the protection of persons captured during armed conflict and urged both States to participate in the relevant procedures.[385]

The use of inter-State applications before the ECtHR by both Armenia and Azerbaijan against each other appears to be primarily politically motivated considering that the Grand Chamber in 2015, in *Chiragov a. O.* v. *Armenia* and *Sargsyan a. O.* v. *Azerbaijan*, held that both States have violated the Convention in respect of various aspects of the Nagorno-Karabakh conflict. The implication of Turkey did not come as a surprise to commentators given the strenuous relationship between Armenia and Turkey and the latter's connection to Azerbaijan.[386]

i) *Ukraine v. Russia (IX)*

In 2021, Ukraine lodged its ninth inter-State application to the ECtHR.[387] This application concerns an alleged ongoing administrative practice by Russia consisting of State-authorized targeted assassination operations against perceived opponents of the respondent state in Russia and on the territory of other States, including other member States of the CoE.

j) *Russia v. Ukraine*

The application concerns allegations of an administrative practice in Ukraine of, among other things, killings, abductions, forced displacement, interference with the right to vote, restrictions on the use of the Russian language, and attacks on Russian

[384] ECtHR Press Release ECHR 310 (2020) issued on 27 October 2020 and available on HUDOC.
[385] ECtHR Press Release ECHR 314 (2020) issued on 4 November 2020 and available on HUDOC.
[386] Risini (n 227).
[387] ECtHR Press Release ECHR 069 (2021) issued on 23 February 2021 and available on HUDOC.

embassies and consulates. Russia further alleges that Ukraine switching off the water supply to Crimea at the Northern Crimean Canal violates the Convention.[388] The application includes a complaint about the downing of Malaysia Airlines Flight MH17 alleging that Ukraine should be held responsible as it failed to close its airspace. Russia submitted a request for interim measures asking the ECtHR to indicate to Ukraine to suspend the blockade of the North Crimean Canal and to stop restrictions on the rights of Russian-speaking persons to use their mother tongue in schools, the media, and on the Internet. The ECtHR rejected the request under Rule 39 RoC as it did not consider that it satisfied the requirement of a serious risk of irreparable harm of a core right of the Convention.

3. The use of *multi-fora* litigation by States in respect of wider underlying political disputes

Political motivations of applicant States behind their applications to the ECtHR can be discerned by their use of multi-*fora* litigation against the same respondent State which ultimately aims to air their complaints on as many accessible *fora* as possible. Georgia, Ukraine, Azerbaijan, and Armenia have seized various international dispute settlement mechanisms in accordance with the *ratione materiae* jurisdiction of each tribunal. Such attempts cannot, however, touch upon the core of their dispute which for the two former States lies in the encroachment of their sovereignty by Russia and for the two latter States in their competing claims over the region of Nagorno - Karabakh.

Georgia instituted proceedings against Russia before the ICJ by virtue of the ICERD in 2008, one year after the submission of its first inter-State application against the same State.[389] Georgia alleged that Russia engaged in widespread discrimination against ethnic Georgians in South Ossetia and submitted a request for provisional measures. The ICJ, satisfied of its *prima facie* jurisdiction, indicated to both Parties that they should refrain from any act of racial discrimination and abstain from sponsoring, defending or supporting such acts. The World Court further indicated to both Parties that they should do everything in their power, whenever

[388] ECtHR Press Release ECHR 240 (2021) issued on 23 July 2021 and available on HUDOC.
[389] See, *inter alia*, Phoebe Okowa, 'The International Court of Justice and the Georgia/Russia Dispute' (2011) 11 Human Rights Law Review 739; Natalia Lucak, '*Georgia v. Russia Federation*: A Question of the Jurisdiction of the International Court of Justice' (2012) 27 Maryland Journal of International Law 323.

and wherever possible, to ensure without distinction the security of individuals, the protection of the property of displaced persons as well as the right to freedom of movement and residence.[390] In 2011, the ICJ rejected Georgia's application as it held that the requirements stipulated in Art. 22 ICERD regarding prior use of negotiations and specific procedures for dispute settlement had not been met.[391]

As *Decaux* noted 'the political instrumentalization of *forum*-shopping is a strong incentive for duplication, as seen already with the mirror cases of *Georgia v. Russia* before the ICJ and the ECHR where the same provisional measures were requested from the two Courts in the name of 'irreparable prejudice and urgency'.[392] Russia has also politically employed the tools provided by the ECHR. With Russia's support, lawyers from South Ossetia lodged against Georgia more than 3.300 individual applications on behalf of Russian soldiers. Nearly half of these applications have been struck out as the legal representatives did not respond to requests for information by the ECtHR.[393]

Ukraine followed in the steps of Russia and, so far, has been more successful. Despite the fact that the major issue at stake between the two States concerns the use of force by Russia, the latter's annexation of Crimea, and the war by proxy in eastern Ukraine, Ukraine has evoked various international legal instruments which do not directly address its primary dispute with Russia but relate to peripheral issues.[394]

Ukraine instituted arbitral proceedings under Annex VII to the Convention on the Law of the Sea in respect of the three Ukrainian naval vessels and the detention of the 24 servicemen on board. Ukraine submitted a request for provisional measure which ITLOS upheld by prescribing the immediate release of the Ukrainian naval vessels and the detained Ukrainian servicemen. ITLOS further urged both

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[390] ICJ, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Order on Request for the indication of provisional measures) [2008] ICJ Rep 353.
[391] ICJ, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70.
[392] Decaux (n 40) 78-9.
[393] Arp (n 271) 171; ECtHR Press Release ECHR 006 (2011) issued on 10 January 2011 and available on HUDOC.
[394] For a more comprehensive analysis of Ukraine's litigation against Russia and its effects on the jurisdiction of international tribunals see Iryna Marchuk, 'Ukraine Takes Russia to the International Court of Justice: Will It Work ?' (*EJIL:Talk!* 26 January 2017) <https://www.ejiltalk.org/ukraine-takes-russia-to-the-international-court-of-justice-will-it-work/> accessed on 3 November 2021; Lawrence Hill-Cawthorne, 'International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study' (2019) 68 International and Comparative Law Quarterly 779.

