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

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Background paper for seminar Opening of the Judicial Year January 2016[1]

INTERNATIONAL AND NATIONAL COURTS CONFRONTING LARGE-SCALE VIOLATIONS OF HUMAN RIGHTS

- Genocide, Crimes against Humanity and War crimes -

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[1]. This document has been prepared by the Department of the Jurisconsult and does not bind the Court.

Questions for the written contributions on Genocide, Crimes against Humanity and War crimes

1. To what extent does domestic law allow for the adaptation of the obligation to investigate in a large-scale crime/human rights' violation context?
What elements of the investigative obligation have been adapted and in what respects (for example, as regards speed, accessibility to the family, public scrutiny)?
What additional steps have been taken (such as the prioritisation of cases) and what additional resources have been accorded (for example, the creation of additional and dedicated investigation, forensic and victim support units)?

2. What is the domestic law and/or practice, if any, on the provision of information to victims and to the public when an investigation has been launched into allegations of serious and/or large-scale violations of human rights?
Does that law/practice recognize any right of the public, as distinct from that of the victims, to have information about the impugned events and the advancement of the investigations?

3. Is it possible under domestic law to terminate an investigation/prosecution for war crimes, crimes against humanity, genocide and other serious human rights' violations on the grounds that a time-limit has expired? Is it possible to amnesty a person convicted of such crimes?

Contributors are requested to observe the following guidelines:

(i) Contributions should be concise, with a suggested upper limit of 10 pages.

(ii) Please use one of the Court's official languages, English or French.

(iii) Contributions should reach the Court no later than **Monday 18 January**. Please use this e-mail address to the submit contributions: valerie.schwartz@echr.coe.int

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INTRODUCTION

The purpose of this background paper is to illustrate the Convention's response to the particular challenges of large-scale human rights violations and, notably, large-scale crime. To this end, this background paper highlights three aspects of the Court's case-law and practice.

In the first place, Article 5 of the United Nations International Convention for the Protection of all Persons from Enforced Disappearances ("IECD") and Article 7 of the Rome Statute of the international Criminal Court both describe the widespread or systemic practice of enforced disappearance as a crime against humanity. Well before this relatively recent legal definition, the Strasbourg Court tackled the complex subject of large-scale enforced disappearances/missing persons and the related investigations. The case-law emerging on this particular subject demonstrates the range and effectiveness of the Convention's response to allegations of large-scale human rights violations.

The Court has also been called upon, as outlined in the second part of this paper, to directly address other crimes against humanity as well as war crimes and genocide. While this case-law mainly examines the elements of those international crimes in light of the principle of legality of Article 7 of the Convention, the Court has also examined related questions of amnesties for, and prescription of, large-scale human rights violations.

Finally, this paper outlines the particular role of the inter-State case in responding to large-scale human rights violations.

I ENFORCED DISAPPEARANCES, MISSING PERSONS, RELATED INVESTIGATIONS[2]

A disappearance is a distinct phenomenon characterised by an ongoing situation of uncertainty and unaccountability in which there is often a lack of information or deliberate concealment of what has occurred[3]. Connected as it often is to a conflict (hidden or open, past or present), the phenomenon is generally large-scale and the investigations inevitably complex. The Court has examined complaints on these subjects in mainly four contexts. The oldest disappearances date from the 1960s and 1974 as regards the Cypriot conflict[4]. Thereafter the Court has addressed disappearances from zones associated with the Turkish separatist movement in south-east Turkey[5] and during the war in Bosnia and Herzegovina[6]. Finally, the largest number of cases concern enforced disappearances (1999-2006) in Chechnya and Ingushetia[7].

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2. See, in general, "*Disappearance cases before the European Court of Human Rights and the UN Human Rights Committee: Convergences and Divergences*", Helen Keller, Olga Chernishova, vol. 32, no. 7-12 (2012), p. 237-249.

3. *Aslakhanova and Others v. Russia*, nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, § 122, 18 December 2012.

4. *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV; *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 185, ECHR 2009; *Charalambous and Others v. Turkey* (dec.), nos. 46744/07 and al., 3 April 2012; and *Emin v. Cyprus* (dec.), no. 59623/08 et al., 3 April 2012.

5. For example, *Osmanoğlu v. Turkey*, no. 48804/99, 24 January 2008; *Akdeniz v. Turkey*, no. 25165/94, 31 May 2005; *İpek v. Turkey*, no. 25760/94, ECHR 2004-II (extracts); *Akdeniz and Others v. Turkey*, no. 23954/94, 31 May 2001; *Taş v. Turkey*, no. 24396/94, 14 November 2000; *Timurtaş v. Turkey*, no. 23531/94, ECHR 2000-VI; *Ertak v. Turkey*, no. 20764/92, ECHR 2000-V; and *Çakıcı v. Turkey* [GC], no. 23657/94, ECHR 1999-IV.

6. *Palić v. Bosnia and Herzegovina*, no. 4704/04, 15 February 2011; *Lejla Fazlic and Others v. Bosnia and Herzegovina* (dec.), no. 66758/09, 3 June 2014; and *Mujkanović and Others v. Bosnia and Herzegovina* (dec.), no. 47063/08, 3 June 2014.

7. As regards Chechnya see *Imakayeva v. Russia*, no. 7615/02, ECHR 2006-XIII (extracts); *Baysayeva v. Russia*, no. 74237/01, 5 April 2007; and *Aslakhanova and Others v. Russia*, cited above, § 100; as regards Ingushetia *see* *Khatuyeva v. Russia*,

A. Unique admissibility issues arising

The very nature of most disappearance cases – notably, the lapse of time since the alleged event and lengthy investigations - means that the Court has been confronted with unique admissibility issues.

1. Historical crimes and the compatibility ratione temporis of an application

In many cases, the date of the impugned event (enforced disappearances or date an individual went missing) was outside of the Court's temporal jurisdiction. While that would not allow the Court to make a substantive finding on an alleged violation of the right to life, the procedural obligation under that Article is detached from the substantive. The Court's temporal jurisdiction can therefore extend to procedural acts or omissions in the period subsequent to the *temporis* date[8].

However, the procedural obligation would come into effect only if there was a "*genuine connection*" between the triggering event and the entry into force of the Convention. Even if a connection was not "*genuine*", the Court's temporal jurisdiction could still be maintained if needed to ensure that the guarantees and the underlying values of the Convention were protected in a real and effective way (the "*Convention values*" test) [9].

These tests were recently revisited in *Janowiec and Others v. Russia* [GC][10]. This case concerned the alleged failure adequately to account for the fate of over 20,000 Polish officers and others executed by Soviet secret police at Katyń in 1940. The applicant relatives complained under Article 3 of the Convention about the manner in which they had been informed of the fate of the deceased and about a lack of access to investigation documents. Since neither of the criteria for establishing the existence of a "*genuine connection*" had been fulfilled, the Court examined whether the "*Convention values*" test, nevertheless, meant that certain procedural obligations subsisted:

> "150. … the Grand Chamber considers the reference to the underlying values of the Convention to mean that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments."

