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# CONCURRENT APPLICATIONS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: COORDINATED SETTLEMENT OF MASSIVE LITIGATION FROM SEPARATIST AREAS

ANTAL BERKES\*

I. INTRODUCTION .....	2
II. THE PRINCIPLES OF THE COORDINATED SETTLEMENT OF CONCURRENT APPLICATIONS....	14
A. EFFECTIVENESS OF THE CONVENTION .....	15
B. SUBSIDIARITY .....	16
C. GOOD ADMINISTRATION OF JUSTICE AND PROCEDURAL ECONOMY.....	19
D. COHERENT AND HARMONIOUS INTERPRETATION OF THE CONVENTION .....	24
III. CONCURRENT PROCEDURES OF INTERNATIONAL INVESTIGATION OR SETTLEMENT .....	28
A. COORDINATION OF PROCEEDINGS .....	29
B. COORDINATION OF FINDINGS .....	42
IV. CONCURRENT APPLICANTS.....	46
A. GROUPING OF CONCURRENT APPLICATIONS.....	47
B. PRIORITIZATION OF A CONCURRENT APPLICATION.....	55
1. Priority Policy.....	55
2. Pilot Judgments.....	59
3. Leading Decisions .....	63

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\* Postdoctoral Research Fellow, University of Manchester (antal.berkes@manchester.ac.uk). The author would like to thank Lilian Apostol, Jean d'Aspremont, Iain Scobbie, Maria Smirnova and Michail Vagias for their invaluable comments and insights on a previous draft version of the paper. All opinions and errors remain the author's personal opinions and errors. Criticisms welcome.

V. CONCURRENT RESPONDENT STATES .....	73
A. COORDINATION BY THE APPLICANT .....	74
B. COORDINATION BY THE ECtHR <i>PROPRIO MOTU</i> .....	81
VI. CONCLUSION .....	85

## I. INTRODUCTION

The Council of Europe (CoE) Parliamentary Assembly in 2003 prepared a report on the “areas where the European Convention on Human Rights cannot be applied,”<sup>1</sup> which aimed to identify the difficulties that hinder the effective application of the European Convention on Human Rights and Fundamental Freedoms (ECHR or the Convention)<sup>2</sup> in certain geographic regions. The report presents a panorama of mostly political situations related to areas “where the application of the Convention comes up against insurmountable obstacles . . . either because of internal conflicts or as a result of the occupation of part of a member state’s territory by another state”<sup>3</sup> and where the State is unable to fully implement its international obligations under the Convention. The report mentioned cases decided or pending before the European Court of Human Rights (ECtHR or the Court) from Northern Cyprus, Transnistria, Abkhazia, and Chechnya.<sup>4</sup> While the armed conflict in Chechnya has not resulted in any permanent loss of effective territorial control by Russia, the other conflicts have produced an area outside the effective control of the State having sovereign title over the territory (territorial State) and not recognized by the overwhelming majority of the international community as an independent State or part of a State other than the territorial State.<sup>5</sup> Those areas can be termed “separatist areas” in the

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1. EUR. PARL. ASS., *Areas Where the European Convention on Human Rights Cannot be Implemented*, 3d Sess., Doc. 9730, (2003), <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=10095&lang=E> [hereinafter Doc. 9730].

2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 230 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights].

3. *Id.*

4. *Id.*

5. While the “Turkish Republic of Northern Cyprus” (TRNC) is recognised only by Turkey, and both the “Republic of Abkhazia” and the “Republic of South

sense that as a consequence of an armed conflict, they fall outside the “effective control” of the territorial State, understood as “actual authority” under the Hague Regulations concerning the Laws and Customs of War on Land.<sup>6</sup> Almost fifteen years after the Parliamentary Assembly’s report, the number of separatist areas has increased considerably in the territory of the Council of Europe: this is the case for Northern Cyprus (Republic of Cyprus), Transnistria (Republic of Moldova), Nagorno-Karabakh (Azerbaijan), Abkhazia and South Ossetia (Georgia), and Crimea and Eastern Ukraine (Ukraine).<sup>7</sup>

All of those separatist areas are different *apropos* the causes of the underlying territorial conflict, the existence and intensity of armed hostilities, and the diplomatic negotiations that have taken place. However, the nature of the human rights violations presents certain similarities. People living in the concerned areas are exposed to “persistent vulnerability”<sup>8</sup> as a consequence of various factual

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Ossetia” by four States (Russia, Venezuela, Nicaragua, and Nauru; two other States, Tuvalu and Vanuatu having granted, but subsequently withdrawn recognition), the other de facto entities controlling separatist areas (the “Moldovan Republic of Transnistria,” the “Nagorno-Karabakh Republic,” the “Donetsk people’s republic” and “Luhansk people’s republic” or the “Republic of Crimea” as annexed to the Russian Federation) are not recognised as States by any State.

6. See Convention (IV) Respecting the Laws and Customs of War on Land Annex art. 42, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (providing the same definition for “effective control” over a territory as used by the ECtHR); see also *Chiragov v. Armenia*, App. No. 13216/05, Eur. Ct. H.R. ¶ 96 (2015), <http://hudoc.echr.coe.int/eng?i=001-155353> (demonstrating the ECtHR’s use of the same definition for “effective control” over a territory).

7. Thomas de Waal, *Enhancing the EU’s Engagement With Separatist Territories*, CARNEGIE EUR. (Jan. 17, 2017), <http://carnegieeurope.eu/2017/01/17/enhancing-eu-s-engagement-with-separatist-territories-pub-67694>. While the present paper does not analyse Kosovo as a separatist area due to its recognition by about three-thirds of the UN member States as an independent State (115 recognitions through the end of 2017), and due to the fact that no single outside State had effective control over the local administration, some reference will be made to the period of its international administration where it was still universally recognised as part of Serbia (2001-2008) but outside its effective control.

8. Office of the U.N. High Comm’r for Human Rights, Rep. on the Human Rights Situation in Ukraine: 16 November 2015 to 15 February 2016, ¶ 10 (Mar. 3, 2016) (referring to non-Russian communities living in Crimea); see Org. for Sec. and Cooperation in Eur. [OSCE] High Comm’r on Nat’l Minorities [HCNM], Human Rights Assessment Mission in Ukraine, 85, May 12, 2014.

elements. First, reliable reports detail extensive and serious violations committed against residents of those areas.<sup>9</sup> Second, authorities of the territorial State are physically absent and unable to offer effective remedies to the victims on the spot,<sup>10</sup> whereas individuals wishing to turn to the *de facto* authorities must confront procedures that lack due process and fair trial guarantees.<sup>11</sup> In other words, domestic remedies available in the separatist region are typically ineffective.<sup>12</sup> Consequently, where individuals from separatist areas find no domestic remedies, international mechanisms and the ECtHR operate as a court of first instance.<sup>13</sup> Among international human rights treaty mechanisms, the ECtHR provides the most sophisticated and only binding judicial remedy available in the above-mentioned separatist areas, and thus constitutes the major procedural way to claim reparation for past and ongoing human rights violations.

As a binding mechanism, the ECtHR has been seized by a mass of applications related to all the above-mentioned areas. As of June 2017, the number of pending applications from separatist areas are as follows: 6 from Northern Cyprus, 12 from Abkhazia, 88 from Transnistria, 1,951 from South Ossetia, 2,175 from Nagorno-Karabakh, and 3,684 from Crimea and Eastern Ukraine.<sup>14</sup> The

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9. See, e.g., Office of the U.N. High Comm'r for Human Rights, Rep. on Accountability for Killings in Ukraine: from January 2014 to May 2016, U.N. Doc. A/HRC/33/CRP.2 (2016).

10. See *id.* ¶ 58 (discussing the ineffective investigation initiated by authorities).

11. See *id.* ¶ 65 (noting the parallel “law enforcement” entities set up for the “Donetsk people’s republic” and the “Luhansk people’s republic”); Office of the U.N. High Comm'r for Human Rights, Rep. on the Human Rights Situation in Ukraine: 16 February to 15 May 2016, ¶¶ 172, 189-90 (June 6, 2016).

12. Office of the U.N. High Comm'r for Human Rights, Rep. on Conflict-Related Sexual Violence in Ukraine, ¶ 16, U.N. Doc. A/HRC/34/CRP.4 (Mar. 16, 2017); EUR. PARL. ASS., *Legal Remedies for Human Rights Violations on the Ukrainian Territories Outside the Control of the Ukrainian Authorities*, Doc. No. 14139, ¶ 7 (Oct. 12, 2016); Office of the U.N. High Comm'r for Human Rights, Rep. on the Human Rights Situation in Ukraine (May 15, 2014).

13. See *Sargsyan v. Azerbaijan*, App. No. 40167/06, Eur. Ct. H.R. ¶¶ 115-120 (2017), <http://hudoc.echr.coe.int/eng?i=001-179555> (explaining that while the it is not a court of first instance, “there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies”); see also *Chiragov v. Armenia*, App. No. 13216/05, Eur. Ct. H.R. ¶¶ 115-120 (2015), <http://hudoc.echr.coe.int/eng?i=001-155353>.

14. Information received from the Registry of the ECtHR, June 28, 2017 (on file

concurrent applications further increase the Court's caseload, which is already overburdened by its backlog of pending cases and the annual influx of new applications. Although between 2011 and 2017, the Court managed to reduce its backlog of pending cases from 151,000 to 56,000,<sup>15</sup> it has been less successful in handling the annual influx that has continuously increased in recent years, with more than 63,000 applications allocated to a judicial formation in 2017.<sup>16</sup> The challenge posed by the increasing caseload stems partly from widespread violations resulting from separatist conflicts with or without continuing armed hostilities.<sup>17</sup>

Beyond a large number of applications, a complexity of applicants also characterizes the ECtHR's pending cases. It suffices to refer to the situation in Crimea and Eastern Ukraine, subject to five inter-state applications submitted by Ukraine against Russia,<sup>18</sup> or the *Georgia v. Russia (II)* case,<sup>19</sup> concerning the August 2008 war in Abkhazia and South Ossetia. Beyond the inter-state cases, more than 1,400 individual applications related to the events in Crimea or the hostilities in Eastern Ukraine were submitted as of October 2015<sup>20</sup> and this

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with the author).

15. See Eur. Ct. H.R., Annual Report 2011, 152 (2012), [https://www.echr.coe.int/Documents/Annual\\_report\\_2011\\_ENG.pdf](https://www.echr.coe.int/Documents/Annual_report_2011_ENG.pdf); Eur. Ct. H.R., Annual Report 2017, 164 (2018), [https://www.echr.coe.int/Documents/Annual\\_report\\_2017\\_ENG.pdf](https://www.echr.coe.int/Documents/Annual_report_2017_ENG.pdf) [hereinafter Annual Report 2017].

16. See Annual Report 2017, *supra* note 15, at 168 (showing the case backlog was 53,400 in 2016 and 40,500 in 2015); see also Eur. Ct. H.R., Annual Report 2016, 191 (2017), [https://www.echr.coe.int/Documents/Annual\\_report\\_2016\\_ENG.pdf](https://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf) (showing the case backlog was 53,500 in 2016 and 40,550 in 2015).

17. Council of Eur., Rep. of the Steering Comm. for Human Rights, *The Longer-Term Future of the System of the European Convention of Human Rights*, ¶ 79 (2015) [hereinafter Longer-Term Future] (linking the high number of cases to violence in separatist conflicts).

18. Press Release, European Court of Human Rights, Grand Chamber to Examine Four Complaints by Ukraine Against Russia Over Crimea and Eastern Ukraine, ECHR 173 (May 9, 2018).

19. See generally *Georgia v. Russia (II)*, App. No. 38263/08, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-108097>.

20. Press Release, European Court of Human Rights, European Court of Human Rights Communicates to Russia New Inter-State Case Concerning Events in Crimea and Eastern Ukraine, ECHR 296 (Oct. 1, 2015), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4945099-6056223&filename=003-4945099-6056223.pdf> [hereinafter ECtHR Press Release, Case Concerning Events in Crimea and Eastern Ukraine].

number may have since tripled.

While facing the difficult question of examining a high volume of both individual and inter-state pending cases concerning the same areas, the ECtHR shall deal with complex factual situations and take into account various parallel procedures of international investigation or settlement concerning the same separatist conflicts. Such parallel proceedings include the mechanisms of the U.N. human rights monitoring bodies, inter-state disputes before the International Court of Justice (ICJ) (the already closed *Georgia v. Russia* or the pending *Ukraine v. Russia* cases), situations the International Criminal Court (ICC) has investigated,<sup>21</sup> or pending investment arbitration claims before arbitral tribunals. The international litigations and fact-finding procedures all address human rights violations in the same separatist areas, presenting various overlaps as to the factual and legal questions.

The complexity of disputes before the ECtHR and other international dispute settlement bodies raise numerous procedural questions in regard to the mechanisms of the ECtHR. The body of case law concerning those areas can be called a set of “concurrent applications”—namely parallel dispute settlement forums seized, simultaneously acting applicants, and more than one respondent State multiplying the pending applications concerning the same broader factual background on the separatist conflict.<sup>22</sup> “Concurrent applications” are defined as applications filed with the ECtHR by several individuals and/or a State or States concerning the same factual context, and directed against one or several States, while a substantially analogous matter has already been submitted to one or more other procedures of international investigation or settlement.<sup>23</sup> This definition implies three types of concurring procedural elements: 1) concurrent dispute settlement forums (the ECtHR and other

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21. See Situation in Georgia, ICC-01/15, Decision on the Prosecutor’s Request for Authorization of an Investigation, ¶ 3 (Jan. 27, 2016) (granting the *proprio motu* investigation of the situation in South Ossetia during the 2008 armed conflict); see also Office of the Prosecutor, ICC, *Report on Preliminary Examination Activities*, 33-42 (Nov. 14, 2016) (discussing the preliminary examination of alleged crimes committed on the territory of Ukraine).

22. Richard Ekins et al., *Clearing the Fog of Law*, POLICY EXCH., 20 (2015), <https://policyexchange.org.uk/wp-content/uploads/2017/12/clearing-the-fog-of-law.pdf>.

23. *Id.*

international adjudicative bodies), 2) concurrent applicants (individuals and States), and 3) concurrent respondent States (two or more States).

Concurrent applications are especially common from separatist areas because the areas' specificities allow victims of human rights violations to use multiple procedural possibilities to obtain remedies for the same breaches of international law. One such specificity is the international, or at least internationalized, character of the separatist conflict. In all of the above-mentioned separatist areas, the armed conflicts and subsequent territorial disputes broke out between the territorial State and a separatist *de facto* entity,<sup>24</sup> effectively controlled or decisively influenced<sup>25</sup> by another, outside State. This opens the way to international dispute settlements between two States or between private individuals and each or both of the concerned States. In particular, disputes concerning human rights are likely to give rise to procedures on the same or similar legal questions before diverse concurrent dispute settlement fora—both judicial and quasi-judicial

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24. *De facto* entities and *de facto* authorities are used as synonyms in the sense of an entity that exercises at least some effective political authority over a territory within a State without being recognized by the overwhelming majority of the international community as an independent State or part of a State other than the territorial State. See Jochen A. Frowein, *De Facto Regime*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2013); see also Anthony Cullen & Steven Wheatley, *The Human Rights of Individuals in De Facto Regimes Under the European Convention on Human Rights*, 13 HUM. RTS. L. REV. 691, 694, 700 (2013); Michael Schoiswohl, *De Facto Regimes and Human Rights Obligations - The Twilight Zone of Public International Law*, 6 AUSTRIAN REV. INT'L & EUR. L. 45, 50-51 (2001).

25. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. Rep. 43, ¶ 391-95, 397 (Feb. 26); see also *Ilascu v. Moldova*, 2004-VII Eur. Ct. H.R. 179, 282 (showing that this test can be considered as an example of the attribution under Article 4 of the ILC Articles on State responsibility); *Loizidou v. Turkey*, App. No. 5318/89, Eur. Ct. H.R. ¶ 52 (1996), <http://hudoc.echr.coe.int/eng?i=001-58007>; *Loizidou v. Turkey*, Preliminary Objections, App. No. 15318/89 Eur. Ct. H.R. ¶ 62 (1995), <http://hudoc.echr.coe.int/eng?i=001-57920> (explaining that these notions refer to a test used by the ECtHR to attribute the conduct of the *de facto* authorities to the outside State); Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 40-42 (2001) [hereinafter ARSIWA]; Stefan Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INT'L & COMP. L.Q. 493, 508-11 (2009).



bodies.<sup>26</sup> A further specificity is the large scale of human rights violations: the concurrence of various applicants' results from the mass of human rights violations affecting both the territorial State and many individual victims. Finally, another characteristic is the complexity of the actors present in the separatist areas and consequently that of responsibility, as the development of international law has led to the engagement of the responsibility of States,<sup>27</sup> international organizations,<sup>28</sup> individuals (international criminal liability),<sup>29</sup> and potentially *de facto* entities.<sup>30</sup> Thus, more than one international subject might incur concurrent responsibility for the same violation of international human rights law.<sup>31</sup> The ECtHR case law has recognized the possibility to find multiple States responsible for their own wrongful acts in the same procedure, which gives rise to new applications against concurrent respondent States.

26. Eur. Ct. H.R., Annual Report 2009, 44 (2010), [https://www.echr.int/Documents/Annual\\_report\\_2009\\_ENG.pdf](https://www.echr.int/Documents/Annual_report_2009_ENG.pdf).

27. ARSIWA, *supra* note 25, at 41 (examining how federal governments are required to enforce international agreements in separate states).

28. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10, at 52-172 (2011) (enumerating the responsibilities of international organizations).

29. *See, e.g.*, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 1 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 2009); Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 (establishing an international criminal court); Statute of the International Tribunal for Rwanda art. 1 (Int'l Crim. Trib. for Rwanda 1994).

30. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 116 (June 27); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 3, ¶ 105 (Feb. 3) (noting that the Court did not exclude the possibility of an attribution under Article 10(2) of the ARSIWA: "Accordingly, even if the acts prior to 27 April 1992 on which Croatia relies were attributable to a 'movement,' within the meaning of Article 10 (2) of the ILC Articles"); ARSIWA, *supra* note 25, at 52; Int'l Law Comm'n, Rep. of Its Fiftieth Session, U.N. GAOR Supp. No. 10, at 1, U.N. Doc. A/53/10, at 59 (1998), *reprinted in* [1966] 2 Y.B. Int'l L. Comm'n 51, 53, U.N. Doc A/CN.4/SER.A/1998/Add.1 (Part 2); Int'l Law Comm'n, Rep. of Its Forty-Eighth Session, U.N. GAOR Supp. No. 10, at 1, U.N. Doc. A/51/10, at 59 (1996), *reprinted in* [1966] 2 Y.B. Int'l L. Comm'n 59, U.N. Doc A/CN.4/SER.A/1996/Add.1 (Part 2).

31. ARSIWA, *supra* note 25, at 142-43 (discussing State responsibility and individual responsibility); Al-Jedda v. United Kingdom, 2001-IV Eur. Ct. H.R. ¶ 80 (showing that the ECtHR impliedly recognized this possibility (dual responsibility of an international organization and troop-contributing States)).

Facing the proliferation of concurrent applications from separatist areas, the ECtHR has to define its judicial strategy<sup>32</sup> and prioritize some of its often-competing goals. Scholarship often identifies the competing goals as the delivery of individual justice and constitutional justice. The basic concept of constitutional justice is that the Court should only settle the most important applications, either because of their gravity or because of the general and systemic importance of the alleged human rights violation.<sup>33</sup> With respect to individual justice, it is widely defined as the Court's ultimate goal, namely to remedy individual grievances under Article 34 on the right to individual application.<sup>34</sup> Notwithstanding the huge backlog of cases, States parties<sup>35</sup> and the Court<sup>36</sup> have constantly reaffirmed their commitment

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32. Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 CHI. J. INT'L L. 115, 117 (2011) (using the notion of "judicial strategy" in the sense of the Court's principled decision to act in a certain manner in questions where it has discretion).

33. Its proponents are, among others, the Court's former President and Registrar, respectively. See Steven Greer & Luzius Wildhaber, *Revisiting the Debate About "Constitutionalising" the European Court of Human Rights*, 12 HUM. RTS. L. REV. 655, 671 (2012); see also Luzius Wildhaber, *The European Court of Human Rights in Action*, RITSUMEIKAN L. REV. 83, 91 (2004); Paul Mahoney, *New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership*, 21 PENN ST. INT'L L. REV. 101, 105 (2002); Rudolf Bernhardt, *The Admissibility Stage: The Pros and Cons of a Certiorari Procedure for Individual Applications*, in THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS: INTERNATIONAL WORKSHOP, HEIDELBERG 34 (Rüdiger Wolfrum and Ulrike Deutsch eds., 2009); Comm. of Ministers, Rep. of the Evaluation Group to Examine Possible Means of Guaranteeing the Effectiveness of the European Court of Human Rights, Doc. EG Court(2001)1, ¶ 98 (2001) [hereinafter Rep. of Evaluation Group].

34. European Convention on Human Rights, art. 34, *supra* note 2; Marie-Benedicte Dembour, *"Finishing Off" Cases: The Radical Solution to the Problem of Expanding ECtHR Caseload*, EUR. HUM. RTS. L. REV. 604, 621 (2002).

35. High Level Conference on the Future of the European Court of Human Rights, *Draft Copenhagen Declaration*, ¶1 (Feb. 5, 2018), [https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft\\_copenhagen\\_declarati\\_on\\_05.02.18.pdf](https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declarati_on_05.02.18.pdf) [hereinafter *Draft Copenhagen Declaration*] (reaffirming State Parties' commitment to the protection of human rights); High Level Conference on the Future of the European Court of Human Rights, *Brighton Declaration*, ¶ 2 (Apr. 19, 2012) [hereinafter *Brighton Declaration*]; High Level Conference on the Future of the European Court of Human Rights, *Interlaken Declaration*, ¶ 1 (Feb. 10, 2010) [hereinafter *Interlaken Declaration*].

