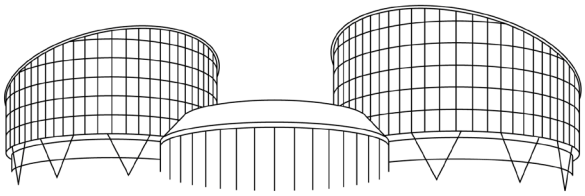

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

2 June 2021

PRACTICE FOLLOWED BY THE PANEL OF THE GRAND CHAMBER WHEN DECIDING ON REQUESTS FOR REFERRAL UNDER ARTICLE 43 OF THE CONVENTION

Note prepared by the Registry[1]

[1] This note has been drawn up by the Grand Chamber Registry and is not binding on the Court. It represents an update of the first version of this note (drafted in 2011), to which it adds developments since then in the proceedings before the Panel of the Grand Chamber and more recent case law examples.

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I. INTRODUCTION

1. In accordance with Article 43 of the Convention, within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber. Requests for referral are examined by a panel of the Grand Chamber, constituted in accordance with Article 43 § 1 of the Convention and Rule 24 § 5 of the Rules of Court (hereinafter "the Panel"). If the Panel accepts the request, the Grand Chamber decides the case by means of a judgment.

2. Since its creation with the entry into force of Protocol No. 11 to the Convention on 1 November 1998, the panel has examined 5,816 referral requests. No reasons are given for its decisions to accept or reject such requests. This consistent practice of the Panel in not giving reasons for its decisions is based on Article 45 of the Convention, a provision added by Protocol No. 11 to the Convention which requires only that reasons be given for judgments and for decisions declaring applications admissible or inadmissible. Paragraph 105 of the explanatory report on Protocol No. 11 states that Article 45 of the Convention "does not concern decisions taken by the panel of five judges of the Grand Chamber in accordance with Article 43". It should also be noted that Rule 73 § 2 *in fine* of the Rules of Court states that "Reasons need not be given for a refusal of the request [for referral]".

3. The question of a possible change to the consistent practice of the Grand Chamber Panel in not giving reasons for its decisions has been considered by the Court on several occasions, first of all in 2011 following a request to that effect by the States Parties signatory to the İzmir Declaration,[2] then in 2015, in response to a similar request in the Action Plan included in the Brussels Declaration,[3] and more recently in 2021, following an examination *proprio motu* of this question by a working group of the Court with the task of examining matters relating to the functioning of the Grand Chamber.

4. The discussions within the Court in 2011, 2015 and 2021 confirmed the justification for this practice and the need for it to be maintained.[4] In the Court's view, the nature of the procedure before the Panel of the Grand Chamber is not one that lends itself to the giving of reasons to the party that made the request: the Panel acts as an intermediary filtering body exercising a wide discretion based on broadly defined criteria. This function is very different from that of ruling on the admissibility and merits of cases, to which the duty to give reasons, as provided for in Article 45 of the Convention, naturally applies. If the Panel adopted a practice of giving precise, detailed reasons, the integrity and finality of Chamber judgments could be affected, whereas a purely formal statement of reasons, that is to say, a mere indication that the

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[2] See point F. 2 (e) of the Follow-up Plan included in the Declaration adopted by the High-Level Conference on the Future of the European Court of Human Rights, held in İzmir, Turkey, on 26-27 April 2011, under the Turkish Chairmanship of the Committee of Ministers of the Council of Europe.

[3] See point A. 1 (d) of the Action Plan included in the Declaration adopted by the High-Level Conference meeting in Brussels on 26 and 27 March 2015 at the initiative of the Belgian Chairmanship of the Committee of Ministers of the Council of Europe.

[4] See in particular §§ 16-19 of the Court's 2016 report "The Interlaken Process and the Court" (Appendix I).

request did not satisfy the conditions specified in Article 43, would be of negligible added value for the parties.[5] Moreover, in view of the large number of referral requests, the Court would have a substantial workload if the Panel were required to give reasons for each of its decisions accepting or rejecting such requests.

5. In the interests of transparency, on 21 June 2011 the Bureau of the Court approved a proposal by the Deputy Registrar of the Court to "provid[e] the States with an overview of the Panel's general practice, giving clear indications as to the cases that risked being rejected and those that were likely to be accepted".

6. This note, drawn up by the Grand Chamber Registry, puts the Deputy Registrar's proposal into practice. It reflects the guiding principles that have emerged in the Panel's practice over the years, from its creation in November 1998 to the present day. Its purpose is to inform the parties about the procedure followed by the Panel and to assist them in assessing the prospects of success of a referral request.[6]

7. What follows is a description of how the Panel currently functions. It can be seen that for certain categories of cases, requests for referral have little chance of succeeding because they do not satisfy the requirement that only exceptional cases can be referred to the Grand Chamber. Conversely, for other categories of cases referral requests have a good chance of being accepted by the Panel because they raise issues of consistency of the Court's case-law or because they raise novel issues of law that require an authoritative determination by the Grand Chamber. Lastly, it can be seen that the composition of the Panel ensures a certain degree of continuity that helps foster coherence and consistency in its practice.

II. STATISTICS

8. Since the entry into force of Protocol No. 11 to the Convention on 1 November 1998, the Panel has examined 5,816 requests for referral[7] (see charts in Appendix II): 38.10% of these requests (2,216) were made by respondent Governments, 38.46% (2,237) by applicants and 7% (404) by both parties.

9. Only 290 requests (approximately 4.98% of all requests) have been accepted to date, resulting in the case being referred to the Grand Chamber.[8] Out of these 290 successful requests, 153 (approximately 53%) were made by the respondent

[5] See the full reasons put forward by the plenary Court in Appendix I to this note.

[6] This note updates the initial version of the note entitled "The general practice followed by the Panel of the Grand Chamber when deciding on requests for referral in accordance with Article 43 of the Convention" (#3672914), dated October 2011 and available on the Court's Internet site: https://www.echr.coe.int/Documents/Note_GC_ENG.pdf

[7] This figure corresponds to the total number of applications concerned by a referral request, including the joint applications (959), as of 29 January 2021. A slight fluctuation in the annual number of requests for referral may be noted: 252 (in 2019), 206 (2018), 248 (2017), 295 (2016), 233 (2015), 285 (2014), 263 (2013), 259 (2012) and 327 (2011), although there was a significant decrease in 2020 (118), which could be explained by the COVID-19 crisis.

[8] The Panel's average acceptance rate of referral requests has remained relatively stable over the years (as of October 2011, the date of the first version of this note, it was 5.16%). As of January 2021, when this version of the note was drawn up, it was 4.98%. Year on year, a certain fluctuation in the acceptance rate of referral requests can nevertheless be noted: 5.93% (in 2020), 4.36% (2019), 3.39% (2018), 7.25% (2017), 5.76% (2016), 8.58% (2015), 6.66% (2014), 5.96% (2013), 3.86% (2012) and 3.36% (2011).

Governments, 122 (approximately 42%) by the applicants and 15 (approximately 5% of all requests) by both parties.[9]

10. These statistics show that requests for referral are accepted in only a small percentage of cases (approximately 5%); indeed, only "exceptional cases" should be referred to the Grand Chamber, in accordance with the letter and spirit of Article 43 of the Convention. Lastly, it should be noted that to date, the number of cases examined by the Grand Chamber as a result of the referral procedure is slightly higher than the number of cases resulting from relinquishment of jurisdiction by a Chamber.[10]

III. ARTICLE 43 OF THE CONVENTION

11. The starting point of the Panel's analysis is necessarily Article 43 § 2 of the Convention, which provides that a request for referral should be accepted "if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance". The explanatory report on Protocol No. 11 notes (in paragraphs 99 to 102) that these conditions should be applied "in a strict sense", which suggests that, in principle, a request for referral should be granted only when the case is, at least in some respects, exceptional. This interpretation is confirmed by the first paragraph of Article 43 of the Convention, which provides that "any party to the case may, *in exceptional cases*, request that the case be referred to the Grand Chamber" (emphasis added). As exceptional cases are extremely limited in number, it may be reasonably expected that only a small minority of referral requests will be accepted.[11]

12. According to the explanatory report on Protocol No. 11, "[s]erious questions affecting the *interpretation* of the Convention are raised when a question of importance not yet decided by the Court is at stake, or when the decision is of importance for future cases and for the development of the Court's case-law". This may also be the case when the impugned judgment is not consistent with a previous judgment of the Court (see paragraph 100 of the explanatory report).

13. A serious question affecting the *application* of the Convention may be raised, according to the explanatory report on Protocol No. 11, when a judgment necessitates a substantial change to national law or administrative practice (see paragraph 101 of the explanatory report). This may happen, for example, where the Court has applied the pilot-judgment procedure in accordance with Rule 61 of the Rules of Court and has therefore considered that the facts of the application disclosed the existence, in the Contracting State concerned, of a "structural or systemic problem or other similar dysfunction" (see also paragraphs 30-32 below).

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[9] See the summary table in Appendix III indicating the "Cases referred to the Grand Chamber by the Panel since the entry into force of Protocol No. 11 to the Convention".

[10] 55.95% of cases have been referred to the Grand Chamber by the Panel and 44.05% following relinquishment of jurisdiction by a Chamber (see chart in Appendix II). As of October 2011, the date of the first version of this note, the respective proportions were: 52.13% of cases referred to the Grand Chamber by the Panel and 47.87% following relinquishment of jurisdiction by a Chamber.

[11] As indicated in the previous section, statistics show that the "acceptance rate" of referral requests is around 5%.