Nonetheless, the notion of "*Convention values*" had its limits: the Court found that it could not be applied to events which occurred prior to the adoption of the Convention itself, on 4 November 1950, for it was only then that the Convention began its existence as an international human rights treaty. Hence, a Contracting Party could not be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention. While some countries continued to successfully try those responsible for war crimes committed during the Second World War, there was a difference between having the opportunity of prosecuting an individual for a serious crime under international law and being obliged to do so by the Convention.

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no. 12463/05, 22 April 2010; *Mutsolgova and Others v. Russia*, no. 2952/06, 1 April 2010; and *Velkhiyev and Others v. Russia*, no. 34085/06, 5 July 2011.

8. Šilih v. Slovenia [GC], no. 71463/01, 9 April 2009; and *Varnava and Others v. Turkey* [GC], cited above, § 136.

9. Šilih v. Slovenia [GC], cited above.

10. *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, ECHR 2013.

2. *When to make a complaint about protracted investigations*

Once that procedural obligation comes into effect, as a rule it lasts as long as the whereabouts and fate of the missing persons were unaccounted for[11]. However, in a number of cases concerning long investigations into missing relatives, the Court has examined the period of time from which the applicant could or should start doubting the effectiveness of a continuing investigation and its bearing on the six-month time-limit provided for in Article 35 § 1 of the Convention.

The Court has found that, where disappearances are concerned, applicants cannot wait indefinitely before coming to Strasbourg[12]. With the lapse of time, memories fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, the prospects that any effective investigation can be undertaken will increasingly diminish and the Court's own examination and judgment may be deprived of meaningfulness and effectiveness. Applicants must therefore prove a certain amount of "*diligence*" and introduce their complaints without undue delay. The following passage from the *Varnava and Others v. Turkey* [GC][13] indicates what this involves:

> "Nonetheless, the Court considers that applications can be rejected as out of time in disappearance cases where there has been excessive or unexplained delay on the part of applicants once they have, or should have, become aware that no investigation has been instigated or that the investigation has lapsed into inaction or become ineffective and, in any of those eventualities, there is no immediate, realistic prospect of an effective investigation being provided in the future. Where there are initiatives being pursued in regard to a disappearance situation, applicants may reasonably await developments which could resolve crucial factual or legal issues. Indeed, as long as there is some meaningful contact between families and authorities concerning complaints and requests for information, or some indication, or realistic possibility, of progress in investigative measures, considerations of undue delay will not generally arise. However, where there has been a considerable lapse of time, and there have been significant delays and lulls in investigative activity, there will come a moment when the relatives must realise that no effective investigation has been, or will be provided. When this stage is reached will depend, unavoidably, on the circumstances of the particular case."

In *Varnava and Others*, the Court concluded that, by the end of 1990, it must have been apparent that the mechanisms set up to deal with disappearances in Cyprus no longer offered any realistic hope of progress in either finding bodies or accounting for the fate of the missing in the near future[14].

In the *Palić v. Bosnia and Herzegovina* case[15], the applicant's husband (a military commander in the ARBiH forces[16]) had been missing since 1995. His remains were exhumed and identified fourteen years later. Two suspects had been identified but had evaded prosecution. As to the six-month time-limit, the judgment distinguished the *Varnava and Others* case, finding that Mrs *Palić* could still realistically expect that an effective investigation would be carried out when she lodged her application in 2004, so that she had acted with reasonable expedition for the purposes of the six-month rule.

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11. *Cyprus v. Turkey* [GC], cited above, and *Varnava and Others v. Turkey* [GC], cited above. Later decisions reiterated these findings, stressing the lasting nature of procedural obligations in disappearance cases, including *Palić v. Bosnia and Herzegovina*, cited above; and *Tashukhadzhiyev v. Russia*, no. 33251/04, 25 October 2011.
12. See *Varnava and Others v. Turkey* [GC], cited above, § 161.
13. *Varnava and Others v. Turkey* [GC], cited above, § 165.
14. The Court has since rejected cases as out of time because there was no evidence of any activity post-1990 which could have provided to the applicants some indication, or realistic possibility, of progress in investigations in relation to the disappearance of their relatives (eg. *Charalambous and Others v. Turkey* (dec.), nos. 46744/07 and al., 1 June 2010).
15. *Palić v. Bosnia and Herzegovina*, cited above, § 70.
16. Army of the Republic of Bosnia and Herzegovina

3. *Re-igniting the investigation*

Even if the disappearance dates and even if the investigation has been at a standstill for a long time, it is, however, possible that a new development occurs (for example, the discovery of a body) such that a fresh obligation to investigate arises. However, the scope of this fresh obligation will depend on the nature of the new evidence or information[17]. The applicants in *Gürtekin and Others v. Cyprus* (dec.)[18] were relatives of men who had disappeared during the conflicts in Cyprus in 1963-1964. The fresh obligation to investigate might be restricted, the Court stated, to verifying the reliability of the new evidence and the authorities could legitimately take into account the prospects of launching a new prosecution at such a late stage.

B. Solutions for resolving complex factual disputes

A common feature of disappearance cases is the absence of conclusive domestic findings, the parties continuing to dispute the facts before the Court against an often sensitive and complex backdrop.

In early cases, the Convention bodies often substituted themselves, through fact-finding missions, for the domestic authorities and resolved factual conflicts[19]. Following Protocol 11 and the increase in the Court's caseload, the use of fact-finding missions fell away. The need for other fact-finding solutions was particularly acute in disappearance cases, there having been an increase in such cases since 1998. Since fact-finding would involve significant resources and prolong the procedure in serious cases, other adjudicatory techniques were developed, which solutions found a particular application in disappearance cases.

1. *Distributing the burden of proof*

In cases, for example, of alleged disappearances caused by State agents in the Northern Caucasus, the Court found that it would be sufficient for the applicants to make a *prima facie* case of abduction of the missing persons by State agents, thus falling within the control of the authorities. It would then be for the Government to discharge that burden of proof, either by disclosing the documents in their exclusive possession or by providing a satisfactory and convincing explanation of how the events in question occurred[20]. If the Government fail to rebut this presumption, that would entail a violation of Article 2 in its substantive part. Conversely, where the applicants failed to make a *prima facie* case, the burden of proof could not be reversed[21].

2. *Presumptions and inferences*

(a) PRESUMED DEAD

Once the Court has established that a person was detained by unidentified police officers, in a conflict or dangerous context, without any subsequent acknowledgment of the detention and that person is then missing for several years without any reliable news, that situation can be regarded as

[17]. *Brecknell v. the United Kingdom*, no. 32457/04, §§ 73-75, 27 November 2007.
[18]. *Gürtekin and Others v. Cyprus* (dec.), nos. 60441/13, 68206/13 and 68667/13, §§ 21-22, 11 March 2014.
[19]. The Commission investigated large-scale human rights abuses in Turkey in the 1980s/1990s on about fifty occasions. See, in general, "*Investigatory powers of the European Court of Human Rights*" Michael O'Boyle, Natalia Brady, 4 EHRLR (2013), 378-391.
[20]. For example, *Umarovy v. Russia*, no. 2546/08, 12 June 2012; *Aslakhanova and Others v. Russia*, cited above.
[21]. *Shafiyeva v. Russia*, no. 49379/09, § 71, 3 May 2012

life-threatening[22]. The Court has presumed a missing person is dead in the absence of any reliable news for periods of four years[23] to more than ten years[24].