36. *Mamatkulov v. Turkey*, 2005-I Eur. Ct. H.R. ¶ 122 ("[A] key component of the machinery for protecting the rights and freedoms set forth in the Convention.");

to individual justice “as a cornerstone of the Convention system.”<sup>37</sup> Regarding concurrent applications from separatist areas, the Court has declared that the thousands of applications from the conflict areas of Ukraine “will not be put on hold and will continue to be processed on a case by case basis.”<sup>38</sup>

Despite the Court’s commitment to examine each application from separatist areas, some scholars doubt whether individual justice is feasible in the case of gross and systematic human rights violations.<sup>39</sup> More importantly, the Draft Copenhagen Declaration on the European Convention on Human Rights system recently presented by the Danish Chairmanship of the Committee of Ministers also expressed the intention to create “separate mechanisms or other means” to deal with those concurrent applications.<sup>40</sup> While the final version of the Copenhagen Declaration did not include the clause, the proposal is a sign of some States’ willingness to further constitutionalize the settlement of concurrent applications from separatist areas, considering the challenge they pose to the ECHR system that the Copenhagen Declaration and the ECtHR itself recognized.<sup>41</sup> Few such “separate mechanisms” had been discussed in the past: some proposed

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Eur. Ct. H.R., Annual Report 2013, 27 (2014), [https://www.echr.coe.int/Documents/Annual\\_report\\_2013\\_ENG.pdf](https://www.echr.coe.int/Documents/Annual_report_2013_ENG.pdf) (affirming the commitment of the Court to the protection of individual human rights).

37. See, e.g., *Draft Copenhagen Declaration*, *supra* note 35, ¶¶ 1, 48.

38. Press Release, European Court of Human Rights, Complaints Concerning Shelling of Homes in Eastern Ukraine Declared Inadmissible Due to Lack of Evidence, ECHR 263 (July 28, 2016).

39. Hans-Joachim Heintze, *The European Court of Human Rights and the Implementation of Human Rights Standards During Armed Conflicts*, 45 GER. Y.B. INT’L L. 60, 77 (2002); Kerem Altiparmak, *Turkish Cases Relating to Terrorism Before the European Court of Human Rights: Procedural Issues*, 5 J. C.L. 30, 48 (2000); Menno T. Kamminga, *Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?*, 12 NETH. Q. HUM. RTS. 153, 153 (1994).

40. *Draft Copenhagen Declaration*, *supra* note 35, ¶ 54(b) (inviting the Committee of Ministers to consider “the establishment of separate mechanisms or other means to deal with inter-State cases as well as individual communications stemming from a conflict between two or more States Parties”).

41. High Level Conference on the Future of the European Court of Human Rights, *Copenhagen Declaration*, Comm. of Ministers, ¶ 45 (2018) [hereinafter *Copenhagen Declaration*]; Opinion on the Draft Copenhagen Declaration, Comm. of Ministers, ¶ 26 (Feb. 19, 2018).

to reduce the massive number of applications of victims of armed conflicts by the transformation of the Commissioner for Human Rights into a Public Prosecutor attached to the Court and/or the introduction of an *actio popularis*,<sup>42</sup> or by extension of the powers of the Commissioner for Human Rights at the national level in conjunction with national ombudsmen,<sup>43</sup> or by setting-up a fact-finding mechanism as a chamber of the Court or outside the ECtHR.<sup>44</sup> Yet, none of those mechanisms have been considered as a real alternative to the ECtHR and none have been institutionalized. Furthermore, non-governmental organizations (NGOs) rejected the recent proposal to create “separate mechanisms or other means” to settle concurrent applications from separatist conflicts, regarding it as an attempt to “displace such cases from the judicial to the political level” and a threat to the right to individual application.<sup>45</sup> Likewise, academic critics underlined<sup>46</sup> that the proposal would remove from the Court’s jurisdiction concurrent applications from separatist areas in contradiction to the Convention stipulation that its provisions continue to apply in situations of “war or other public emergency”<sup>47</sup> and the opinion of the Steering Committee for Human Rights under which

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42. Doc. 9730, *supra* note 1, ¶ 59; EUR. PARL. ASS., *Areas Where the European Convention on Human Rights Cannot be Implemented*, Rec. 1606, ¶¶ 10(b)-(c) (2003).

43. Rep. of the Group of Wise Persons to the Committee of Ministers, Minister’s Deputies, ¶¶ 109-13, Doc. No. CM(2006)203 (2006).

44. Final Activity Report on the Protection of Human Rights During Armed Conflict as Well as During Internal Disturbances and Tensions, Rep. of the Steering Comm. for Human Rights, ¶¶ 7-11, Doc. No. CM(2003)165-AddII (2004) (referring to the proposal of a consultant study).

45. *Joint NGO Response to the Draft Copenhagen Declaration*, AMNESTY INT’L 10 (2018), [https://www.amnesty.eu/content/assets/Reports/Joint\\_NGO\\_Response\\_To\\_The\\_Copenhagen\\_Declaration\\_-\\_13\\_February\\_2018.pdf](https://www.amnesty.eu/content/assets/Reports/Joint_NGO_Response_To_The_Copenhagen_Declaration_-_13_February_2018.pdf).

46. Alice Donald & Philip Leach, *Copenhagen: Keeping on Keeping on. A Reply to Mikael Rask Madsen and Jonas Christoffersen on the Draft Copenhagen Declaration*, EJIL:TALK! (Feb. 24, 2018), <https://www.ejiltalk.org/copenhagen-keeping-on-keeping-on-a-reply-to-mikael-rask-madsen-and-jonas-christoffersen-on-the-draft-copenhagen-declaration/> [hereinafter Donald & Leach, *Copenhagen: Keeping on Keeping on*]; Alice Donald & Philip Leach, *A Wolf in Sheep’s Clothing: Why the Draft Copenhagen Declaration Must Be Rewritten*, EJIL:TALK! (Feb. 21, 2018), <https://www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten/#more-15927> [hereinafter Donald & Leach, *A Wolf in Sheep’s Clothing*].

47. European Convention on Human Rights art. 15(1), *supra* note 2.

“[t]he Court has a pivotal role” in examining large-scale violations.<sup>48</sup> Its defenders, however, emphasized that the Draft Copenhagen Declaration does not suggest the striking of the pending cases out of the list of the Court “but rather it calls for rethinking how justice can better be served in those difficult circumstances.”<sup>49</sup>

The present paper submits that the settlement of concurrent applications from separatist areas is feasible through the strategic use of existing procedural tools of the ECtHR without introducing a separate mechanism or further constitutionalizing the Convention to the detriment of individual justice. The Court should settle such concurrent applications in a coordinated way, taking into account the interconnected legal and factual background as well as procedural and substantive law questions of concurrent cases in individual procedures. Each case having its own factual specificities, the broader context and legal background make the concurrent applications interconnected. Taking into account concurrent applications originating from the same factual and legal context does not impair the Court’s function to provide individual justice, as far as particular circumstances of each case are duly examined, while promoting the Court’s other function—the so-called constitutional justice—by remedying gross and systematic violations. As this paper will illustrate, the separatist conflicts in Europe have led to a series of concurrent applications that the Court has decided in various ways and using several procedural tools, to make effective the human rights enshrined in the Convention. The similar procedural steps and conclusions on substantive law show that the Court does not consider those applications isolated from each other, but strives to settle them in a coordinated way, taking into account the related procedural and substantive law issues.

Part II defines the method and principles of coordinated treatment that this paper purports to advocate as the most efficient case-management practice to settle concurrent applications. As the

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48. Longer-Term Future, *supra* note 17, ¶ 88.

49. Mikael R. Madsen & Jonas Christoffersen, *The European Court of Human Rights’ View of the Draft Copenhagen Declaration*, EJIL:TALK! (Feb. 23, 2018), <https://www.ejiltalk.org/the-european-court-of-human-rights-view-of-the-draft-copenhagen-declaration/>.

subsequent parts explain, the method of coordinated settlement is a particularly welcome technique in the pending concurrent applications from separatist regions. Part III scrutinizes the various international dispute settlement mechanisms that States or individuals have seized from separatist areas simultaneously in parallel with their application to the ECtHR. The precedents clarify that the parallel pending procedures of international investigation or settlement do not necessarily constitute a ground for inadmissibility before the ECtHR under the *lis pendens* rule and that they can strengthen the effective settlement of the ECHR applications. Supposing that the case is admissible, Part IV will elucidate how the Court has to coordinate effectively between the applications of numerous concurrent individuals and/or a State regarding the same factual context and legal problems. Various procedural tools allow the Court to group concurrent applications or prioritize one of them, while facilitating the further settlement of others. Part V explains how the Court should coordinate the treatment of applications against concurrent respondent States, especially the territorial State and an outside State. The precedents and the underlying international character of the separatist conflicts indicate that the Court should coordinate between States by designating a co-respondent *proprio motu*, by deciding on the reparation duties of co-respondents, and by inviting third-party interventions of States factually linked to the underlying separatist conflict. Part VI concludes with recommending the most effective settlement for concurrent applications to the Court. Those recommendations intend to contribute to three ongoing academic debates: 1) the question of the appropriateness of the ECtHR to supervise international human rights law in armed conflicts,<sup>50</sup> 2) the ongoing Copenhagen reform process of the ECtHR,<sup>51</sup> and 3) the broader question of the proliferation of competing jurisdictions in international adjudication.<sup>52</sup>

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50. See, e.g., Linos-Alexandre Sicilianos, *The European Court of Human Rights at a Time of Crisis in Europe*, EUR. HUM. RTS. L. REV. 121, 130-34 (2016); Heintze, *supra* note 39; Kamminga, *supra* note 38.

51. See, e.g., Donald & Leach, *Copenhagen: Keeping on Keeping on*, *supra* note 46; Donald & Leach, *A Wolf in Sheep's Clothing*, *supra* note 46; Mikael R. Madsen, *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?*, J. INT'L DISP. SETTLEMENT 1 (2017).

52. See, e.g., Pierre-Marie Dupuy & Jorge E. Viñuales, *The Challenge of*

## II. THE PRINCIPLES OF THE COORDINATED SETTLEMENT OF CONCURRENT APPLICATIONS

Under “coordinated settlement”, the present paper understands a principled treatment of interconnected applications, in accordance with a judicial strategy developed to address the massive influx of applications and as opposed to the isolated settlement of an individual case without due regard to other cases. This latter concept would be an extreme interpretation of individual justice, requiring the traditional case-by-case adjudication of each application notwithstanding to other applications. However, the Court’s judicial strategy and case management has considerably evolved from this simplistic reading to a coordinated method or “systemic approach”<sup>53</sup> of case management, where it uses a “range of procedural tools to solve a large number of applications resulting from systemic issues.”<sup>54</sup> In other words, rather than focusing merely on the individual case at hand, the Court will settle procedural and substantive law issues raised in the application by linking them to other concurrent applications.

The coordinated method ensures the coherence of the case law and the effectiveness of the Court and the Convention. “Effectiveness” of the Court is understood as goal-based judicial performance; “the degree to which international courts meet the expectations of relevant constituencies”, especially of their mandate providers.<sup>55</sup> The goals of the ECtHR set in its mandate (the 1949 Statute of the CoE, the *travaux préparatoires* of the ECHR and to the process of drafting the Statute, the Protocols and CoE documents on the reform of the ECtHR) are norm support, dispute settlement, regime support, and legitimation.<sup>56</sup> This Part will explain that the coordinated settlement of the mass of

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*“Proliferation: An Anatomy of the Debate, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 136 (Cesare Romano et al. eds., 2014); YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 8 (Philippe Sands et al. eds., 2003); Christoph H. Schreuer, Concurrent Jurisdiction of National and International Tribunals, 13 Hous. L. Rev. 508, 508 (1976).*

53. Longer-Term Future, *supra* note 17, ¶ 89 (noting that the Court’s policy has transitioned to a “problem-oriented approach” instead of a case-by-case approach).

54. *Id.*

55. YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 8 (MacKenzie et al. eds., 2014).

56. *Id.* at 6.

applications from separatist areas serves all of those goals of the Court, while strengthening the effectiveness of the Convention.

The coordinated method of dispute settlement shall comply with some procedural and substantive law principles that the Court has elaborated in its case law: the effectiveness of the Convention (Part II.A), subsidiarity (Part II.B), good administration of justice and procedural economy (Part II.C), and the coherent and harmonious interpretation of the Convention (Part II.D). This Part will explain that while deciding on individual cases, the Court should ease its fact-finding and legal analytical burden by applying these principles.

### A. EFFECTIVENESS OF THE CONVENTION

The notion of effectiveness of the Convention is often used by the Court as a “long established principle” under which “the Convention is intended to guarantee rights that are practical and effective, and not theoretical and illusory.”<sup>57</sup> It also refers to the guarantee of the implementation of Article 34 of the Convention on the right to individual petition: the Court shall be “in a position to process applications within a reasonable time, while maintaining the quality and authority of its judgments.”<sup>58</sup> Effectiveness of the ECtHR is closely related to the other above-mentioned principles: it is “contingent on the quality, cogency and consistency of the Court’s judgments.”<sup>59</sup>

The massive number of applications, especially the simultaneous submission of concurrent applications from separatist areas presents a challenge for the effectiveness of the Convention, because the more annual influx overburdens the Court, the longer the time lapse between submitting an application to the Court and getting a judgment (commonly referred to as the “Brighton backlog”).<sup>60</sup> Beyond the

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57. *Khlebiuk v. Ukraine*, App. No. 2945/16, Eur. Ct. H.R. ¶ 71 (2017), <http://hudoc.echr.coe.int/eng?i=002-11601>; *Artico v. Italy*, 37 Eur. Ct. H.R. (ser. A.) ¶ 33 (1980).

58. EUR. PARL. ASS., *Guaranteeing the Authority and Effectiveness of the European Convention of Human Rights*, Res. 1856, ¶ 2 (2012).

59. Longer-Term Future, *supra* note 17, ¶ 96.

60. *Burmych v. Ukraine*, App. Nos. 46852/13 et al., Eur. Ct. H.R. ¶ 150 (2017), <http://hudoc.echr.coe.int/eng?i=001-178082>; EUR. PARL. ASS., *The Effectiveness of the European Convention on Human Rights: The Brighton Declaration and Beyond*,



Convention's effectiveness, the huge backlog of cases and the rise of the annual influx both risk compromising "the quality and the consistency of the case-law and the authority of the Court."<sup>61</sup> Paradoxically, the saying "the Court became a victim of its own success"<sup>62</sup> has become increasingly true over the last three decades. The effectiveness of the recourse to the Court provokes its own paralysis as individuals increasingly file their applications with the Court. However, the other principles allow some procedural tools that decrease the Court's adjudicative burden to provide individualized decision: subsidiarity, good administration of justice and procedural economy, and the coherent and harmonious interpretation of the Convention.<sup>63</sup> As the next Parts will explain, the Court can both act under those principles and ensure the effectiveness of the Convention if it takes due account of the specific facts and circumstances of each individual case.

## B. SUBSIDIARITY

The principle of subsidiarity protects the primary role and relative autonomy of national courts to settle disputes, "by applying international obligations in a specific factual and (national) legal context."<sup>64</sup> Scholars commonly use "subsidiarity" to refer to "the relationship between certain international human rights treaties and domestic law."<sup>65</sup> The principle is reflected in human rights treaty

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Doc. 13719, ¶ 15 (2015) [hereinafter Doc. 13719] (recognizing that the massive influx of applications "is liable to affect the Court's ability to fulfil its mission under Article 19 in relation to other meritorious applications warranting examination").

61. *Interlaken Declaration*, *supra* note 35, ¶ 8.

62. *The ECHR in 50 Questions*, ECHR 11 (Feb. 2014), [https://www.echr.coe.int/Documents/50Questions\\_ENG.pdf](https://www.echr.coe.int/Documents/50Questions_ENG.pdf); Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 126 (2008); Lynne Turnbull, *Victim of Its Own Success: The Reform of the European Court of Human Rights*, 1 EUR. PUB. L. 215 (1995).

63. Helfer, *supra* note 62.

64. André Nollkaemper, *Conversations Among Courts: Domestic and International Adjudicators*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 527 (Cesare Romano et al. eds., 2014); Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 67 (2003).

65. Carozza, *supra* note 64, at 39 n.7.

articles providing that nothing in the treaty shall limit or restrict rights and freedoms guaranteed under the domestic law of the State parties.<sup>66</sup> Another practical manifestation of the principle is the exhaustion of domestic remedies as a condition of admissibility before international human rights courts.<sup>67</sup>

Regarding the ECHR, the mechanism of the Convention is “subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions.”<sup>68</sup> The Court’s early case law<sup>69</sup> elaborated upon this principle and the States parties<sup>70</sup> reiterated it as a solution to the increasing number of pending

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66. See, e.g., Convention on the Rights of Persons with Disabilities art. 4(4), Dec. 13, 2006, G.A. Res. 61/106, U.N. Doc. A/RES/61/106; African Charter on the Rights and Welfare of the Child art. 1(2), O.A.U. Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999); Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women art. 13, June 9, 1994, 35 I.L.M. 1534; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13; American Convention on Human Rights art. 29(b), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter Pact of San Jose]; European Convention on Human Rights art. 53, *supra* note 2.

67. Solomon T. Ebovrah, *International Human Rights Courts*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 241 (Cesare Romano et al. eds., 2014).

68. Explanatory Report on Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR ¶ 9, [https://www.echr.coe.int/Documents/Protocol\\_15\\_explanatory\\_report\\_ENG.pdf](https://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf) (last visited June 29, 2018) [hereinafter Explanatory Report on Protocol No. 15].

69. See *Handyside v. United Kingdom*, App. No. 5493/72, Eur. Ct. H.R. ¶ 48 (1976), <http://hudoc.echr.coe.int/eng?i=001-57499> (“Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.”); see also Case “Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium,” 3 Eur. Ct. H.R. (ser A.) ¶ 10 (1967), <http://hudoc.echr.coe.int/eng?i=001-57525> (“[T]he Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention.”).

70. See *Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the Improvement of Domestic Remedies*, COUNCIL OF EUR. COMM. OF MINISTERS, ¶ 13 (May 12, 2004), [https://search.coe.int/cm/Pages/result\\_details.aspx](https://search.coe.int/cm/Pages/result_details.aspx)

cases. States parties foresaw to amend the ECHR with a preambular paragraph providing that “High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto.”<sup>71</sup>

With regard to concurrent applications specifically, subsidiarity is the key consideration when the Court coordinates between similar cases and settles one prioritized case, while leaving the settlement of the other cases to domestic authorities. Procedural tools like the pilot judgment or leading cases<sup>72</sup> promote subsidiarity, as far as the respondent State is able and willing to cooperate and set up effective domestic remedies. As an exception to the subsidiarity rule, the Court does not require the exhaustion of domestic remedies when unavailable or effective, which has been the case in most human rights disputes submitted from separatist areas.<sup>73</sup> In those cases, the Court operates as a “court of first instance,”<sup>74</sup> turning the subsidiary nature

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?ObjectID=09000016805dd18e (“When a judgment which points to structural or general deficiencies in national law or practice (‘pilot case’) has been delivered and a large number of applications to the Court concerning the same problem (‘repetitive cases’) are pending or likely to be lodged, the respondent state should ensure that potential applicants have, where appropriate, an effective remedy allowing them to apply to a competent national authority, which may also apply to current applicants. Such a rapid and effective remedy would enable them to obtain redress at national level, in line with the principle of subsidiarity of the Convention system.”); *see also Brighton Declaration*, *supra* note 35, ¶ 11 (“The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions . . . [T]he role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State’s margin of appreciation.”).

71. Explanatory Report on Protocol No. 15 art. 1, *supra* note 68.

72. *See infra* Section IV.B.2.

73. *See Practical Guide on Admissibility Criteria*, ECHR ¶ 72, (Feb. 28, 2017), [https://www.echr.coe.int/Documents/Admissibility\\_guide\\_ENG.pdf](https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf) (stating that applicants are only required to exhaust domestic remedies when those remedies are accessible and capable of providing a reasonable remedy to their complaint).

74. *Sargsyan v. Azerbaijan*, App. No. 40167/06, Eur. Ct. H.R. ¶¶ 32-33 (2017), <http://hudoc.echr.coe.int/eng?i=001-179555> (explaining that because the Government failed to comply with its commitments and obligations under the

of the ECHR mechanism “on its head.”<sup>75</sup>

However, where the Court found a domestic remedy effective and available, it required the exhaustion rule and reaffirmed its ultimate supervisory jurisdiction.<sup>76</sup> This was the case with the domestic remedy that the “Turkish Republic of Northern Cyprus” (TRNC) created to settle the mass of disputes of expropriated Greek Cypriot owners<sup>77</sup> and that of the Ukrainian courts relocated from the separatist areas to government controlled territories.<sup>78</sup> The Court considered both of those domestic procedures as effective remedies to be exhausted before seizing the Convention mechanism, in accordance with the subsidiarity principle.<sup>79</sup> Therefore, the Court shall examine on a case-by-case basis whether subsidiarity can be invoked in the given separatist area, as a huge number of applications can be redirected to domestic remedies if effective and available.

### C. GOOD ADMINISTRATION OF JUSTICE AND PROCEDURAL ECONOMY

Two closely related principles, good administration of justice and procedural economy, help the ECtHR to rationalize its procedure while dealing with concurrent applications. First, good administration of justice is a principle that enables courts to fill gaps in the regulation

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Convention the Court must act as the court of first instance); *Chiragov v. Armenia*, App. No. 13216/05, Eur. Ct. H.R. ¶¶ 118-20 (2015), <http://hudoc.echr.coe.int/eng?i=001-155353> (stating that the respondent Government failed to show a remedy capable of resolving the applicants’ complaints, so the Court dismissed the Government’s objection of non-exhaustion of domestic remedies and then proceeded to hear the case).

75. Paul Mahoney, *Speculating on the Future of the Reformed European Court of Human Rights*, 20 HUM. RTS. L.J. 1, 4 (1999) (“The subsidiary character of the ECHR has been turned on its head, the ECHR institutions do not have the benefit of fact-finding and an initial assessment by the domestic courts, and the new Court runs the risk of being swamped with work for which it is not presently equipped.”).