Parties to refrain from taking any action which might aggravate or extend the dispute submitted to the arbitral tribunal.[395] In the context of *Ukraine v. Russia (VIII)* which is pending before the ECtHR, the latter indicated to Russia by way of interim measures that it should ensure the administration of appropriate medical treatment to the captive Ukrainian naval officers who required it and to anyone who might had been wounded in the naval incident.[396]

Ukraine also initiated proceedings before the Permanent Court of Arbitration under Annex VII to the Convention on the Law of the Sea concerning a dispute about state rights in the Black Sea, Sea of Azov, and Kerch Strait. The Arbitral Tribunal considered that a significant part of Ukraine's claims rested on the premise that Ukraine is sovereign over Crimea and therefore the question of which State is sovereign over Crimea was a prerequisite to its decision.[397] The PCA upheld Russia's preliminary objections and accepted that it lacked jurisdiction to the extent that a ruling on the merits of some of Ukraine's claims would require it to decide, directly or implicitly, on the soverignty of either party over Crimea.

In addition, Ukraine seized the ICJ by virtue of the ICSFT[398] and the ICERD. Ukraine brought proceedings under the former instrument in respect of the events in Eastern Ukraine and under the latter instrument concerning the situation in Crimea. On the basis of the ICSFT, Ukraine alleges that Russia has instigated and sustained an armed insurrection in eastern Ukraine and has financed acts of terrorism. With respect to the ICERD, Ukraine argues that, after Russia seized Crimea by military force and attempted to legitimize its act of aggression through an illegal referendum, Russia violated its obligations by systematically discriminating against and mistreating the Crimean Tatars and ethnic Ukrainians in Crimea. Ukraine further alleges that Russia is suppressing political and cultural expression of Crimean Tatar identity and complains of the ban on the *Mejlis*, a self-governing Crimean Tatar body with quasi-executive functions. Moreover, Ukraine maintains that Russia has violated the ICERD by suppressing the use of Ukrainian and Crimean Tarter

[395] ITLOS, Case concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation) (Provisional Measures, Order of 25 May 2019) ITLOS Reports 2018-2019, 280.
[396] ECtHR Press Release ECHR 421 (2018) issued on 4 December 2018 and available on HUDOC.
[397] PCA, Dispute Converning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation) (Award of 21 February 2020 concerning the preliminary objections of the Russian Federation), §§153-4.
[398] International Convention on the Suppression of the Financing of Terrorism (adopted on 9 December 1999, entered into force 10 April 2002) 2178 UNTC 197 (ICSTFT).

languages and education in such languages and by preventing both groups from gathering to celebrate and commemorate important cultural events.

The ICJ indicated provisional measures after a relevant request by the applicant State. The World Court indicated to Russia that it should refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*, and to ensure availability of education in the Ukrainian language. The ICJ further indicated to both Parties that they should refrain from any action which might aggravate or extend the dispute before it or make it more difficult to resolve. With regard to the situation in eastern Ukraine, the World Court reminded both Parties of Security Council resolution 2202(2015) on measures for the implementation of the Minsk Agreements and held that it expected both Parties to work on their full implementation in order to achieve a peaceful settlement of the conflict.[399]

On 8 November 2019 the ICJ rejected Russia's objections regarding the Court's lack of jurisdiction *ratione materiae* under the ICSFT and ICERD and held that the procedural preconditions of both Conventions had been met.[400] The World Court clarified that 'the fact that a dispute before the Court forms part of a complex situation that includes various matters, however important, over which the States concerned hold opposite views, cannot lead the Court to decline to resolve that dispute, provided that the parties have recognized its jurisdiction to do so and the conditions for the exercise of its jurisdiction are otherwise met. The case is not about "alleged unlawful occupation" or on any violations of rules of international law other than those contained in the ICSFT and ICERD'.[401]

In 2021, Armenia and Azerbaijan also lodged applications before the ICJ on the basis of ICERD against each other. On 7 December 2021, the ICJ issued two orders indicating provisional measures having found that there was a sufficient basis

[399] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* (Order on Request for the indication of provisional measures) [2017] ICJ Rep 104.
[400] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* (Preliminary Objections) [2019] ICJ Rep 558.
[401] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* (Preliminary Objections) [2019] ICJ Rep 558, §§ 28-9.

to establish *prima facie* the existence of a dispute between the Parties relating to the interpretation or application of ICERD and its jurisdiction to entertain the cases.[402]

The World court indicated to Armenia to take all necessary measures to prevent the incitement and promotion of racial hatred, including by third parties in its territory, targeted at persons of Azerbaijani national or ethnic origin. The same provisional measure was granted to protect persons of Armenian origin. Moreover, the ICJ indicated to Azerbaijan that it should protect from violence and bodily harm all persons captured during the aggravated phase of the conflict in 2020 who remain in detention and to ensure their security and equality before the law. It further reminded the latter's duty to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage. In both orders, the ICJ indicated to both parties to refrain from any action which might aggravate or extend the dispute before the ICJ or make it more difficult to resolve. Scholars have already commented on the ulterior motives of both States behind the use of the compromissory clause of ICERD.[403]

4. Conclusions

Inter-State applications have been, more often than not, riddled with political overtones and have been employed as a means to publicize the political dimension of inter-State disputes.[404] It appears that Art. 33 ECHR is being increasingly utilized by countries as a means to complain about issues of national interest and/or to protect themselves from neighboring states' hostile acts. In *Ukraine v. Russia (re Crimea)*, the ECtHR explicitly recognized that the question at hand had political aspects and that political motivations may have inspired the applicant State.[405]

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[402] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (Order on Request for the indication of provisional measures) [2021] < https://www.icj-cij.org/public/files/case-related/180/180-20211207-ORD-01-00-EN.pdf > accessed on 13 January 2022; ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* (Order on Request for the indication of provisional measures) [2021] < https://www.icj-cij.org/public/files/case-related/181/181-20211207-ORD-01-00-EN.pdf > accessed on 13 January 2022.

[403] Filippo Fontanelli, 'The Disputes Between Armenia and Azerbaijan: The CERD Compromissory Clause as a One-way Ticket to Hague' (*EJIL:Talk!*, 11 November 2021) < https://www.ejiltalk.org/the-disputes-between-armenia-and-azerbaijan-the-cerd-compromissory-clause-as-a-one-way-ticket-to-hague/> accessed on 11 January 2022

[404] Prebensen (n 11) 460.

[405] *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, §§ 272-3, 16 December 2020.

It should be noted, however, that most inter-State applications in this category, have led to the improvement, to a certain extent, of the human rights situation on the ground. *Greece v. the United Kingdom (I)* may not have been a triumph for human rights;[406] nevertheless, certain punitive measures against civilians were revoked voluntarily by the respondent State while Greece's second application against the same State resulted in the establishment of a system whereby detainees were inspected every few days and proper records were maintained.[407]

Regarding the Northern Ireland conflict, some scholars consider that the enforcement organs of the ECHR did not adopt a strict enough approach in their consideration of applications dealing with the conflict and that such a failure may have aided in prolonging the conflict.[408] However, use of the five techniques which violated Art. 3 was terminated during the adjudication of *Ireland v. the United Kingdom (II)*.