(b) INFERENCES DRAWN FROM A FAILURE BY THE STATE TO CO-OPERATE

In a series of cases against Russia concerning anti-terrorist operations in Chechnya, the Court has had recourse, for example, to another inference in order to make findings of fact. The case of *Imakayeva v. Russia*[25] concerned the disappearance of the applicant's husband in Chechnya. She presented evidence that he had been detained by the authorities. Having at first denied that he had been so detained, the Government then acknowledged his detention on suspicion of involvement in a terrorist organisation but it would not provide any document or disclose any details of the investigation, on the basis that the case-file contained State secrets. The Court found a violation of Article 38 of the Convention and drew inferences of fact from that violation for the purposes of the substantive and procedural violations alleged by the applicant.

C. Adapting the investigative obligations to large-scale disappearances

1. Differing investigation obligations in the case of historical disappearances

The Court has accepted that the obligation of investigative expedition in such historical cases can be quite different from the standard applicable to recent incidents. The decision in *Gürtekin and Others v. Cyprus* (dec.)[26] explained as follows (disappearances in Cyprus in 1963-1964):

> "21 … The standard of expedition in such historical cases is much different from the standard applicable in recent incidents where time is often of the essence in preserving vital evidence at a scene and questioning witnesses when their memories are fresh and detailed.
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> 22. The extent to which the other requirements of an adequate investigation - effectiveness, independence, accessibility to the family and sufficient public scrutiny - apply will again depend on the particular circumstances of the case …. While what reasonably can be expected by way of investigative measures may well be influenced by the passage of time as stated above, the criterion of independence will, generally, remain unchanged … Finally, it must be noted in general that with a considerable lapse of time since an incident, memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and the prospects of any effective investigation leading to the prosecution of suspects will increasingly diminish…"

2. Differing investigation obligations given the conflict context

The Court accepts that the Article 2 investigative obligation can also be adapted in other contexts, such as when the investigation takes place in a conflict context[27] or takes place after a conflict but concerns a wartime death[28]. This ability to modulate the investigative obligation has had a particular application in the missing persons' cases against Bosnia and Herzegovina.

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[22]. For example, *Yandiyev and Others v. Russia*, nos. 34541/06, 43811/06 and 1578/07, 10 October 2013; and *Dovletukayev and Others v. Russia*, nos. 7821/07, 10937/10, 14046/10 and 32782/10, 24 October 2013.

[23]. *Askhabova v. Russia*, no. 54765/09, § 137, 18 April 2013. More recently, 5 years in *Abdurakhmanov and Abdulgamidova v. Russia*, no. 41437/10, 22 September 2015.

[24]. *Kaykharova and others v. Russia*, nos. 11554/07, 7862/08, 56745/08 and 61274/09, 1 August 2013.

[25]. *Imakayeva v. Russia*, no. 7615/02, ECHR 2006-XIII (extracts).

[26]. *Gürtekin and Others v. Cyprus* (dec.).

[27]. *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011; and *Jaloud v. the Netherlands* [GC], no. 47708/08, ECHR 2014.

[28]. See the principles adopted in *Jelić v. Croatia*, no. 57856/11, 12 June 2014, recently applied in *B. and Others v. Croatia*, no. 71593/11, 18 June 2015.

The *Palić v. Bosnia and Herzegovina* case[29], referred to above, was the first disappearance case where the State was found to have fulfilled its obligations even in the face of a long-standing disappearance. As to the speed of the investigation, the judgment analysed the situation in Bosnia and Herzegovina after the war, finding that the domestic legal system was not capable of dealing with disappearance cases until 2005:

> "… The Court takes into account the complex situation in Bosnia and Herzegovina, notably in the first ten years following the war. In such a post-conflict situation, what amounts to an impossible and/or disproportionate burden must be measured by the very particular facts and context. In this connection, the Court notes that more than 100,000 people were killed, almost 30,000 people went missing and more than two million people were displaced during the war in Bosnia and Herzegovina. Inevitably choices had to be made in terms of post-war priorities and resources. Furthermore, after a long and brutal war, Bosnia and Herzegovina underwent a fundamental overhaul of its internal structure and political system: Entities and Cantons were set up pursuant to the Dayton Peace Agreement, power-sharing arrangements were introduced in order to ensure effective equality between the "constituent peoples" in the post-conflict society …, new institutions had to be created and the existing ones had to be restructured. Some reluctance on the part of the former warring parties to work with those new institutions could be expected in the post-war period, as evidenced in the present case. While it is difficult to pinpoint when exactly this process ended, the Court considers that the domestic legal system should have become capable of dealing effectively with disappearances and other serious violations of international humanitarian law by 2005, following comprehensive vetting of the appointment of police and judiciary and the establishment of the War Crimes Sections within the Court of Bosnia and Herzegovina …".

The Court also noted with approval the measures taken since 2005. These included the creation of the War Crimes Section of the Court of Bosnia and Herzegovina and the adoption of the National War Crimes Strategy which defined the time-frames, capacities, criteria and mechanisms for managing war crimes cases. As to the particular steps taken in the applicant's case, the remains of Mr Palić had been identified and an independent and effective criminal investigation into his disappearance/death had been carried out. If those responsible had not been punished, this was for objectively justifiable reasons. Taking into account the special circumstances prevailing up until 2005, the steps taken thereafter and the circumstances of the case, there had been no violation of Article 2 of the Convention.

In later cases, the key question of whether the authorities had done all that could reasonably be expected of them was also answered in the affirmative, even in *Lejla Fazlić and Others v. Bosnia and Herzegovina and 4 Others applications* (dec.) where the remains of the missing persons had not been found[30]. A further positive example is the case of *Nježić and Štimac v. Croatia*[31], in which the Court accorded particular weight to the national efforts aimed at alleviating the suffering of the victims' families.

3. *Has a right to the truth emerged from the recognition of the unique suffering of close relatives of missing persons?*[32]

As already noted, a disappearance is a distinct phenomenon, characterised by unique suffering which can give rise to a violation of Article 3 in respect of close relatives of the victim. The essence of the

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[29]. *Palić v. Bosnia and Herzegovina*, cited above, § 70.

[30]. *Lejla Fazlić and Others v. Bosnia and Herzegovina and 4 Others applications* (dec.), nos. 66758/09, 66762/09, 7965/10, 9149/10 and 12451/10, § 37, 3 June 2014. See also *Mujkanović and Others v. Bosnia and Herzegovina* (dec.), cited above.

[31]. *Nježić and Štimac v. Croatia*, no. 29823/13, 9 April 2015.