76. *See Demopoulos v. Turkey*, 2010-I Eur. Ct. H.R. 365, 415 (affirming that applicants who have exhausted all available paths in pursuit of a remedy may invoke their rights under the Convention and the Court will have ultimate supervisory jurisdiction).

77. *See id.* at 407; *see also Xenides-Arestis v. Turkey*, App. Nos. 46347/99 et al., Eur. Ct. H.R. ¶ 37 (2006), <http://hudoc.echr.coe.int/eng?i=001-71800>.

78. *See Tsezar v. Ukraine*, App. Nos. 73590/14 et al., Eur. Ct. H.R. ¶¶ 69-71 (2018), <http://hudoc.echr.coe.int/eng?i=001-180845>.

79. *See id.* ¶ 69.

of their procedures. When the statute or the rules of procedure of a given tribunal do not address a given scenario, any international tribunal is “at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.”<sup>80</sup> The principle of good administration of justice allows international tribunals, due to their “inherent power,”<sup>81</sup> “to mitigate the rigid application of the rule of procedure or to solve an issue of procedure which is not regulated by specific rules” of procedure.<sup>82</sup> The ICJ invoked the standard of good administration of justice to disregard the applicant’s initial lack of capacity to seize the Court if the applicant’s deficiency might be overcome in the course of proceedings,<sup>83</sup> to rule on the respective claims and counter-claims of the parties in a single set of proceedings,<sup>84</sup> to order the joinder of preliminary objections to the merits,<sup>85</sup> or in the “interest of the applicant to have its claims decided

80. *Mavrommatis Palestine Concessions (Greece v. U.K.)*, Judgment, 1924 P.C.I.J. (ser. B) No. 2, at 16 (Aug. 30).

81. *See Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Joinder of Proceedings, 2013 I.C.J. Rep. 177, ¶ 14 (Apr. 17) (separate opinion by Trindade, J.) (“In my understanding, the Court did not do so pursuant to an ‘implied power’ ensuing from the regulatory texts, but rather, and more precisely, pursuant to an ‘inherent power,’ proper to the exercise of the international judicial function. It is an ‘inherent power’ of the international tribunal concerned to see to it that the procedure functions properly, so that justice is done and is seen to be done. It is an ‘inherent power’ of an international tribunal such as the ICJ to see to it that the procedure operates in a balanced way, ensuring procedural equality and the guarantees of due process, so as to preserve the integrity of its judicial function.”).

82. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*, Preliminary Objections, Judgment, 2008 I.C.J. Rep. 590, ¶ 91 (dissenting opinion of Kreća, J.).

83. *See id.* at 441, ¶ 85.

84. *See Oil Platforms (Iran v. U.S.)*, Counter-Claim, 1998 I.C.J. Rep. 205, ¶ 43 (Mar. 10); *see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia)*, Counter-Claims, 1997 I.C.J. Rep. 257-58, ¶¶ 30-31 (Dec. 17).

85. *See Barcelona Traction, Light and Power Company (Belg. v. Spain)*, Preliminary Objections, 1964 I.C.J. Rep. at 42 (July 24); *see also Panevezys-Saldutiskis Railway Case (Est. v. Lith.)*, Preliminary Objections, 1938 P.C.I.J. (ser. A/B) No. 75, at 56 (June 30) (“Whereas the Court may order the joinder of preliminary objections to the merits, whenever the interests of the good administration of justice require it.”).

within a reasonable period of time.”<sup>86</sup> This principle serves the adequate functioning of the procedure, so that the international tribunal can be in possession of all elements necessary for the decision in good time and be able to deal with the “totality of a dispute.”<sup>87</sup>

The ECtHR invokes the “proper administration of justice” for instance to order the simultaneous examination of applications by the same formation of the Court,<sup>88</sup> to join applications in one procedure,<sup>89</sup> to examine an adjourned application within the pilot-judgment procedure,<sup>90</sup> or to invite the third party intervention of a State or any person who is not a party to the proceedings.<sup>91</sup> In those examples, the ECtHR uses its judicial discretion to assess the degree of connectedness between claims, cases, or parties and integrates those connected elements accordingly in its procedure. Thus, where the Court translates interconnected substantial law questions into its procedure, it promotes the adequate functioning of its mechanism and develops the coordinated settlement of disputes.

Second, the ICJ interprets “judicial economy” as “an element of the requirements of the sound administration of justice” which aims “to prevent the needless proliferation of proceedings.”<sup>92</sup> The principle of judicial economy grants the courts discretion to simplify their procedure. Judicial economy allows tribunals “to refrain from

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86. See *Iran v. U.S., Counter-Claim*, 1998 I.C.J. Rep. at 205, ¶ 43.

87. See *id.*; see also ROBERT KOLB, *THE INTERNATIONAL COURT OF JUSTICE* 1130–31 (2013).

88. Rules of Court of the European Court of Human Rights art. 35(2) (1959) [hereinafter ECtHR Rules 1959].

89. See *Varga v. Hungary*, App. Nos. 14097/12 et al., Eur. Ct. H.R. ¶ 39 (2015), <http://hudoc.echr.coe.int/eng?i=001-152784>; see also *Association “21 December 1989” v. Romania*, App. No. 33810/07, Eur. Ct. H.R. ¶ 7 (2011), <http://hudoc.echr.coe.int/eng?i=001-104864>; *Atanasiu v. Romania*, App. Nos. 30767/05, 33800/06, Eur. Ct. H.R. ¶ 108 (2010), <http://hudoc.echr.coe.int/eng?i=001-100989>.

90. See Rules of Court of the European Court of Human Rights art. 61(6)(c) (2018) [hereinafter ECtHR Rules 2018].

91. See European Convention on Human Rights art. 36(2), *supra* note 2; see also ECtHR Rules 2018 art. 44(3)(a), *supra* note 90; *Avotiņš v. Latvia*, App. No. 17502/07, Eur. Ct. H.R. ¶ 10 (2016), <http://hudoc.echr.coe.int/eng?i=001-163114>.

92. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croat. v. Serb.*), Preliminary Objections, Judgment, 2008 I.C.J. Rep. 442-43, ¶ 89 (dissenting opinion of Kreća, J.).

addressing claims beyond those necessary to resolve the dispute,” but it does not compel them to exercise such restraint.<sup>93</sup>

The Permanent Court of International Justice (PCIJ) applied the principle of judicial economy to preliminary objections for the first time in international case law. The Court concluded that a procedural defect is curable by subsequent action of the applicant or respondent in view of considerations of judicial economy.<sup>94</sup> The ICJ similarly confirmed that judicial economy provided a justification for disregarding jurisdictional defects, if they could be easily cured by the subsequent action of the applicant or respondent.<sup>95</sup> It also invoked procedural economy to decide on any preliminary objections—for example, jurisdiction or admissibility—before entering into lengthy and costly proceedings on the merits of a case,<sup>96</sup> or to exercise its power to join proceedings.<sup>97</sup> Other international tribunals used judicial economy as a principle allowing them to exercise discretion to decide not to examine alternative claims if unnecessary for the dispute

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93. See Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶ 133, WTO Doc. WT/DS276/AB/R (adopted Aug. 30, 2004); see also Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 71, WTO Doc. WT/DS138/AB/R (adopted May 10, 2000).

94. See *Mavrommatis Palestine Concessions (Greece v. U.K.)*, Judgment, 1924 P.C.I.J. (ser. B) No. 2, at 17 (Aug. 30).

95. See *Croat. v. Serb.*, Preliminary Objections, Judgment, 2008 I.C.J. Rep. 441, ¶ 89.

96. See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.)*, Preliminary Objections, Judgment, 1998 I.C.J. Rep. 47, 49-50 (joint declaration of Bedjaoui, J., Guillaume, J., and Ranjeva, J.) (“When the Court, in 1972, adopted the text which later became Article 79, it did so for reasons of procedural economy and of sound administration of justice. Court and parties were called upon to clear away preliminary questions of jurisdiction and admissibility as well as other preliminary objections before entering into lengthy and costly proceedings on the merits of a case . . . The interpretation given by the Court in the present case to the notion ‘not exclusively preliminary character’ is, however, so wide and so vague that the possibility of accepting a preliminary objection becomes seriously restricted. Thereby the Judgment acts counter to the procedural economy and the sound administration of justice which it is the intent of Article 79 to achieve.”).

97. See *Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica)*, Joinder of Proceedings, 2013 I.C.J. Rep. 184 ¶¶ 12, 18 (Apr. 17).

settlement,<sup>98</sup> to decline “to disrupt the reasonable factual and legal findings of the initial decision-maker in order to promote efficiency in the conduct of adjudicatory proceedings;”<sup>99</sup> or to determine the logical order in which a court or tribunal considers the various issues before it.<sup>100</sup>

Human rights courts found that certain domestic norms providing on the connectivity of different cases in one procedure served the legitimate purpose of procedural economy.<sup>101</sup> For example the Inter-American Court of Human Rights (IACtHR) held the Venezuelan “principle of connection”, which combined the prosecution of several perpetrators of a crime or several interconnected punishable acts in the hands of the same court, as conforming to procedural economy and the right to be tried by a competent tribunal.<sup>102</sup> Likewise, the ECtHR held it reasonable for the purposes of procedural economy that a high court joined different sets of proceedings so that they may be disposed of

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98. See Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, ¶ 183, WTO Doc. WT/DS166/AB/R (adopted Dec. 22, 2000); see also Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, 399 ¶ 10.219, WTO Docs. WT/DS139/AB/R, WT/DS142/AB/R (adopted May 31, 2000).

99. *Government of Sudan v. Sudan People’s Liberation Movement/Army*, 30 R.I.A.A. 145, 307-08, ¶ 422, [http://legal.un.org/riaa/cases/vol\\_XXX/145-416.pdf](http://legal.un.org/riaa/cases/vol_XXX/145-416.pdf).

100. See *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, 2002 I.C.J. Rep. 19, ¶¶ 45-46; see also *Iran v. U.S.*, 35 Iran-U.S. C.T.R. No. 823, Award No. 595-823-3 of 16 Nov. 1999; *Barcelona Traction, Light and Power Company (Belg. v. Spain)*, Preliminary Objections, 1964 I.C.J. Rep. at 85, 96-99 (July 24) (dissenting opinion by Morelli, J.).

101. See *Bikas v. Germany*, App. No. 76607/13, Eur. Ct. H.R. ¶ 60 (2018), <http://hudoc.echr.coe.int/eng?i=001-180316>; see also *Avotiņš v. Latvia*, App. No. 17502/07, Eur. Ct. H.R. ¶ 118 (2016), <http://hudoc.echr.coe.int/eng?i=001-163114>; *Kuhlen-Rafsandjani v. Germany*, App. Nos. 21980/06 et al., Eur. Ct. H.R. ¶¶ 82, 85 (2011), <http://hudoc.echr.coe.int/eng?i=001-102918>; *Matter of Certain Venezuelan Prisons, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. (July 6, 2011)*, [http://www.corteidh.or.cr/docs/medidas/centrospenitenciarios\\_se\\_01\\_ing5.pdf](http://www.corteidh.or.cr/docs/medidas/centrospenitenciarios_se_01_ing5.pdf); *Matter of the Ciudad Bolivar Judicial Detention Center “Vista Hermosa Prison,” Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. (May 15, 2011)*, [http://www.corteidh.or.cr/docs/medidas/vistahermosa\\_se\\_01\\_ing.pdf](http://www.corteidh.or.cr/docs/medidas/vistahermosa_se_01_ing.pdf); *Leiva v. Venezuela, Merits, Reparations, and Costs, Judgment, 2009 Inter-Am. Ct. H.R. (ser. C) No. 206 (Nov. 17, 2009)*; *Petersen v. Denmark*, App. No. 6315/02, Eur. Ct. H.R. 8, 9 (2004), <http://hudoc.echr.coe.int/eng?i=001-23918>; *Süssmann v. Germany, 1996-IV Eur. Ct. H.R. ¶¶ 56-57*.

102. See *Leiva v. Venezuela, Merits, Reparations, and Costs, Judgment, 2009 Inter-Am. Ct. H.R. (ser. C) No. 206, ¶¶ 74, 80*.



together, or coordinated them for purposes of disposal.<sup>103</sup> The ECtHR further held that in some cases, a domestic high court might leave some applications pending and “await further constitutional complaints in order to rule on them together for reasons of procedural economy . . . for example where a leading decision is sought.”<sup>104</sup> It also found useful for procedural economy a law authorizing the domestic courts to take into account in the sentencing process further similar and closely-linked criminal acts<sup>105</sup> or the joinder of criminal trials of several accused whose roles were closely interconnected.<sup>106</sup> In their own procedure, regional human rights tribunals also justified with judicial economy the joinder of cases or proceedings on provisional measures,<sup>107</sup> the rule on exhaustion of domestic remedies,<sup>108</sup> or the lack of examination of a specific complaint “either where the judgment has dealt with the main legal issue or where the complaints coincide or overlap.”<sup>109</sup> Therefore, in accordance with the ICJ’s approach, the ECtHR should act under the principle of judicial economy so as to prevent the needless proliferation of proceedings.

#### D. COHERENT AND HARMONIOUS INTERPRETATION OF THE CONVENTION

While interpreting a provision of the Convention, the Court must try to achieve “an internal and external harmony, namely, respectively, harmony within the Convention, reading it as a whole, and harmony with the rules of international law.”<sup>110</sup>

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103. See Case C-194/99 P, Thyssen Stahl AG v. Comm’n of the E.C., Opinion of Advocate-General Stix-Hackl, 2003 E.C.R. I-10821 ¶ 243; see also Süßmann v. Germany, 1996-IV Eur. Ct. H.R. ¶¶ 56, 59.

104. See *Kuhlen-Rafsandjani*, App. Nos. 21980/06 et al., Eur. Ct. H.R. ¶¶ 82, 85.

105. See *Bikas*, App. No. 76607/13, Eur. Ct. H.R. ¶ 60.

106. See *Petersen*, App. No. 6315/02, Eur. Ct. H.R. at 8-9.

107. See *Matter of Certain Venezuelan Prisons, Provisional Measures*, Order of the Court, Inter-Am. Ct. H.R. ¶ 23 (July 6, 2011), [http://www.corteidh.or.cr/docs/medidas/centrospenitenciarios\\_se\\_01\\_ing.pdf](http://www.corteidh.or.cr/docs/medidas/centrospenitenciarios_se_01_ing.pdf); see also *Matter of the Ciudad Bolivar Judicial Detention Center “Vista Hermosa Prison,” Provisional Measures*, Order of the Court, Inter-Am. Ct. H.R. ¶ 19 (May 15, 2011), [http://www.corteidh.or.cr/docs/medidas/vistahermosa\\_se\\_01\\_ing.pdf](http://www.corteidh.or.cr/docs/medidas/vistahermosa_se_01_ing.pdf).

108. See *Avotiņš v. Latvia*, App. No. 17502/07, Eur. Ct. H.R. ¶ 118 (2016), <http://hudoc.echr.coe.int/eng?i=001-163114>.

109. See *Catan v. Moldova*, 2012-V Eur. Ct. H.R. 309, 374, ¶ 1.

110. *Güzelyurtlu v. Cyprus*, App. No. 36925/07, Eur. Ct. H.R. ¶ 61 (2017)

The first level where the coherent and harmonious interpretation of the ECHR operates is in the Court's own case law as a whole. Beyond the Convention's reference to undesired inconsistency of its interpretation,<sup>111</sup> both the ECtHR<sup>112</sup> and States parties to the ECHR<sup>113</sup> highlight the importance of the clarity and consistency of the Court's case law. It means that comparable cases shall be "resolved in the light of the same principles" developed by the Court<sup>114</sup> and under consistently applied procedural rules.<sup>115</sup> On the one hand, the coherent and harmonious interpretation of the provisions of the ECHR provides legal certainty. The Court and States parties recognized that "[w]hile the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and

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(dissenting opinion of Serghides, J.), <http://hudoc.echr.coe.int/eng?i=001-172460>; see also Annual Report 2017, *supra* note 15, at 25 ("[T]he Court's approach being to read the Convention as a whole so as to ensure the coherent and harmonious interpretation of its provisions.").

111. See European Convention on Human Rights art. 30, *supra* note 2 ("Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.").

112. See *Buishvili v. Czech Republic*, App. No. 30241/11, Eur. Ct. H.R. ¶ 44 (2012), <http://hudoc.echr.coe.int/eng?i=001-114051> (stating that the Court noted a consistent interpretation was required between Article 5 § 4 of the Convention and Article 5 § 3, as both share a close affinity); see also *Stec v. United Kingdom*, 2005-X Eur. Ct. H.R. 321, 340-41.

113. See *Brighton Declaration*, *supra* note 35, ¶ 12(c)(ii) ("The Conference . . . [w]elcomes and encourages open dialogues between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention, including particularly dialogues between the Court and . . . [t]he Committee of Ministers, including on the principle of subsidiarity and on the clarity and consistency of the Court's case law."); see also *Interlaken Declaration*, *supra* note 35, ¶ 4; ("[The Conference] [s]tresses the importance of ensuring the clarity and consistency of the Court's case-law and calls, in particular, for a uniform and rigorous application of the criteria concerning admissibility and the Court's jurisdiction."); EUR. PARL. ASS., *Effective Implementation of the European Convention on Human Rights: The Interlaken Process*, Res. 1726, ¶ 7 (2010).

114. See *De Souza Ribeiro v. France*, 2012-VI Eur. Ct. H.R. 203, 256 (concurring opinion of De Albuquerque, J., joined by Vučini, J.).

115. See *Burmych v. Ukraine*, App. Nos. 46852/13 et al., Eur. Ct. H.R. ¶ 213 (2017), <http://hudoc.echr.coe.int/eng?i=001-178082>.

equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases.”<sup>116</sup> As Part III will explain, procedural tools like pilot judgments, leading cases, or Grand Chamber judgments promote legal certainty by a well-settled case law.

On the other hand, consistency of the Convention’s interpretation does not exclude that the Court deviates from an established case law in light of the specific circumstances of a case. In the context of domestic courts, the ECtHR recognized that “the principle of good administration of justice cannot be taken to impose a strict requirement of case-law consistency.”<sup>117</sup> The same principle applies to the ECtHR too: case law development is not, in itself, contrary to the proper administration of justice. The Court shall follow a dynamic and evolutive approach while interpreting the Convention as a “living instrument,” in light of present-day conditions.<sup>118</sup>

A second level of the coherent and harmonious interpretation of the Convention operates between the ECHR and other international legal regimes. The Court recognized at various occasions that the Convention shall so far as possible be interpreted in harmony with other obligations of the State parties under general international law<sup>119</sup> or special treaty regimes such as European Union law,<sup>120</sup> the law of the

116. See *Scoppola v. Italy* (No. 2), App. No. 10249/03, Eur. Ct. H.R. ¶ 104 (2009), <http://hudoc.echr.coe.int/eng?i=001-94135> (confirmed by the States parties in paragraph 25(c) of the Brighton Declaration); see also *Stafford v. United Kingdom*, 2002-IV Eur. Ct. H.R. 115, 137, ¶ 68; *Chapman v. United Kingdom*, 2001-I Eur. Ct. H.R. 41, 66, ¶ 70; *Brighton Declaration*, *supra* note 35, ¶ 25(c).

117. See *Şahin v. Turkey*, App. No. 13279/05, Eur. Ct. H.R. ¶ 84 (2011), <http://hudoc.echr.coe.int/eng?i=001-107156>; see also *Atanasovski v. Macedonia*, App. No. 36815/03, Eur. Ct. H.R. ¶ 38 (2010), <http://hudoc.echr.coe.int/eng?i=001-96673>; *Unédic v. France*, App. No. 20153/04, Eur. Ct. H.R. ¶ 73 (2008), <http://hudoc.echr.coe.int/eng?i=001-90350>.

118. See *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) ¶ 71 (1995); *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A.) ¶ 31 (1978).

119. See *Al-Dulimi v. Switzerland*, App. No. 5809/08, Eur. Ct. H.R. ¶ 138 (2016), <http://hudoc.echr.coe.int/eng?i=001-164515>; see also *Nada v. Switzerland*, 2012-V Eur. Ct. H.R. 213, 272, ¶ 170; *Al-Saadoon v. United Kingdom*, 2010-II Eur. Ct. H.R. 61, 128; *Streletz v. Germany* 2001-II Eur. Ct. H.R. 409, 447; *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 100.

120. See *Annual Report 2017*, *supra* note 15, at 17; Eur. Ct. H.R., *Annual Report 2015*, Speech Given by Mr. Dean Spielmann, 36 (2015), [https://www.echr.coe.int/Documents/Annual\\_Report\\_2015\\_ENG.pdf](https://www.echr.coe.int/Documents/Annual_Report_2015_ENG.pdf).

sea,<sup>121</sup> or international humanitarian law.<sup>122</sup> This means in practice that while deciding on an individual case, the Court shall take into account and cooperate between its case law as a whole and other norms of international law. The use of the harmonious interpretation “as far as possible” means that the Court must also have regard for the special character of the ECHR as a human rights treaty.<sup>123</sup>

Coordination among the Court’s own decisions on the one hand, and between its own case law and other regimes of international law on the other hand, facilitates good administration of justice and procedural economy, because its precedents and external sources of international law might prevent the needless proliferation or prolongation of proceedings.

The above-mentioned principles of the coordinated settlement shall endorse the Court’s procedure while facing its massive case law. While deciding on individual cases, the Court should ease its fact-finding and legal analytical burden by applying the principles of subsidiarity, good administration of justice and procedural economy, and the coherent and harmonious interpretation of the Convention. Some of those principles conflict with each other in the sense that their application might limit that of other principles. Especially good administration of justice and judicial economy might threaten individual justice and thus the Convention’s effectiveness if no due consideration is given to each particular case. For instance, judicial economy requires the Court to strike out an application if “it is no longer justified to continue its examination,”<sup>124</sup> while the effectiveness of the Convention might justify its continued examination if it “would contribute to elucidate, safeguard and develop the standards of protection under the Convention.”<sup>125</sup> This is a discretionary question that the Court can decide on only if it has a general overview of its

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121. See *Medvedyev v. France*, 2010-III Eur. Ct. H.R. 61, 96-101.