Turkey may not have paid, to this day, the non-pecuniary damages awarded by the ECtHR to the Greek Cypriots injured by its actions, but certain improvements have occurred, particularly, with respect to the living conditions of Greek Cypriots living in 'TRNC'. In its first resolution on *Cyprus v. Turkey (IV)*, the CoM noted that military officers were no longer entitled to serve on military courts and the latter's jurisdiction had been limited. Most cases had been transferred to civilian courts.[409] Access of Greek Cypriot children to full secondary education was ensured in 2005 and the 'TRNC' relaxed its censorship of schoolbooks.[410] A second priest was also accepted by Turkey in the Karpas region as a result of *Cyprus v. Turkey (IV)*.[411] On 3 September 2020, the CoM terminated its examination of the violations of property rights of Greek Cypriots residing in the northern part of Cyprus and their heirs.[412] The right of Greeks Cypriots living in the Republic of Cyprus to inherit their deceased relatives residing in northern Cyprus has been recognized on an equal basis to 'TRNC' citizens by virtue of the relevant legislation and the work of the Immovable Property Committee.

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[406] Simpson (n 32) 1019.
[407] Ibid 1027.
[408] Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press 2010) 375. See also Duffy Aoife, *Torture and Human Rights in Northern Ireland: Interrogation in Depth*, Routledge 2019.
[409] CoE CoM, Interim Resolution DH (2005) 44, 7 June 2005.
[410] CoE CoM, Interim Resolution DH (2007) 25, 4 April 2007.
[411] Ibid.
[412] CoE CoM, Interim Resolution DH (2020) 185, 3 September 2020.

C. A Method of Diplomatic Protection

States also use the inter-State application under the ECHR as a means to protect their nationals from breaches of their Convention rights committed by other Contracting Parties.

1. Inter-State applications for which a final judgment or decision has been issued

a) *Denmark v. Turkey*

The case concerned the detention and subsequent interrogation of Mr. Kemal Koç, a Danish national of Turkish origin and member of the Danish political party *Enhedslisten*, by Turkish authorities during his visit to Turkey to attend his brother's funeral. Turkish authorities detained Mr. Koç for more than a month. He was interrogated about his alleged connection to the PKK. Denmark complained about Mr. Koç ill-treatment during his interrogation. The applicant State alleged that his ill-treatment attained the minimum level of severity required for Art. 3 ECHR to be engaged and violated. Denmark also maintained that Mr. Koç's ill-treatment was not an isolated incident, but rather an example of a widespread practice in Turkey in contravention to Art. 3 ECHR.

The application was settled by means of a friendly settlement.[413] Turkey agreed to pay an *ex gratia* lump sum to the applicant State and officially expressed regrets for occasional and individual cases of torture and ill-treatment by its authorities. Both States agreed that the use of inappropriate police interrogation techniques constitute a violation of Art. 3 ECHR. In addition, Turkey partially funded and voluntarily participated in a CoE project which included training in police investigation. Denmark committed to finance a bilateral project aimed at training Turkish police officers in order to enable them to achieve knowledge and practical skills in the field of human rights. An Action Plan for the Development of Bilateral Relations between the two countries was also agreed upon by the respective Ministers of Foreign Affairs. Turkey further declared that changes had been made within its legal and administrative system with a view to redefine and prevent torture and ill-treatment, in accordance with international conventions, and to punish individuals perpetrating such acts. The ECtHR decided to strike the case out of its

[413] *Denmark* v. *Turkey*, no. 34382/97, ECHR 2000-IV.

list on 5 April 2000 as it was satisfied that the settlement was based on respect for human rights as defined in the Convention.

b) *Latvia v. Denmark*

Latvia submitted an application against the respondent State on 19 February 2020 claiming that the extradition of Ms. Misane, a Latvian national, to South Africa would breach Arts. 3, 5, and 8 ECHR. Ms. Misane was detained in Denmark at the time. On 13 March 2020, Latvia informed the ECtHR that the case had been resolved as Ms. Misane had been returned by Denmark to Latvia on 3 March 2020. Latvia requested that the ECtHR strike out the application in accordance with Art. 37 § 1 ECHR. The case was dealt with by a Committee which granted Latvia's request.[414]

Due to the brevity of the decision, comprehensive information regarding the context of this case is hard to locate. The Latvian Defense Minister, Artis Pabriks, claimed in a social media post that he had raised the case of Ms. Misane with the Danish Defense Minister at a meeting of NATO defense ministers.[415] However, a Danish court decided to extradite Ms. Misane to Latvia based on a European arrest warrant issued by the Latvian Prosecutor General's Office. It seems that recourse to the ECtHR did not play a considerable role in the return of Ms. Misane back to Latvia.

2. Pending applications

a) *The Netherlands v. Russia*

This case relates to the downing of flight MH17 on 17 July 2014 over the territory of Eastern Ukraine. All 298 passengers were killed, including 196 Dutch nationals. Two individual applications lodged by relatives of people who were killed in the MH17 disaster are pending.[416] The Netherlands alleges that the plane was shot down by a BUK-TELAR surface-to-air missile system which belonged to and/or was provided by Russia. The applicant alleges that Russia is responsible for the

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[414] *Latvia v. Denmark* (striking out), no. 9717/20, 16 June 2020.
[415] The Baltic Times, 'European Court of Justice closes cross-border case "*Latvia v. Denmark*" in connection with extradition of Latvian citizen to Sourth Africa', 9 July 2020 available at < https://www.baltictimes.com/european_court_of_justice_closes_cross-border_case___latvia_vs_denmark___in_connection_with_extradition_of_latvian_citizen_to_south_africa/ > accessed 18 November 2020; LSM.LV (Latvian Public Broadcasting), 'Father gives other side of the Misane case', 12 February 2020, available at https://eng.lsm.lv/article/society/crime/father-gives-other-side-of-the-misane-case.a348130/ accessed 18 November 2020.
[416] *Ayley a. O.* v. *Russia*, no. 25714/16 (pending application); *Angline a. O.* v. *Russia*, no. 56328/18 (pending application).

deaths and has infringed upon Arts. 2, 3, and 13 ECHR.[417] The applicant State's arguments focus on the lack of an appropriate investigation.[418] On 4 December 2020 the application was joined to *Ukraine v. Russia (re Eastern Ukraine)*.[419]

b) *Liechtenstein v. the Czech Republic*

The Principality of Liechtenstein and the Czech Republic share a complicated relationship. They only established diplomatic relations in July 2009.[420] Their dispute relates to legislation allowing confiscation of properties of individuals of German and Hungarian nationality by the Republic of Czechoslovakia after WWII. To this day and for the purposes of the application of the relevant legislation, nationals of Liechtenstein are considered to be of German ethnicity and have thus been included on the list of persons whose property can be confiscated.