[32]. See, in general, "*The right to the Truth in International law: origins and Definitions*", Olga Chernishova, to be published in 2016 in a book of essays in honour of Michael O'Boyle "*The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Legal Developments since McCann v. the United Kingdom*"

violation concerns less the fact of the "*disappearance*" of the family member but rather the authorities' reactions and attitudes to the situation when it is brought to their attention[33].

This focus on the attitude of the authorities in responding to victims' suffering has led to the emergence of a limited form of right to the truth for victims, a right which has, arguably, recently taken on a public dimension. This development took place, notably, in cases of large-scale human rights violations having a significant political and societal impact.

(a) AS PART OF THE VICTIM-ORIENTATED INVESTIGATION OBLIGATION

The obligation to carry out an effective investigation includes a key requirement to effectively involve the victim or the next-of-kin.

In the case of large-scale violations, this right has been interpreted as having a collective dimension. The case of *Association "21 December 1989" and Others v. Romania*[34] concerned numerous deaths and injuries sustained during the violent crackdown on demonstrations in 1989 in Bucharest. The Court noted the importance of the investigations for Romanian society "*which consisted in the right of the numerous victims to know what had happened, implying the right to an effective judicial investigation and a possible right to compensation*".

This found a particular resonance in missing persons' cases, as demonstrated by the Court's oft-cited statement in *Varnava and Others v. Turkey* [GC]:

> "… need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so."[35]

More recently, in a war-time missing persons' case, the Court emphasized:

> "the importance of the right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the right to life"[36].

In *Aslakhanova and Others v. Russia*[37], a case about systematic non-investigation of disappearances in the Northern Caucasus, the Court suggested general measures typical of truth-finding, such as the setting up a single body for the collection of information and dialogue with the victims' families.

(b) SOME RECOGNITION OF A PUBLIC DIMENSION TO THE RIGHT TO TRUTH?

The first mention by the Grand Chamber of a possible public dimension of the right to truth was in *Janoweic and others v. Russia*[38]. The Court found a breach of the obligation to cooperate with the Court under Article 38. It criticised the Russian courts' acceptance of the relevant documents as secret on formal grounds and the absence of:

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33. *Orhan v. Turkey*, no. 25656/94, § 358, 18 June 2002; and *Imakayeva v. Russia*, cited above, § 164. The Court does not accord the same acknowledgement of suffering in a killings context, where it is not considered that the applicant sustains the uncertainty, anguish and distress characteristic of the specific phenomenon of disappearances (*Jelić v. Croatia*, cited above).
34. *Association "21 December 1989" and Others v. Romania*, nos. 33810/07 and 18817/08, § 144, 24 May 2011. See also *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, ECHR 2014 (extracts).
35. *Varnava and Others v. Turkey* [GC], cited above, § 185.
36. *Lejla Fazlić and Others v. Bosnia and Herzegovina and 4 Others applications* (dec.), cited above, § 38.
37. *Aslakhanova and Others v. Russia*, nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, 18 December 2012.
38. *Janowiec and Others v. Russia* [GC], cited above, § 214.

> "… a balancing exercise between the alleged need to protect the information owned by the Federal Security Service, on the one hand, and the public interest in a transparent investigation into the crimes of the previous totalitarian regime and the private interest of the victims' relatives in uncovering the circumstances of their death, on the other hand".

In the recent "*extraordinary rendition*" case of *El-Masri v. the former Yugoslav Republic of Macedonia* [GC][39], the applicant was a German citizen of Lebanese origin. He complained that he had been illegally detained and ill-treated in Skopje and then in a secret detention centre operated by the CIA in Afghanistan. The Grand Chamber found that the respondent State was responsible for the applicant's ill-treatment, both on its own territory and after his extra-judicial transfer. The Court's judgment acknowledged, with reference to the IECD, that the applicant's detention should be qualified as a "*disappearance*" and that his ill-treatment had reached the threshold of torture. In its conclusion on a breach of the procedural aspect of Article 3, the Court stressed, especially in view of the worldwide attention drawn to the phenomenon of renditions, the:

> "… great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened".

The next rendition cases concerned Messrs Husayn and Al-Nashiri[40] a stateless Palestinian and a citizen of Saudi Arabia, respectively, who were seized in 2002 and, after a series of transfers between secret locations in different countries, detained for several months in Poland. The Court had enough elements to conclude that there existed a secret agreement between the US and Poland which allowed the organisation of flights, transfers and detention of individuals outside the usual formalities, that Poland was aware of the nature of treatment and therefore bore responsibility for the applicants' situation. In both judgments, the Court admitted that the "*Polish public has a legitimate interest in being informed of the investigation and its results*". It also stressed the importance of democratic oversight over intelligence services and expressed concerns whether the Polish legal order contained "*appropriate safeguards – both in law and in practice – against intelligence services violating Convention rights, notably in the pursuit of their covert operations*"[41].

4. *Article 46 of the Convention in large-scale disappearance cases*

The case-law concerning enforced disappearances from the Northern Caucasus provides guidance on ordering general measures under Article 46, in addition to the payment of just satisfaction under Article 41 of the Convention. In many of the earlier cases, the Court had found that the common shortcomings identified had rendered the relevant criminal investigation and, consequently, the domestic remedies available to the victims, ineffective[42] but it did not initially address the question of making orders under Article 46 even when the matter was specifically argued before it[43].

When *Aslakhanova and Others v. Russia*[44] was examined, the Court had already made over 100 findings about a lack of proper investigations into allegations of disappearances. The Court

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39. *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 191, ECHR 2012.
40. *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, 24 July 2014; and *Al-Nashiri v. Poland*, no. 28761/11, 24 July 2014.
41. These principles were recently relied upon by the International Advisory Panel on Ukraine in its 'Report on the Maidan investigations' of 31 March 2015 (http://www.coe.int/fr/web/kyiv/iap-press-releases-and-briefings/-/asset_publisher/lEViPSzK0VlZ/content/presentation-by-sir-nicolas-bratza-of-the-panel-s-maidan-report-at-the-press-conference-of-31-march-2015?inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2Ffr%2Fweb%2Fkyiv%2Fiap-press-releases-and-briefings%3Fp_p_id%3D101_INSTANCE_lEViPSzK0VlZ%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1).
42. *Vakhayeva and Others v. Russia*, no. 1758/04, 29 October 2009; *Shokkarov and Others v. Russia*, no. 41009/04, 3 May 2011; and *Umarova and Others v. Russia*, no. 25654/08, 31 July 2012.
43. *Alikhadzhiyeva v. Russia*, no. 68007/01, 5 July 2007.
44. *Aslakhanova and Others v. Russia*, cited above.

acknowledged the systemic nature of the problem for which there was no effective domestic remedy. Since it affected core human rights and required prompt and comprehensive measures, the Court provided some guidance under Article 46 of the Convention and, notably, indicated two groups of measures to be taken in order to comply with the judgment.