122. See *Hassan v. United Kingdom*, 2014-VI Eur. Ct. H.R. 1, 49-50, 61-62; *Varnava v. Turkey*, 2009-V Eur. Ct. H.R. 13, 75-76 (2009).

123. *Demopoulos v. Turkey*, 2010-I Eur. Ct. H.R. 365, 410-11 (“It is correct, as the applicants and intervening Government asserted, that the Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part . . . however, the Court must also have regard to its special character as a human rights treaty . . .”).

124. See European Convention on Human Rights art. 37(1)(c), *supra* note 2.

125. *Id.*; see also *Karner v. Austria*, 2003-IX Eur. Ct. H.R. 199, 209.

past and pending cases. As a precedent in concurrent applications from separatist areas, several applicants from Eastern Ukraine challenged the abduction and arbitrary detention of their relatives by separatist forces and later, after the release of their relatives, expressly stated that they no longer wished to pursue their application.<sup>126</sup> The Court decided to strike out those applications, given the fact “that a number of cases concerning similar facts and raising similar issues under the Convention have been brought before the Court and is currently pending before it,” and that “[t]he Court will therefore have an opportunity to determine legal issues involved in these cases.”<sup>127</sup> This is an example of prioritization of judicial economy, while protecting the effectiveness of the Convention through other pending cases.

Thus, the coordinated settlement of concurrent applications is based on the application of all the above-mentioned principles. On the one hand, the Court should find the right balance between its main function, individual justice, and effectiveness of the Convention, and, on the other hand, the principles of subsidiarity, good administration of justice and procedural economy, and the coherent and harmonious interpretation of the Convention. As the Part III explains, the first concurring element that challenges the application of those principles is the various international dispute settlement mechanisms that States or individuals have seized from separatist areas simultaneously in parallel with their application to the ECtHR.

### III. CONCURRENT PROCEDURES OF INTERNATIONAL INVESTIGATION OR SETTLEMENT

Concurrent applications to different dispute settlement bodies suppose the concurrent jurisdiction of those judicial or investigative bodies over the same facts and legal questions.<sup>128</sup> If there is no

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126. See *Zosim v. Ukraine*, App. Nos. 58316/14 et al., Eur. Ct. H.R. ¶ 8 (2017), <http://hudoc.echr.coe.int/eng?i=001-179511>; see also *Polovynko v. Ukraine*, App. Nos. 52061/14 et al., Eur. Ct. H.R. ¶ 8 (2016), <http://hudoc.echr.coe.int/eng?i=001-165564>.

127. *Polovynko*, App. Nos. 52061/14 et al., Eur. Ct. H.R. ¶ 11; *Zosim*, App. Nos. 58316/14 et al., Eur. Ct. H.R. ¶ 11.

128. See Schreuer, *supra* note 52, at 511 (“The most obvious cases of concurrent jurisdiction arise in situations in which national and international proceedings are

structural coordination among the different international fora having overlapping jurisdiction, concurrent procedures might result in the substantive fragmentation of international law.<sup>129</sup> Without coordination between concurrent international investigation or dispute settlement mechanisms in simultaneous proceedings related to separatist conflicts, international adjudicatory bodies risk the adoption of contradictory conclusions on fact or law that would create legal uncertainty. Furthermore, each dispute settlement body would be obliged to reconstruct the legal and factual background of complex and large-scale violations of international law as a first instance court. Therefore, coordination between concurrent international investigation or dispute settlement mechanisms is crucial to ensure legal certainty and to ease the legal analytical and fact-finding burden on dispute settlement bodies.

This Part first argues that the ECtHR should coordinate between concurrent procedures of international investigation or settlement and its own mechanism in the sense that it shall narrowly interpret the identity of the facts, complaints, and the applicant of the concurrent proceedings for the purposes of *lis pendens* and *res judicata* rules (Part III.A). This ensures that individuals submitting concurrent applications have access to the ECtHR if the other forums do not provide effective remedy. Second, this Part explains that even if the *lis pendens* and *res judicata* rules of the ECtHR do not significantly reduce the Court's backlog, taking into account the substantive conclusions of concurrent procedures of international investigation or settlement assures the harmonious interpretation of the Convention with other rules of international law and eases the Court's fact-finding burden (Part III.B).

#### A. COORDINATION OF PROCEEDINGS

Under Article 35(2)(b) of the ECHR, the Court shall find

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open to the same parties to pursue the same claim.”).

129. See Dupuy & Viñuales, *supra* note 52, at 143 (“The situation in the international legal order is in part similar and in part different to that of domestic systems. Like domestic systems, the areas and issues covered by international law have become increasingly diverse and complex. Yet, no explicit coordination has been developed between the institutions established to implement this growing body of obligations.”).

inadmissible any application submitted under Article 34 on individual applications that “is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.”<sup>130</sup> Thus, the ECHR excludes any re-litigation of identical claims already submitted to (*lis pendens*) or decided by (*res judicata*) another international procedure,<sup>131</sup> whereas other human rights treaty bodies define *lis pendens* more flexibly, only excluding an identical matter actually pending under another procedure of international investigation or settlement.<sup>132</sup> The rule aims at preventing the risk of diverging interpretations of similar provisions of international human rights treaties.<sup>133</sup> Before the ECtHR,

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130. See European Convention on Human Rights art. 35(2)(b), *supra* note 2.

131. See Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, *opened for signature* Dec. 19, 2011, 1577 U.N.T.S. I-27531 (entered into force Apr. 14, 2014); see also Rules of Procedure of the African Commission on Human and Peoples’ Rights, Rule 93 §2(j), approved May 26, 2010, [http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules\\_of\\_procedure\\_2010\\_en.pdf](http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf); Rules of Procedure of the Inter-American Commission on Human Rights art. 33(1), approved November 13, 2009, <http://www.oas.org/en/iachr/mandate/Basics/RulesIACHR2013.pdf>; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights art. 3(2)(c), G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008) [hereinafter OP-ICESCR]; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women art. 4(2)(a), G.A. Res. 54/4, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/4 (Oct. 15, 1999) [hereinafter OP-CEDAW]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 22(4)(a), G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter Convention Against Torture]; African Charter on Human and Peoples’ Rights art. 56(7), June 27, 1981, 21 I.L.M. 58 (1982); Optional Protocol to the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, U.N. Doc. A/61/611 (entered into force May 3, 2008) [hereinafter OP-CRPD].

132. See International Convention for the Protection of All Persons from Enforced Disappearance art. 31(2)(c), G.A. Res. A/RES/61/177, U.N. Doc. A/HRC/RES/2006/1 (Dec. 20, 2006) [hereinafter ICED]; see also Pact of San Jose art. 46(1)(c), *supra* note 66 (stating that the Commission will admit a petition when the subject of the petition is not in a status of pending with other international tribunals); Optional Protocol to the International Covenant on Civil and Political Rights art. 5(2)(a), Dec. 16, 1966, U.N. G.A. Res. 2200 (XXI), *reprinted in* 6 I.L.M. 383 (entered into force in 1976) [hereinafter OP-ICCPR].

133. See August Reinisch, *International Courts and Tribunals, Multiple Jurisdiction*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 10 (Apr. 2011), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e41?rskey=AUZMZo&result=1&prd=EPIL>.

several respondent States invoked ongoing inter-state court proceedings or status talks about the given disputed area as a preliminary objection precluding the admissibility of the application.<sup>134</sup>

First, the preliminary objection of *lis pendens* could be raised in inter-state applications. In the *Georgia v. Russia (II)* case, concerning systematic human rights violations allegedly committed by Russian forces and/or by the separatist forces under their control in the August 2008 armed conflict, Russia argued that the application concerned essentially the same dispute as the pending *Georgia v. Russian Federation* case before the ICJ.<sup>135</sup> It added that the same complaints lodged under Article 14 taken in conjunction with other provisions of the ECHR—concerning alleged discriminatory attacks directed against civilians of Georgian origin—as already subjected to ICJ examination.<sup>136</sup> Without examining whether the two procedures concerned the same matter, the ECtHR briefly noted that after the ICJ had held in a judgment of April 1, 2011, that it did not have jurisdiction to entertain the application,<sup>137</sup> the procedure before that international court had accordingly “come to an end.”<sup>138</sup> Furthermore, the Court held it “clear from the explicit wording of Article 35(2) of the Convention that it applies only to individual applications” and consequently dismissed Russia’s preliminary objection.<sup>139</sup>

Regardless of the *lis pendens* rule, one might argue on the basis of the preeminent role of the ICJ in the development of international law or the international comity between tribunals<sup>140</sup> that the ECtHR should

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134. Lilian Apostol, *The Role of the ECHR and Other Human Rights Bodies During the Ukrainian Conflict, Its Eventual Settlement and Aftermath*, SSRN ¶ 22 (Apr. 25, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2982277](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982277).

135. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Memorial of Geor., [2009] 1 I.C.J. (Sept. 2).

136. *Georgia v. Russia (II)*, App. No. 38263/08, Eur. Ct. H.R. ¶ 77 (2011), <http://hudoc.echr.coe.int/eng?i=001-108097>.

137. Application of the International Convention on the Elimination of All Forms of Racial Discrimination, 2011 I.C.J. Rep. 70, 75 (Apr. 1).

138. *Georgia*, App. No. 38263/08, Eur. Ct. H.R. ¶ 77.

139. *Id.* ¶ 79; *Cyprus v. Turkey*, App. No. 25781/94, Eur. Comm’n H.R. (1996), <http://hudoc.echr.coe.int/eng?i=001-3213>; *Cyprus v. Turkey*, App. No. 8007/77, Eur. Comm’n H.R. (1983), <http://hudoc.echr.coe.int/eng?i=001-104211>.

140. Dupuy & Viñuales, *supra* note 52, at 144–147.



stay its proceedings and wait for the decision of the ICJ in case of concurrent inter-state applications. However, human rights tribunals, like the ECtHR, could easily reject proposals granting the ICJ prejudicial competence for a case pending concurrently before another international court<sup>141</sup> on account of their judicial autonomy. This served as the main argument of the IACtHR to a State party's request to decline its competence to give an advisory opinion in a concurrent contentious case pending with the ICJ, for reasons of "prudence, if not considerations of comity."<sup>142</sup> The IACtHR rejected the claim, stressing that the Court is an "autonomous judicial institution."<sup>143</sup> Indeed, in the present state of international law there exists no hierarchy between international courts, and the ECtHR has the autonomy for deciding disputes arising out of the interpretation and application of the Convention.<sup>144</sup> Consequently, similar but not identical claims pending before the ICJ or other international tribunals shall not limit the jurisdiction of the ECtHR to rule on inter-state applications. While procedural economy and comity might incline the ECtHR to suspend its procedure until the decision of the ICJ on similar factual or legal questions,<sup>145</sup> the procedural autonomy of the Court and the effectiveness of the Convention should prevail: for these reasons, the Court should proceed without suspending or slowing down its procedure.

Second, as for individual applications, Turkey raised the preliminary objection of the *lis pendens* rule in the *Varnava v. Turkey* case before the European Commission of Human Rights (Commission), claiming that the applications on the sort of persons that disappeared in the conflict of Northern Cyprus concerned a matter that had already been submitted to another procedure of international investigation or settlement of the Committee on Missing Persons

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141. See Tullio Treves, *Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals*, 4 MAX PLANCK Y.B. OF U.N. L. 215, 215 (2000); Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT'L & COMP. L.Q. 848, 862 (1995).

142. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 55 (Oct. 1, 1999).

143. *Id.* ¶¶ 44, 61.

144. *Cyprus*, App. No. 25781/94, Eur. Comm'n H.R. at 28.

145. Apostol, *supra* note 134, ¶ 102.

(Committee)—a bi-communal body established with the participation of the United Nations.<sup>146</sup> The Commission found *lis pendens* procedures inadmissible under the ECHR as “procedures in which a matter is submitted by way of ‘a petition’ lodged formally or substantively by the applicant.”<sup>147</sup> This was not the case with the Committee on Missing Persons because Turkey was not a party to the procedure, the Committee could not “attribute responsibility for the deaths of any missing persons or make findings as to their cause,” and finally because “the Committee’s investigating capacity is limited.”<sup>148</sup> Consequently, the European Commission of Human Rights concluded that the Committee is not “a procedure of international investigation or settlement” of the “matter” in the *Varnava* case.<sup>149</sup>

Another contested issue concerned whether the identity of the applicant excludes the admissibility of an individual application of which claim has been equally addressed by an inter-state application. Such a scenario has occurred with respect to Northern Cyprus, the Georgian, and the Ukrainian separatist areas, subject to numerous individual and inter-state applications before the Court.<sup>150</sup> The Commission left the question open. First, in the *Donnelly v. United Kingdom* case<sup>151</sup> concerning the alleged ill-treatment of detainees in the context of the armed hostilities in Northern Ireland, the Commission did not find the *lis pendens* or *res judicata* rule applicable on account of the then pending *Ireland v. United Kingdom* case,<sup>152</sup> even though in the latter case the Government applicant referred to the treatment of some applicants in support of its allegations under Article 3 of the ECHR. The Commission shortly held that the *res judicata* rule could not apply because the examination on the merits of the inter-

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146. *Varnava v. Turkey*, App. Nos. 16064/90 et al., Eur. Comm’n H.R. 1, 15 (1998), <http://hudoc.echr.coe.int/eng?i=001-4179>.

147. *Id.*

148. *Id.*

149. *Id.* at 14.

150. See generally *Lisnyy v. Ukraine*, App. Nos. 5355/15 et al., Eur. Ct. H.R. 1 (2016), <http://hudoc.echr.coe.int/eng?i=001-165566>; *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. ¶ 52.

151. See generally *Donnelly v. United Kingdom*, App. Nos. 5577/72 et al., Eur. Comm’n H.R. (1973), <http://hudoc.echr.coe.int/eng?i=001-3173>.

152. See generally *id.*; *Ireland v. United Kingdom*, App. Nos. 5310/71 & 5451/72, Eur. Comm’n H.R. (1972), <http://hudoc.echr.coe.int/eng?i=001-142537>.

state case still remained to be carried out.<sup>153</sup> The Commission drew the same conclusion in the *Varnava* case, where Turkey claimed that the application concerned a matter which the Commission had examined previously in three *Cyprus v. Turkey* inter-state cases.<sup>154</sup> After the Court adopted its judgment in the *Cyprus v. Turkey* case which included findings of violations under Articles 2, 3, and 5 of the ECHR concerning missing Greek Cypriots and their families, Turkey argued in the *Varnava* case that Article 35(2)(b) barred examination of the individual applications that were “substantially the same.”<sup>155</sup> The ECtHR did not accept the Turkish position and found that by introducing an inter-state application a Government applicant thereby does not deprive individual applicants of the possibility of introducing or pursuing their own claims.<sup>156</sup> Therefore, because of the difference of the applicants’ character and interests,<sup>157</sup> a pending or already decided inter-state case, even if expressly addressing human rights violations against the same individuals, cannot exclude the admissibility of an individual application with the same subject matter.<sup>158</sup> The *lis pendens* rule excludes the admissibility of an application only if the application concerns substantially not only the same facts and complaints but also introduced by the same persons.

The Court further clarified whether the *lis pendens* rule applies to international status negotiations discussing certain human rights issues addressed in an application before the ECtHR.<sup>159</sup> In the *Chiragov v.*

153. *Donnelly*, App. Nos. 5577/72 et al., Eur. Comm’n H.R. ¶ 5.

154. *Varnava v. Turkey*, App. Nos. 16064/90 et al., Eur. Comm’n H.R. 1, 13 (1998), <http://hudoc.echr.coe.int/eng?i=001-4179>.

155. *Varnava v. Turkey*, 2009-V Eur. Ct. H.R. 13, 53, ¶ 114.

156. *Id.* at 54, ¶ 118.

157. LEO ZWAAK, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 173-79 (Pieter van Dijk et al. eds., 4th ed. 2006) (holding that the commission considered the present application as already having been examined regardless of its relevance as an individual application).

158. *Berdzenishvili v. Russia*, App. Nos. 14594/07 et al., Eur. Ct. H.R. ¶ 44 (2016), <http://hudoc.echr.coe.int/eng?i=001-169648> (explaining the joinder of the parties due to similar subject matter and factual background); *Dzidzava v. Russia*, App. No. 16363/07, Eur. Ct. H.R. ¶ 65 (2016), <http://hudoc.echr.coe.int/eng?i=001-169649>; *Shioshvili v. Russia*, App. No. 19356/07, Eur. Ct. H.R. ¶ 47 (2016), <http://hudoc.echr.coe.int/eng?i=001-169650>.

159. See generally *Chiragov v. Armenia*, App. No. 13216/05, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-108383>; *Varnava*, App. Nos. 16064/90 et al., Eur. Comm’n H.R.

*Armenia* case, Azerbaijani Kurds complained of their inability to return to their homes and property in the Lachin area, which belongs to the internationally-recognized territory of Azerbaijan but remains under Armenian occupation, after being forced to leave in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh.<sup>160</sup> The Armenian Government argued that the matters raised in the application had already been submitted to another international institution for settlement, the ongoing negotiations conducted within the Minsk Group of the Organization for Security and Co-operation in Europe (OSCE), which comprised of questions relating to the resettlement of refugees and internally displaced persons as well as compensation issues.<sup>161</sup> Similar to the *Varnava* case, the Grand Chamber required that “a criterion for finding that the application before the Court is substantially the same as another matter is that the latter has been submitted by way of a petition lodged formally or substantively by the same applicants.”<sup>162</sup> The Court held that OSCE inter-state talks on Nagorno-Karabakh, “where the applicants are not parties and which cannot examine whether the applicants’ individual rights have been violated,” do not constitute a “procedure of international investigation or settlement” of the matters which are the subject of the concrete application.<sup>163</sup>

To summarize the precedents, Article 35(2)(b) of the ECHR only excludes admissibility where the application before the Court concerns substantially not only the same facts and complaints but also introduced by the same persons.<sup>164</sup> To find the matter identical, the Court examines the nature of the dispute settlement body, its procedure, and the legal effect of its decisions.<sup>165</sup> Thus, the *lis pendens* rule clearly does not apply to inter-state applications and applies to individual applications under restricted conditions. The Court should find with sufficient certainty that the finding of the international

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160. *Chiragov*, App. No. 13216/05, Eur. Ct. H.R. ¶¶ 6-19.

161. *Id.* ¶ 57.

162. *Id.* ¶ 61.

163. *Id.*

164. European Convention on Human Rights art. 35(2)(b), *supra* note 2.

165. *See generally* *UCA v. Turkey*, App. No. 73489/12, Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=001-147660>; *Peraldi v. France*, App. No. 2096/05, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng?i=001-92489>.

investigation or settlement also concerned the case of the applicants before the Court and against the same State, that is both the applicant and the same respondent State must be a party to the procedure. Furthermore, the concurrent procedure of international investigation or settlement shall satisfy certain qualitative criteria: it must be able to attribute responsibility for the human rights violations or make findings as to their cause and the dispute settlement body's investigating capacity must present certain effectiveness.<sup>166</sup>

In the case of Crimea and Eastern Ukraine, the Ukrainian State and individuals have initiated various concurrent proceedings. As for the dispute settlement procedures initiated by Ukraine, Kiev seized the ICJ alleging several violations of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) in Eastern Ukraine and of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in Crimea by Russia.<sup>167</sup> The ICJ adopted its order on provisional measures on April 19, 2017, and held that it had *prima facie* jurisdiction to deal with the case, under Article 24(1) of the ICSFT and under Article 22 of the CERD.<sup>168</sup> While the case will remain pending before the ICJ in the coming years, several claims that Ukraine raised may overlap with applications filed with the ECtHR. In this regard, the claims submitted in the inter-state applications should not be taken into account because, as explained above, the *lis pendens* rule does not apply to inter-state applications before the ECtHR. However, individual applications before the ECtHR do concern the same human rights violations as the ICJ's *Ukraine v. Russia* case. In the latter case, Ukraine is requesting the world court to order Russia to make full reparation for the shelling of

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166. *Varnava v. Turkey*, App. Nos. 16064/90 et al., Eur. Comm'n H.R. 1, 15 (1998), <http://hudoc.echr.coe.int/eng?i=001-4179> (holding that the Committee is incapable of attributing responsibility for the deaths to Turkey because Turkey is not a party to the procedure before that that Committee).

167. *Terrorism Financing and Racial Discrimination in Ukraine (Ukr. v. Russ.)*, Application Instituting Proceedings, 2017 I.C.J. 1, 36-47 (Jan. 16) (outlining the legal grounds for Ukraine's claims).

168. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.)*, Order, 2017 I.C.J. ¶ 62 (Apr. 19).

civilians in various cities in the separatist areas of Eastern Ukraine,<sup>169</sup> whereas before the ECtHR individual applicants are complaining about the violation of their right to property, their right to life, and the prohibition of torture in the course of military hostilities in Eastern Ukraine.<sup>170</sup> Similarly, Ukraine's request to order Russia the "full reparation for all victims of the Russian Federation's policy and pattern of cultural erasure through discrimination in Russian-occupied Crimea"<sup>171</sup> might overlap with the Crimean individual applications before the ECtHR. However, even if the ICJ decided in favor of Ukraine and ordered full reparations, the applicants before the ECtHR are not parties to the ICJ procedure and the world court cannot examine whether the applicants' individual rights under the ECHR have been violated. Consequently, the individual applications directed against Russia or Russia and Ukraine would not be inadmissible under Article 35(2)(b) of the ECHR since there is no identical matter.

Another concurrent procedure might be the individual complaints procedures of UN treaty bodies such as the Human Rights Committee, the Committee against Torture, or the Committee on the Elimination of Racial Discrimination (CERD). Currently, eight of the UN human rights treaty bodies may under certain conditions receive and consider individual complaints or communications from individuals.<sup>172</sup> Ukraine is a party to seven of the respective instruments,<sup>173</sup> while Russia is a party to four of them.<sup>174</sup> Whereas Ukraine and Russia have not

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169. *Ukr. v. Russ.*, Application Instituting Proceedings, 2017 I.C.J. ¶ 136.