14. Lastly, a "serious issue of general importance" could involve a substantial political issue or an important issue of policy (see paragraph 102 of the explanatory report).

15. The mere fact that a case is factually complex or politically delicate or has given rise to dissenting opinions does not, as such, justify its referral to the Grand Chamber. For example, the Panel systematically rejects requests which challenge the factual findings of the Chamber in cases concerning prison conditions or other issues under Articles 2 and 3 of the Convention where the case-law is well established. However, under certain circumstances, these same facts may be factors militating in favour of the existence of one or more of the grounds for referral set forth in Article 43 § 2 of the Convention (in other words, when the dissenting opinions are, in the Panel's view, well reasoned on key Convention issues and/or point out inconsistencies in the case-law).

16. The members of the Panel consider whether the case warrants referral to the Grand Chamber on the grounds that it is exceptional as indicated in the text of Article 43 of the Convention. They do not seek to impose their views on the merits of the case, nor do they vote to refer a case because they disagree with the Chamber's reasoning or would themselves have voted differently. The members of the Panel thus do not assess the merits of the case but, as in national leave-to-appeal procedures, express views as to whether the case should be referred to the Grand Chamber because it meets the statutory criteria set out above. Disagreement on issues of fact, on the inferences to be drawn from the facts, and/or, for instance, on the fair balance that should have been struck between competing rights in the particular circumstances of the case, does not necessarily mean that the conditions for referral are met. Indeed, the Grand Chamber should not be seen as an appeal court whose function is to correct alleged errors of fact or of assessment of the various features of each individual case. The intervention of the Grand Chamber is instead limited to cases which, by their nature and by the nature of their legal, social and political implications, are capable of having a serious impact on the extent and scope of the protection afforded by the Convention.

IV. CASES IN WHICH A REFERRAL REQUEST MAY BE GRANTED

17. Although the Panel's decisions do not contain reasons, the parties to those cases that are accepted for referral will generally have some idea as to why they are considered by the Panel to meet the criteria set out in Article 43. Such cases, for example, may raise new legal issues, may have given rise to issues of consistency at Chamber level or may have a high profile for other reasons relating to the complaints raised or the context of the dispute. For requests that are rejected, the cases fall into a variety of categories (see paragraphs 39-47 and 54 below) which the Panel will systematically reject as not suitable for referral. Needless to say, there are also borderline cases which lend themselves to lively discussion within the Panel as to whether they should be referred to the Grand Chamber, and which are consequently difficult to classify.

18. Nevertheless, it should not be overlooked that the Panel and the Grand Chamber are separate and differently composed bodies. As a result, they may have differing views as to the importance of a case from the perspective of the Court's case-law or

general policy. Thus, it is quite conceivable that the Panel's reasons for referral may not be followed by the majority of the Grand Chamber, which may, for instance, decide simply to confirm the Chamber judgment,[12] although it may sometimes do so on the basis of different reasoning.[13]

19. It follows that the Panel's practice cannot be inferred only from the Grand Chamber's reasoning and that an analysis of its reasons should take into account the parties' requests for referral. Where such requests have been accepted, it may be assumed that the Panel has, at least partly, accepted the Government's or applicant's arguments.

20. Cases that will be referred to the Grand Chamber are likely to belong to the following categories.

(a) Cases affecting case-law consistency

21. The fundamental role of the Panel is to ensure that Chamber judgments are consistent with the established case-law of the Court. Where a Chamber judgment significantly departs from the previous case-law or where a number of approaches to the same question have (or appear to have) emerged over time in the practice of the Sections, with the risk of undermining the coherence and consistency of the Court's case-law, the Panel exercises the function conferred on it by the Convention by asking the Grand Chamber to determine the interpretation to be pursued and to settle any conflict.

22. Examples of this kind of situation may be found in the following cases:

- *Lopes de Sousa Fernandes v. Portugal* (no. 56080/13), where the respondent Government, joined by the Irish and United Kingdom Governments intervening as third parties, argued, *inter alia*, that the approach adopted by the Chamber to the question of medical negligence was inconsistent with the principles developed by the Court concerning the State's positive obligation to protect life and their application in a number of other cases;[14]

- *Bouyid v. Belgium* (no. 23380/09), where the applicants, joined by the third-party interveners, argued, *inter alia*, that the Chamber's legal characterisation of the slapping by police officers of a person in police custody was inconsistent with the principles developed by the Court concerning the use of force by a State agent against a person deprived of his liberty and their application in a number of other cases;[15]

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[12] See paragraph 26 below.

[13] This was the case, for example, in *Magyar Kétfarkú Kutya Párt v. Hungary* (no. 201/17) and *S.M. v. Croatia* (no. 60561/14), where the Panel of the Grand Chamber accepted a referral request by the Government and the Grand Chamber reached the same conclusion as the Chamber judgment, but with different reasoning.

[14] The applicant referred in particular to *Byrzykowski v. Poland* (no. 11562/05, 27 June 2006); *Eugenia Lazăr v. Romania* (no. 32146/05, 16 February 2010); *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* ([GC], no 47848/08, ECHR 2014); and *Powell v. the United Kingdom* ((dec.), no. 45305/99, ECHR 2000-V).

[15] The applicants referred to the following cases, among others: *Selmouni v. France* ([GC], no. 25803/94, ECHR 1999-V); *Ribitsch v. Austria* (4 December 1995, Series A no. 336); *Rivas v. France*

– *Muršić v. Croatia* (no. 7334/13), where the applicant's request for referral highlighted the emergence in the practice of different Chamber formations of inconsistent approaches to the question of the minimum personal space to be allocated to a prisoner in a multi-occupancy cell;

– *Guiso-Gallisay v. Italy* (no. 58858/00), where the Chamber had "departed from the case-law on the application of Article 41 in cases of constructive expropriation";[16]

– *Scoppola (no. 3) v. Italy* (no. 126/05), where the respondent Government challenged, *inter alia*, the consistency of the Chamber's approach with the principles on prisoners' voting rights set forth in *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005-IX);

– *Herrmann v. Germany* (no. 9300/07), where the applicant contested the consistency of the Chamber judgment on the issue of hunting rights with the principles set forth in *Chassagnou and Others v. France* ([GC], nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III);

– *Sabri Güneş v. Turkey* (no. 27396/06), where the Chamber had departed from the Court's practice in fixing the *dies ad quem* of the six-month time-limit set forth in Article 35 § 1 of the Convention.[17]

23. A distinction should be made, however, between judgments which *depart* from the case-law and judgments which simply *apply the existing case-law to new situations*. The latter do not necessarily lend themselves to referral, as they may be seen as constituting a simple extension of – and not a change in – the case-law. Referral is appropriate only when the Panel feels that such an extension goes beyond the scope of the existing case-law.[18]

(b) Cases which may be suitable for development of the case-law

24. The Panel may also decide to refer cases to the Grand Chamber which do not disclose, as such, a (potential) inconsistency with the previous case-law, but which present an opportunity for development of the case-law. This may occur, for example, where a case raises issues going beyond the scope of the existing case-law, or where a request for referral highlights a change in society that might call for the previous case-law to be updated by means of an interpretation of the Convention in the light of present-day conditions.

(no. 59584/00, 1 April 2004); and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 152, ECHR 2012).

[16] See *Guiso-Gallisay v. Italy* (just satisfaction) [GC], no. 58858/00, § 56, 22 December 2009.

[17] See *Sabri Güneş v. Turkey*, no. 27396/06, §§ 33-44, 24 May 2011.

[18] See paragraphs 24 and 25 below. For an older example, see *Nejdet Şahin and Perihan Şahin v. Turkey* (no. 13279/05, § 52, 27 May 2010), in which the Chamber applied the principles concerning legal certainty (developed in respect of divergences in decisions adopted by courts belonging to the same branch of the legal system) to a (partly) new situation: discrepancies between judgments of different and hierarchically unrelated types of court. The Grand Chamber confirmed the Chamber's approach (see judgment of 20 October 2011).

25. Examples of the above are the following cases:

– *Ilias and Ahmed v. Hungary* (no. 47287/15), which gave the Grand Chamber the opportunity to develop its case-law on the question whether the confinement of asylum-seekers in a transit zone at the land border between two member States of the Council of Europe could be regarded as deprivation of liberty for the purposes of Article 5 § 1 of the Convention;[19]

– *Rooman v. Belgium* (no. 18052/11), where the Grand Chamber was called upon to determine whether, in the light of the gradual developments in its case-law over the past fifteen years and current international standards that attached significant weight to the need to provide treatment for the mental health of persons in compulsory confinement, the time had come to consider that the provision of "appropriate and individualised treatment" to detainees with mental disorders was a condition for the "lawfulness" of their deprivation of liberty; the Grand Chamber answered in the affirmative, reversing the Chamber's conclusion on this issue;

– *S.M. v. Croatia* (no. 60561/14), where the Grand Chamber was called upon to determine whether the principles established in cases concerning human trafficking were also applicable in cases concerning forced prostitution; the Grand Chamber answered in the affirmative, noting the conceptual proximity between the two phenomena;

– *N.D. and N.T. v. Spain* (nos. 8675/15 and 8697/15), which gave the Grand Chamber its first opportunity to address the issue of the immediate and forcible return of aliens *from a land border*, thereby developing its case-law concerning the removal of aliens who had attempted to enter a State's territory *by sea*;

– *Svinarenko and Slyadnev v. Russia* (nos. 32541/08 and 43441/08), where the Grand Chamber was called upon to determine whether the time had come to find that holding a person in a metal cage during a trial was, in view of its objectively degrading nature, incompatible in itself with the standards of civilised behaviour that were the hallmark of a democratic society; it answered in the affirmative, following a series of Chamber judgments in which the use of a cage had not been prohibited as such if it was justified by security considerations;