The first group of measures ordered was designed to relieve the suffering of the victims' families including the creation of a single sufficiently high-level body in charge of solving disappearances in the region and the provision of adequate resources to carry out large-scale forensic and scientific work as well as compensation for families with a clear admission of responsibility for the families suffering within the meaning of Article 3 of the Convention. The second group of measures concerned the need to carry out an effective investigation. The Court underlined that the continuing obligation to investigate remained in force even if the humanitarian aspect of the case under Article 3 (suffering of families) had been resolved and even if the Government was conducting a complex anti-terrorist operation in the region. Most notably, the Court detailed the various aspects of the future investigations in order to be effective including the need for a comprehensive and concentrated effort with a time bound strategy, the need for useful access to relevant data of military and security agencies as well as the need for access of victims to the investigation case-file.

II. CRIMES AGAINST HUMANITY, WAR CRIMES AND GENOCIDE IN THE COURT'S CASE-LAW

A. Article 7 "No punishment without law"

Article 7 incorporates the principle of legality according to which a person should only be convicted on the basis of law, which includes the prohibition of the retroactive application of the criminal law. The essential question is whether convictions for such crimes were, at the relevant times, based in law and, more particular, could be considered to have been foreseeable by the applicant at the time he or she had carried out the impugned acts.

1. What constitutes a sufficiently clear legal basis for the conviction?

Complaints under Article 7 about a conviction based on international law require the Court to examine the substantive content and application of that law by the domestic courts to determine whether there was a sufficiently certain legal basis for conviction.

***Kolk and Kislyiy v. Estonia*[45] (crimes against humanity, 1949)**

The Court noted that the deportation of a civilian population had been expressly recognised as a crime against humanity in the Charter of the Nuremberg Tribunal of 1945. Although the Nuremberg Tribunal had been established for a specific purpose, the universal validity of the principles concerning crimes against humanity had been subsequently confirmed by, *inter alia*, Resolution No. 95 of the General Assembly of the United Nations adopted in 1946.

Even if the acts committed by the applicants could have been regarded as lawful under Soviet law at the material time, they were found by the Estonian courts to constitute crimes against humanity under international law at the time of their commission. The Court found no reason to call into question the Estonian courts' interpretation and application of domestic law done in the light of the

[45]. *Kolk and Kislyiy v. Estonia* (dec.), nos. 23052/04 and 24018/04, ECHR 2006-I.

relevant international law. The applicant's conviction was considered foreseeable within the meaning of Article 7 of the Convention[46].

***Kononov v. Latvia* [GC] (war crimes, 1944)[47]**

The issue under Article 7 was whether there was a sufficiently clear legal basis in 1944 on which to base the applicant's conviction for war crimes. Certain persons in a village in Latvia were said to have denounced a group of Russian partisans hiding in one of their barns to the German occupying force. The Russian group was killed by German soldiers, following which the applicant's unit of Russian partisans killed certain villagers.

The Court reviewed the legal status of the applicant and the villagers (combatants, civilian etc) and pronounced on the question of the existence of individual criminal responsibility for war crimes in 1944 before concluding that there was indeed a clear and contemporary legal basis in international law for the applicant's conviction and punishment for war crimes as commander of the unit.

2. *Foreseeability: the relevance of the nature of the impugned acts?*

The inherently objectionable nature of the impugned acts (when measured against fundamental concepts of human rights and dignity) is a relevant factor in determining the foreseeability of criminal liability.

K.-H.W. v. Germany [GC][48] (multiple homicides, 1971-1979)

The Court found that an individual junior border guard, who shot unarmed persons crossing the border (Berlin wall), could not rely on blind obedience or even the attitude of the regime in favour of acts where those acts nonetheless flagrantly breached legal principles and internationally protected human rights and, notably, the supreme right in the hierarchy of human rights, the right to life.

***Kononov v. Latvia* [GC] (war crimes, 1944)[49]**

In responding to the applicant's suggestion that his conviction for war crimes was unforeseeable and despite the fact that the Latvian Criminal Code did not contain any explicit reference to the international laws and customs of war and even though those laws and customs had not been published in the USSR or in the Latvian SSR, the Court underlined that the impugned acts were of a such a "*flagrantly unlawful nature*" that even the most cursory of reflection by the applicant would have indicated that, at the very least, he risked prosecution for war crimes.

3. *Foreseeability: when there is no established interpretation of the elements of the offence*

***Jorgic v. Germany*[50] (genocide, mid-1992)**

The applicant was convicted of murder and genocide as regards, *inter alia*, the ill-treatment and killing of Muslims in Bosnia and Herzegovina in May-September 1992. The conviction was based on an interpretation of the crime of genocide to the effect that it was sufficient to show that he

46. See also *Penart v. Estonia* (dec.), no. 14685/04, 24 January 2006.
47. *Kononov v. Latvia* [GC], no. 36376/04, ECHR 2010.
48. *K.-H.W. v. Germany* [GC], no. 37201/97, ECHR 2001-II (extracts).
49. *Kononov v. Latvia* [GC], cited above.
50. *Jorgic v. Germany*, no. 74613/01, ECHR 2007-IX.

intended to destroy a group of Muslims as a distinct social unit. He complained under Article 7 that this interpretation of the crime of genocide had no basis in German or international law at the time.

While the Court found that the majority of scholars favoured a narrower interpretation of the offence (destruction in a physical sense), a considerable number supported the broader interpretation (relied upon by the domestic courts). While the ICTY[51] disagreed with the broader interpretation of the domestic courts, the ICTY cases were decided after the commission of the relevant offences. Accordingly, with the assistance of legal advice, Mr Jorgic could reasonably have foreseen that, despite the varying doctrinal views and jurisprudence, he risked being charged with, and convicted of, genocide for his acts.

4. Foreseeability and the evolved interpretation of the law by a new regime

The Court considers it legitimate and foreseeable for a successor State to bring criminal proceedings against persons who have committed crimes under a former regime and that the successor courts cannot be criticised for applying and interpreting the legal provisions, in force at the material time during the former regime, in the light of the principles governing a State subject to the rule of law and having regard to the core principles on which the Convention system is built. It is especially the case when the matter at issue concerns the right to life, a supreme value in the Convention and international hierarchy of human rights and which right Contracting parties have a primary Convention obligation to protect.

These principles have been applied, for example, to the change of regime following the collapse of the Berlin wall and the GDR in 1989 and the reunification of Germany in 1990[52] as well as to the change of regime following the declarations of independence in the Baltic States in the early 90s[53].

5. Later and more lenient criminal law must be applied retroactively

The general principal of legality includes the principle that the criminal law must not be extensively construed to an accused's detriment and that intervening more lenient criminal law must be applied retroactively[54].

***Maktouf and Damjanović v. Bosnia and Herzegovina* [GC][55] (war crimes, 1991-1995)**

The applicants were convicted of war crimes against civilians during the 1992-1995 war. They did not dispute the lawfulness of their convictions for war crimes but they contested their sentences arguing that the 2003 Criminal Code had been retroactively applied to them resulting in heavier sentences than if the 1976 Criminal Code had been applied.

The Court noted that, since there was a real possibility that the retroactive application of the 2003 Code had operated to the applicants' disadvantage as regards sentencing, it could not be said that they had been afforded effective safeguards against the imposition of a heavier penalty. Accordingly, there had been a violation of Article 7 in the particular circumstances of the applicants' cases, the Court emphasising that that conclusion did not indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 Code should have been applied.