170. See generally ECtHR Press Release, Case Concerning Events in Crimea and Eastern Ukraine, *supra* note 20; *Lisnyy v. Ukraine*, App. Nos. 5355/15 et al., Eur. Ct. H.R. ¶¶ 1-21 (2016), <http://hudoc.echr.coe.int/eng?i=001-165566> (outlining various claims of property damage, the right to home, and violations of the right to life).

171. *Ukr. v. Russ.*, Application Instituting Proceedings, 2017 I.C.J. ¶ 138.

172. See generally OP-CEDAW, *supra* note 131; OP-ICCPR, *supra* note 132; OP-CRPD, *supra* note 131; ICED, *supra* note 132; OP-ICESCR, *supra* note 131; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, U.N. Doc. A/RES/54/263 (Mar. 16, 2001), <https://www.ohchr.org/Documents/ProfessionalInterest/crc-sale.pdf> [hereinafter OP-CRCCP].

173. *Status of Ratification Interactive Dashboard: OP-ICESCR*, UNHR, <http://indicators.ohchr.org/> (last visited June 16, 2018).

174. *Status of Ratification Interactive Dashboard: OP-ICESCR, ICED, OP-CRPD, OP-CRCCP*, UNHR, <http://indicators.ohchr.org/> (last visited June 16, 2018).

formally seized the CERD with their dispute on Crimea before the ICJ procedure,<sup>175</sup> individuals might direct their human rights petitions to one of the UN human rights treaty bodies under the respective human rights treaties to which Ukraine or Russia are parties. Such a quasi-judicial complaint procedure will constitute a “procedure of international investigation or settlement”<sup>176</sup> under Article 35(2)(b) of the ECHR. However, petitions pending before UN treaty bodies are not communicated until held inadmissible or decided on the merits, and since the outbreak of the Ukrainian armed conflicts, no UN treaty bodies have published a decision concerning Crimea or Eastern Ukraine.<sup>177</sup> Moreover, it is highly unlikely that individuals will submit communications before any of the UN treaty bodies, having only power to make recommendations to the respondent State, before exhausting the “stronger” remedy of the ECtHR, leading to a decision binding the State party.

Beyond UN treaty bodies, individuals may also address claims to the Human Rights Council within its confidential complaints procedure, successor of the former “1503 procedure.”<sup>178</sup> However, unlike the treaty bodies’ individual petition mechanism, the Human Rights Council complaints procedure is not a quasi-judicial procedure leading to a formal decision on the State’s responsibility, but an examination of the case by two working groups cooperating with the

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175. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Order, 2017 I.C.J. ¶ 60 (Apr. 19) (“Although both Parties agree that negotiations and recourse to the procedures referred in Article 22 of CERD constitute preconditions to be fulfilled before the Seisin of the Court, they disagree as to whether these preconditions are alternative or cumulative.”).

176. *Vojnović v. Croatia*, App. No. 4819/10, Eur. Ct. H.R. ¶ 31-32 (2012), <http://hudoc.echr.coe.int/eng?i=001-112143>; *Peraldi v. France*, App. No. 2096/05, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng?i=001-92489>; *Fornieles v. Spain*, App. No. 17512/90, 73 Eur. Comm’n H.R. Dec. & Rep. 214, 223 (1992).

177. See *About the Jurisprudence*, OHCHR.ORG, <http://juris.ohchr.org/Home/About> (last visited June 16, 2018) (highlighting the goals of the Jurisprudence database).

178. *Human Rights Council Complaint Procedure*, OHCHR.ORG, <https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx> (last visited June 16, 2018) (outlining the complaint procedure established by “Institution-Building of the United Nations Human Rights Council”).

State concerned.<sup>179</sup> Since the procedure examines the human rights situation in a State and not individuals' complaints, and because it does not aim at offering direct reparation to victims, the ECtHR does not consider it as a "procedure of international investigation or settlement."<sup>180</sup> The same applies to the CoE Committee for the Prevention of Torture which is particularly active in separatist areas,<sup>181</sup> but also does not offer direct reparation for the victims.<sup>182</sup> Neither can exclude the admissibility of ECHR applications, the so-called communication procedure of the Human Rights Council: in this proceeding, special mandate-holders intervene directly with the State on allegations of violations of human rights that come within their mandates by means of letters which include urgent appeals and other communications.<sup>183</sup> Such communications have been addressed to the Ukraine government with respect to alleged cases of arbitrary arrest, disappearance, and summary executions of civilians in Eastern

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179. See generally Human Rights Council Res. 5/1, Annex B.2.4(b) (June 18, 2007).

180. *Peraldi*, App. No. 2096/05, Eur. Ct. H.R. at 11; *Celniku v. Greece*, App. No. 21449/04, Eur. Ct. H.R. ¶ 39 (2007), <http://hudoc.echr.coe.int/eng?i=001-81431>; *Mikolenko v. Estonia*, App. No. 16944/03, Eur. Ct. H.R. 12 (2006), <http://hudoc.echr.coe.int/eng?i=001-72118>.

181. See, e.g., Eur. Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report on the Visit to the Region of Abkhazia, Georgia, Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 27 April to 4 May 2009*, at 3, CPT/Inf (2009) 38 (2009), <https://rm.coe.int/16806961da>; Eur. Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Government of the Republic of Moldova on the Visit to Prison Establishment No. 8 in Bender Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, at 7, CPT/Inf (2008) 37 (2008), <https://rm.coe.int/16806975a4>.

182. *Podeschi v. San Marino*, App. No. 66357/14, Eur. Ct. H.R. ¶ 95 (2017), <http://hudoc.echr.coe.int/eng?i=001-172665>; *Zagaria v. Italy*, App. No. 24408/03, Eur. Ct. H.R. (2008), <http://hudoc.echr.coe.int/eng?i=001-87263>; *De Pace v. Italy*, App. No. 22728/03, Eur. Ct. H.R. ¶¶ 26-28 (2008), <http://hudoc.echr.coe.int/eng?i=001-87620>.

183. *Communications*, OHCHR.ORG, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx> (last visited June 16, 2018) [hereinafter *Communications*, OHCHR.ORG] (explaining that the "communication" process within the Human Rights Council Special procedures "involves sending a letter to the concerned State identifying the facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action").



Ukraine.<sup>184</sup> As the procedure relies on the cooperation of the State and victims do not participate in the proceedings, it cannot constitute “matters” under Article 35(2)(b) of the ECHR.<sup>185</sup> Similarly, the Court did not consider the procedure of the UN Working Group on Enforced or Involuntary Disappearances as “a procedure of international investigation or settlement” of the “matter” which was pending before the Court, because the Working Group does not investigate disappearances, nor does it provide legal means of redress and cannot attribute responsibility for the deaths of any missing persons or make findings as to their cause.<sup>186</sup> However, the Court considered the procedure of the UN Working Group on Arbitrary Detention as constituting “another procedure of international investigation or settlement.”<sup>187</sup> It took into account that the Working Group on Arbitrary Detention examines individuals’ complaints, the authors of the communication can participate in the procedure and are duly informed on the procedural steps, and the Working Group determines in a contentious procedure the State’s responsibility.<sup>188</sup>

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184. Ariel Dulitzky (Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances), *Mandate of the Working Group on Enforced or Involuntary Disappearances*, U.N. Doc. UKR 3/3014 (Dec. 4, 2014); Christof Heyns (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), *Mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. UKR 2/3014 (Nov. 3, 2014).

185. *Communications*, OHCHR.ORG, *supra* note 183.

186. *Malsagova v. Russia*, App. No. 27244/03, Eur. Ct. H.R. 12 (2008), <http://hudoc.echr.coe.int/eng?i=001-85506> (“[I]n the applicants’ view, the Working Group [on Enforced or Involuntary Disappearances] could not be regarded as judicial or a quasi-judicial body within the meaning of Article 35 § 2 (b) of the Convention.”); U.N. H.R. Comm., Communication 2117/2011, Views Adopted by the Committee at its 112th Session, U.N. Doc. CCPR/C/112/D/2117/2011 ¶ 7.9 (Nov. 25, 2014), <https://digitallibrary.un.org/record/788591?ln=en>; U.N. H.R. Comm., Communication 2132/2012, Views Adopted by the Committee at its 112th Session, U.N. Doc. CCPR/C/112/D/2132/2012 ¶ 7.9 (Nov. 20, 2014), <https://digitallibrary.un.org/record/788570/>; U.N. H.R. Comm., Communication 1559/2007, Views, U.N. Doc. CCPR/C/99/D/1559/2007 ¶ 7.10 (Aug. 20, 2010), <https://digitallibrary.un.org/record/688864/files/?ln=en> (establishing the Committee’s ability to only determine whether there was a violation of the Covenant).

187. *Peraldi v. France*, App. No. 2096/05, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng?i=001-92489>.

188. *UCA v. Turkey*, App. No. 73489/12, Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=001-147660>; *Peraldi*, App. No. 2096/05, Eur. Ct. H.R.

Other pending disputes concerning Crimea are the investment arbitration proceedings brought by companies owned and controlled by the Ukrainian state against Russia.<sup>189</sup> These Ukrainian companies allege that the Russian Federation breached its obligations under the Ukraine-Russia Bilateral Investment Treaty<sup>190</sup> by interfering with and ultimately expropriating their investments, which may overlap with similar individual applications claiming the violations of the right to property in Crimea.<sup>191</sup> If the matters under the respective bilateral investment treaties are “substantially the same” within the meaning of Article 35(2)(b) of the ECHR, the Court would likely hold that the proceedings may be seen as “another procedure of international investigation of settlement.”<sup>192</sup>

In sum, the ECtHR considers only a limited number of mechanisms as other procedures “of international investigation or settlement” under Article 35(2)(b) of the ECHR, namely those that the Court considers as judicial or quasi-judicial proceedings similar to those set up by the Convention.<sup>193</sup> The procedure of UN treaty bodies, the UN

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189. See, e.g., *Stabil v. Russ.*, PCA Case Repository No. 2015-35 (Perm. Ct. Arb. 2015), <https://www.pcacases.com/web/view/122>; *Lugzor v. Russ.*, PCA Case Repository No. 2015-29 (Perm. Ct. Arb. 2015), <https://www.pcacases.com/web/view/124>; *PJSC CB PrivatBank v. Russ.*, PCA Case Repository No. 2015-21 (Perm. Ct. Arb. 2015), <https://www.pcacases.com/web/view/130>; *Everest Estate v. Russ.*, PCA Case Repository No. 2015-36 (Perm. Ct. Arb. 2015), <https://www.pcacases.com/web/view/133>; *Aeroporto Belbek v. Russ.*, PCA Case Repository No. 2015-07 (Perm. Ct. Arb. 2015), <https://www.pcacases.com/web/view/123>; *PJSC Ukrnafta v. Russ.*, PCA Case Repository No. 2015-34 (Perm. Ct. Arb. 2015), <https://www.pcacases.com/web/view/121>.

190. See generally *Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments*, Russ.-Ukr., Nov. 27, 1998, <https://investmentpolicyhub.unctad.org/Download/TreatyFile/2233>.

191. Press Release, European Court of Human Rights, *European Court of Human Rights Deals with Cases Concerning Crimea and Eastern Ukraine*, ECHR 345 (Nov. 26, 2014), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4945099-6056223&filename=003-4945099-6056223.pdf> (“Property belonging to Ukrainian legal entities was subjected to unlawful control, namely by being taken by the self-proclaimed authorities of the Crimean Republic.”).

192. *Yukos v. Russia*, App. No. 14902/04, Eur. Ct. H.R. ¶¶ 519-26 (2011), <http://hudoc.echr.coe.int/eng?i=001-106308>.

193. *Podeschi v. San Marino*, App. No. 66357/14, Eur. Ct. H.R. ¶ 94 (2017), <http://hudoc.echr.coe.int/eng?i=001-172665>; *Lukanov v. Bulgaria*, App. No. 21915/93, Eur. Comm’n H.R. (1995), <http://hudoc.echr.coe.int/eng?i=001-2003>.

Working Group on Arbitrary Detention, or investor-State arbitration proceedings constitute “another procedure of international investigation or settlement,” provided that the “matters” are the same.<sup>194</sup> “Matters” are identical only if the application before the ECtHR concerns substantially not only the same facts and complaints but also introduced by the same persons.<sup>195</sup> On the one hand, the strict scrutiny of the identity of the facts, complaints, and the applicant for the purposes of *lis pendens* and *res judicata* does not significantly reduce the Court’s backlog. It is unlikely that many of the applications from separatist areas are found inadmissible on account of a decision of a UN individual communication procedure or an investor-State arbitration.

On the other hand, the Court should continue to coordinate between parallel international procedures of international investigation or settlement and its own mechanism, because finding the case inadmissible on ground of *lis pendens* or *res judicata* helps to share its judicial burden with other international dispute settlement mechanisms. Furthermore, the narrow interpretation of *lis pendens* or *res judicata* ensures that individuals submitting concurrent applications have access to the ECtHR if the other forums do not provide effective remedy. This enhances the legitimacy and the effectiveness of the Court and the Convention because the Court remains the ultimate authority deciding on those human rights disputes.

## B. COORDINATION OF FINDINGS

The concurrent international dispute settlement and fact-finding proceedings do contribute to the ECtHR’s effectiveness, because the Court can rely on the conclusions of other international forums to ensure judicial economy. It is well-known that the ECtHR has engaged increasingly in a “judicial dialogue,” relying on the legal conclusions of other international courts, pronouncements of international bodies

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194. *Vojnović v. Croatia*, App. No. 4819/10, Eur. Ct. H.R. ¶¶ 31-32 (2012), <http://hudoc.echr.coe.int/eng?i=001-112143>; *Peraldi v. France*, App. No. 2096/05, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng?i=001-92489>; *UCA v. Turkey*, App. No. 73489/12, Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=001-147660>; *Yukos*, App. No. 14902/04, Eur. Ct. H.R. ¶¶ 519-26.

195. Practical Guide on Admissibility Criteria, *supra* note 73, ¶¶ 152-54.

carrying out quasi-judicial procedures, and international organizations.<sup>196</sup> As several international judges recognized, cross-references to the judgments of other international jurisdictions not only provides inspiration for the judge to settle the concrete case, but strengthens the unity of international law and prevents fragmentation.<sup>197</sup> In cases submitted from areas outside the territorial State's effective control, the Court cited ICJ case law when it had to decide on a series of questions of general international law such as the primarily territorial notion of jurisdiction,<sup>198</sup> the lawfulness of acts adopted by unrecognized entities,<sup>199</sup> the judicial consideration of statements from high-ranking officials,<sup>200</sup> the concurrent application of international human rights law and international humanitarian law,<sup>201</sup> the duties of the occupying power,<sup>202</sup> the obligation to make

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196. See, e.g., Laurence Boisson de Chazournes, *Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach*, 28 EUR. J. INT'L L. 13, 45 (2017) (noting the use of procedures to prevent parallel or overlapping proceedings); Christos L. Rozakis, *The European Judge as Comparatist*, 80 TUL. L. REV. 257, 274-76 (2005) (discussing the dialogue of the ECHR with the international legal order).

197. See Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Compensation, Judgment, 2012 I.C.J. Rep. 324 (June 19) (Declaration of Greenwood, J.) (formulating that international law "is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions").

198. Jaloud v. Netherlands, 2014-VI Eur. Ct. H.R. 229, 299.

199. See, e.g., Mozer v. Moldova, App. No. 11138/10, Eur. Ct. H.R. ¶ 137 (2016), <http://hudoc.echr.coe.int/eng?i=001-161055>; Demopoulos v. Turkey, 2010-I Eur. Ct. H.R. 365, 404-405; Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 1, 29-31 (describing the vacuum of rights and protections for individuals that could arise if actions taken by de facto authorities were disregarded by international courts).

200. See, e.g., Chiragov v. Armenia, 2015-III Eur. Ct. H.R. 135, 213-214 (explaining that statements of high-ranking officials that were closely involved with the dispute in question "are of particular evidentiary value when they acknowledge facts or conduct that place the authorities in an unfavorable light").

201. See, e.g., Hassan v. United Kingdom, 2014-VI Eur. Ct. H.R. 1, 26-28, 49-50, 60-62 (clarifying that the ICJ has the view that protections under human rights conventions do not cease in situations of international armed conflict, and that the Court will apply human rights law, as well as the *lex specialis*, international humanitarian law, in such situations).

202. See, e.g., Al-Jedda v. United Kingdom, 2011-IV Eur. Ct. H.R. 305, 347-348, 376-377 (discussing how Article 43 of the Hague Regulations obliges an occupying power to "take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting unless absolutely prevented, the laws in

reparation in an adequate form in an inter-state dispute,<sup>203</sup> the legal personality of the UN as international territorial administration,<sup>204</sup> or the attribution of conduct to the State.<sup>205</sup> Even if the Court does not feel bound by the case law of other courts like in the question of attribution of conduct of non-state entities to the State,<sup>206</sup> it cites the relevant case law and tries to follow an interpretation in harmony with other rules of international law.<sup>207</sup> Since many of the above-mentioned questions will arise in separatist conflicts, the Court shall continue to take into account the international case law and interpret the Convention under the principle of harmonious interpretation.

Beyond the legal findings, the Court should take into account the factual conclusions of other jurisdictions and investigative bodies. The factual complexities of the cases submitted from areas outside the territorial State's effective control, the high number of submitted applications from those areas, and the Court's overall workload with more than 90,000 pending cases in 2017 all require the Court to have resort to external sources that parties submit, rather than using its own

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force in the country," and that internment should only be used as a last resort in meeting that obligation).

203. *See, e.g.*, *Cyprus v. Turkey*, 2014-II Eur. Ct. H.R. 245, 264 (explaining that Article 41 of the Convention mirrors the public international law norm under which "an injured state is entitled to obtain compensation from the state which has committed an internationally wrongful act for the damage caused by it").

204. *See, e.g.*, *Behrami v. France and Saramati v. France*, App. Nos. 71412/01 & 78166/01, Eur. Ct. H.R. ¶ 144 (2007), <http://hudoc.echr.coe.int/eng?i=001-80830> (describing that while the legal personality of the UN is separate from its member states, and it is not a Contracting Party to the Convention, its action and inaction are, in principle, attributable to it).

205. *See, e.g.*, *Jaloud v. Netherlands*, 2014-VI Eur. Ct. H.R. 229, 278-279, 301 (explaining that the ICJ may equate conduct by a person or entity to that of a state organ, even if such conduct would not be attributable to the state under internal law, if the person or entity "acted in accordance with that state's instructions or under its 'effective control'" and if such instructions or effective control were given in respect to the individual operation under which the violations occurred, rather than just in a general sense to the actions of the said person or entity).

206. The ECtHR cites the ICJ even when it follows an attribution test other than the ICJ's. *See Mozer v. Moldova*, App. No. 11138/10, Eur. Ct. H.R. ¶ 102 (2016), <http://hudoc.echr.coe.int/eng?i=001-161055>; *see also Catan v. Moldova*, 2012-V Eur. Ct. H.R. 309, 243-344.

207. *Hassan v. United Kingdom*, 2014-VI Eur. Ct. H.R. 1, 49-50, 61-62; *Catan*, 2012-V Eur. Ct. H.R. at 366; *Georgia v. Russia (II)*, App. No. 38263/08, Eur. Ct. H.R. ¶ 72 (2011), <http://hudoc.echr.coe.int/eng?i=001-108097>.

investigatory power under Article 38 of the ECHR.<sup>208</sup> The factual findings of other international dispute settlement bodies are increasingly quoted by the ECtHR in the section “background of the case.”<sup>209</sup> Due to the lower workload and the commonly used investigative powers of other tribunals such as the ICJ or international criminal tribunals, the ECtHR can obtain reliable evidence from case law. For instance, in cases concerning Crimea and Eastern Ukraine, the fact-finding of international organizations, dispute settlement bodies, and non-governmental organizations should certainly provide invaluable information that the Court alone could not investigate. To give a specific example, in the pending case concerning the crash of the Malaysian Airlines MH17 flight,<sup>210</sup> the ECtHR should rely on the published reports of internationalized fact-finding bodies established in the Netherlands<sup>211</sup> or the investigations of the ICC.<sup>212</sup>

In sum, with respect to concurrent procedures of international investigation or settlement, the ECtHR should take into account all closed and pending international procedures to decide on the admissibility of individual applications and to contribute to the effectiveness of its own mechanism. The Court shall examine the nature of the dispute settlement body, its procedure, and the legal effect of its decisions to decide whether the case before it constitutes

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208. Michael O’Boyle & Natalia Brady, *Investigatory Powers of the European Court of Human Rights*, 4 EUR. H.R. L. REV. 378, 387-88 (2013).

209. See *Stichting Mothers of Srebrenica v. Netherlands*, App. No. 65542/12, Eur. Ct. H.R. ¶¶ 42-53 (2013), <http://hudoc.echr.coe.int/eng?i=001-122255> (relying on international decisions and judgments relating to the Srebrenica massacre); see also *Al Hamdani v. Bosnia and Herzegovina*, App. No. 31098/10, Eur. Ct. H.R. ¶¶ 6-12 (2012), <http://hudoc.echr.coe.int/eng?i=001-108994> (relying on the case law of the International Criminal Tribunal for the former Yugoslavia to summarize the relevant background).

210. *Ioppa v. Ukraine*, App. Nos. 73776/14 et al., Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/eng?i=001-165535>.

211. *Criminal Investigation MH17*, OPENBAAR MINISTERIE, <https://www.om.nl/onderwerpen/mh17-crash/> (last visited on July 9, 2018); *Investigation MH17 Crash, July 17, 2014 Donetsk*, ONDERZOEKSAAD VOOR VEILIGHEID, <https://www.onderzoeksraad.nl/nl/onderzoek/2048/onderzoek-mh17-crash-17-juli-2014?s=EA2E71D0AAFD6E68F4E5CC2F3919A1BBB9568F0B> (last visited on July 9, 2018).