– *Bayatyan v. Armenia* (no. 23459/03), in which the Chamber, considering that an evolutive interpretation of the Convention was not justified in the circumstances, concluded that Article 9, read in the light of Article 4 § 3 (b),

[19] See also *Z.A. and Others v. Russia*, nos. 61411/15, 61420/15, 61427/15 and others (2019), which provided the Grand Chamber with an opportunity to develop the case-law concerning the prolonged confinement of asylum-seekers in an airport transit zone, while emphasising the need to adopt a practical and realistic approach to this issue, having regard to the present-day conditions and challenges linked to the mounting migration crisis in Europe.

did not guarantee a right to refuse to perform military service on conscientious grounds; the Grand Chamber reached a different conclusion.[20]

26. It goes without saying that in such cases there is nothing to prevent the Grand Chamber from confirming the existing case-law and refusing to endorse the change envisaged by the majority of the Panel.[21]

(c) Cases which are suitable for clarifying the principles set forth in the case-law

27. In some cases referred to the Grand Chamber, the Chamber judgment, without being *per se* innovative, touched on an area in which it was felt that clarification of the relevant basic principles was needed. For instance:

– In *Lopes de Sousa Fernandes v. Portugal* (no. 56080/13), the Grand Chamber had the opportunity to review the case-law concerning the scope of the State's substantive positive obligation in relation to deaths occurring as a result of alleged medical negligence, and was able to clarify the nature of that obligation and the circumstances in which the State's responsibility to protect life could be engaged in respect of the acts and omissions of healthcare providers;

– In *Paposhvili v. Belgium* (no. 41738/10), the Grand Chamber had the opportunity to provide guidance as to the point at which humanitarian considerations prevailed over other interests in relation to the expulsion of a seriously ill person, and was thus able to clarify what it had meant by the "other very exceptional cases" referred to in its earlier judgment in *N. v. the United Kingdom*;[22]

– In *Guðmundur Andri Ástráðsson v. Iceland* (no. 26374/18), the Grand Chamber was able to clarify the meaning and scope of the concept of "tribunal established by law" and its relationship with the other "institutional requirements" (notably those of independence and impartiality of a tribunal);

– In *Güzelyurtlu and Others v. Cyprus and Turkey* (no. 36925/07), the referral gave the Grand Chamber the opportunity to define and develop, in the context of transnational criminal investigations, the concept of a Contracting State's obligation to cooperate with another Contracting State or with a *de facto* entity under the effective control of another Contracting State;

– In *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* (nos. 68271/14 and 68273/14), the referral enabled the Grand Chamber to refine and clarify the

[20] See *Bayatyan v. Armenia* [GC], no. 23459/03, 7 July 2011. Further examples of cases which may fall into this category are *Silih v. Slovenia* ([GC], no. 71463/01, 9 April 2009) and *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, 18 September 2009).

[21] It can be argued that something of this kind happened in *Gorou v. Greece (no. 2)* ([GC], no. 12686/03, 20 March 2009), in which one of the main questions raised was whether the domestic authorities' positive obligations under Article 6 § 1 of the Convention should be extended to the point of establishing a duty for the public prosecutor to justify his or her decision not to lodge an appeal sought by a civil party. The Grand Chamber answered in the negative.

[22] *N. v. the United Kingdom* [GC], no. 26565/05, 27 May 2008.

third criterion set forth in *Engel and Others v. the Netherlands*[23] in order to determine whether proceedings concerning the imposition of a fine, with no statutory limit, on defence counsel for failing to appear at a hearing could be regarded as "criminal" in nature;

– In *Albert and Others v. Hungary* (no. 5294/14), the referral allowed the Grand Chamber to clarify the distinction to be made between acts affecting shareholders' rights and acts affecting a company, thereby confirming the crucial importance of this distinction in accepting the victim status of shareholders;

– In *Ibrahim and Others v. the United Kingdom* (no. 50541/08, 50571/08, 50573/08 and others), the referral gave the Grand Chamber the opportunity to develop and clarify the criteria set forth in *Salduz*[24] and the relationship between them as regards the restriction of the right of access to a lawyer during initial police questioning;

– In *Üner v. the Netherlands* (no. 46410/99), the Grand Chamber had the opportunity to enumerate and clarify the relevant criteria for assessing whether an order for an alien's expulsion was necessary in a democratic society and proportionate to the legitimate aim pursued;

– In *Ramsahai and Others v. the Netherlands* (no. 52391/99), the Grand Chamber was called upon to specify the requirements for an investigation into a death attributable to a State agent to be regarded as effective and independent;

– In *Medvedyev and Others v. France* (no. 3394/03), the referral gave the Grand Chamber the opportunity, *inter alia*, to explain in detail, with reference to its established case-law, the factors that brought the applicants, who had been arrested on a ship on the high seas, within the jurisdiction of France for the purposes of Article 1 of the Convention.[25]

(d) Cases in which the Grand Chamber may be called upon to re-examine a development in the case-law endorsed by the Chamber

28. The Chamber may adopt a judgment which, without explicitly conflicting with previous authorities, may be seen as a significant development of the case-law principles. In these cases, the Panel may feel that confirmation (or rejection) of such a development is needed from the Grand Chamber. This is notably the case when the Chamber has found a violation of the Convention in circumstances which, in the past, had not systematically led to such a conclusion.

29. Examples of this type of situation may be found in the following cases:

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[23] *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.
[24] *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008.
[25] See also *Blečić v. Croatia* ([GC], no. 59532/00, ECHR 2006-III), in which the Court had the opportunity to clarify its case-law concerning its jurisdiction *ratione temporis*.

– *Pentikäinen v. Finland* (no. 11882/10), in which the Chamber found no violation of Article 10 of the Convention on account of the arrest, detention and conviction of a journalist who had disobeyed police orders to disperse during a demonstration; this conclusion was confirmed by the Grand Chamber in the light of a comparative-law survey and the international and European standards regulating the conduct of the police towards journalists covering demonstrations;

– *Lopez Ribalda and Others v. Spain* (nos. 1874/13 and 8567/13), in which the Chamber found a violation of Article 8 of the Convention on account of the video-surveillance of supermarket cashiers by their employer through cameras installed at their workplace; this conclusion was reversed by the Grand Chamber, which held that the principles set out in the *Bărbulescu* judgment[26] concerning the monitoring of employees' Internet use in the workplace should be transposed to the case at hand;

– *Bouyid v. Belgium* (no. 23380/09), in which the Chamber held that a slap inflicted by police officers during questioning could not be regarded as having attained the level of severity required to fall within the scope of Article 3 of the Convention and therefore found no violation of that Article; the Grand Chamber reversed that finding, *inter alia* in the light of international texts and instruments relating to the concept of "human dignity" and the arguments put forward by the third-party interveners;

– *Dvorski v. Croatia* (no. 25703/11), in which the Chamber found no violation of Article 6 of the Convention on account of the admission in evidence in criminal proceedings of a confession made by the applicant during initial police questioning in the presence of a lawyer, but after the applicant had been denied the opportunity to appoint a lawyer of his choosing; the Grand Chamber reversed that finding after a detailed analysis of whether the denial of that opportunity had irretrievably prejudiced the accused's defence rights;

– *Guðmundur Andri Ástráðsson v. Iceland* (no. 26374/18), in which the Grand Chamber endorsed and refined the "flagrant breach" criterion which the Chamber had applied in assessing the effect on compliance with the "tribunal established by law" requirement of the fact that one of the judges sitting on the bench of a court of appeal had been appointed in breach of the procedures provided for by domestic law;

– *Selahattin Demirtaş v. Turkey (no. 2)* (no. 14305/17), in which the Chamber examined for the first time the effects of the pre-trial detention of an elected member of parliament on the performance of his parliamentary duties, and found a violation of Article 3 of Protocol No. 1; this conclusion was confirmed by the Grand Chamber;

– *Mamatkulov and Askarov v. Turkey* (nos. 46827/99 and 46951/99), in which the Chamber found, for the first time, a violation of Article 34 of the Convention in that the respondent Government had failed to comply with the

[26] *Bărbulescu v. Romania* [GC], no. 61496/08, 5 September 2017.

interim measures indicated by the Court under Rule 39 of the Rules of Court; this finding was confirmed by the Grand Chamber on the basis of an attentive analysis of the scope of interim measures and of the right of individual petition;

– *Kovačić and Others v. Slovenia* (nos. 44574/98, 45133/98 and 48316/99), in which the Chamber struck out the cases, concerning the freezing of foreign-currency bank accounts, on the grounds that the matter had been resolved and that it was no longer justified to continue the examination of the applications; the Grand Chamber confirmed these findings;

– *Paladi v. Moldova* (no. 39806/05), in which the Chamber found that the delay in complying with an interim measure, even if it had not caused irreparable damage to the applicant and had not prevented him from pursuing his application before the Court, had violated Article 34 of the Convention; the Grand Chamber agreed;

– *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* (no. 32772/02), in which the Chamber held that the domestic authorities' refusal to review a judgment which had been adopted in breach of Article 10 of the Convention amounted to a fresh violation of that provision; the Grand Chamber endorsed that finding, after careful scrutiny of the principles governing the execution of the Court's judgments;

– *Kart v. Turkey* (no. 8917/05), in which the Chamber concluded that the refusal to lift the applicant's parliamentary immunity had violated his right to access to a court for the determination of the criminal charges against him; the Grand Chamber reversed this finding;

– *Kononov v. Latvia* (no. 36376/04), in which the Chamber found that the applicant could not reasonably have foreseen his punishment for war crimes for acts committed in 1944; the Grand Chamber reversed this conclusion, finding that the applicant's acts constituted offences defined with sufficient accessibility and foreseeability by the laws and customs of war;

– *Taxquet v. Belgium* (no. 926/05), in which the Chamber found a violation of Article 6 § 1 of the Convention on account of the lack of reasoning in the Assize Court's judgment; the Grand Chamber endorsed this finding in the light of, *inter alia*, a comparative-law survey and the submissions of the third-party interveners, the United Kingdom, Irish and French Governments;

– *Perdigão v. Portugal* (no. 24768/06), in which the Chamber found that the concrete application of Portugal's method of calculating and fixing court fees had led to a complete lack of compensation for the expropriation of the applicants' property; the Grand Chamber agreed that there had been a violation of Article 1 of Protocol No. 1.