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51. Cases of *Prosecutor v. Krstić*, IT-98-33-T and IT-98-33-A) and *Prosecutor v. Kupreškić and Others*, IT 95 16-T.
52. *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II, and *K.-H.W. v. Germany* [GC].
53. For example, *Kuolelis and Others v. Lithuania*, nos. 74357/01, 26764/02 and 27434/02, § 117, 19 February 2008; *Kononov v. Latvia* [GC], § 241.
54. *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 109, 17 September 2009.
55. *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, ECHR 2013 (extracts).

6. *When the European Court has departed from the national courts' interpretation*

***Korbely v. Hungary* [GC][56] (crimes against humanity, 1956)**

The Court was required to examine whether the relevant act was capable of amounting to a crime against humanity as that concept was understood in 1956 including whether it could reasonably be said that the victim was a person who was "*taking no active part in the hostilities*" within the meaning of common Article 3 of the Convention.

The Court found that the victim could not be said to have expressed an intention to surrender or to have laid down his arms within the meaning of common Article 3 of the Geneva Conventions so that he did not fall within any of the categories of non-combatants protected by common Article 3. Departing from the domestic courts' analysis, the Court found that the applicant's conviction for crimes against humanity could not reasonably be based on common Article 3 in the light of the international standards applicable in 1956 and was not therefore foreseeable.

***Vasiliauskas v. Lithuania* [GC][57] (genocide, 1953)**

In 2004 the applicant was convicted of genocide concerning his participation in the killing of two Lithuanian partisans during a military operation in 1953, which operation was part of the suppression of the partisan movement by the Soviet authorities. The applicant complained under Article 7 that his conviction had no basis in law in 1953. The Grand Chamber was required to pronounce for the first time on whether the persecution, following the Second World War, of Baltic partisans by the Soviet authorities constituted genocide. It concluded as to a violation finding that the Lithuanian partisans were neither a group nor part of a group protected by international law (conventional or customary) on genocide as understood in in 1953.

B. Amnesties/prescription and serious/large-scale human rights violations

1. *Amnesties for grave breaches of human rights*

The Court was required, in the case of *Marguš v. Croatia* [GC][58], to pronounce on the acceptability under international law of granting amnesties for grave breaches of human rights law. The applicant, a member of the Croatian army, was indicted for murder and other serious offences committed in 1991 during the war in Croatia. While some of the charges were dropped, he was amnestied as regards the others. He was later convicted of war crimes in a parallel set of proceedings. The applicant complained, *inter alia*, under Article 4 of Protocol No. 7 of a violation of his right not to be tried twice for the same acts.

The Court considered that, while the applicant had been prosecuted twice for the same offences, the Article was not applicable because the applicant had been improperly granted an amnesty for acts that amounted to grave breaches of fundamental human rights protected by Articles 2 and 3 of the Convention. The Court found that the growing tendency in international law was to see such amnesties as unacceptable because they were incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties were possible in particular circumstances (for example, a reconciliation process), there was nothing to indicate that any such circumstances obtained in that case. Accordingly, by bringing a fresh indictment against the applicant and convicting him of war

[56]. *Korbely v. Hungary* [GC], no. 9174/02, ECHR 2008.
[57]. *Vasiliauskas v. Lithuania* [GC], no. 35343/05, 20 October 2015.
[58]. *Marguš v. Croatia* [GC], no. 4455/10, ECHR 2014 (extracts).

crimes against the civilian population, the Croatian authorities acted in compliance with the obligations flowing from Articles 2 and 3 of the Convention.

2. *The prescription of investigations into large-scale crime*

The Court has often addressed the application of national statutes of limitations to investigations of grave and large-scale violations of human rights.

In the case of *Aslakhanova and Others v. Russia*[59], for example, the statute of limitations had been applied to the bulk of investigations into abductions committed prior to 2007. The Court found that, bearing in mind the seriousness of the crimes, the large number of persons affected and the relevant legal standards applicable to such situations in modern-day democracies, the termination of pending investigations into abductions solely on the grounds that the time-limit had expired was contrary to the obligations under Article 2 of the Convention. The Court also noted that there was little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events, since the public interest in obtaining the prosecution and conviction of perpetrators was firmly recognised, particularly in the context of war crimes and crimes against humanity[60].

C. *Establishing historical facts and their legal characterisation*

The Court has also been called upon, in responding to complaints about convictions for statements about large-scale historical events, to pronounce on what are and are not established historical facts and on how those facts are to be characterised.

Two approaches are possible depending on the nature of the expression. The first is to acknowledge the historical fact and the crime and to exclude its denial from Convention protection altogether by way of Article 17 of the Convention (exclusively invoked to date in Article 10 cases). The second is to treat that Article 17 aspect as an element of, or similar to, the issue at stake under the second paragraph of Article 10 of the Convention.

1. *Article 17 of the Convention*

The former Commission's approach, when dealing with applicants punished for denying the Holocaust, was to find their complaints under Article 10 manifestly ill-founded, taking Article 17 into account in so doing[61]. The new Court continued along these lines[62]. Two later Chamber cases[63] applied Article 17 to statements denying the Holocaust, before the Court returned in 2011[64] to the earlier approach of taking Article 17 into account in the Article 10 analysis.

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59. *Aslakhanova and Others v. Russia*, cited above.
60. Citing *Brecknell v. the United Kingdom*, cited above; and *Association "21 December 1989" and Others v. Romania*, cited above. See also *Janowiec and Others v. Russia* [GC], cited above.
61. Eg. *Walendy v. Germany*, no. 21128/92, Commission decision of 11 January 1995, DR 80-A, p. 94; *Marais v. France*, no. 31159/96, Commission decision of 24 June 1996, DR 86-B, p. 184; *Nachtmann v. Austria*, no. 36773/97, Commission decision of 9 September 1998, unreported.
62. *Lehideux and Isorni v. France*, 23 September 1998, Reports of Judgments and Decisions 1998-VII, and *Witzsch v. Germany* (no. 1) (dec.), no. 41448/98, 20 April 1999.
63. *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX (extracts), and *Witzsch v. Germany* (no. 2) (dec.), no. 7485/03, 13 December 2005.
64. *Gollnisch v. France*, no. 48135/08, 07 June 2011.

The earlier approach of the Commission appears to be reflected in the most recent assessment of the application of Article 17 by the Grand Chamber in the *Perinçek v. Switzerland* [GC] case[65], which case concerned the applicant's criminal conviction for statements he made about the massacre and deportation of Armenians by the Ottoman Empire in 1915 and in the following years. Relying on the statement in *Paksas v. Lithuania* [GC][66] that Article 17 should only apply "*on an exceptional basis and in extreme cases*", the Grand Chamber found that the key issues under Articles 17 and 10 § 2 overlapped, so that the Article 17 issue had to be joined to the merits of those under Article 10. Since the Court went on to find a violation of Article 10 (see immediately below), there were no grounds to apply Article 17 of the Convention.