212. *Preliminary Investigation of Ukraine*, ICC, <https://www.icc-cpi.int/ukraine> (last visited on July 9, 2018).

a *lis pendens* or *res judicata*. In its decision, the Court should also integrate the legal and factual conclusions of other international procedures. Such an integrative approach assures a harmonious interpretation of the Convention with other rules of international law and eases the Court's fact-finding burden. In other words, the coordination between the Court's mechanism and other concurrent procedures of international investigation or settlement promotes good administration, judicial economy, and the harmonious interpretation of the Convention.

#### IV. CONCURRENT APPLICANTS

Applications from separatist areas are often submitted not only by an individual victim but by a high number of victims, numerous relatives of the victims, and/or the State of their nationality, typically the territorial State. A high number of applications from areas outside the effective control of the territorial State concern the same systemic or structural deficiencies in the law or practice of *de facto* authorities in the concerned area.<sup>213</sup> Whereas the Court shall settle each application individually, "[t]he good administration of justice requires that similar facts be handled in the same way and under the same rules."<sup>214</sup>

The major challenges that the huge backlog from the same conflict regions raises are the timely settlement of all cases, the need to elucidate the factual and legal complexities of the underlying armed conflict, the proper division of work between the Chamber and the

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213. Such alleged structural deficiencies have been the reparation for the unlawful expropriation of property (Northern Cyprus), the investigation and remedies for enforced disappearance cases, unlawful practices of arrest, detention and criminal procedures (Transnistria), denial of educational rights of linguistic minorities (Transnistria, Crimea), death or injury of civilians and destruction of property in the course of an armed conflict (Nagorno-Karabakh, South Ossetia, Eastern Ukraine), remedies for internally displaced persons (Nagorno-Karabakh, South Ossetia, Crimea, Ukraine), etc. See, e.g., Arabella Thorp, *Property Disputes in Northern Cyprus*, HOUSE OF COMMONS (July 28, 2010) (highlighting the issue of property transfer after the displacement of individuals in Cyprus).

214. Lucius Wildhaber, *Discussion Following the Presentation by Lucius Wildhaber, in THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS* 77, 89 (Rüdiger Wolfrum & Ulrike Deutsch eds., 2009).

Grand Chamber, the undefined links between inter-state and individual cases related to the same conflict, and the respect of the proper administration of justice. In the precedents on separatist conflicts, the Court has applied a variety of procedural techniques such as the grouping of cases, namely the joinder or simultaneous examination of applications (Part IV.A), and various techniques prioritizing an individual case that leads to the settlement of numerous similar cases (Part IV.B). As the scrutiny of each of those procedural techniques will demonstrate, their wise combination might lead to a coordinated settlement of the thousands of pending applications from areas out of the territorial State's effective control.

#### A. GROUPING OF CONCURRENT APPLICATIONS

The joinder and simultaneous examination of applications serve the objectives of the proper administration of justice and the common treatment of analogous cases: they help to examine independent applications in common or simultaneous procedures, thus easing the legal analytical and fact-finding burden of the Court. However, the difference between the criteria for the application of each of the two procedures is not well-defined in the Rules of the Court; both occur when the applications concern the same or similar factual circumstances.<sup>215</sup> A closer look at the precedents shows that their use has been inconsistent and led to highly contestable decisions, especially when joinder grouped legally similar but factually different applications.

As for the first technique, the joinder of two or more cases is common in the procedural rules of international tribunals: this procedural tool allows courts "to address simultaneously the totality of the various interrelated and contested issues raised by the Parties, including any questions of fact or law that are common to the disputes presented."<sup>216</sup> Hearing and deciding factually and/or legally similar

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215. Maarten Den Heijer, *Procedural Aspects of Shared Responsibility in the European Court of Human Rights* 4 J. INT'L DISP. SETTLEMENT 361, 370 (2013).

216. International Court of Justice, Rules of Court, art. 47 (Apr. 14, 1978) (amended Apr. 14, 2005) [hereinafter ICJ Rules]; *Construction of a Road in Costa Rica Along the San Juan River* (Nicar. v. Costa Rica), Joinder of Proceedings, 2013 I.C.J. Rep. 184, ¶ 17 (Apr. 17); *Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicar.), Joinder of Proceedings, 2013 I.C.J. Rep. 177, ¶ 24 (Apr.



cases together has significant advantages as to procedural economy.<sup>217</sup> Under the Rules of the ECtHR, the “Chamber may, either at the request of the parties or of its own motion, order the joinder of two or more applications.”<sup>218</sup> Within the mechanism of the ECHR, the States parties encouraged the grouping of similar applications for a single decision or judgment, through the settlement of “a small number of representative applications from a group of applications that allege the same violation against the same respondent State Party, such determination being applicable to the whole group.”<sup>219</sup>

The ECtHR resorted to the joinder of individual cases that had “similar factual and legal background,”<sup>220</sup> for example where the alleged breaches were committed by agents of the international territorial administration of the same area;<sup>221</sup> where applicants suffered from the same measures of *de facto* authorities;<sup>222</sup> where the applicants were relatives of persons disappeared during the same armed conflict;<sup>223</sup> or where the applicants complained the deprivation of the use of their property and/or access to their homes and the ineffectiveness of the same domestic remedies of the *de facto* authorities.<sup>224</sup> The joinder of cases enables the Court to connect

17) (separate opinion by Trindade, J.).

217. *Nicar.*, 2013 I.C.J. Rep. 184, ¶¶ 17-18.

218. ECtHR Rules 2018, *supra* note 90, at Rule 42(1).

219. *Brighton Declaration*, *supra* note 35, ¶ 20(d).

220. *Gürtekin v. Cyprus*, App. Nos. 60441/13 et al., Eur. Ct. H.R. ¶ 16, (2014), <http://hudoc.echr.coe.int/eng?i=001-142369>.

221. *Behrami v. France and Saramati v. France*, App. Nos. 71412/01 & 78166/01, Eur. Ct. H.R. Preamble (2007), <http://hudoc.echr.coe.int/eng?i=001-80830>.

222. *See, e.g., Turturica v. Moldova*, App. Nos. 28648/06 & 18832/07, Eur. Ct. H.R. ¶¶ 7-8 (2016), <http://hudoc.echr.coe.int/eng?i=001-166480> (arguing against the seizure of their cars); *Bobecio v. Moldova and Iovcev v. Moldova* App. Nos. 30003/04 & 40942/14, Eur. Ct. H.R. ¶ 3 (2014), <http://hudoc.echr.coe.int/eng?i=001-158680> (highlighting teachers, employees of, and pupils of five Moldovan schools in a pending case on Transnistria); *Catan v. Moldova*, 2012-V Eur. Ct. H.R. 309, ¶ 4.

223. *See, e.g., Gürtekin v. Cyprus*, App. Nos. 60441/13 et al., Eur. Ct. H.R. ¶ 16 (2014); *Emin v. Cyprus*, App. No. 59623/08, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-110460>; *Emin v. Cyprus*, App. Nos. 59623/08 et al., Eur. Ct. H.R. (2010), <http://hudoc.echr.coe.int/eng?i=001-99466>; *Varnava v. Turkey*, App. Nos. 16064/90 et al., Eur. Ct. H.R. (1998), <http://hudoc.echr.coe.int/eng?i=001-4179>.

224. *Demopoulos v. Turkey*, 2010-I Eur. Ct. H.R. 365, 377-378.

hundreds or even thousands of applicants in one single procedure<sup>225</sup> and also prevents the risk of diverging judgments,<sup>226</sup> thus serving both judicial economy and the harmony of the Convention.

If the parties do not request the joinder, for example, because the applicants are unaware of each other, it is the Registry's responsibility to inform the designated Chamber of the similar factual and legal background justifying a joinder. This can even link applications submitted in different years: for example, in the *Demopoulos* case, eight individual applications submitted between 1999 and 2004 contested the effectiveness and availability of the same domestic remedy instituted by the *de facto* authorities in 2005.<sup>227</sup> Consequently, the Court has a major function of reviewing and coordinating the legal and factual background of all pending cases so as to identify the interconnected cases that are likely to be joined.

Another way to coordinate concurrent applicants is the simultaneous examination of cases: under the Rules of the Court, “[t]he President of the Chamber may, after consulting the parties, order that the proceedings in applications assigned to the same Chamber be conducted simultaneously, without prejudice to the decision of the Chamber on the joinder of the applications.”<sup>228</sup> The precedents where the Court resorted to simultaneous examination of cases concerned somewhat similar factual and legal backgrounds where the applicants were in different situations, often constituting two facets of the same coin. For example, the *Axel Springer AG v. Germany* and *Von Hannover v. Germany (no. 2)* cases related to the media coverage of celebrities' private lives where one case concerned a court order to publish a daily newspaper's article about the arrest and

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225. See, e.g., *Burmych v. Ukraine*, App. Nos. 46852/13 et al., Eur. Ct. H.R. ¶ 129 (2017), <http://hudoc.echr.coe.int/eng?i=001-178082> (joining 12,143 applications listed in Appendices I and II to the judgment); *Sandu v. Moldova*, App. No. 21034/05, Eur. Ct. H.R. (2013), <http://hudoc.echr.coe.int/eng?i=001-116626> (pending case combining 8 applications from 1,651 applicants lodged between Oct. 2004 and Sept. 2006); Correspondence with Mr. Lilian Apostol, 28 March 2018 (on file with author).

226. BERTRAND WÄGENBAUR, COURT OF JUSTICE OF THE EUROPEAN UNION. COMMENTARY ON STATUTE AND RULES OF PROCEDURES 631 (2013).

227. *Demopoulos*, 2010-I Eur. Ct. H.R. at 391-393.

228. ECtHR Rules, *supra* note 90, at Rule 42(2).

conviction of a famous actor,<sup>229</sup> whereas the other concerned the reverse scenario, the refusal of domestic courts to issue an injunction restraining further publication of a famous couple's photograph that was taken without their knowledge.<sup>230</sup> Contrary to the Chamber, the Grand Chamber decided not to join the examination of those two cases, considering that "the nature of the facts and the substantive issues raised in those cases" were different,<sup>231</sup> while it examined them simultaneously. Indeed, the first case concerned a court decision prohibiting the publication of an article, contested by the publisher, while the second case concerned the court's refusal to limit the further publication of already published media coverage that was contested by the given celebrity. Different, but "complementary" situations likewise justified the simultaneous examination of the *Chiragov v. Armenia* and the *Sargsyan v. Azerbaijan* cases, both related to the denial of access to homes to displaced persons in the context of the Nagorno-Karabakh conflict: whereas the *Chiragov* case concerned the claim of Azerbaijani citizens displaced from the adjacent territories occupied by Armenia to return to their homes, the *Sargsyan* case concerned the claim of ethnic Armenians to return to their homes near to the ceasefire line, in the territory and under the effective control of Azerbaijan.<sup>232</sup> The two cases presented two facets of the same highly politicized frozen conflict from the point of view of displaced persons of the two sides and of different ethnicities. These considerations led the President of the ECtHR to assign the *Chiragov v. Armenia* and the *Sargsyan v. Azerbaijan* cases to the same composition of the Grand Chamber.<sup>233</sup> While simultaneously examining those cases, the Court intended to be as impartial and balanced as possible, trying to give equal weight to both applications against Azerbaijan and Armenia, so as not to exacerbate the very politicized inter-state tensions between those two States parties.

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229. *Axel Springer AG v. Germany*, App. No. 39954/08, Eur. Ct. H.R. ¶ 9 (2012), <http://hudoc.echr.coe.int/eng?i=001-109034>.

230. *Von Hannover v. Germany* (II), 2012-I Eur. Ct. H.R. 399, 401-402.

231. *Id.* at 427; *Axel Springer AG*, App. No. 39954/08, Eur. Ct. H.R. ¶ 52.

232. *Chiragov v. Armenia*, 2015-III Eur. Ct. H.R. 135, 154; *Sargsyan v. Azerbaijan*, 2015-IV Eur. Ct. H.R. ¶¶ 29-32 (2015), <http://hudoc.echr.coe.int/eng?i=001-155662>.

233. *Chiragov*, 2015-III Eur. Ct. H.R. at 146; *Sargsyan*, 2015-IV Eur. Ct. H.R. at 12.

In other applications examined simultaneously, the factual background of the cases was less “complementary” and much more similar. In the *Veselinski* and *Djidrovski* cases, both applicants, former officers of the Yugoslav army, complained that they had a “legitimate expectation” to purchase their apartments at the reduced price provided for under the former Yugoslav legislation, whereas the Macedonian authorities denied this right.<sup>234</sup> Although the President of the Chamber decided to examine the two cases simultaneously “in the interests of the proper administration of justice,”<sup>235</sup> the facts, the domestic law, and the Court’s conclusions were almost identical in the two cases and the Court could have easily joined the two applications, in accordance with the principle of procedural economy. Similarly, the Court examined simultaneously the *Frasik v. Poland* and *Jaremowicz v. Poland* cases “in the interests of the proper administration of justice,” but the domestic law and the Court’s conclusions were identical and even the facts were similar.<sup>236</sup> In those cases, the joinder of the applications would have been fully justifiable and would have spared the duplication of factually and legally identical procedures.

However, the simultaneous examination of cases is certainly advisable when the applicants are in “symmetrical” situations where their factual and legal background presents two facets of the same highly politicized territorial conflict. This would arguably lead to different outcomes from that of a procedure where the same

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234. *Djidrovski v. Macedonia*, App. No. 46447/99, Eur. Ct. H.R. ¶¶ 1-3 (2005), <http://hudoc.echr.coe.int/eng?i=001-68385>; *Veselinski v. Macedonia*, App. No. 45658/99, Eur. Ct. H.R. ¶¶ 1-3 (2005), <http://hudoc.echr.coe.int/eng?i=001-68378>.

235. *Djidrovski*, App. No. 46447/99, Eur. Ct. H.R. ¶ 6; *Veselinski*, App. No. 45658/99, Eur. Ct. H.R. ¶ 6.

236. The major difference was that in the *Jaremowicz* case, the authorities dealing with the applicant’s request for leave to marry justified their refusal by reference to grounds related to the nature and the quality of the applicant’s relationship with a female detainee, whereas in the *Frasik* case, the reason for the denial was the trial court’s conviction that the marriage between the applicant and his former partner whom he had raped would have adverse consequences for the taking of evidence against him. However, the Court found that in both cases the underlying problem was the “arbitrary fashion in which the Polish authorities exercised their decision-making power” on a detainee’s request for leave to marry in prison. See *Frasik v. Poland*, 2010-I Eur. Ct. H.R. 1, 29; see also *Jaremowicz v. Poland*, App. No. 24023/03, Eur. Ct. H.R. ¶ 64, (2010), <http://hudoc.echr.coe.int/eng?i=001-96455>.

applications joined. For instance in the *Behrami* and *Saramati* cases concerning acts performed by Kosovo Force (KFOR) and UN Interim Administration Mission in Kosovo (UNMIK) under the aegis of the UN, the Court joined the *Behrami* and *Saramati* cases which concerned slightly different factual scenarios.<sup>237</sup> While the former concerned an accident that occurred as a consequence of the demining responsibilities of the UNMIK, a special mission and thus a *de jure* organ of the UN, the latter related to detention that the KFOR multinational brigade ordered.<sup>238</sup> In a joined examination of the two cases, the Court concluded that both conducts, demining by UNMIK and detention by KFOR multinational brigades, were performed under the “ultimate authority and control” of the United Nations Security Council (Security Council) and thus attributable to the UN.<sup>239</sup> Since the UN had a legal entity distinct from its member states and was not a contracting party to the Convention, the Court declared both applications inadmissible *ratione personae*.<sup>240</sup> As numerous critics of the decision pointed out, the UN retained “ultimate authority and control” over the UNMIK, but not over the KFOR, where the chain of command stopped at the level of the commanders of national contingents and where the Security Council exercised only a superficial *a posteriori* control.<sup>241</sup> Had the Court properly assessed the

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237. *Behrami v. France and Saramati v. France*, App. Nos. 71412/01 & 78166/01, Eur. Ct. H.R. (2007), <http://hudoc.echr.coe.int/eng?i=001-80830>.

238. *Id.* ¶¶ 52-53.

239. *Id.* ¶¶ 134-35, 140-41.

240. *Id.* ¶ 144.

241. See, e.g., Linos-Alexandre Sicilianos, *L'(ir)responsabilité des forces multinationales?*, in INTERNATIONAL LAW AND THE QUEST FOR ITS IMPLEMENTATION 104 (Laurence Boisson de Chazournes & Marcelo Kohen eds., 2010); Philippe Lagrange, *Responsabilité Des Etats Pour Actes Accomplis En Application Du Chapitre VII de La Charte Des Nations Unies – Observations à Propos de La Décision de La Cour Européenne Des Droits de l'homme (Grande Chambre) Sur La Recevabilité Des Requêtes Behrami et Behrami c. France et Saramati c. Allemagne, France et Norvège*, 31 Mai 2007, 112 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 85, 97-98 (2008); Pierre Klein, *Responsabilité Pour Les Faits Commis Dans Le Cadre D'opérations de Paix et Étendue Du Pouvoir de Contrôle de La Cour Européenne Des Droits de L'homme: Quelques Considérations Critiques Sur l'arrêt Behrami et Saramati*, 53 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 43, 54 (2007) (discussing that the reporting requirements of states directed to use force by the UN Security Council are largely self-regulating, making the notion of control of the mission by the Security Council more theoretical than

“symmetrical” but different factual background and examined the two applications in simultaneous rather than joined procedures, the outcome could have been different. The procedural decision is all the more important that unlike the simultaneous examination, the joinder of cases does not oblige the Court to consult the parties to the dispute prior to this procedural decision.<sup>242</sup> For instance, the ICJ seems to attribute particular importance to the views of the parties when it decides on the joinder of cases.<sup>243</sup> If the joinder opposed the interests of the parties, the ICJ chose to litigate the cases in parallel.<sup>244</sup> Therefore, an ill-decided joinder can disregard the interests of the parties and lead to improper conclusions.

Finally, a relatively new phenomenon is the submission of several inter-state applications by the same State against another State concerning similar claims. With regard to the situations in Crimea and Eastern Ukraine, the Ukrainian government submitted six inter-state

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practical); Theodore Christakis & Karine Bannelier, *Acteur Vigilant Ou Spectateur Impuissant? Le Contrôle Exercé Par Le Conseil de Sécurité Sur Les Etats Autorisés à Recourir à La Force*, 37 REVUE BELGE DE DROIT INTERNATIONAL 498, 516–17 (2004) (explaining that the UN Security Council has only loose control over states operating under its direction; states are required to report their activities to the Security Council, but there is not a lot of follow-up on the Council’s part).

242. ECtHR Rules, *supra* note 90, at Rule 42(1)-(2).

243. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Preliminary Objections, Judgment, 1998 I.C.J. Rep. 43, ¶ 18 (joint declaration of Bedjaoui, J., Guillaume, J., and Ranjeva, J.) (explaining in its decision not to join the cases that the Court considered the parties had different arguments, even if for the same legal issues, so it would be inadvisable to “effect a joinder leading to a single judgment that would have to rule separately on those various arguments”); see also Fisheries Jurisdiction (U.K. v. Ice.), Merits, Judgment, 1974 I.C.J. Rep. 3, 5-6, ¶ 8 (July 25) (deciding not to join cases with identical basic legal issues because of differences in the positions of the parties and the fact that joinder was contrary to the wishes of both parties); Martins Paparinskis, Procedural Aspects of Shared Responsibility in the International Court of Justice, 4 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 295, 304 (2013) (discussing the practice of the ICJ to consider the parties’ interests when deciding whether to join cases).

244. See, e.g., Legality of Use of Force (Serb. and Montenegro v. Belg.), Preliminary Objections, Judgment, 2004 I.C.J. Rep. 287, ¶ 18 (Dec. 15) (highlighting the claim of Serbia against NATO member states); *Libya*, Preliminary Objections, Judgment, 1998 I.C.J. Rep. at 13, ¶ 9 (referencing two proceedings instituted by Libya against the United Kingdom and the United States of America).

applications against Russia,<sup>245</sup> one of them being already withdrawn. The Ukrainian Government argues that Russia has exercised and continues to exercise effective control over Crimea and—by controlling separatists and armed groups there—*de facto* control over the regions of Donetsk and Luhansk and consequently, those areas fall within its jurisdiction.<sup>246</sup> As there might be overlap between the inter-state applications themselves and with individual applications, the Court has to coordinate and logically group those inter-state claims.

It is highly unlikely that the Court examines joint or simultaneous inter-state cases with individual applications, but it might join or simultaneously examine the inter-state cases. Before starting any admissibility procedure, the Court has already used its procedural discretion to coordinate between the different claims of the five pending *Ukraine v. Russia* applications. As the sort of the armed conflict was unpredictable in 2014, the Ukrainian government submitted an application firstly concerning the situation in the Crimean peninsula (*Ukraine v. Russia (I)*), secondly on abductions of children in Eastern Ukraine (*Ukraine v. Russia (II)*), and the later applications concerning both Crimea and Eastern Ukraine (*Ukraine v. Russia (IV)-(VI)*).<sup>247</sup> As the subsequent applications created a system of overlapping claims, the Court decided to regroup the inter-state cases in a logical way, according to geographical and time criteria. On February 9, 2016, the Court decided “with a view of making the processing of the case more efficient, to divide the first inter-state application according to geographical criteria”—all the complaints related to the events in Crimea up to September 2014 are currently registered under the *Ukraine v. Russia (I)* case, whereas the complaints concerning the events in Eastern Ukraine up to September 2014 are now registered under the *Ukraine v. Russia (V)* case.<sup>248</sup> Likewise, on November 25, 2016, the Court decided to register all the complaints related to the events in Crimea from September 2014 under the case

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245. *Factsheet – Armed Conflicts*, ECHR (May 2018), [http://www.echr.coe.int/Documents/FS\\_Armed\\_conflicts\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf); ECHR Press Release, Case Concerning Events in Crimea and Eastern Ukraine, *supra* note 20.

246. *Factsheet – Armed Conflicts*, *supra* note 245; ECHR Press Release, Case Concerning Events in Crimea and Eastern Ukraine, *supra* note 20.

247. *Factsheet – Armed Conflicts*, *supra* note 245.