(e) Cases raising a serious question affecting the application of the Convention

30. Where the facts of an application disclose the existence, in the Contracting State concerned, of a structural or systemic problem or other dysfunction necessitating a substantial change to domestic law or administrative practice, the Panel may consider it useful for the Grand Chamber to intervene in order to broaden the examination of the applicant's complaints to other provisions of the Convention or the Protocols thereto in addition to those envisaged by the Chamber. It may also deem it necessary, in the light of the arguments put forward by the party requesting referral, for the Grand Chamber to re-examine the fundamental question of the nature of the systemic or endemic dysfunction giving rise to the problem, which will have a bearing on the extent of the general measures the respondent State would be required to take to remedy it.

31. Examples can be found in the following cases:

- *Kurić and Others v. Slovenia* (no. 26828/06), where the referral enabled the Grand Chamber to extend the examination of the applicants' complaints to Article 14 of the Convention, bearing in mind the importance of the issue of discrimination in this case in relation to the solution envisaged by the Chamber to the question of the authorities' alleged failure to settle the question of "erased" people in Slovenia;
- *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"* (no. 60642/08), concerning the inability to recover "old" foreign-currency savings – deposited with two banks in the current territory of Bosnia and Herzegovina – following the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), where the referral gave the Grand Chamber the opportunity to confirm the validity of the Chamber's application of the pilot-judgment procedure, while also allowing it to highlight the singular nature of this case and to distinguish it from standard cases involving the rehabilitation of insolvent private banks;
- *Hutten-Czapska v. Poland* (no. 35014/97), concerning the rent-control scheme that imposed a number of restrictions on the rights of landlords in Poland, where the referral allowed the Grand Chamber to provide some important explanations about the cause of the underlying systemic problem, which had significant repercussions on the general measures the respondent State was required to take to remedy it.

32. It is important to note, however, that the mere fact that a Chamber judgment has been adopted in accordance with the pilot-judgment procedure provided for in Rule 61 of the Rules of Court does not in itself mean that the case must be referred to the Grand Chamber.[27] Recent practice shows that the Court's pilot judgments under Rule 61 are mainly delivered by a Chamber. Most of these judgments become final in the

[27] The most recent judgments in which the Grand Chamber dealt with cases in which the pilot-judgment procedure had been applied date back to 16 July 2014 (*Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"*, no. 60642/08) and 26 June 2012 (*Kurić and Others v. Slovenia*, no. 26828/06).

circumstances set out in Article 44 § 2 of the Convention,[28] without any intervention by the Grand Chamber.[29]

(f) Cases concerning "new" issues

33. A reason in favour of referral might be that the Chamber judgment touches on a (relatively new) field of law which has not previously been examined by the Court, and/or which is socially and politically sensitive. In these cases it is frequently felt that guidance is needed from the Court's enlarged formation on issues which, on account of their original character and the debate they generate in society and the media, should be subjected to the most careful scrutiny. Thus, the Grand Chamber may be given the opportunity to adapt the existing case-law to new situations and/or to develop new principles, having regard to the possible implications for future, similar cases.

34. For instance, "new issues" were raised in the following cases:

– *Big Brother Watch and Others v. the United Kingdom* (nos. 58170/13, 62322/14 and 24960/15) and *Centrum för Rättvisa v. Sweden* (35252/08): sharing with foreign States of intelligence obtained through secret surveillance schemes involving bulk interception of external communications;

– *Selahattin Demirtaş v. Turkey (no. 2)* (no. 14305/17): effects of the continued pre-trial detention of a member of parliament on the proper performance of his parliamentary duties;

– *Bărbulescu v. Romania* (no. 61496/08): collection by an employer of an employee's personal data in the workplace and use of such data to justify the employee's dismissal;

[28] This provision refers to Article 44 § 2 of the Convention, which provides: "The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43."

[29] For examples of pilot judgments that have become final without the intervention of the Grand Chamber, see, *inter alia*, the final Chamber judgments in the following cases: *Sukachov v. Ukraine*, no. 14057/17, 30 January 2020 (inadequate conditions of pre-trial detention); *Rezmiveș and Others v. Romania*, nos. 61467/12, 39516/13, 48231/13 and others, 25 April 2017 (structural dysfunction specific to the Romanian prison system); *Varga and Others v. Hungary*, nos. 14097/12, 45135/12, 73712/12 and others, 10 March 2015 (dysfunction in the Hungarian prison system leading to a recurrent structural problem of inadequate conditions of detention); *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12 and others, 27 January 2015 (structural problem within the Bulgarian prison system, justifying a pilot-judgment procedure on account of the seriousness and persistence of the problems observed); *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09 and others, 8 January 2013 (structural and systemic nature of prison overcrowding in Italy); *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10 January 2012 (dysfunction in the prison system leading to a recurrent structural problem of inadequate conditions of detention); and *Gerasimov and Others v. Russia*, nos. 29920/05, 3553/06, 18876/10 and others, 1 July 2014 (delayed enforcement of domestic judicial decisions imposing obligations in kind).

– *N.D. and N.T. v. Spain* (nos. 8675/15 and 8697/15): immediate and forcible return of aliens from a land border following an attempt by a large number of migrants to cross it in an unauthorised manner and en masse;

– *Z.A. and Others v. Russia* (nos. 61411/15, 61420/15, 61427/15 and others): long-term confinement of asylum-seekers in an airport transit zone;

– *Ilias and Ahmed v. Hungary* (no. 47287/15): confinement of asylum-seekers in a transit zone at the land border between two member States of the Council of Europe;

– *Lekić v. Slovenia* (no. 36480/07): lifting of the corporate veil by the State in order to ensure stability in the commercial market and financial discipline;

– *Naït-Liman v. Switzerland* (no. 51357/07): universal jurisdiction of the civil courts in relation to torture;

– *Avotiņš v. Latvia* (no. 17502/07): mutual recognition mechanisms founded on the principle of mutual trust between the member States of the European Union and designed to be applied virtually automatically;

– *Delfi AS v. Estonia* (no. 64569/09): duties and responsibilities of an Internet news portal as regards comments made by users on material published on the portal;

– *Karácsony and Others v. Hungary* (no. 42461/13 and 44357/13): scope of parliamentary autonomy and procedural safeguards applicable in disciplinary proceedings instituted against members of parliament for conduct deemed gravely offensive to parliamentary order;

– *Leyla Şahin v. Turkey* (no. 44774/98): ban on wearing the Islamic headscarf in higher-education institutions;

– *Evans v. the United Kingdom* (no. 6339/05): dispute over the implantation of an embryo following the withdrawal of consent by the male gamete provider;

– *D.H. and Others v. the Czech Republic* (no. 57325/00): discriminatory treatment of Roma children in the field of education;

– *Dickson v. the United Kingdom* (no. 44362/04): right of access to artificial insemination for prisoners;

– *S.H. and Others v. Austria* (no. 57813/00): *in vitro* fertilisation;

– *Gillberg v. Sweden* (no. 41723/06): conviction for refusal to disclose medical research material.

(g) Cases raising a "serious issue of general importance"

35. A sub-group of the category of cases mentioned in section (f) above is that of cases which, without addressing a "new" field of law, raise an important issue at European or global level. Examples of cases of this kind may be the following:

– *Big Brother Watch and Others v. the United Kingdom* (nos. 58170/13, 62322/14 and 24960/15) and *Centrum för Rättvisa v. Sweden* (35252/08) concerning the bulk interception of communications in a national security context and intelligence sharing with foreign States;

– *Kurt v. Austria* (no. 62903/15), concerning domestic violence and the State's obligation to protect potential victims;

– *S.M. v. Croatia* (no. 60561/14), concerning human trafficking and forced prostitution;

– *Bărbulescu v. Romania* (no. 61496/08), concerning the protection of employees' personal data gathered by the employer in the workplace;

– *Svinarenko and Slyadnev v. Russia* (nos. 32541/08 and 43441/08), concerning the holding of defendants in a metal cage during their trial;

– *Avotiņš v. Latvia* (no. 17502/07), concerning mechanisms for mutual recognition of court decisions between member States of the European Union;

– *Delfi AS v. Estonia* (no. 64569/09), concerning the duties and responsibilities of Internet news portals as regards offensive comments left by users on published material;

– *Muršić v. Croatia* (no. 7334/13), concerning the minimum personal space to be allocated to a prisoner in a multi-occupancy cell;

– *Khlaifia and Others v. Italy* (no. 16483/12), concerning the issue of collective expulsions of migrants in the context of the 2011 migration crisis, when the events surrounding the "Arab Spring" led to a mass influx of migrants and heightened tension in the host States;

– *Paposhvili v. Belgium* (no. 41738/10), concerning the issue of the expulsion of seriously ill individuals and whether humanitarian considerations prevailed over other interests in preventing such expulsions;

– *Medvedyev and Others v. France* (no. 3394/03), concerning the key issue of the fight on the high seas against drug trafficking and other crimes;

– *Mangouras v. Spain* (no. 12050/04), about the protection of the marine environment from pollution;

– *D.H. and Others v. the Czech Republic* (no. 57325/00), *Aksu v. Turkey* (nos. 4149/04 and 41029/04) and *Oršuš and Others v. Croatia* (no. 15766/03),

touching on the topical issue of protection of Roma minorities in today's Europe.