The applicant State claims that its national are being forced by the respondent State, directly or indirectly, into the latter's domestic courts in order to defend their property rights. The domestic proceedings are conducted in an unfair, discriminatory, and arbitrary manner, with no reasonable prospect of redress. In addition, Liechtenstein claims that the Czech Republic has commenced judicial proceedings seeking to acquire for itself title to properties that has been owned for centuries by nationals of the applicant State despite the fact that they have been registered as the lawful owners of the properties and their ownership has not previously been contested.[421]

Liechtenstein focuses on two sets of domestic proceedings in the Czech Republic.[422] The first set relates to proceedings against the Prince of Liechtenstein Foundation, which inherited all property owned by the late Prince Franz Josef II. The second set concerns 33 individual cases brought by Liechtenstein nationals, including Prince Hans-Adam II. One of the cases was decided by the Constitutional Court of the respondent State in February 2020.

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[417] ECtHR Press Release ECHR 213 (2020) issued on 15 July 2020 and available on HUDOC.
[418] Risini and Ulfstein (n 228).
[419] ECtHR Press Release ECHR 354 (2020) issued on 4 December 2020 and available on HUDOC.
[420] Government of Liechtenstein Press Release of 13 July 2019 available at https://web.archive.org/web/20110511222932/http://88.82.102.51/fileadmin/_pm.liechtenstein.li/en/090713_PM_Beziehungen_CzFl_en.pdf accessed on 14 November 2020.
[421] Isabella Risini and Geir Ulfstein, '*Liechtenstein v Czech Republic* before the European Court of Human Rights' (*EJIL:Talk!* 7 September 2020) <https://www.ejiltalk.org/liechtenstein-v-czech-republic-before-the-european-court-of-human-rights/> accessed 2 November 2021.
[422] ECtHR Press Release ECHR 233 (2020) issued on 19 August 2020 and available on HUDOC.

3. Conclusions

Latvia v. Denmark, undoubtedly, falls squarely within this category while *Liechtenstein* v. *the Czech Republic* appears to also pursue a more 'selfish' goal given a press release issued by the government of the applicant State highlighting that the application is intended to guard the 'sovereignty of Liechtenstein'.[423] The application of the Netherlands against Russia has been classified under this category due to the fact that more than two thirds of the victim were Dutch nationals. However, the government of the Netherlands has stated that 'by submitting this inter-State application, it stands by *all* 298 MH17 victims, of 17 different nationalities, and their next of kin'.[424] The application was lodged in 'the pursuit of truth, justice and accountability'. Both Liechtenstein[425] and the Netherlands have exhausted many different legal and political avenues before lodging their respective applications with the ECtHR. Russia was the only country that vetoed a Security Council resolution which was supported by the Netherlands and would have established an international tribunal for the purpose of prosecuting persons responsible for the downing of the MH17 plane.[426]

Moreover, while *Latvia v. Denmark* appears to have been employed as a method to put pressure on the government of the respondent State in order to 'save' the applicant State's national, *Denmark v. Turkey* was submitted after the release and return of the Danish national to his home country and after comprehensive medical examinations by various competent bodies which verified his ill-treatment. It should be noted, however, that representatives of the Danish Embassy in Turkey were involved during his detention. Nevertheless, domestic remedies regarding Mr. Koç's ill-treatment had not been exhausted. Denmark lodged its application on 7 January 1997. Mr. Koç only filed a lawsuit against the responsible Turkish police officers on 23 December 1996 and the competent first instance court issued its judgment on the criminal proceedings against Mr. Koç on 12 July 1997. The compliance of Denmark's application with the six-month time-limit and the rule of

[423] Risini and Ulfstein (n 421).
[424] Emphases in the original press release, 10 July 2020 available at https://www.government.nl/latest/news/2020/07/10/the-netherlands-brings-mh17-case-against-russia-before-european-court-of-human-rights accessed on 17 November 2020.
[425] See Andrea Gattini, 'A Trojan Horse for Sudeten Claims? On Some Implications of the *Prince of Liechtenstein v. Germany*' (2002) 13 European Journal of International Law 513.
[426] UNSC 'Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims' (29 July 2015) Meetings Coverage SC/11990

exhaustion of domestic remedies was considered as closely interlinked with the merits of the application to which both admissibility requirements were joined.[427] However, due to the fact that Denmark and Turkey reached a friendly settlement they were never ruled upon by the ECtHR. It is difficult to precisely determine the Danish government's motivations in lodging its inter-State application, but it seems plausible that their claim regarding an administrative practice of widespread ill-treatment by Turkish authorities, which was held admissible in the ECtHR's decision, was primarily aimed at ensuring the admissibility of their claims in respect of Mr. Koç's ill-treatment.

In conclusion, applications used principally as a method for the High Contracting Parties to protect their nationals and ensure respect for their human rights may simultaneously pursue other 'more altruistic' goals as well, although to a lesser degree, while political considerations are ever present. Once again, the use of the inter-State application by States appears to lie on a spectrum rather than distinct and self-contained categories.

D. Public Interest Litigation

The last category is comprised of inter-State applications lodged by States in order to address widespread and systematic human rights abuses committed by another High Contracting Party to the Convention against the latter's nationals. This category does not include, so far, any pending applications and has only been utilized against military regimes which gravely threatened or abolished democracy.

1. Inter-State applications for which a final judgment or decision has been issued

a) *Denmark, Norway, Sweden and the Netherlands v. Greece (The Greek Case I)*

This case concerns a *coup d' etat* by a group of Greek military officers on 21 April 1967.[428] The junta or the Colonel's regime, as it came to be known, declared martial law while political parties and activities were prohibited, and elections were cancelled. The revolutionary government, as the junta referred to itself, notified the Secretary General of the CoE of its derogation on 3 May 1967.

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[427] *Denmark* v. *Turkey* (dec.) no. 34382/97, p. 34, 8 June 1999.
[428] For more information regarding the *coup d' etat* and its political reasons and effects see Stephen Xydis, 'Coups and Countercoups in Greece , 1967-1973' (1974) 89 Political Science Quarterly 507.