248. *Id.*

*Ukraine v. Russia (IV)* and all the complaints concerning the events in Eastern Ukraine from September 2014 under the case *Ukraine v. Russia (VI)*.<sup>249</sup> To comply with the Court's above-mentioned core principles, the coordination between the geographically and temporarily interconnected claims, the joinder or simultaneous examination of the inter-state cases is a welcome development and should be followed in case of interrelated individual applications too.

## B. PRIORITIZATION OF A CONCURRENT APPLICATION

Beyond grouping concurrent applications together, the Court can select one particular case from the concurring applications and prioritize its settlement, while deciding on the other concurrent applications in conformity with the prioritized decision. The underlying consideration of this coordination between concurrent applications is that beyond individual justice, "the Court serves a purpose beyond the individual interest in the setting and applying of minimum human rights standards for the legal space of the Contracting States."<sup>250</sup> Such a general interest in prioritizing a specific application might operate in the priority decision on the order of the applications, sanctioned in the *stricto sensu* priority policy (Part IV.B.1), the application of the pilot procedure (Part IV.B.2), or the so-called leading decisions (Part IV.B.3). While grouping of concurrent applications is an existing practice of other international tribunals,<sup>251</sup> the prioritization of cases is a speciality of the ECtHR that the exceptionally high number of applicants has made necessary.

### 1. Priority Policy

Most human rights treaty bodies having judicial or quasi-judicial functions decide on individual applications in the order in which they have been received by the control body's secretary.<sup>252</sup> However, the

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249. *Id.*

250. *Varnava v. Turkey*, App. Nos. 16064/90 et al., Eur. Ct. H.R. ¶ 156 (2008), <http://hudoc.echr.coe.int/eng?i=001-84336>.

251. *See, e.g.*, ICJ Rules art. 47, *supra* note 216 (providing for the joinder of cases).

252. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Rules of Procedure, Rule 111(3), UN Doc. CAT/C/3/Rev.6 (Sept. 1, 2014) ("[U]nless they decide otherwise."); Comm. on



chronological treatment of applications in the order of their submission date is problematic for a court with 50-60,000 applications per year, because it does not allow for the prioritization of the most important or urgent cases where judicial delay would cause significant harm. Thus, to enhance the effectiveness of the Convention, the ECtHR defined a priority policy in its Rules of the Court. Under those rules, when determining the order in which cases are to be dealt with, “the Court shall have regard to the importance and urgency of the issues raised on the basis of criteria fixed by it.”<sup>253</sup> To take into account the importance and urgency of the issues raised in the cases filed with the Court, the Court has fixed certain criteria which enable it to give some cases priority over others. Among the seven main categories of cases, the first two categories are:

I. Urgent applications (in particular risks to the life or health of the applicant, the applicant being deprived of liberty as a direct consequence of the alleged violation of his or her Convention rights, or other circumstances linked to the personal or family situation of the applicant, particularly where the well-being of a child is at issue (application of Rule 39 of the Rules of the Court)).

II. Applications raising questions capable of having an impact on the effectiveness of the Convention system (in particular a structural or endemic situation that the Court has not yet examined, pilot-judgment procedure) or applications raising an important question of general interest (in particular a serious question capable of having major implications for domestic legal systems or for the European system).<sup>254</sup>

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Econ., Soc., and Cultural Rights, Provisional Rules of Procedure Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Rule 8(1), UN Doc. E/C.12/49/3 (Jan. 15, 2013) (“[U]nless the Committee decides otherwise.”); Human Rights Comm., Rules of Procedure of the Human Rights Committee, Rule 95, UN Doc. CCPR/C/3/Rev.10 (Jan. 11, 2012); Afr. Comm. on Human and Peoples’ Rights, Rules of Procedure of the African Commission on Human and Peoples’ Rights, Rule 95 (May 26, 2010), [http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules\\_of\\_procedure\\_2010\\_en.pdf](http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf); Comm. on the Elimination of Racial Discrimination, Rules of Procedure of the Committee on the Elimination of Racial Discrimination, Rule 86(2), UN Doc. CERD/C/35/Rev.3 (Jan. 1, 1986).

253. ECtHR Rules *supra* note 90, at Rule 41.

254. *The Court’s Priority Policy*, ECHR, [http://www.echr.coe.int/Documents/Priority\\_policy\\_ENG.pdf](http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf) (last visited on June 30, 2018).

The second category is especially likely to cover applications coming from separatist areas, representing a conflict situation having an impact on the effectiveness of the Convention system, serious structural problems such as the systematic violations of human rights or the lack of effective domestic remedies, an important question of general interest for an inter-state case. Therefore, concurrent applications from those areas should be prioritized and treated in a timely manner. The ECtHR seems to prioritize the cases submitted from separatist areas such as Transnistria, Nagorno-Karabakh, Crimea, or the eastern separatist regions of Ukraine. For example, the Court decided two applications from Eastern Ukraine within two years,<sup>255</sup> NGOs representing Transnistrian victims reported that none of their applications had been found inadmissible,<sup>256</sup> and many of the highly politicized cases were referred before the Grand Chamber. This was the case for the *Loizidou*,<sup>257</sup> *Cyprus v. Turkey (IV)*,<sup>258</sup> *Demopoulos*,<sup>259</sup> *Varnava*,<sup>260</sup> *Ilaşcu*,<sup>261</sup> *Catan*,<sup>262</sup> *Chiragov*,<sup>263</sup> *Sargsyan*,<sup>264</sup> *Mozer v. the Republic of Moldova and Russia*<sup>265</sup> and the pending *Georgia v. Russia (II)*<sup>266</sup> cases; all of which were referred before the Grand Chamber. Moreover, the Grand Chamber held two

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255. *Tsezar v. Ukraine*, App. Nos. 73590/14 et al., Eur. Ct. H.R. ¶¶ 69-71 (2018), <http://hudoc.echr.coe.int/eng?i=001-180845>; *Khlebič v. Ukraine*, App. No. 2945/16, Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-175656>.

256. Interview with Ian Manole, NGO Promo-Lex (Sept. 6, 2012) (discussing Chisinau) (on file with the author).

257. *Loizidou v. Turkey* (Article 50), App. No. 15318/89, Eur. Ct. H.R. (1998), <http://hudoc.echr.coe.int/eng?i=001-58201>; *Loizidou v. Turkey*, App. No. 15318/89, Eur. Ct. H.R. (1996); <http://hudoc.echr.coe.int/eng?i=001-58007>; *Loizidou v. Turkey*, App. No. 15318/89, Eur. Ct. H.R. (1995), <http://hudoc.echr.coe.int/eng?i=001-57920>.

258. *Cyprus v. Turkey*, 2014-II Eur. Ct. H.R. 245; *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 5.

259. *Demopoulos v. Turkey*, 2010-I Eur. Ct. H.R. 365.

260. *Varnava v. Turkey*, 2009-V Eur. Ct. H.R. 13.

261. *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. 179.

262. *Catan v. Moldova*, 2012-V Eur. Ct. H.R. 309.

263. *Chiragov v. Armenia*, 2015-III Eur. Ct. H.R. 135.

264. *Sargsyan v. Azerbaijan*, App. No. 40167/06, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-155662>.

265. *Mozer v. Moldova*, App. No. 11138/10, Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/eng?i=001-161055>.

266. *Georgia v. Russia (II)*, App. No. 38263/08, Eur. Ct. H.R. ¶ 1-102 (2011), <http://hudoc.echr.coe.int/eng?i=001-108097>.

hearings—one on the admissibility and another on the merits—in such politicized cases: the *Catan*, *Chiragov*, and *Sargsyan* cases all had two hearings – a unique case law in the history of the Court.<sup>267</sup>

However, the practice of the Court is not entirely consistent with respect to the use of its priority policy. For instance, the ECtHR communicated to respondent governments some cases complaining of the Transnistrian *de facto* authorities' detention practice after a decade had passed,<sup>268</sup> while the applicants remained deprived of liberty during the two years after the filing of their application, thus falling under category I of the priority cases.<sup>269</sup> Furthermore, even if some South Ossetian cases were prioritized,<sup>270</sup> none of the almost 2,000 applications from the Georgian separatist areas and the *Georgia v. Russia* case have been settled for ten years.<sup>271</sup> One can speculate about the reasons for the lack of progress in the Georgian cases, as discussed below, but as a matter of principle they should be prioritized over less important cases. Under the maxim “justice delayed is justice denied,” the lack of progress in those concurrent applications weakens the Convention's effectiveness.

It must be admitted that the prioritization of cases alone is not sufficient to effectively settle several thousand concurrent applications if most of them are of equal priority.<sup>272</sup> Hence, further coordination is necessary between the applications: it will be explained that through pilot judgments or leading cases, the Court should identify some model cases that it settles first, while giving lower priority to similar cases and resolving them on the model of the leading decision, unless

267. See generally *Chiragov*, 2015-III Eur. Ct. H.R.; *Sargsyan*, App. 40167/06, Eur. Ct. H.R.; *Catan*, 2012-V Eur. Ct. H.R.

268. *Braga v. Moldova*, App. 76957/01, Eur. Ct. H.R. ¶ 24-28 (2017), <http://hudoc.echr.coe.int/eng?i=001-177650>; *Draci v. Moldova*, App. 5349/02, Eur. Ct. H.R. ¶ 15 (2017), <http://hudoc.echr.coe.int/eng?i=001-177651>.

269. *Braga*, App. 76957/01, Eur. Ct. H.R. ¶¶ 7-16; *Draci*, App. 5349/02, Eur. Ct. H.R. ¶¶ 11-12.

270. See, e.g., *Parastayev v. Russia*, App. 50514/06, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-108451>.

271. But see Press Release, European Court of Human Rights, Witness Hearing in the Inter-State Case of Georgia v. Russia (II), ECHR 211 (June 17, 2016).

272. See Madsen, *supra* note 51, at 206 (noting that the Court has an estimated backlog of 10,000 priority cases).

they need high priority on account of their individual substance.<sup>273</sup>

## 2. Pilot Judgments

The Court may initiate a pilot procedure and adopt a pilot judgment “where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.”<sup>274</sup> Under a doctrinal definition, the pilot procedure must have three mandatory elements: the ECtHR must “identify a structural or systemic problem or other dysfunction, point out the type of domestic remedies the respondent is required to develop and indicate such measures in the operative parts of the judgment.”<sup>275</sup> The instrument is an appropriate means to prioritize a case representing a high number of analogous cases concerning the same region. Cases selected for this procedure “shall be processed as a matter of priority.”<sup>276</sup> The procedure reflects the principles of subsidiarity and judicial economy, considering that the Court’s supervisory role over the Convention and the Protocols thereto “is not necessarily best achieved by repeating the same findings in a large series of cases.”<sup>277</sup> Furthermore, once the Court renders a pilot judgment, it falls to the national authorities, under the supervision of the Committee of Ministers, to take the necessary remedial measures so that the Court does not have to repeat its finding in a lengthy series of comparable cases.<sup>278</sup>

In concurrent cases from separatist areas, the pilot procedure has

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273. See Steering Comm. for Hum. Rts., *CDDH Rep. on the Advisability and Modalities of a “Representative Application Procedure,”* CDDH(2013)R77 Addendum IV, ¶¶ 4-5 (2013) [hereinafter *CDDH Report on a Representative Application Procedure*].

274. ECtHR Rules, *supra* note 90, Rule 61(1).

275. Dilek Kurban, *Forsaking Individual Justice: The Implications of the European Court of Human Rights’ Pilot Judgment Procedure for Victims of Gross and Systematic Violations*, 16 HUMAN RIGHTS L. REV. 731, 738 (2016).

276. ECtHR Rules, *supra* note 90, Rule 61(2)(c).

277. *Rutkowski v. Poland*, Apps. 72287/10 et al., Eur. Ct. H.R. ¶ 22 (2015), <http://hudoc.echr.coe.int/eng?i=001-155815>; *Association of Real Property Owners in Łódź v. Poland*, 2011-II Eur. Ct. H.R. 99, 108-09.

278. *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1, 76-77.

been effectively applied in the *Xenides-Arestis v. Turkey* case,<sup>279</sup> contributing to the radical decrease of the Court's workload from Northern Cyprus. The case was filed by a Cypriot national of Greek-Cypriot origin who had been prevented from living in her home or using her property in Northern Cyprus since 1974, since the invasion of the region by Turkey—an archetypal case of hundreds of disputes concerning Northern Cyprus.<sup>280</sup> In its judgment on the merits, the Court indicated, under Article 46 of the ECHR, that the respondent State “must introduce a remedy which secures genuinely effective redress for the Convention violations identified in the instant judgment in relation to the present applicant as well as in respect of all similar applications pending before it.”<sup>281</sup> This conclusion has led to the creation of a domestic remedy by the “TRNC,” the so-called Immovable Property Commission. With the decision, the Court took into account the fact that, at that time, approximately 1,400 property cases were pending before it brought primarily by Greek Cypriots against Turkey<sup>282</sup> and sought to “identify general measures the State ought to take in order to comply with its judgment.”<sup>283</sup>

Similarly, after applicants filed more than 3,300 applications with the ECtHR to seek redress against either Georgia or Russia for alleged human rights violations in the context of the armed conflict of August 2008, the Court addressed the question to the applicants whether their application was suitable for the “pilot judgment” procedure.<sup>284</sup> The

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279. *Demopoulos v. Turkey*, 2010-I Eur. Ct. H.R. 365, 398, 401 (discussing the pilot procedure as applied in *Xenides-Arestis v. Turkey*).

280. *Xenides-Arestis v. Turkey*, App. 46347/99, Eur. Ct. H.R. ¶¶ 9-13 (2005), <http://hudoc.echr.coe.int/eng?i=001-71800>.

281. *Id.* ¶ 40.

282. *Id.* ¶ 38.

283. Eur. Ct. H.R., Annual Report 2005, 89 (2006), [https://www.echr.coe.int/Documents/Annual\\_report\\_2005\\_ENG.pdf](https://www.echr.coe.int/Documents/Annual_report_2005_ENG.pdf) (stressing that “although the judgment is not a ‘pilot judgment’ in the strict sense, it forms part of a group of judgments in which the Court has significantly developed its role in relation to the execution of judgments”).

284. Question to the parties, communicated cases visited on Dec. 21, 2017. *See, e.g., Kulumbegov v. Georgia*, App. No. 15213/09, Eur. Ct. H.R. 1, 5 (2010), <http://hudoc.echr.coe.int/eng?i=001-102598>; *Shmyganovskaya v. Georgia*, App. No. 34945/09, Eur. Ct. H.R. 1, 2 (2010), <http://hudoc.echr.coe.int/eng?i=001-183999>; *Sipols v. Georgia*, App. No. 8336/09, Eur. Ct. H.R. 1, 3 (2010), <http://hudoc.echr.coe.int/eng?i=001-18399>; *Bekoyeva v. Georgia*, App. No. 48347/08, Eur. Ct. H.R. 1, 3 (2009).

major criterion of its instigation is that the application reveals “the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications” in the concerned State party.<sup>285</sup> Consequently, the Court should coordinate its pending cases from separatist areas so that it could identify the existence of a structural or systemic problem or other similar dysfunction in the respondent State. The applicability of the procedure is the most compelling in repetitive cases, but it can also be of use in cases which may serve as a model for similar future applications.<sup>286</sup>

However, the pilot procedure is not the only and most adequate coordinating tool for concurrent applications from separatist areas, as most root causes of the challenged human rights violations either cannot be classified as “a structural or systemic problem or other similar dysfunction”<sup>287</sup> or there is no prospect of their domestic settlement. As for the nature of human rights violations, it is difficult to see how the Court could apply the criteria “structural or systemic problem or other similar dysfunction”<sup>288</sup> for violations in separatist areas, where the main problems arise not from a domestic law problem, but from administrative practice and violence. The only case from a separatist area in which the Court arguably applied the pilot procedure was the *Xenides-Arestis v. Turkey* case concerning the domestic remedy for the expropriation disputes.<sup>289</sup> Nevertheless, in cases of massive violence such as extrajudicial killing, abductions, enforced disappearance, arbitrary detention, or shelling of houses, the Court might be tempted to identify the core “structural or systemic” root causes of the human rights violations at the national level and apply the pilot procedure. While very case sensitive, it is perhaps not impossible that the Court could choose this approach to settle numerous concurrent applications from separatist areas.

As for the prospect of the domestic settlement of those human rights violations, especially in ongoing international or non-international

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285. ECtHR Rules, *supra* note 90, Rule 61(1).

286. *Demopoulos v. Turkey*, 2010-I Eur. Ct. H.R. 365, 400-01.

287. ECtHR Rules, *supra* note 90, Rule 61(1).

288. *Id.*

289. *Xenides-Arestis v. Turkey*, App. No. 46347/99, Eur. Ct. H.R. ¶ 53 (2005), <http://hudoc.echr.coe.int/eng?i=001-71800>.

armed conflicts, where high State interests are at stake (the precondition of the success of the pilot judgment), the respondent State's willingness to cooperate is unlikely.<sup>290</sup> While the Court held that the use of the pilot judgment procedure is not conditional on a Government's compliance with the previous judgments,<sup>291</sup> its efficacy requires the respondent State and the Committee of Ministers in its supervisory function to duly execute the judgment.<sup>292</sup> Where the State is unwilling or unable to fully implement the pilot judgment, all other related and suspended applications will be "frozen."<sup>293</sup> Pilot judgments might redress repetitive cases arising from a systemic problem in domestic law or practice and order the implementation through the establishment of a given effective and available remedy, but they seem inadequate to address gross and large-scale violations in separatist areas where legislative solutions in themselves might not provide adequate answers.<sup>294</sup> Nevertheless, legislative solutions are not the only general measures pilot judgments can lead to. While there is usually a regulatory basis that the respondent State shall adopt, the Court can order, for example, the establishment of effective civilian control over state security forces or human rights and international humanitarian law training programs for law enforcement officials, military, and security forces.<sup>295</sup>

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290. See Kurban, *supra* note 275, at 764-69; Antoine Buyse, *The Pilot Judgment Procedure at the European of Human Rights: Possibilities and Challenges*, 3 L. UKR.: LEGAL J. 303, 315 (2013).

291. *Demopoulos*, 2010-I Eur. Ct. H.R. at 400-01.

292. EUR. PARL. ASS., *Implementation of Judgments of the European Court of Human Rights*, Res. 1516, ¶ 21 (2006).

293. *Id.*

294. See generally Kurban, *supra* note 275, at 767 (discussing the pilot judgment mechanism and empirical research demonstrating the ineffectiveness of the pilot judgment when applied to cases where ethno-political disputes are the underlying issues).

295. See *Montero-Aranguren v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. ¶¶ 148, 11 (July 5, 2006) ("The State must adequately educate and train the members of armed forces to effectively secure the right to life and avoid a disproportionate use of force. Furthermore, the State must develop and implement a training program on human rights and international standards regarding individuals held in custody aimed at police and prison agents, as set forth in paragraphs 147 to 149 herein."); *Blanco-Romero v. Venezuela*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. ¶¶ 106, 11 (Nov. 28, 2005) ("The State is to include, as part of the education and training

### 3. *Leading Decisions*

Some CoE documents vaguely mention “judgments of principle” while referring to the interpretative authority (*res interpretata*) of certain individual judgments of the ECtHR within the legal orders of States other than the respondent State in a given case, without defining the scope of those “judgments of principles.”<sup>296</sup> The Evaluation Group to the Committee of Ministers on the European Court of Human Rights spoke about “constitutional judgments” of the ECtHR, defining them as “fully reasoned and authoritative judgments in cases which raise substantial or new and complex issues of human rights law.”<sup>297</sup> Some authors speak about “judgment of principle” when they refer to a decision of the ECtHR that “may well settle the issue for many other persons in a similar situation.”<sup>298</sup> A more precise scholarly definition of the notion “judgment of principle” or “leading decision” is a judgment in which “the Court decides a Convention question on a level of generality that makes it possible to apply the decision to

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courses for the officers of the Armed Forces and the Office of the Sector Director General of the Intelligence and Preventive Services Bureau, a program regarding the principles and rules of human rights protection, particularly the prohibition against forced disappearance, torture and disproportionate use of force, taking into consideration the case-law of the Inter-American System for the Protection of Human Rights, as a mechanism to prevent the recurrence of events such as the ones in the instant case, as per paragraphs 106 and 116 of the instant Judgment.”); *Caracazo v. Venezuela, Reparations and Costs*, Judgment, Inter-Am. Ct. H.R. ¶¶ 127, 4(a) (Aug. 29, 2002) (“[T]hat the State must take all necessary steps to avoid recurrence of the circumstances and facts of the instant case, in accordance with paragraph 127 of the instant Judgment, pursuant to which it will . . . take all necessary steps to educate and train all members of its armed forces and its security agencies regarding principles and provisions on protection of human rights and the limits to which the use of weapons by law enforcement officials is subject, even under a state of emergency.”); G.A. Res. 60/147, ¶ 23 (Mar. 21, 2006).

296. EUR. PARL. ASS., *Effective Implementation of the European Convention on Human Rights: The Interlaken Process*, Doc. 12221, at App. II, ¶ 15 (2010).

297. Rep. of Evaluation Group, *supra* note 33, ¶ 98.

298. Anne Peters, *Discussion Following the Presentation by Lucius Wildhaber, in THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS* 77, 78 (Rüdiger Wolfrum & Ulrike Deutsch eds., 2009); Paul Mahoney, *Discussion Following the Presentation by Lucius Wildhaber, in THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS* 77, 86-87 (Rüdiger Wolfrum & Ulrike Deutsch eds., 2009).



comparable pending applications.”<sup>299</sup> Recently, the Court expressly identified certain “leading cases,” understood as individual applications for which settlement serves as a model for hundreds of similar follow-up cases.<sup>300</sup> After a “leading case” decides a generalized problem, the Court will refer to this earlier case law as authoritative precedent while deciding later cases of similar legal and factual background. It serves the Court’s effectiveness because after a leading case, the Court does not have to deal any longer with the same question of admissibility or merits in similar cases but can summarily decide on it. The Court is likely to choose mainly priority cases to be treated as judgments of principle.<sup>301</sup>

From separatist areas, individual decisions decided both admissibility and merits questions that have served as points of reference for subsequent decisions in similar cases. Several admissibility questions of major importance were decided in such leading decisions and systematically applied in subsequent cases as to the admissibility. From the early Northern Cyprus case law, the Court decided on the difficult question of the respondent State’s jurisdiction with regard to facts that occurred outside its territory, within a region of another (territorial) State in an individual application, the *Loizidou v. Turkey* case, whereas in subsequent cases the Court reiterated the same principles adopted in *Loizidou*.<sup>302</sup> In the concrete case, the applicant had no access to her property situated in Northern Cyprus and claimed for remedies; however, Turkey, the respondent State, argued that the question of access to property in Northern Cyprus was

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299. Lize Glas, *Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be Drawn*, 14 HUM. RTS. L. REV. 671, 676 (2014).