(h) Cases with significant repercussions

36. Finally, some cases are referred to the Grand Chamber both because of the complexity of the legal issues they raise and because of the serious implications for the State concerned. These may stem from the identity of the applicant or from the fact that the application concerns matters which are at the centre of a sensitive national, European or global debate. These cases generally relate to historical, geopolitical or religious issues. They may also concern a specific incident or crime that has attracted exceptional media attention.

37. The following are examples of such cases:

– *Navalnyy v. Russia* (nos. 29580/12, 36847/12, 11252/13 and others), concerning the arrest on seven occasions, pre-trial detention and conviction of an opposition leader for taking part in peaceful public assemblies;

– *Ilnseher v. Germany* (nos. 10211/12 and 27505/14), concerning the preventive detention system in Germany; the case had significant consequences for that State as it raised doubts as to the compatibility with the Convention of the new preventive system introduced in the wake of the leading judgment in *M. v. Germany*, delivered in 2009 by a Chamber of the Court;

– *Selahattin Demirtaş v. Turkey (no. 2)* (no. 14305/17), concerning the constitutional amendment of 20 May 2016 that had resulted in the lifting of parliamentary immunity, and the initial and continued pre-trial detention of one of the co-chairs of the HDP (Peoples' Democratic Party), a pro-Kurdish political party which in 2015 had passed the threshold for representation in the National Assembly, becoming the second largest opposition party;

– *Merabishvili v. Georgia* (no. 72508/13), concerning the pre-trial detention of a former Prime Minister and leader of the largest opposition party (the UNM), chiefly for the purpose of gathering information on matters unrelated to the offence of which he was suspected;

– *Big Brother Watch and Others v. the United Kingdom* (nos. 58170/13, 62322/14 and 24960/15) and *Centrum för Rättvisa v. Sweden* (35252/08): brought in the wake of revelations by Edward Snowden, a former contractor with the United States National Security Agency, about surveillance schemes and intelligence sharing between the United States and United Kingdom intelligence services;

– *Refah Partisi (the Welfare Party) and Others v. Turkey* (nos. 41340/98, 41342/98, 41343/98 and 41344/98), concerning the dissolution of a political party which after the 1995 general election was the largest party in Turkey, with a total of 158 seats (out of 450) in the Grand National Assembly, and which had come to power in June 1996 by forming a coalition government;

– *Öcalan v. Turkey* (no. 46221/99), in which, prior to his arrest, the applicant was the leader of the PKK (Workers' Party of Kurdistan);

– *Leyla Şahin v. Turkey* (no. 44774/98), concerning the ban on wearing the Islamic headscarf in higher-education institutions;

– *Ramirez Sanchez v. France* (no. 59450/00), in which the applicant, who claimed to be a revolutionary by profession, was held responsible for a series of terrorist attacks in France;

– *Yumak and Sadak v. Turkey* (no. 10226/03), concerning the compatibility with Article 3 of Protocol No. 1 of the imposition of an electoral threshold of 10% in parliamentary elections;

– *Gäfgen v. Germany* (no. 22978/05), concerning a nationally well-known case of kidnapping and murder;

– *Lautsi and Others v. Italy* (no. 30814/06), concerning the presence of religious symbols (in particular, crucifixes) in classrooms;

– *Giuliani and Gaggio v. Italy* (no. 23458/02), concerning the killing of a demonstrator by a police officer during the demonstrations on the fringes of the G8 summit in Genoa in July 2001.

38. It should be clarified that the above distinctions are made in order to provide, in outline form, a better understanding of the Panel's practice and should not be seen as rigid or mutually exclusive. A case referred to the Grand Chamber may also fall within more than one of the categories described above[30] or "in between" some of them. Moreover, referral may sometimes be granted for a number of reasons, none of which would be decisive if taken alone. In connection with this, it is worth noting that the scarcity of case-law on a particular Convention provision, although not *per se* decisive, may be a factor in favour of referring the case to the Grand Chamber.[31]

V. REQUESTS THAT ARE IN PRINCIPLE REJECTED

39. The Panel has developed the practice of systematically rejecting referral requests which challenge:

(a) Decisions by the Chamber to declare a complaint inadmissible

[30] It can be argued, for instance, that the case of *Selahattin Demirtaş v. Turkey (no. 2)* (cited above) fell into both categories (d) and (h), *Öcalan* (cited above) fell into both categories (b) and (h), while *Lautsi and Others* belonged to both (f) and (h).

[31] See, for instance, *Garib v. the Netherlands* (no. 43494/09), which was of particular interest since it was the first case to deal in detail with Article 2 of Protocol No. 4; the Grand Chamber provided an authentic interpretation of the expression "freedom to choose [one's] residence" (first paragraph of that Article), and the conditions in which that freedom could be restricted (third and fourth paragraphs). For an older example, see *Mangouras v. Spain* (no. 12050/04), concerning, *inter alia*, the "guarantees to appear for trial" by which, in accordance with Article 5 § 3 of the Convention, release pending trial may be conditioned. Before the Grand Chamber judgment, the Court's case-law was scarce on this issue.

40. Applicants should be reminded that according to the Court's settled case-law, the "case" referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment. The "case" referred to the Grand Chamber is the application as it has been declared admissible, as well as the complaints that have not been declared inadmissible (see *S.M. v. Croatia* [GC], no. 60561/14, § 216, 25 June 2020, and the authorities cited therein). This means that the Grand Chamber must examine the case in its entirety in so far as it has been declared admissible; it cannot, however, examine those parts of the application which have been declared inadmissible by the Chamber (see, for instance, *Kurić and Others v. Slovenia* [GC], no. 26828/06, §§ 234-35, ECHR 2012 (extracts), and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 87, 6 November 2018).

(b) Awards made by the Chamber under Article 41 of the Convention

41. The sums awarded by the Chamber under Article 41 of the Convention by way of redress for pecuniary and/or non-pecuniary damage take into account the nature of the violation found and may be seen as a factual assessment. Moreover, in many cases the Chamber decides the amount of just satisfaction on an "equitable basis", and such an assessment, by definition, does not lend itself to a review by the Grand Chamber.

42. An exception to this principle may be found in the case of *Guiso-Gallisay v. Italy* (no. 58858/00), where the main question submitted to the Grand Chamber was that of the pecuniary damage sustained by the applicants following the unlawful expropriation of their land. However, in that case the Grand Chamber was not called upon to review the assessment of the amount of the applicants' losses, but to clarify the criteria governing the calculation of those losses (and indeed it came to the conclusion that it was appropriate to change the Court's position, to avoid the application of the *Papamichalopoulos* case-law to cases of constructive expropriation and to adopt a new approach[32]). There was therefore a "serious question affecting the *interpretation* of [Article 41 of] the Convention".[33]

(c) The Chamber's assessment of the facts

43. As indicated above, the Grand Chamber should not be seen as an appeal court with the function of correcting errors of fact allegedly made by the Chamber. If that were the case, there would be no need for filtering by the Panel, and the parties would have direct access to the Grand Chamber whenever the establishment of a fact by the Chamber ran counter to their interests. Thus, for instance, it could be said that a State would have very little prospect of success in requesting referral with a view to challenging the Chamber's finding that the use of force was imputable to agents of the State.

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[32] See *Guiso-Gallisay v. Italy* [GC], no. 58858/00, §§ 102-07, 22 December 2009.

[33] See also *Arvanitaki-Roboti and Others v. Greece* [GC], no. 27278/03, 15 February 2008, and *Kakamoukas v. Greece* [GC], no. 38311/02, 15 February 2008, in which the main question addressed by the Grand Chamber was the amount of the award to be made in cases of excessive length of proceedings.

(d) Lack of significant shortcomings in the relevant proceedings and the decision-making process at national level

44. In the context of cases where States have procedural obligations to render effective the rights secured in Articles 2, 3 and 4 of the Convention in particular, the Grand Chamber has emphasised that it is not required to rule on allegations of errors or isolated omissions on the part of the investigating authorities, but only on significant shortcomings in the proceedings and the relevant decision-making process, namely those that might undermine the investigation's capability of establishing the circumstances of the case or the persons responsible (see, for example, *S.M. v. Croatia* [GC], no. 60561/14, § 320, 25 June 2020, in the context of the States' procedural obligations under Article 4 of the Convention in combating human trafficking and forced prostitution). Accordingly, it can be presumed that in cases where procedural obligations are at stake, a referral request has little chance of succeeding if the proceedings and the decision-making process at national level do not disclose any shortcomings that might undermining the investigation's capability of establishing the circumstances of the case or the persons responsible.