On 20 September 1967 Norway, Sweden, and Denmark filed identical applications to the EComHR. They alleged violations of Arts. 5, 6, 8, 9, 10, 11, 13, and 14 ECHR as well as failure to show that conditions of Art. 15 had been met. The Netherlands joined its own application a few days later. The applications focused on mass detention without access to a legal authority, sentences passed by martial courts on the grounds of political opinions, particularly communist and left-oriented opinions, and censorship of press and private communications. In its first admissibility decision, the EComHR declared the application admissible as it related to the compatibility of legislative measures and practices with the ECHR.[429]

On 25 March 1968 the governments of Denmark, Norway, and Sweden filed a joint memorial and extended their original allegations to Arts. 3 and 7 of the ECHR as well as Arts. 1 and 3 of Prot. 1. The three applicants alleged an administrative practice of torture and ill-treatment of political prisoners by police officers. Art. 7 related to a legal provision enacted by the junta allowing the deprivation of Greek citizenship from Greeks residing abroad or who had more than one citizenship, if they acted or had acted unpatriotically. Art. 1 of Prot. 1 concerned a legal provision that provided for the confiscation of property from any person who lost his/her Greek citizenship. Under Art. 3 of the same Protocol the applicants referred to the cancelled elections, the fact that there was no elected legislative body in Greece, and the fact that the junta had not indicated when democratic elections would take place.

The EComHR issued its second admissibility decision on 31 May 1968 and declared the new allegations admissible.[430] The EComHR held that the news allegations concerned, or were closely related to, issues of law or fact raised in the original application and involved the general situation of human rights and fundamental freedoms in Greece after the *coup d' etat*.

The EComHR concluded that Greece had not fully met the requirements of Art. 15 § 3. The junta had not communicated to the Secretary General the texts of certain legislative measures and, in particular, the new Constitution of 1968 and had not provided full information regarding the detention of persons without court order. In addition, Greece had not communicated the reasons for its derogation until 4

[429] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR decision of 24 January 1968, ECHR Collection 25.
[430] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR decision of 31 May 1968.

months after the relevant measures had been put in place.[431] The EComHR could not conclude, on the basis of the evidence presented, that on 21 April 1967 a public emergency threatening the life of the Greek nation existed.[432] There was no imminent displacement of the lawful Government by force of arms by the Communists[433] nor did street demonstrations and strikes attain such a magnitude as to constitute a public emergency.[434] This was the first time, in an inter-State application, that the EComHR found the requirements of Art. 15 to have not been met.

The EComHR was of the opinion that deprivation of liberty through detention under administrative order with no provision for judicial review and house arrest violated Art. 5 ECHR.[435] Moreover, Art. 6 had been breached by the dismissal of judges who disagreed with the official policy line of the junta, the dependence of extraordinary courts on ministerial direction and the fact that persons convicted of offences against national security had no recourse to appellate courts.[436] With respect to Art. 8, the EComHR considered that the authorities' practice of carrying out arrests at night was not a necessary measure in a democratic society. [437] The EComHR further concluded that the legislation regarding press censorship was incompatible with Art. 10, if applied to its full extent.[438]

Regarding freedom of association and the dissolution of almost 300 trade unions and other organizations on the grounds that they were affiliated with Communism, the EComHR opined that it had not been shown that such measures were necessary as far as they concerned the professional functions of trade unions.[439] The EComHR was also adamant in its opinion on the administrative practice of subjecting indoor meetings to the permission of the police and lectures to that of the

[431] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR report of 5 November 1969, pp. 41-3.
[432] Ibid p. 76.
[433] Ibid p. 73.
[434] Ibid p. 74.
[435] Ibid pp. 134-5.
[436] Ibid pp. 147-9.
[437] Ibid pp. 152-3.
[438] Ibid p. 164.
[439] Ibid pp. 171-2. The Greek junta also faced investigations by the ILO regarding similar complaints: Report on the Commission of Inquiry appointed under article 26 of the Constitution of the International Labor Organization to examine the complaints concerning the observance by Greece of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

military authorities, without any clear indication as to their discretion; it concluded that these measures were the 'antithesis of a democratic society'.[440]

The EComHR extensively investigated 30 cases of ill-treatment and either confirmed or found strong indications that torture or ill-treatment of detainees had habitually occurred. The EComHR also found that conditions of detention were contrary to Art. 3.[441] Moreover, given the lack of independence of the judiciary and the ineffectiveness of the examination of complaints by political prisoners alleging torture or ill-treatment, the EComHR considered that an administrative enquiry did not constitute an effective remedy in accordance with the Convention.[442]

Last but not least, Art. 3 of Prot. 1 presupposes the existence of a representative legislature, elected at reasonable intervals as the basis of a democratic society.[443] Taking into account the cancellation of scheduled parliamentary elections, the absence of an elected legislative body in Greece since April 1967, as well as the fact there was no legal provision establishing the right to elections and that no date had been set for the holding of elections, the EComHR concluded that this article had been breached.

The CoM issued a resolution on 14 December 1969 in agreement with the findings of the EComHR.[444] However, the Greek Government had already denounced the ECHR and had declared that it considered the report of the EComHR null and void. The CoM decided that there was no basis for further action and published the EComHR's report in accordance with former Art. 32 § 3 ECHR. The CoM also urged Greece to abolish torture and ill-treatment of prisoners and to release persons detained under administrative order. After the collapse of the Greek junta and the readmission of Greece to the Council of Europe the CoM discontinued its examination of the situation in Greece.[445]

b) *Denmark, Norway and Sweden v. Greece (The Greek case II)*

Denmark, Norway, and Sweden lodged a second application against Greece on 10 April 1970. Greece had denounced the ECHR on 12 December 1969 during a

[440] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR report of 5 November 1969, pp. 171.
[441] Ibid pp. 503-5.
[442] Ibid p. 174.
[443] Ibid p. 180.
[444] CoE, CoM, Resolution DH (70) 1, 15 April 1970.
[445] CoE, CoM, Resolution DH (74) 2, 26 November 1974.

meeting of the CoM in Paris. The case concerned the trial of 34 persons accused of subversive activities before a martial court in Athens. The applicant States alleged violations of Arts. 3 and 6 ECHR.