Subsequently, the Court applied Article 17 in the case of *Dieudonné M'Bala M'Bala v. France*[67]. The impugned expression was considered negationist and to constitute hate speech and anti-Semitism, all disguised as an artistic production. Seeking, as the applicant did, to use his right to freedom of expression for anti-Convention ends, the Court applied Article 17 to exclude his expression from the protection of the Convention altogether.

2. Article 10 of the Convention

In the above-mentioned *Perinçek* case[68] the Grand Chamber (as did the Chamber) found a violation of Article 10 of the Convention. In so doing, it clarified that its role was not to examine whether the criminalisation of genocide denial was, in principle, justified. Neither was its role to establish the facts about the persecution of Armenians by the Ottoman Empire, to determine whether those events should attract the legal qualification of genocide or to decide whether the relevant statements constituted genocide denial. Rather, the salient question was whether the applicant's statements, read as a whole and in their context, could be seen to amount to a call to violence, hatred or intolerance. Following the analysis of a number of identified factors, the Court concluded that the applicant's expression should not be interpreted as a call to violence etc, so that his criminal conviction was not a proportionate response to the need to protect the rights of the Armenian community at stake.

IV. THE ROLE OF INTER-STATE CASES AS REGARDS LARGE-SCALE HUMAN RIGHTS VIOLATIONS

A. Renewed recourse to the inter-State case?[69]

The inter-State case was the only mandatory aspect of the Convention process at the outset, an indication of the importance accorded to this process in the maintenance of public order in Europe[70]. If the early inter-State cases involved groups of States operating a form of public order or policing role[71], the most common inter-State case has been, and remains, those cases where the applicant

[65]. *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015.
[66]. *Paksas v. Lithuania* [GC], no. 34932/04, ECHR 2011.
[67]. *Dieudonné M'bala M'Bala v. France* (dec.), no 25239/13, 20 October 2015.
[68]. *Perinçek v. Switzerland* [GC], cited above.
[69]. See the address of President Dean Spielmann to Gray's Inn, London on 7 November 2014 "*The ECHR as a guarantor of a peaceful public order in Europe*"
[70]. *Austria v. Italy*, no. 788/60, decision of 11 January 1961, Yearbook 4, p. 116; and *Loizidou v. Turkey (merits)*, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI.
[71]. For example, the applications by *Denmark, Norway, Sweden and the Netherlands v. Greece* ("*the Greek case*" – applications nos. 3321/67, 3322/67, 3323/67 and 3344/67, Committee of Ministers Resolution of 15 April 1970) about a

State is closely connected to and represents a group of persons in the context of alleged large-scale violations of the Convention[72], this being highlighted by the recent inter-State applications introduced by Georgia[73] and Ukraine[74] against Russia.

In parallel with this form of inter-State case, 1000s of individual applications are pending before the Strasbourg court on similar issues[75].

Finally, there are many "*quasi inter-State cases*" namely, individual applications which concern and highlight large-scale human rights violations set against a backdrop of often similar and sensitive inter-State issues[76], with States often intervening as third parties.

B. The limited admissibility requirements on the applicant State

The text of Article 35 makes it clear that the only admissibility requirements applicable to inter-State cases are the six-month rule and the rule concerning exhaustion of domestic remedies.

The Court has therefore consistently refused to reject an inter-State case on grounds that it is, for example, "*substantially the same*"[77] or manifestly ill-founded[78]. This does not prevent the Court from establishing already at the admissibility stage, under general principles governing the exercise of jurisdiction by international tribunals, the compatibility (ratione *loci*, *materiae*, *personae* and *temporis*) of the application and whether it has any competence at all to deal with the matter laid

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series of administrative and legislative measures after the military coup in 1967. Weeks after an extensive Commission Report, the Greek Government denounced the Convention whilst the Commission Report was in front of the Committee of Ministers, following which a new Government ratified the Convention again in 1974. The new Government furnished information to the Commission about remedies available to victims of the former regime so the proceedings were closed. See also *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, applications nos. 9940-9944/82, Commission decision of 6 December 1983.

[72]. *Greece v. the United Kingdom* (dec.), no. 176/56, 2 June 1956; *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25; and the cases concerning Turkish military operations in northern Cyprus (*Cyprus v. Turkey* [GC], cited above, and *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, ECHR 2014).

[73]. The cases by Georgia against Russia: *Georgia v. Russia (I)* [GC], no. 13255/07, ECHR 2014 (extracts), concerning arrest and deportation from Russia of Georgian nationals from September 2006 to January 2007; *Georgia v. Russia* (II) (dec.), no. 38263/08, 13 December 2011, currently before the Grand Chamber, about the conflict in South Ossetia and Abkhazia. (A third case brought by Georgia, relating to the detention of four Georgian minors in South Ossetia, was withdrawn after they were released in December 2009).

[74]. *Ukraine v. Russia* (no. 20958/14), lodged on 13 March 2014 concerns the events leading up to and following the assumption of control by the Russian Federation over the Crimean peninsula from March 2014 and subsequent developments in Eastern Ukraine up to the beginning of September 2014. *Ukraine v. Russia (II)* (no. 43800/14) concerns the alleged abduction of three groups of children in Eastern Ukraine and their temporary transfer to Russia on three occasions between June and August 2014. The case of *Ukraine v. Russia (IV)* (no. 42410/15) concerns the events in Crimea and Eastern Ukraine mainly as from September 2014. (*Ukraine v. Russia (III)* (dec.), no. 49537/14, 1 September 2015 was struck out of the Court's list of cases when Ukraine informed the Court that it did not wish to pursue the case given that the person concerned by the matter had introduced an individual application - http://hudoc.echr.coe.int/eng-press?i=003-5187816-6420666).

[75]. In the Georgia/Russia context, approximately 2,000 individual cases are pending against one or both States. In the Ukraine/Russia context, approximately 1500 individual cases have been introduced against one or both States.

[76]. Turkish Military operations in northern Cyprus (*Loizidou v. Turkey* (merits), cited above); Transdniestria (*Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII; *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012 (extracts); and *Mozer v. the Republic of Moldova and Russia*, no. 11138/10, pending before the Grand Chamber; the Armenian-Azerbaijani conflict concerning Nagorno-Karabakh and adjacent territories (*Chiragov and Others v. Armenia* [GC], no. 13216/05, ECHR 2015; and *Sargsyan v. Azerbaijan* [GC], no. 40167/06, ECHR 2015) where each State was a third party in the other case; and the fate of Polish prisoners executed at Katyń in 1940 (*Janowiec and Others v. Russia* [GC], cited above) where Poland intervened as a third party.

[77]. *Georgia v. Russia (II)* (dec.), cited above, § 79.

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

before it[79]: however, these criteria are both broadly interpreted[80] or joined to the merits of the application[81].

Moreover, the six-month rule is normally not an obstacle (the complaints concern a continuing situation) and there are two broad exceptions to the exhaustion requirement (it does not apply when the complaint concerns legislative measures and where there is *prima facie* evidence of an administrative practice).