(e) Application of well-established case-law

45. Unless the Panel considers that it is time for development of the Court's case-law (see section IV (b) above), judgments entailing "normal" application of well-established case-law are in principle not referred to the Grand Chamber.[34]

46. Moreover, it should be emphasised that in principle the case will not be referred to the Grand Chamber if the main legal question raised concerns specific legislation peculiar to one country only and is not likely to be of interest to the other High Contracting Parties, thus not raising an issue of general interest at European level.[35]

47. Likewise, a request for referral by a government contesting the application by the Chamber of the requirements laid down in Article 35 § 1 of the Convention with regard to the exhaustion of domestic remedies and the calculation of the six-month time-limit has strong chances of being rejected because the question, although important for the respondent State, is not likely to be of general interest at European level to merit treatment by the Grand Chamber.

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[34] See, for instance, the "Chechen cases", in which, without submitting any new information, the Government essentially challenged the role of the Court in assessing the existence of a substantive or procedural violation of Article 2 of the Convention: see, *inter alia*, *Shokkarov and Others v. Russia*, no. 41009/04; *Amuyeva and Others v. Russia*, no. 17321/06; *Matayeva and Dadayeva v. Russia*, no. 49076/06.

[35] See, for example, *P.N. v. Germany*, no. 74440/17, where the main issue raised by the applicant in his request for referral to the Grand Chamber of the judgment delivered on 11 June 2020 by a Chamber of the Court related to the accessibility and foreseeability of the national regulations that had formed the legal basis for a police order for the collection and storage of personal data for the purposes of an investigation; the Panel of the Grand Chamber rejected the referral request on 16 November 2020. See also *RTBF v. Belgium*, no. 50084/06, where the Chamber judgment of 29 March 2011 concerned the existence of a legal basis, in Belgian law and in the light of the case-law of the Belgian Court of Cassation, for prohibiting the broadcasting of television programmes. The Government's referral request of 29 June 2011 was rejected by the Panel of the Grand Chamber on 15 September 2011.

VI. WORKING PROCEDURES OF THE PANEL OF THE GRAND CHAMBER

48. A meeting of the Panel of the Grand Chamber is organised when a sufficient number of requests for referral are ready for examination. On average, the Panel meets at intervals of six to eight weeks (taking into account periods of judicial recess), thus keeping the number of referral requests on the agenda of each meeting to a reasonable level. The dates are scheduled by the President in advance for a six-month period.

49. Before each meeting, all the members receive a file containing the referral requests and the judgments concerned.

50. The procedure before the Panel is not adversarial. All requests for referral are examined solely on the basis of the file, that is to say, the Chamber judgment and the contents of the request (or requests, if both parties request the referral of the case within the three-month time-limit). The Panel does not ask for observations on a referral request that has been submitted to it and does not take into consideration any unsolicited observations (for example, arguments in favour of rejecting the request) that may have been submitted by the opposing party. Nor can any third-party comments be submitted to the Panel, even if the third party in question had been granted leave to participate in the proceedings before the Chamber. Similarly, the Panel will refuse to consider any unsolicited "third-party interventions" that may be submitted by other States wishing to support a request by the respondent Government for the referral of a case.

51. The members of the Panel of the Grand Chamber examine whether the case satisfies the criteria set forth in Article 43 § 2 of the Convention and accordingly warrants referral to the Grand Chamber because it "raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance". They must not seek to set out their own views on the merits of the case, or vote to refer a case to the Grand Chamber simply because they disagree with the Chamber's reasoning or the final outcome of the case before the Chamber. The President (who, in accordance with usual practice, is the last to speak) asks the judges of the Grand Chamber Panel to indicate whether they consider that the request for referral should be accepted. If it is clear that the five judges of the Panel are unanimous, there is no vote; if not, a vote is held and the decision is taken by a majority.

If an initial exchange of views reveals a division among the Panel as to the decision that should be taken, the President may also ask the members of the Panel to express their opinions during a second discussion before proceeding with the final vote.[36]

52. The results of meetings of the Grand Chamber Panel are circulated among all the judges of the Court by email, and the parties are notified by means of a letter indicating the names of all the members of the Panel that gave the decision. Details of

[36] This recommendation was made in 2020 by a working group of the Court which examined the procedure before the Panel of the Grand Chamber, and was approved by the plenary Court on 2nd June 2021.

how each member of the Panel voted and whether the Panel's decision was taken unanimously or by a majority are confidential.

53. It is worth pointing out that where a request for referral is based on the discovery of a new fact which, by its nature, might have had a decisive influence on the outcome of a case that has already been determined, the Panel may decide to refuse referral and to forward the parties' observations to the Chamber that delivered the judgment in question, so that the Chamber can in turn examine whether the conditions for revising its judgment are fulfilled. In accordance with Rule 80 of the Rules of Court, the "discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known" to at least one of the parties is a reason for requesting revision of the judgment in question.

54. The Panel declares inadmissible any referral requests which:

> (a) challenge the Chamber's decision declaring a complaint inadmissible (see section V (a) above); or
>
> (b) do not comply with the three-month rule set out in Article 43 § 1 of the Convention.

In this connection, it is to be noted that the Panel has consistently held that the period of three months within which referral may be requested starts to run from the day after the delivery of the Chamber judgment,[37] irrespective of whether the party concerned may have learned about it at a later stage. It expires three calendar months later and is not interrupted by bank holidays or periods of judicial recess. Thus, for example, if a Chamber judgment is delivered on 10 January, the time-limit set forth in Article 43 § 1 of the Convention expires on 10 April at midnight (Central European Time). The request for referral should reach the Registry of the Court before the expiry of the relevant period (see *Kovačić and Others v. Slovenia* [GC], nos. 44574/98, 45133/98 and 48316/99, § 197, 3 October 2008[38]). Where no request has been received by the Registry, the judgment will become final on the same date at midnight.

VII. COMPOSITION OF THE PANEL OF THE GRAND CHAMBER

55. Rule 24 § 5 of the Rules of Court provides:

> "(a) The panel of five judges of the Grand Chamber called upon to consider a referral request submitted under Article 43 of the Convention shall be composed of
>
> - the President of the Court. If the President of the Court is prevented from sitting, he or she shall be replaced by the Vice-President of the Court taking precedence;

[37] This approach is consistent with the one followed by the Court in relation to the six-month rule in Article 35 § 1 of the Convention (see *Otto v. Germany* (dec.), no. 21425/06, 10 November 2009, and *Praha v. the Czech Republic* (dec.), no. 38354/06, 28 September 2010).

[38] See also Rule 73 § 1 of the Rules of Court, which provides: "… any party to a case may exceptionally, within a period of three months from the date of delivery of the judgment of a Chamber, *file in writing at the Registry* a request that the case be referred to the Grand Chamber" (emphasis added).

- two Presidents of Sections designated by rotation. If the Presidents of the Sections so designated are prevented from sitting, they shall be replaced by the Vice-Presidents of their Sections;
- two judges designated by rotation from among the judges elected by the remaining Sections to serve on the panel for a period of six months;
- at least two substitute judges designated in rotation from among the judges elected by the Sections to serve on the panel for a period of six months.

(b) When considering a referral request, the panel shall not include any judge who took part in the consideration of the admissibility or merits of the case in question.

(c) No judge elected in respect of, or who is a national of, a Contracting Party concerned by a referral request may be a member of the panel when it examines that request. An elected judge appointed pursuant to Rules 29[39] or 30[40] shall likewise be excluded from consideration of any such request.

(d) Any member of the panel unable to sit, for the reasons set out in (b) or (c) shall be replaced by a substitute judge designated in rotation from among the judges elected by the Sections to serve on the panel for a period of six months. ..."

56. In practice, depending on the number of referral requests on the agenda for each meeting of the Grand Chamber Panel, one or more formations of the Panel sit to decide on the requests. Each formation is made up of five members, including: the President of the Court or, if he or she is unable to sit (for example, because he or she is the national judge or was a member of the Chamber that delivered the judgment), the Vice-President of the Court taking precedence, two Section Presidents designated from among those who did not take part in the consideration of the admissibility or merits of the case in question, and two judges designated from among those who have been elected by their respective Sections to serve on the Panel for a period of six months.

57. The current system excludes from the Panel any judges who took part took part in the consideration of the admissibility and/or merits of the case in question, including the national judge (whether serving, *ad hoc* or appointed as a common-interest judge).

58. The Panel's composition is based on rotation between the different Section Presidents and the judges designated as ordinary members, and ensures a balance between the different Sections, each of which – except the one that delivered the judgment whose referral is being requested – is represented on the Panel, other than in exceptional cases. The participation of the President of the Court and the Section Presidents for an unlimited duration while they hold their respective offices ensures a certain degree of continuity that helps foster coherence and consistency in the Panel's practice.

[39] Rule 29 – *Ad hoc* judges.
[40] Rule 30 – Common interest.

APPENDIX I: Extracts from the 2016 report "The Interlaken process and the Court"[41]

Conclusions of the Plenary Court on the giving of reasons when the Grand Chamber panel rejects a referral request

In its examination of the point, the Court was mindful of the case-law under Article 6 concerning the reasoning of judicial decisions.[42] This lays down the general proposition that court judgments should adequately state the reasons on which they are based. One may link this duty to the principles of transparency, legitimacy and foreseeability that are inherent in the rule of law. Yet it is also established in the Convention case-law that the extent of the duty to give reasons may vary according to the nature of the decision in question. While the Article 43 procedure is not truly comparable to an appeal, it is not without relevance to note that the case-law permits an appellate court to simply endorse, without further reasoning, the decision given by a lower decision. Where the question for decision is leave to appeal, the Court has held that the Convention does not require that refusal of leave be subject to a requirement to give detailed reasons.[43]

The Court has concluded that, in light of the text of the Convention and of the intrinsic nature of the referral procedure, it would be neither appropriate nor advisable to introduce a practice of giving reasons for negative decisions of the Grand Chamber Panel. The explanation for this conclusion is set out in the following paragraphs.