The EComHR issued an interim report on 5 October 1970 concluding that it could not adequately discharge its functions with a view to the eventual adoption of a report under former Art. 30 or 31 ECHR.[446] The EComHR reassumed its consideration of the application on 13 December 1974 after the readmission of Greece to the CoE. The EComHR was satisfied that persons claiming violations of their rights by the former regime had access to criminal and compensatory remedies and decided to strike the application out of its list.[447]

The Greek case was one of the most severe challenges of the ECHR's history; it challenged the political integrity of the CoE itself.[448] The Colonel's regime was a political system in complete contradiction to the Convention and democracy. The Consultative Assembly was particularly vocal in its opposition to the junta administration; it called, early on, for the expulsion of Greece from the CoE.[449] In June 1967, the Standing Committee of the Consultative Assembly directly encouraged member States to refer the Greek case to the EComHR.[450] *Leckie* has argued that political pressure from the Consultative Assembly may have contributed to the resolution of the situation and the restoration of democracy in Greece.[451] On the other hand, the CoM only recognized in 1969, after the denouncement of the ECHR by Greece, that the latter had violated Art. 3 of the Statute of the CoE, principles of the rule of law and the enjoyment of human rights and fundamental freedoms.[452] Contemporary commentators argued that due to the fact that the CoM was primarily a political body it was ill equipped to exercise judicial functions.[453]

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[446] The report is not available on HUDOC database. However, it is mentioned in *The Greek case (II)*, No. 4448/70, EComHR report of 4 October 1976, § 5.
[447] *The Greek case (II)*, no. 4448/70, EComHR report of 4 October 1976.
[448] Coufoundakis (n 335) 471.
[449] CoE, Consultative Assembly, Resolution 361 (1968) concerning the situation in Greece of 31 January 1968; CoE, Consultative Assembly, Resolution 547 (1969) concerning the situation in Greece of 30 January 1969.
[450] CoE, Standing Committee of the Consultative Assembly, Resolution 346 (1967) concerning the situation in Greece, 23 June 1967.
[451] Leckie (n 272) 292.
[452] CoM Resolution DH (69) 51 on Greece, 12 December 1969.
[453] Thomas Buergenthal, 'Proceedings against Greece under the European Convention on Human Rights' (1968) 62 Americal Journal of International Law 441, 446-7.

These two cases have been commended as a historic step away from politically motivated uses of the inter-state application.[454] Both applications were grounded in a genuine belief that the applicant States had a moral duty to act.[455] The applicants had more to lose than to gain by the submission of their applications. Their trade exports to Greece were affected as Scandinavian goods were boycotted in the Greek market.[456] The Netherlands, soon after the submission of its application, withdrew from active participation in the adjudication of the first application due to internal pressure.[457] It also never joined the other Scandinavian States in respect of the supplementary complaints submitted during the adjudication of the *Greek case (I)* and did not support the *Greek case (II)* either. The governments of Belgium, Iceland, and Luxembourg only expressed their support for the application to the Secretary General of the CoE without formally associating themselves.[458]

Greece's decision to undergo this procedure for more than two years speaks, to a certain extent, to the authority held by the CoE.[459] The Greek cases can be considered a success in terms of the ECHR mechanism.[460] However, the ultimate goal of protecting human rights was not achieved.[461] The practice of administrative detention and ill-treatment of detainees continued, and elections were held after the collapse of the Colonel's regime. Nevertheless, it has been argued that the applications and assessment thereof by the EComHR restrained the Greek authorities.[462] During the proceedings of the first Greek case the Secretary General of the CoE requested postponement of the execution of Mr. Panagoulis who had been convicted of committing crimes against public order and Greece complied.[463] As a result of the negotiations over a friendly settlement, the so called revolutionary government signed an agreement with the International Red Cross which allowed the latter to visit certain detention centers and prisons.[464] Scholars have argued that the Greek crisis had a major impact on European human rights politics as well. The

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[454] Leckie (n 272) 290.
[455] Becket (n 139) 95.
[456] Ibid.
[457] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR decision of 31 May 1968, p. 11.
[458] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR decision of 24 January 1968, p. 9, ECHR Collection 25.
[459] Becket (n 139) 116.
[460] Ibid 112-3.
[461] Ibid.
[462] Ibid.
[463] *The Greek case (I)*, no. 3321/67 and 3 others, EComHR report of 5 November 1969, p. 417.
[464] Becket (n 139) 112.

attitude of the CoE with respect to the Greek junta served as a role model for human rights politics of the European Community.[465]

The system of the Convention could not change the political situation in Greece; nevertheless, it maintained the integrity of the Convention and the CoE. In the words of *Decaux* 'a handful of States…. saved the honor of the CoE on these two occasions by referring them to the EComHR'.[466] However, these cases are further proof that the ECHR system can only protect human rights when States have the will to respect them on the level of domestic law and under the condition that the rule of law is an operational reality.[467]

c) *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*

The application concerns the third *coup d' etat* in Turkey which took place on 12 September 1980 and lasted for three years. The Turkish parliament was dissolved, and its power and duties were transferred to the National Security Council. Full executive powers were transferred to the Chairman of the latter. Martial law was decreed in 67 districts of the country. Turkey derogated from the ECHR and informed the Secretary General of the CoE of the measures taken while stating the derogation was necessary due to serious threats to internal peace, the total paralysis of the democratic regime, and a political situation which endangered fundamental rights and freedoms in the country.

The applicants lodged their application on 1 July 1980. They complained of restrictions, ranging from suspension to complete prohibition, on political parties, trade unions and the press under Arts. 9, 10, and 11 ECHR. They further alleged that martial law courts were not independent and that the rights of persons accused of committing a crime were not respected. Under Art. 5, the applicant States maintained that arrest and detention could last as much as 45 days without any judicial control of its lawfulness and there was no possibility to appeal such decisions. In addition, detainees were systematically tortured or subjected to inhuman or degrading treatment and Turkey had not taken adequate measures to combat such phenomena.

[465] Victor Fernandez Soriano, 'Facing the Greek Junta: The European Community, the Council of Europe and the Rise of Human-Rights Politics in Europe' (2017) 24 European Review of History: Revue européenne d'histoire 358, 359.
[466] Decaux (n 1) 401.
[467] Becket (n 139) 113.

The EComHR issued its admissibility decision on 6 December 1983.[468] The EComHR considered that the application related firstly to legislation, the existence of which could not be disputed, and secondly to alleged practices in respect of which the applicants had adduced detailed evidence. The EComHR further held that the applicants' arguments under Art. 3 were admissible as they adduced *prima facie* evidence substantiating the existence of an administrative practice. The EComHR concluded that there were indications of tolerance at the level of direct superiors and that Turkey's efforts were not sufficient to prevent violations of Art. 3.