C. The inter-State case and the examination of the existence of any administrative practice

An administrative practice exists when a repetition of acts incompatible with the Convention and official tolerance of same by the State authorities has been shown to exist, and it is of such a nature as to make proceedings futile or ineffective (*Ireland v. the United Kingdom* judgment, § 159[82]; *Akdivar and Others v. Turkey*, § 67[83]).

At the admissibility stage, only *prima facie* evidence of an administrative practice is required. The approach, already applied in *Denmark v. Turkey* and *Georgia and Russia (I)*, was recently applied in *Georgia and Russia (II)*[84]. In the latter case, the Court observed that the evidence before the Court meant that Georgia's complaints were not "*wholly unsubstantiated*" and all other questions concerning the existence and scope of the alleged administrative practices related to the merits of the case and could not be examined definitively at the admissibility stage[85].

D. Interim measures are indicated in inter-State cases

Since the Grand Chamber judgment in 2005 in *Mamatkulov and Askarov v Turkey*[86], States are obliged to comply with the Court's rulings under Rule 39 of the Rules of Court. By and large the rulings, mostly made in an extradition/expulsion context, have been followed in individual cases[87].

Interim measures were successfully applied in the Second Greek case in 1970 by the European Commission of Human Rights in order to prevent the executions of 34 criminal suspects. In recent years interim measures have again been indicated in a number of inter-State cases:

1. In *Georgia v Russia (II)* the President of the Court applied Rule 39 in August 2008, calling upon both Parties to comply with their engagements under the Convention, particularly as regards Articles 2 and 3. The ruling, made in August 2008, was extended several times and was still in force when the Court held a hearing in September 2011.
2. A similar ruling under rule 39 was made in *Ukraine v. Russia (I)* [GC]. The case was lodged on 13 March 2014 and on the same day the Strasbourg Court indicated an interim measure calling upon both Russia and Ukraine to refrain from taking action which might lead to

79. *Georgia v. Russia (II)* (dec.), cited above, § 64.
80. For an inter-State case to be compatible *ratione personae* both the applicant and respondent States must be parties to the Convention, the applicant State not having to show that it can claim to be a victim in any way of the alleged breach or to have a special interest in the subject matter of the application.
81. Joining compatibility *ratione materaie* and loci to the merits in *Georgia v. Russia (II)* (dec.), cited above, §§ 68 and 75.
82. *Ireland v. the United Kingdom*, cited above, p. 64, para. 159.
83. *Akdivar and Others v. Turkey*, 16 September 1996, § 67, *Reports of Judgments and Decisions* 1996-IV.
84. *Georgia v. Russia (II)* (dec.), cited above.
85. *Georgia v. Russia (II)* (dec.), cited above, § 90.
86. *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I.
87. For those individual cases where the interim measures were not complied with see (http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf).

violations of the Convention rights of the civilian population, in particular Articles 2 and 3. The States were to inform the Court as soon as possible of the measures they had taken in response. That ruling remains in force. The interim measure applied in *Ukraine v. Russia (II)* was lifted as soon as the children were returned[88].

E. Fact-finding in inter-State cases[89]

Even if the Court might not be specifically equipped to establish facts concerning large-scale human rights violations, it is nevertheless called upon to do so in inter-State cases and on matters often of exceptional societal, political and legal importance.

1. Fact-finding in the early days

The First Greek case was brought in 1967 by Denmark, Norway, Sweden and the Netherlands[90] to denounce large-scale violations of human rights by the military regime in Greece. The case involved extensive fact-finding by the Commission and the final report ran to more than 1000 pages.

The case of *Ireland v. the United Kingdom*[91] concerned interrogation techniques used on IRA suspects in Northern Ireland at the beginning of the 1970s. The Commission again invested heavily in fact-finding, taking testimony in various locations including in a secret location in Norway. Its report adopted in 1976 was a detailed document of over 500 pages. The case was referred to the Court at the request of the Irish Government becoming the Court's first inter-State case.

In *Cyprus v. Turkey* [GC][92], the Commission conducted a fact-finding hearing and on-site investigations on issues concerning effective control and jurisdiction in the northern part of Cyprus.

2. Recent fact-finding in inter-State and quasi inter-State cases

In *Ilaşcu and Others v. Moldova and Russia* [GC][93] the Court conducted a fact-finding hearing, on similar issues of effective control and jurisdiction, in relation to the region of Transdniestria.

Most recently, in *Georgia v. Russia (I)* [GC] the Court carried out a limited form of fact-finding. The case arose out of the expulsion of more than 4500 Georgian nationals from Russia in late 2006/early 2007. A hearing of witnesses, summoned to testify, took place in Strasbourg in January 2012. The events had also been documented by international observers so that the witness evidence obtained was supplemented by reports of the Council of Europe's Parliamentary Assembly and of human rights NGOs and by other relevant public sources.

The material before the Court was found to disclose a "*coordinated policy of arresting, detaining and expelling*" Georgians from Russia – an administrative practice. It followed that the objection raised on grounds of non-exhaustion of domestic remedies had to be dismissed, that there had been a violation of Article 4 of the Fourth Protocol and, in turn, a violation of Article 5 (if the exercise was collective in nature, the mass arrests were arbitrary with no possibility to test their lawfulness).

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88. In approximately 150 related cases brought by individuals against Ukraine, Russia or both about events in the Crimea and the hostilities in Eastern Ukraine, interim measures have also been applied inviting Russia and/or Ukraine to ensure respect for the Convention rights of persons deprived of liberty or those whose whereabouts are unknown.
89. See "*Investigatory powers of the European Court of Human Rights,* Michael O'Boyle, Natalia Brady, cited above.
90. *Denmark, Norway, Sweden and the Netherlands v. Greece*, "*the Greek case*", cited above.
91. *Ireland v. the United Kingdom*, cited above.
92. *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV.
93. *Ilaşcu and Others v. Moldova and Russia* [GC], cited above.

F. From global findings on the merits to individual-centred just satisfaction awards

In the *Cyprus v. Turkey* judgment of 2014[94], the Court made, for the first time, an award of just satisfaction to individuals arising out of violations established on the merits of an inter-State case[95].

In its main judgment, the Court had found a continuing violation of Article 2 for failure to investigate the disappearance in life-threatening circumstances of nearly 1,500 Greek Cypriots, with a related finding under Article 5. The intense suffering of the families of the disappeared was found to be in violation of Article 3. The treatment of the Greek Cypriot residents in the enclaved Karpas peninsula was also found to constitute a violation of Article 3 of the Convention.

The Court first rejected an objection by the Turkish Government to the effect that Article 41 did not have any application to inter-State cases, the Court looking to the *travaux préparatoires* and to the principles of international law. However, the Court proposed a case-by-case approach to the issue noting that, where the case was about the basic human rights of one or more individuals, it might be appropriate to award just satisfaction for the sole benefit of the victims. The claim in the case was in favor of two specific groups of individual victims and, acting in equity, the Court decided on the sums of 30 million euros, to be paid to the families of the missing persons, and 60 million euros, for those residents of the Karpas peninsula.

94. *Cyprus v. Turkey (just satisfaction)* 2014.
95. *Cyprus v. Turkey* [GC], cited above.