(i) The text of the Convention

The procedure for referring cases to the Grand Chamber was introduced into the Convention by Protocol No. 11. The parties may request referral "within a period of three months from the date of the Chamber judgment" "in exceptional cases" (Article 43 § 1 of the Convention). The Panel "shall accept the request if the case raises serious questions affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance" (Article 43 § 2). If the Panel rejects the request, the judgment of the Chamber becomes final (Article 44 § 2 (c)). If the Panel accepts the request, the Grand Chamber shall decide the case by means of a judgment (Article 43 § 3).

It is not envisaged either in the text of the Convention, or in the Explanatory Report, that the Panel should give reasons for its decisions. Article 45 § 1 only provides that "Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible." Paragraph 105 of the Explanatory Report, which in somewhat broader terms affirms that Article 45 "lays down a general rule that all judgments and most decisions of the Court must be reasoned", states expressly "[t]his

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[41] The full version of this report is available online in English: https://www.echr.coe.int/Documents/2016_Interlaken_Process_ENG.pdf and in French: https://www.echr.coe.int/Documents/2016_Interlaken_Process_FRA.pdf

[42] As summarised in *Hansen v. Norway*, no. 15319/09, §§ 71-74, 2 October 2014.

[43] See *Hansen*, cited above, §§ 80-81.

Article does not concern decisions taken by the Panel of five judges of the Grand Chamber in accordance with Article 43." Accordingly, there is no support in the Convention or in the Explanatory Report for any proposition that the Panel should give reasons. On the contrary, and in contrast to the filtering procedure that operated under Protocol No. 9,[44] it is clear that the Panel was deliberately exempted from any such requirement. Neither Protocol No. 14 or 15 brought any change here.

(ii) The nature of the procedure

For the Panel to give reasons might seem difficult to reconcile with the special features of the Panel procedure, seen in the context of the proceedings as a whole, and its particular role as an intermediary filtering body, between the Chamber and the Grand Chamber, exercising a wide discretion based on broadly defined criteria.

The Panel decision in effect determines whether the Chamber judgment should become final, or if it should be for the Grand Chamber to give final judgment. Either way, whether final judgment is given by a Chamber or the Grand Chamber, Article 45 § 1 ought to be interpreted to mean that the reasons stated for the purposes of this provision are to be given in the judgment itself. It is important that those reasons not only be adequate for disposing of the particular case but also for fulfilling the Court's wider role of providing guidance on the interpretation and application of the Convention (Article 32 of the Convention), a role that is not reserved for the Grand Chamber but also assumed by Chambers.

If the Panel were to provide purely formal reasons, i.e. simply state that the case in question did not fulfil the criteria of Article 43, it would be of very limited value. If instead the Panel were to state specific reasons for its decision to reject a referral request, one might expect reasoning involving an assessment of the nature of the subject matter of the case, whether it is fact-specific or one of principle, and of the seriousness of the issues raised – whether there is a "serious question affecting the interpretation or application of the Convention" or a "serious issue of general importance" (Article 43). That assessment is different from the one involving a determination of admissibility and merits, for which reasons should be given pursuant to Article 45. The test and the criteria are different in that those which apply in the Article 43 context involve an element of discretion in assessing the Convention case-law which does not lend itself to being set out with the same conclusiveness as reasoning provided for the purposes of Article 45. In short, the exercise is different in nature from the one referred to under Article 45.

However, it is inevitable that the Panel scrutinises the reasoning given by the Chamber and reaches its decision in the light of its agreement or disagreement with the majority or the minority, as the case may be, on the substance of the case and of its evaluation of the potential added-value of examination by the Grand Chamber and so on.

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[44] Protocol No. 9 (signed in 1990, in force for several States 1994-1998) which introduced a procedure to filter requests by individual applicants to refer their case to the Court. The Rules of Court governing that procedure provided that where the Panel declined the request, a briefly reasoned decision was given to the applicant.

In so far as the reasons for the Panel's rejection of a referral request could be seen to overlap with the reasoning of a Chamber judgment, it seems likely to bring a series of consequences.

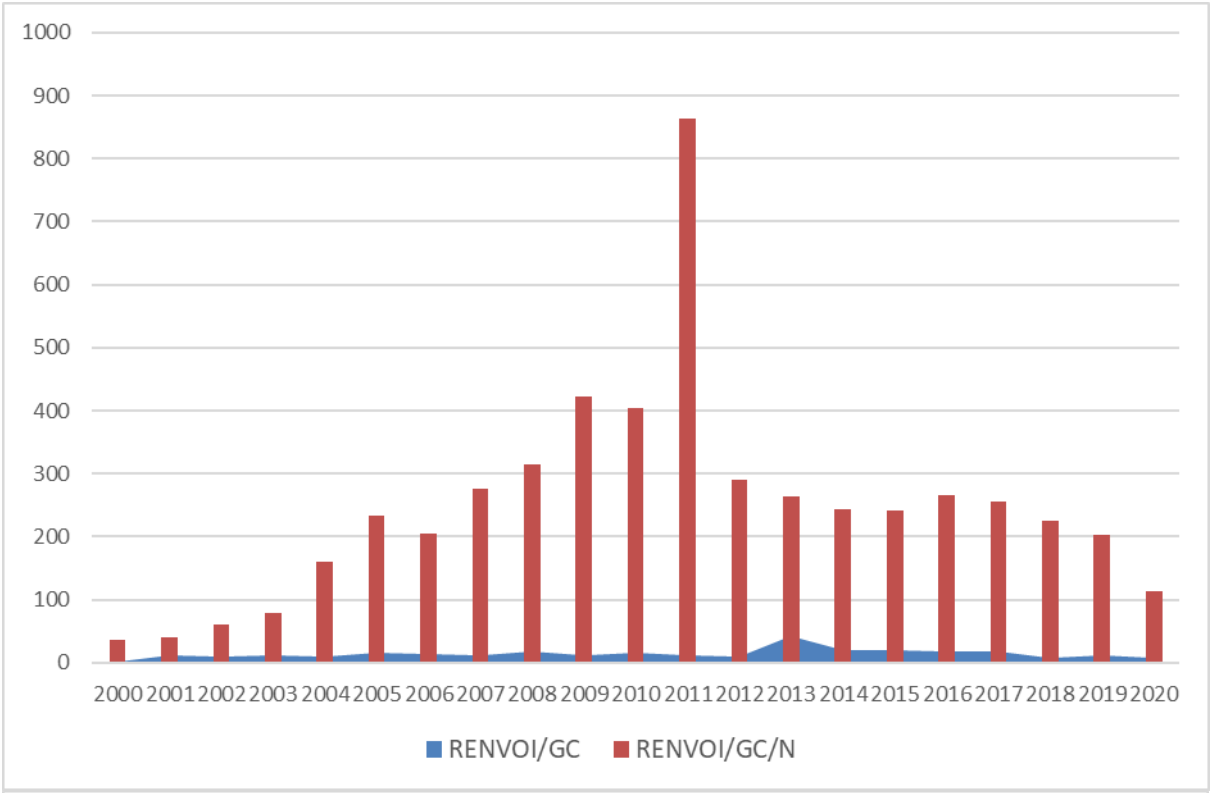
To start with, the reasons could be perceived as adding something to those already given by the Chamber for its judgment which becomes final by virtue of the Panel's decision. Although it may be difficult to foresee what such an addition would actually entail in practice, it is probable that it would in some way affect the integrity of the Chamber judgment. This could be the case where the Panel identifies which of the referral grounds were not fulfilled, or even if it expressly endorses the Chamber judgment. In order to appreciate the jurisprudential value of a Chamber judgment, the legal user could not limit his or her enquiry to studying the reasoning stated in the judgment but would have to look into a source outside the judgment, namely the reasoning provided by the Panel for rejecting the referral request. There is thus a real danger of the Panel's reasoning diminishing and even undermining the reasoning of the Chamber's final and legally binding conclusion. It would give the Panel a power which goes beyond the role of merely acting as a filter.