The Parties reached a friendly settlement and on 7 December 1985 the EComHR adopted its report.[469] Turkey had held elections on 6 November 1983, the National Security Council had been dissolved, and democracy was being progressively restored as legislation was subject to the authority of the elected Turkish Parliament. Most of the laws and decrees forming the basis of the application were no longer in force. Negotiations for a friendly settlement lasted for more than a year. Turkey undertook to ensure strict observance of Art. 3 by all public authorities and to report to the EComHR specific measures they would employ to this end. Changes were also made to the remaining emergency legislation considering Turkey's obligations under the ECHR. Turkey also undertook to inform the EComHR of internal developments regarding amnesty, pardons, and similar measures of leniency. The EComHR concluded that the settlement reached was secured on the basis of respect for human rights as defined in the Convention.

The friendly settlement in *France, Norway, Denmark, Sweden and the Netherlands* v. *Turkey* has been widely criticized on several grounds.[470] Critics have argued that there was no indication that the alleged violations of Arts. 5 and 6 were remedied or seriously addressed while the settlement afforded little consideration to the prosecution of those responsible for torture and the rehabilitation and compensation of victims of violations of Art. 3 ECHR. Less than ten years after the friendly settlement was reached, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment published a statement on Turkey and concluded that the practice of torture and other forms of severe ill-

[468] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR decision of 6 December 1983, Decisions and Reports 35.
[469] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 994/82 and 4 others, EComHR report of 7 December 1985.
[470] Kooijmans (n 10) 90, 96; Leckie (n 272) 293; Kamminga (n 139) 158.

treatment of persons in police custody remained widespread in Turkey and that such methods were applied to both ordinary criminal suspects and persons held under anti-terrorism provisions.[471]

2. Conclusions

The abovementioned cases against the military regimes established in Greece and Turkey are examples of public interest litigation where political or economic interests did not play a dominant role in the decision to initiate the inter-State application procedure.[472] However, as can be deduced by the outcome of these cases, the motivation behind lodging an application is not directly translated into 'better' human rights protection and concomitant achievement of the purpose of the Convention, namely the collective enforcement of human rights.

Most importantly, States seem to rise above their 'self-interest' and into their position as guarantors of the human rights set forth in the Convention only in cases where democracy itself is critically endangered. The friendly settlement in the case of *France, Norway, Denmark, Sweden and the Netherlands* v. *Turkey* appears to reinforce this view. The applicant States did not pursue their applications and reached a friendly settlement after the reestablishment of democracy through elections and despite the fact that martial law had not been lifted in all provinces of Turkey. Human rights organizations continued to report political imprisonment as well as widespread and systematic use of torture.[473] Scholars have attributed an inherent danger in friendly settlements in inter-State applications that may favor a political settlement of the dispute under question to the detriment of the protection of human rights.[474]

The Parliamentary Assembly of the CoE was quite vocal on Russia's role in the grave endangerment of basic human rights, including indiscriminate and disproportionate aerial bombardments, due to its military intervention in the Chechen Republic and had called upon States 'to make use of Art. 33 as a matter of urgency and to refer to the ECtHR alleged breaches by Russia of the provisions of the ECHR and its Protocols'.[475] However, no State headed its call. This example

[471] CoE, CPT, Public statement on Turkey (15 December 1992) CPT/Inf (93)1, § 21.
[472] Leckie (n 272) 289.
[473] Prebensen (n 11) 457.
[474] Kooijmans (n 10) 90.
[475] CoE, PACE, Recommendation 1456 (2000) Conflict in the Chechen Republic – Implementation by Russia of Recommendation 1444 (2000), 6 April 2000.

coupled with the withdrawal of the Netherlands from participation in the two Greek cases may lead one to argue that altruistic motives in respect of inter-State public interest litigation of human rights are not exempted from political considerations. In practice, political considerations in these cases function in a diametrically opposed direction to cases in the first and second category; they result in States standing by in the face of widespread and systematic human rights abuses. Such an approach, however, may embolden States which routinely and habitually violate human rights and lead to their *de facto* 'immunity' as long as they maintain a *façade* of adherence to democratic institutions.

IV. Conclusion

The sterility of inter-state complaint mechanisms within the international human rights realm[476] has given way to a steadily increasing current of inter-State litigation by virtue of international and regional human rights instruments. This development is not restricted to CoE member States.

The Gambia lodged an application against Myanmar under the Convention on the Prevention and Punishment of the Crime of Genocide before the ICJ. On 23 January 2020, the World Court ordered Myanmar to comply with its obligations under the Genocide Convention in respect of members of the Rohingya group on its territory and to take all measures within its power to prevent killings, serious bodily or mental harm, and deliberate infliction of conditions of life calculated to bring about the physical destruction of the minority.[477] Myanmar should also abstain from imposing measures intended to prevent births. The ICJ has also indicated provisional measures in the context of the application of Qatar against the United Arab Emirates (UAE).[478] The application has been lodged on the grounds of the ICERD.

The year 2018 also saw three inter-State communications submitted to the Committee on the Elimination of Racial Discrimination. On 8 March 2018 Qatar submitted two inter-State communications against UAE and the Kingdom of Saudi

[476] Schabas and O'Sullivan (n 309) 39.
[477] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (Order on Request for the Indication of Provisional Measures) [2020] ICJ Rep 3.
[478] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* (Order on Request for the Indication of Provisional Measures) [2018] ICJ Rep 406.

Arabia and on 23 April 2018 Palestine submitted an inter-State communication against Israel. All inter-State communications have been declared admissible.[479]

Hence, the revival of the inter-State application under the ECHR is part of a general trend of inter-State human rights litigation and, simultaneously, constitutes its most eloquent manifestation given the number of inter-State applications before the Convention organs that have been either been resolved or are currently pending. The examination of inter-State case-law under the Convention can clarify, to a certain extent, the reasons States resort to the ECHR mechanism and, potentially, to other international human rights instruments. The most important advantage lies with the accessibility of inter-State procedures in human rights treaties.[480] The low admissibility requirements for inter-State applications under the ECHR have made Strasbourg a rather easily accessible *forum*.[481] In addition, and in the face of difficulties in establishing administrative practices of large-scale abuses though individual applications, Art. 33 ECHR is a unique tool as it provides for a mechanism to address such abuses in detail through strategically lodged inter-State applications.[482]

Another advantage lies with the extensive employment of fact-finding operations in inter-State applications and the subsequent formalization of the results thereof by establishing 'a public record'. Judge O' Donoghue[483] stressed in his dissenting opinion in *Ireland v. the United Kingdom (I)* that 'the value of hearing evidence in a local venue cannot be overestimated…no written description, however colorful, could have been as informative as the visit to Bouboulinas Street in Athens'.[484] The important role of fact-finding is even more relevant in our time. As

[479] CERD, Decision on the jurisdiction inter-State communication Qatar vs. UAE (CERD/C/99/3); Decision on the admissibility of the inter-State communication Qatar vs. UAE (CERD/C/99/4); Decision on the jurisdiction inter-State communication Qatar vs. Saudi Arabia (CERD/C/99/5); Decision on the admissibility of the inter-State communication Qatar vs. Saudi Arabia (CERD/C/99/6); Decision on the Committee's jurisdiction regarding the inter-State communication submitted by the State of Palestine vs. Israel Part I (CERD/C/100/3), Part II (CERD/C/100/4), Part III (CERD/C/100/5).
[480] Theodor Meron, *International Law in the Age of Human Rights: General Course on Public International Law* (Martinus Nijhoff Pub 2004) 312.
[481] Ulfstein and Risini (n 90).
[482] Onder Bakircioglu and Brice Dickson, 'The European Convention in Conflicted Societies: The Experience of Northern Ireland and Turkey' (2017) 66 International and Comparative Law Quarterly 263, 293.
[483] Judge O' Donoghue had been a member of the delegation of the EComHR which visited Greece in order to ascertain the facts and verify the allegations of the applicant States in the *Greek case (I)*.
[484] Separate Opinion of Judge O' Donoghue, 19 in *Ireland v. the United Kingdom (I)*, No. 5310/71, Series A25.

the Plenary formation of the ECtHR noted, facts are very often disputed in inter-State cases and particularly in cases related to armed conflict.[485]

Decisions and judgments documenting the suffering of individuals, irrespective of whether they are based on fact-finding missions or solely on witness hearings and the parties' submissions, serve as a source of frustration for the respondent State. In the context of *Ireland v. the United Kingdom (I)*, internal documents of the United Kingdom published decades after the relevant adjudication reveal that the contemporary respondent government was anxious about the potential embarrassment and damage to the reputation of those who had authorized the use of the five techniques inducing sensory deprivation and extreme mental suffering to their victims.[486]

However, an inter-State application is bound to be treated as an unfriendly act and may trigger repercussions.[487] States are particularly sensitive about allegations that they, regularly and systematically, violate human rights.[488] In addition, an inter-State application is time and resource-consuming for the applicant State; it requires intensive legal research and investigations to gather evidentiary material, garnering of sufficient parliamentary support as well as coordinated efforts between various branches of the State and continuous involvement in the procedure.[489]

Examination of the inter-State case-law under the ECHR reveals that an inter-State application almost inevitably carries a political dimension.[490] Economic and political concerns exercise a distinct influence in inter-State cases. On the one hand, political interests continue to define States' human rights policies regarding other States. Human rights protection is frequently subordinated to political and economic concerns; as a result, the ideal operation of the inter-State complaint procedure is not put in motion frequently. States rarely rise up to their role as guarantors of the Convention rights as they seem to be unwilling to lodge inter-State applications unless the case has a special interest for them. With the exception of

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[485] ECtHR, Committee on Working Methods (n 246) § 14. See also Jeffrey Kahn, 'Oral Argument in *Georgia v. Russia (II)*: The Fake News Era Reaches Strasbourg' (*Lawfare Blog*, 31 May 2018) < https://www.lawfareblog.com/oral-argument-georgia-v-russia-ii-fake-news-era-reaches-strasbourg > accessed 25 November 2020.
[486] *Ireland v. the United Kingdom (I)* (revision), no. 5310/71, § 114, 20 March 2018.
[487] Leckie (n 272) 297.
[488] Kooijmans (n 10) 88.
[489] Leckie (n 272) 254.
[490] Sicilianos (n 6).

France in *France, Norway, Denmark, Sweden and the Netherlands v. Turkey* and Russia in *Russia v. Ukraine*, the larger States in Europe have tended to avoid any involvement as an applicant in inter-State proceedings.[491]

On the other hand, political interests have played a major role in the politicization of the inter-State applications as a means for a member State to air its complaints in respect of an issue which affects its vital interests, sovereignty or territory. As the ICJ has noted 'legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned'.[492] Nevertheless, the ECtHR cannot shy from its obligations under Art. 19 ECHR to ensure the observance of the engagements undertaken by the High Contracting Parties on the condition of each application's admissibility.[493] The political dimension of a legal question cannot deprive it of its character as a 'legal question',[494] and consequently cannot deprive the ECtHR from its competence to examine all inter-State applications in accordance with the Convention.

Political considerations have also played a major role within the CoE. Scholars have argued that political considerations within the CoM prevailed in the *Greek case (I)* and *Cyprus v. Turkey*.[495] The ECtHR in *Cyprus v. Turkey (IV)* recognized that both resolutions issued in the three previous inter-State cases did not result in a 'decision' within the meaning of Article 32 § 1.[496] Turkey claimed in its memorials in the *Loizidou* case that the CoM did not endorse the EComHR's findings in the previous inter-State cases.[497] According to *Decaux* 'by simply sitting back and allowing situations to deteriorate, and by effectively burying the cases that were passed to it the CoM has demonstrated that it is neither a major diplomatic organ nor a respected judicial authority'.[498] CoE membership partially overlaps with

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[491] Prebensen (n 11) 458; Marko Milanović, 'Russia Files Interstate Complaint Against Ukraine in Strasbourg' (*EJIL:Talk!*, 26 July 2021) < https://www.ejiltalk.org/russia-files-interstate-complaint-against-ukraine-in-strasbourg/> accessed on 10 January 2022.
[492] ICJ, *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Judgment) [1980], ICJ Rep 3, 20.
[493] *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 272, 16 December 2020.
[494] ICJ, *Legality of the Threat of Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 234.
[495] Prebensen (n 11) 454-5.
[496] *Cyprus v. Turkey (IV)* [GC], no. 25781/94, § 67, ECHR 2001-IV.
[497] *Loizidou v. Turkey* [GC] (preliminary objections), 23 March 1995, § 56, Series A no. 310.
[498] Decaux (n 1) 406.

NATO and EU membership and it has been argued that when disputes arise between members and involve multiple interests, weight seems more likely to be accorded to security and economic interests than human rights enforcement.[499]

Notwithstanding all political considerations, the Convention protects human rights and fundamental freedoms through, arguably, the most effective international human rights enforcement mechanism in the world.[500] Inter-State applications offer a unique method to address general situations or practices which are incompatible with the Convention and its employment has ameliorated, to some degree, the human rights situation on the ground; its use should be encouraged.

[499] Coufoundakis (n 335) 471.
[500] Laurence R Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 European Journal of International Law 125, 126.

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