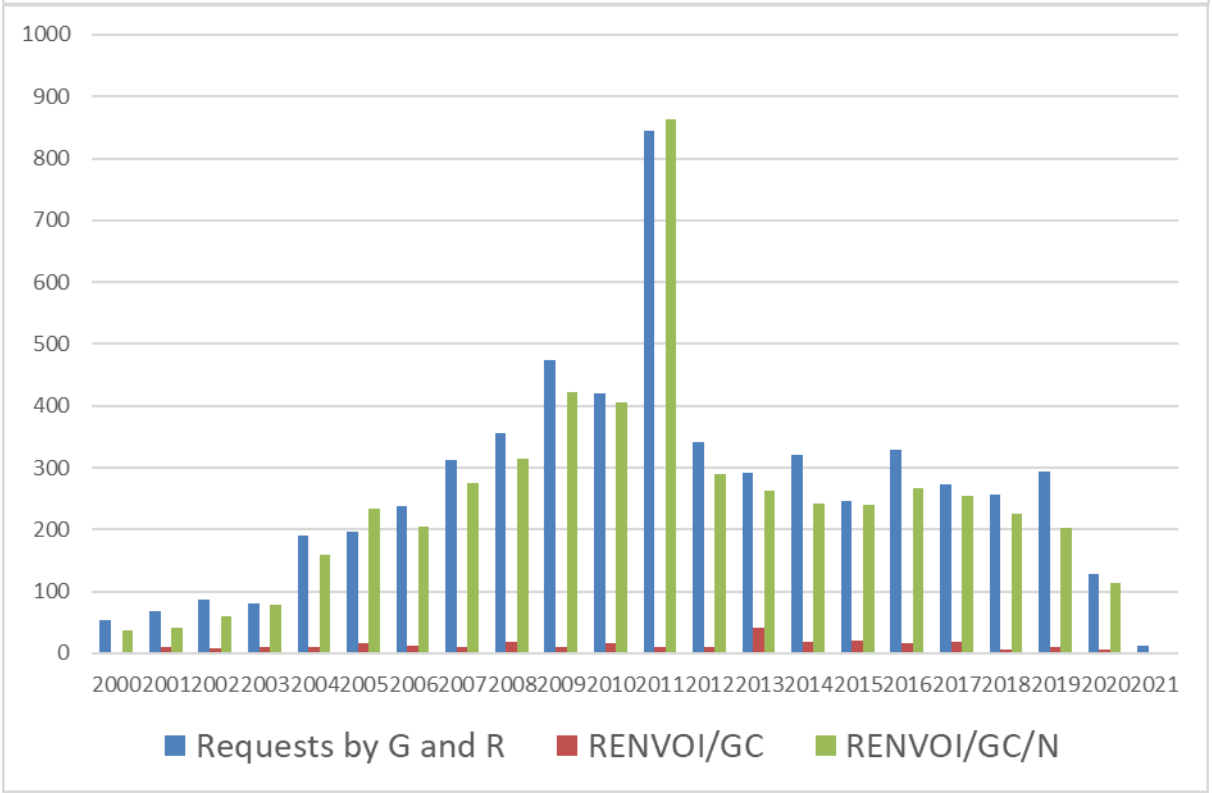
Moreover, the party which was unsuccessful before the Chamber might then see the referral request as an opportunity for obtaining more reasons from the Panel that could weaken the Chamber judgment. Such prospects may lead to more referral requests being brought. The successful party might be justified in considering it not "fair" that such an opportunity is given without adversarial argument. The Panel procedure, in its current form, consists of a summary examination of the referral request in the light of the Chamber judgment and the case-file as it stands, without any adversarial argument. If reasons were to be given for the rejection of a referral request, it might be necessary in the interest of the proper administration of justice to consider allowing adversarial pleadings. This would clearly be at the expense of efficient filtering.

The fact Protocol No. 16 provides that the panel shall give reasons if it declines to accept a request for an advisory opinion coming from a domestic does not alter the analysis. That context is entirely different from Article 43, and the concerns set out above do not arise.

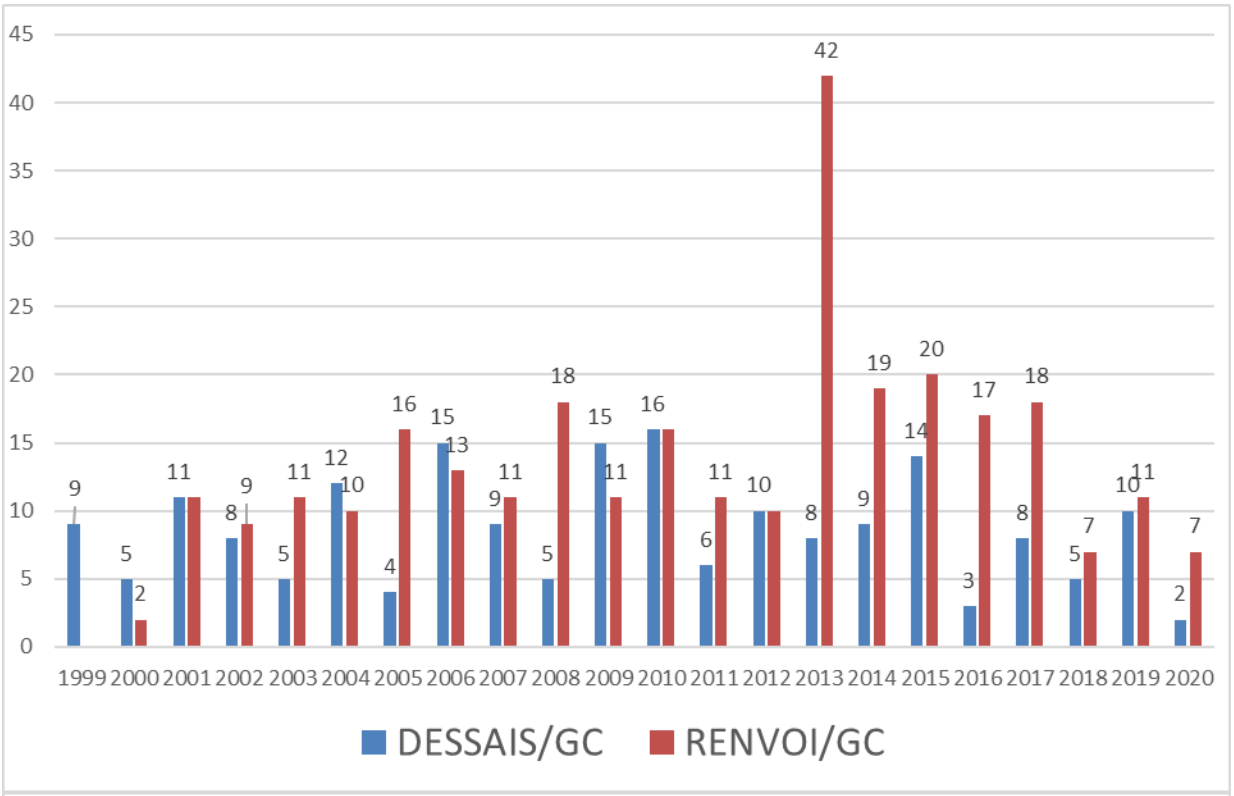
In conclusion, for the panel to adopt a practice of giving reasons would risk creating confusion about the meaning of the Chamber judgment. It further raises a number of other procedural issues likely to make the procedure much more burdensome, which would outweigh the modest advantage that a reasoned panel decision would represent for the requesting party.

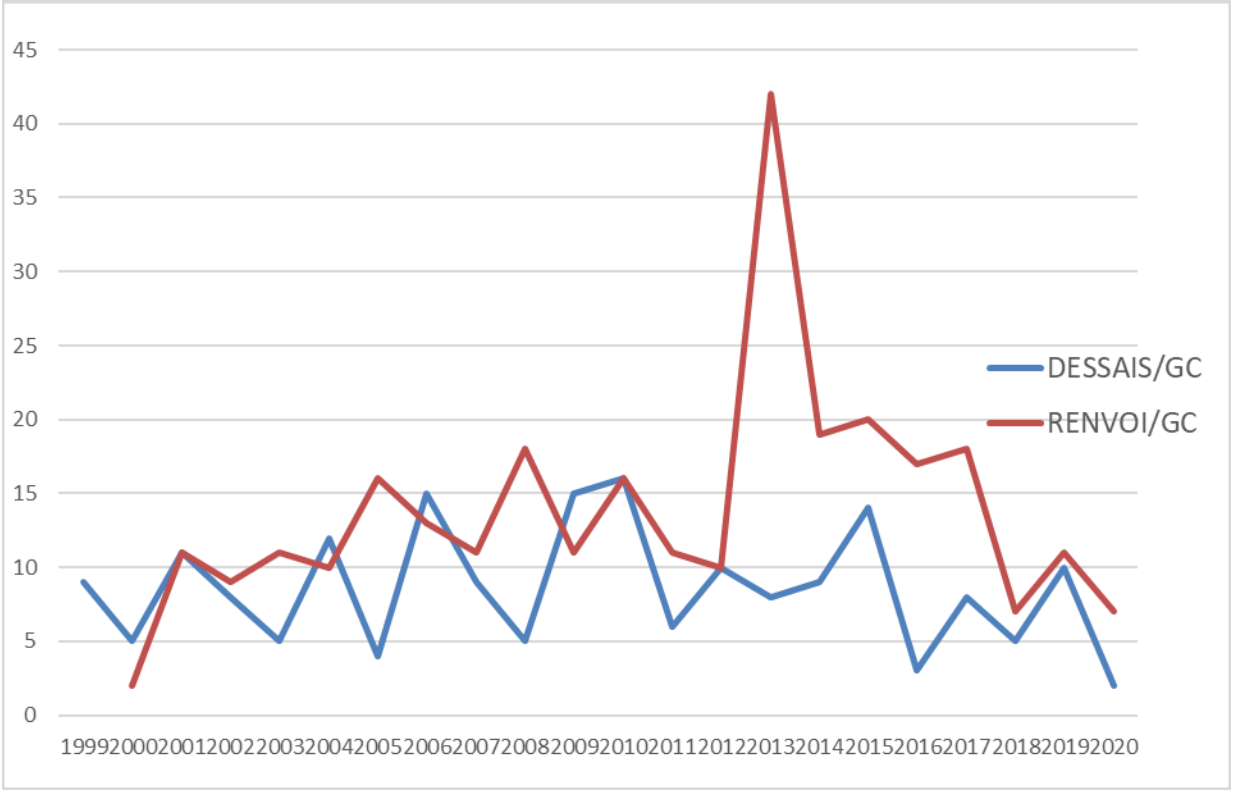
APPENDIX II: <u>Statistics on the number of referral requests accepted or rejected by the Panel of the Grand Chamber</u>





Distribution of the Grand Chamber's caseload: comparison between the number of cases referred by the Panel and following relinquishment of jurisdiction





APPENDIX III: Cases referred to the Grand Chamber by the Panel since the entry into force of Protocol No. 11 to the Convention

The table may be consulted via the following link:

Pratique du Collège
GC - annexe III.DOC