300. *Chiragov v. Armenia*, App. No. 13216/05, Eur. Ct. H.R. ¶ 51 (2017), <http://hudoc.echr.coe.int/eng?i=001-179554>; *Sargsyan v. Azerbaijan*, App. 40167/06, Eur. Ct. H.R. ¶¶ 33, 63 (2017), <http://hudoc.echr.coe.int/eng?i=001-179555>; *Burmych v. Ukraine*, App. Nos. 46852/13 et al., Eur. Ct. H.R. ¶¶ 156-161, app. 1 (2017), <http://hudoc.echr.coe.int/eng?i=001-178082> (identifying *Sargsyan v. Azerbaijan* as a leading judgment); *Muradyan v. Armenia*, App. 11275/07, Eur. Ct. H.R. ¶ 126 (2016), <http://hudoc.echr.coe.int/eng?i=001-168852> (identifying *Chiragov v. Armenia* as a leading judgment).

301. *CDDH Report on a Representative Application Procedure*, *supra* note 273, ¶ 4.

302. *Loizidou v. Turkey*, Preliminary Objections, App. No. 15318/89, Eur. Ct. H.R. ¶ 62 (1995), <http://hudoc.echr.coe.int/eng?i=001-57920>.

outside the realm of its “jurisdiction” and only the “TRNC,” recognized as a State only by Turkey, had jurisdiction over life and property in the region.<sup>303</sup> The Court refused Turkey’s arguments about the restriction of the notion of “jurisdiction” under Article 1 of the Convention to the national territory and held:

the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.<sup>304</sup>

In the *Loizidou* case, for the first time in an admissibility decision, the Court generally recognized that “effective control” over a subordinated *de facto* administration might entail “jurisdiction” *ratione loci* under Article 1 of the ECHR over individuals in the entire separatist area.<sup>305</sup> The same conclusion, that the Grand Chamber later called “a broad statement of principle,” served as a basis for deciding about Turkey’s general responsibility under the Convention for the policies and actions of the ‘TRNC’ authorities in the inter-state *Cyprus v. Turkey (IV)* case<sup>306</sup> and in all subsequent cases where Turkey raised the same preliminary objection *ratione loci* or *ratione personae*.<sup>307</sup>

A second admissibility question of major importance in separatist conflicts is the admissibility *ratione temporis* in enforced disappearance cases. In the *Varnava* case, Turkey argued that even in a continuing situation of disappearance, the six months rule applies under Article 35(1) of the Convention.<sup>308</sup> It added that in the concrete

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303. *Id.* ¶ 56.

304. *Id.* ¶ 62.

305. *Id.* ¶¶ 62-63.

306. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, 25 (2001).

307. *See, e.g.*, *Demopoulos v. Turkey*, 2010-I Eur. Ct. H.R. 365, 388; *Djavit An v. Turkey*, 2003-III Eur. Ct. H.R. 231, 240-42 (2003); *Kakoulli v. Turkey*, App. No. 38595/97, Eur. Ct. H.R. ¶ 86 (2001), <http://hudoc.echr.coe.int/eng?i=001-71208>; *Hapshisi-Michaelidou v. Turkey*, App. No. 35214/97, Eur. Ct. H.R. ¶ 12 (2000), <http://hudoc.echr.coe.int/eng?i=001-94218>; *Gavriel v. Turkey*, App. No. 41355/98, Eur. Ct. H.R. ¶¶ 23, 27 (2000), <http://hudoc.echr.coe.int/eng?i=001-5070>; *Andreou v. Turkey*, App. No. 18360/91, Eur. Ct. H.R. ¶ 29 (1999), <http://hudoc.echr.coe.int/eng?i=001-90979>.

308. *Varnava*, 2009-V Eur. Ct. H.R. at 64-65.

case, the applicants had waited too long, for more than four years, before bringing their cases before either the authorities and before the ECtHR.<sup>309</sup> The Court had to rule on this issue for the first time: it held that in cases of disappearances, it is indispensable that the relatives of missing persons do not unduly delay bringing a complaint about the ineffectiveness or lack of such investigation before the Court.<sup>310</sup> The Court concluded that an application could 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.”<sup>311</sup> Based on this principle, the Court rejected several subsequent applications in disappearance cases as out of time claims.<sup>312</sup>

A third example for leading cases at the admissibility stage is the Court’s decision to qualify a national mechanism as effective domestic remedy that has to be exhausted. For instance, the Grand Chamber held in its admissibility decision *Demopoulos v. Turkey*, concerning deprivation of access to property, that Northern Cyprus had an effective domestic remedy which the applicants failed to exhaust.<sup>313</sup> As a consequence of the decision, the Court declared inadmissible all similar applications.<sup>314</sup> The Steering Committee for Human Rights of Council of Europe welcomed this leading decision as “[one] particular variant of the pilot judgment procedure,” capable of responding to concurrent applications.<sup>315</sup> As a result of the *Demopoulos* decision,

309. *Id.*

310. *Id.* at 67; *Varnava v. Turkey*, App. 16064/90, Eur. Ct. H.R. 1, 28 (2008), <http://hudoc.echr.coe.int/eng?i=001-84336>.

311. *Varnava*, 2009-V Eur. Ct. H.R. at 68-69.

312. *See, e.g., Eftymiou v. Turkey*, App. No. 40997/02, Eur. Ct. H.R. ¶ C (2013), <http://hudoc.echr.coe.int/eng?i=001-120501>; *Emin v. Cyprus*, App. No. 59623/08, Eur. Ct. H.R. ¶ 2 (2012), <http://hudoc.echr.coe.int/eng?i=001-99466>.

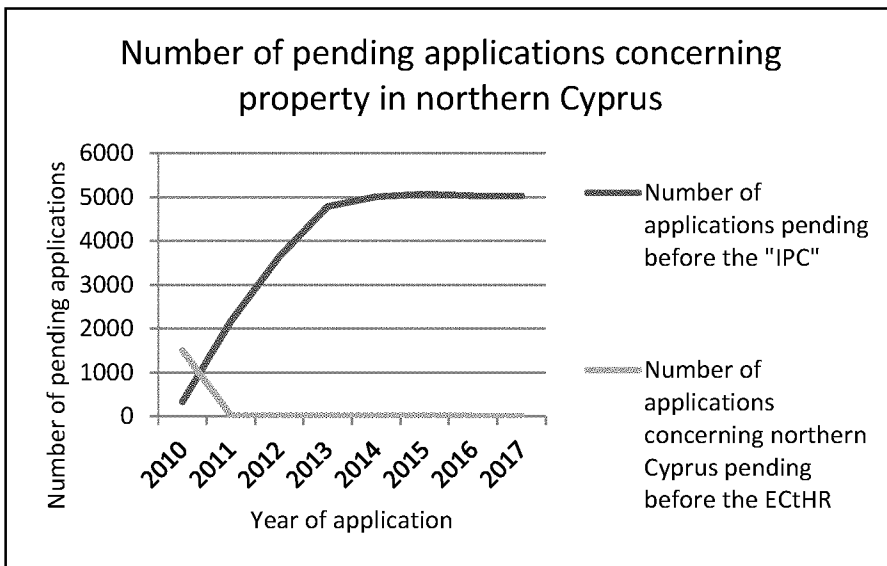
313. *Demopoulos v. Turkey*, 2010-I Eur. Ct. H.R. 365, 407, 415 (2010).

314. *See, e.g., Eftymiou*, App. No. 40997/02, Eur. Ct. H.R. ¶ C; *Papaioannu v. Turkey*, App. No. 58678/00, Eur. Ct. H.R. ¶ 1 (2012), <http://hudoc.echr.coe.int/eng?i=001-109153>; *Chrysostomos v. Turkey*, App. No. 66611/09, Eur. Ct. H.R. ¶¶ 1-2 (2011), <http://hudoc.echr.coe.int/eng?i=001-103100>.

315. *CDDH Report on a Representative Application Procedure*, *supra* note 273, ¶ 9.

while the number of pending applications radically decreased by 1,400 cases before the ECtHR, the same litigants directed their claims to the domestic “IPC” established in the “TRNC” (Table 1).<sup>316</sup> While the decision has been strongly contested as to the effectiveness of the local remedies,<sup>317</sup> the procedural technique intended to ensure to all applicants individual justice and undoubtedly decreased the Court’s backlog.

**Table 1**



A fourth example of leading cases concerns documentary evidence from a separatist region under ongoing armed conflict. In *Lisnyy v. Ukraine and Russia*, the applicants complained that the shelling of the villages in Eastern Ukraine where they lived “had hindered the peaceful enjoyment of their property and dwelling places.”<sup>318</sup> In its inadmissibility decision, the Court clarified the rules for the production of *prima facie* evidence to substantiate their allegations which could serve as a model for future applications from ongoing

316. *Proceedings of the Immovable Property Commission*, IMMOVABLE PROP. COMM’N (Feb. 15, 2018), <http://www.tamk.gov.ct.tr/english/istatistik.html>.

317. Elena Proukaki, *The Right of Displaced Persons to Property and to Return Home After Demopoulos*, 14 HUM. RTS. L. REV. 701, 714-15 (2014).

318. *Lisnyy v. Ukraine*, Apps. Nos. 5355/15 et al., Eur. Ct. H.R. ¶ 21 (2016), <http://hudoc.echr.coe.int/eng?i=001-165566>.

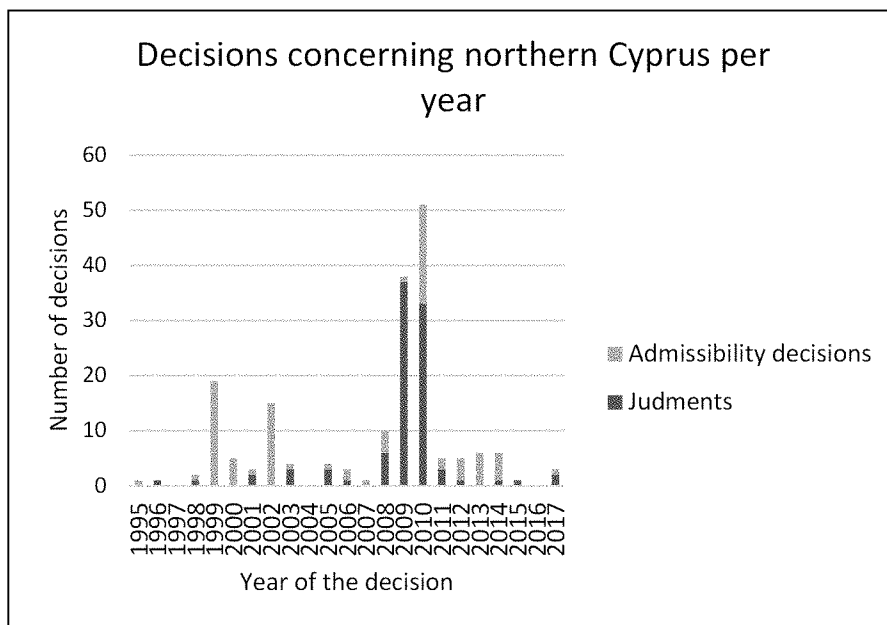
armed conflicts.<sup>319</sup>

The admissibility questions decided in leading cases facilitate the prompt settlement of numerous further applications from the same region. If one examines the number of decided cases concerning Northern Cyprus from the *Loizidou* admissibility decision of 1995 until the end of 2017 (Table 2), one finds that leading cases like *Loizidou*, *Cyprus v. Turkey (IV)* and *Demopoulos*, contributed largely to the settlement of other similar applications within a short period of time. After the first judgment concerning the region in the *Loizidou* case at the end of 1996, the Court rendered forty-one admissibility decisions between 1998 and 2002, citing *Loizidou* as a leading case for the admissibility *ratione loci*. A high number of similar applications concerning expropriation of property and denial of displaced persons' right to return to their homes were settled on the merits in 2009 (thirty-seven judgments) on the model of the *Loizidou* and *Cyprus v. Turkey (IV)* judgments, while the amount of the just satisfaction was settled in separate judgments in 2010 (thirty-three judgments). The effect of the *Demopoulos* case is also manifest in the increase of the number of inadmissibility decisions: in the same year, in 2010, seven inadmissibility decisions involving forty-eight applications relied on the *Demopoulos* case. In 2011, the Court considered 875 applicants as no longer wishing to pursue their applications in light of the *Demopoulos* case.<sup>320</sup>

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319. *Id.* ¶¶ 26-27; see also Apostol, *supra* note 134, ¶¶ 67-68.

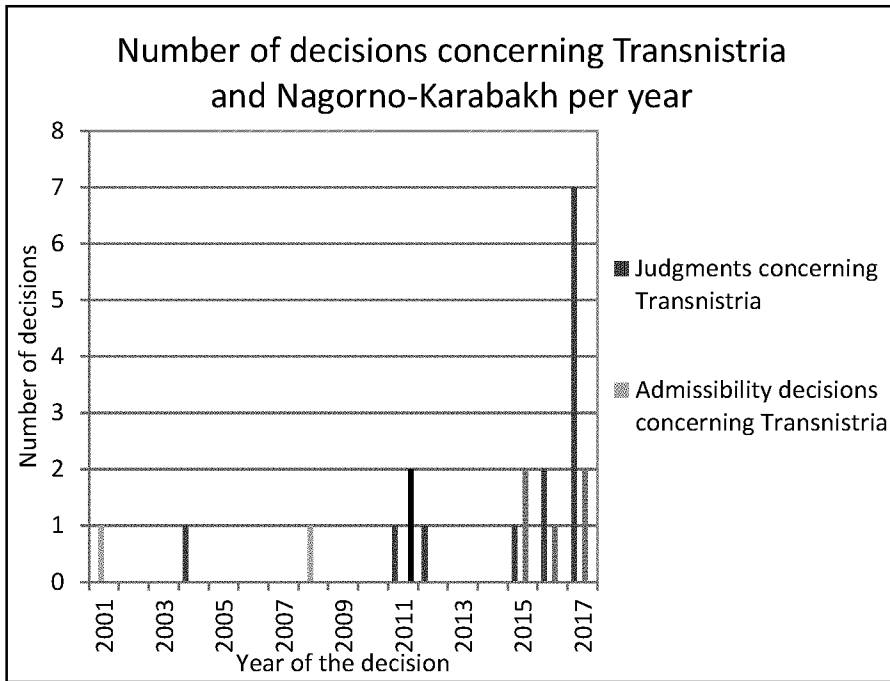
320. *Kosta v. Turkey*, Apps. No. 30984/96 & 35213/97, Eur. Ct. H.R. 3 (2011), <http://hudoc.echr.coe.int/eng?i=001-108215>.

**Table 2**

The number of decisions concerning Transnistria (Table 3) since the first admissibility decision in the *Ilaşcu* case (2001) shows, to a lower extent, the facilitating role of leading cases. After the leading decisions *Ilaşcu*, *Catan*, and *Mozer*, all rendered by the Grand Chamber, the capacity of the Chambers to effectively settle applications from the same region has largely strengthened, with seven cases decided in the merits in 2017. To a lesser extent, the first two admissibility and then merits decisions on Nagorno-Karabakh (Table 3), the *Sargsyan/Chiragov* judgments, seem to simplify the proceedings of later cases from Nagorno-Karabakh: they were largely cited in a Chamber judgment in another case in 2016<sup>321</sup> and in the just satisfaction judgments in the *Sargsyan/Chiragov* cases in 2017.<sup>322</sup>

321. *Muradyan v. Armenia*, App. No. 11275/07, Eur. Ct. H.R. ¶ 126 (2016), <http://hudoc.echr.coe.int/eng?i=001-168852>.

322. *Chiragov v. Armenia*, App. No. 13216/05, Eur. Ct. H.R. ¶¶ 44-48 (2017), <http://hudoc.echr.coe.int/eng?i=001-179554>; *Sargsyan v. Azerbaijan*, App. No. 40167/06, Eur. Ct. H.R. ¶¶ 26-30 (2017), <http://hudoc.echr.coe.int/eng?i=001-179555>.

**Table 3**

Leading cases decided on the merits could be the solution for the effective settlement of concurrent applications by individuals and a State concerning the same subject matter or region. Ideally, the government should withdraw an inter-state application protecting a concrete individual citizen if the individual's application concerning the same subject matter awaits a Court decision.<sup>323</sup> This scenario occurred with the third *Ukraine v. Russia (III)* case, concerning the deprivation of liberty and treatment of a Ukrainian national belonging to the Crimean Tatars ethnic group, "in the context of criminal proceedings that the Russian authorities have conducted against him."<sup>324</sup> However, once an inter-state application is maintained and covers a wide range of human rights violations that individual applications also address, judicial economy and effectiveness of the Convention require that the Court settles the inter-state case as a

323. See *Cyprus v. Turkey*, 2014-II Eur. Ct. H.R. 245, 254 (2014).

324. *Ukraine v. Russia*, App. No. 49537/14, Eur. Ct. H.R. 2 (2015), <http://hudoc.echr.coe.int/eng?i=001-157568>.

judgment of principle, before resolving the individual cases raising similar points.<sup>325</sup> This was the case with the *Cyprus v. Turkey (IV)* interstate case, which covered a wide range of legal questions not yet resolved in the previous Northern Cyprus cases, such as the *Loizidou* case. The Court established several conclusions of major importance in the *Cyprus v. Turkey (IV)* judgment: “remedies available in the ‘TRNC’ may be regarded as ‘domestic remedies’”;<sup>326</sup> the displaced persons’ lack of access to their property and homes is regarded as continuing violations of Article 1 of Protocol No. 1 and of Article 8, respectively.<sup>327</sup>

In other words, where a State party files an application on behalf of its citizens from the same region, the inter-state judgment is likely to answer to numerous general questions raised also by the individual applications. This is the case of South Ossetia, Abkhazia, Crimea, and Eastern Ukraine, where thousands of individual applications are cumulated with inter-state applications. In the *Georgia v. Russia* case, Georgia alleges that the Russian Federation had allowed or caused an administrative practice to develop in violation of Articles 2, 3, 5, 8, and 13 of the Convention, Articles 1 and 2 of Protocol No. 1, and Article 2 of Protocol No. 4, through indiscriminate and disproportionate attacks against civilians and their property in Abkhazia and South Ossetia by the Russian army and/or the separatist forces placed under their control.<sup>328</sup> The subsequently lodged *Ukraine v. Russia* applications raise similar legal and factual complexities.<sup>329</sup> Those cases are likely to lead to principled conclusions, for example, the alleged violation of the right to free elections under Article 3 of Protocol No. 1 in separatist areas *de facto* controlled by Russia<sup>330</sup> or Russia’s alleged jurisdiction on account of its “effective control over

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325. *Copenhagen Declaration*, *supra* note 41, ¶ 45.

326. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, 32; *Adali v. Turkey*, App. No. 38187/97, Eur. Ct. H.R. ¶ 186 (2005), <http://hudoc.echr.coe.int/eng?i=001-68670>; *Kakoulli v. Turkey*, App. No. 38595/97, Eur. Ct. H.R. 1, ¶ 89 (2001).

327. *See Cyprus*, 2001-IV Eur. Ct. H.R. at 49; *Xenides-Arestis v. Turkey*, App. No. 46347/99, Eur. Ct. H.R. ¶¶ 20, 22 (2005), <http://hudoc.echr.coe.int/eng?i=001-71800>.

328. *Georgia v. Russia*, App. 38263/08, Eur. Ct. H.R. 1, 2-3 (2011).

329. *See* ECtHR Press Release, Case Concerning Events in Crimea and Eastern Ukraine, *supra* note 20.

330. *Id.*



Crimea and—by controlling separatists and armed groups there—*de facto* control over the regions of Donetsk and Luhansk.”<sup>331</sup>

However, an interstate case might not be the only case to pronounce a judgment of principle: for example, the *Cyprus v. Turkey (IV)* judgment largely relied on the previous *Loizidou* case, decided by the Grand Chamber in an individual application.<sup>332</sup> In other regions where no inter-state application was submitted like Transnistria or Nagorno-Karabakh, individual cases gave rise to judgments of principle. The *Ilaşcu*, *Chiragov*, and *Sargsyan* judgments concerned Transnistria and Nagorno-Karabakh, respectively, where no inter-state complaint has been lodged. In all these leading decisions, the Grand Chamber has answered fundamental admissibility questions such as jurisdiction *ratione loci*, *ratione personae*, victim status, or the availability and effectiveness of domestic remedies in the given separatist area. The fact that in those cases the designated Chambers relinquished jurisdiction in favor of the Grand Chamber, indicated a serious question affecting the interpretation of the Convention or the importance to ensure the consistency with previous case law,<sup>333</sup> and thus, paved the way to a leading decision.

The above-mentioned procedural techniques all serve to coordinate the settlement of cases filed by a mass of applicants from areas outside of the territorial State’s effective control. The choice and combination of the given procedural techniques depend on the factual and legal background of the pending applications. Beyond the pending inter-state applications that should lead, on account of their factual complexities and the high number of individual concerned, to leading cases, the pilot procedure and the joined or simultaneous examination of cases might equally rationalize the settlement of the claims of concurrent applicants. Their application is not exclusive, but the Court should combine them as far as possible. For example, the *Lisnyy* case joined three applications, the Court seems to have prioritized its settlement<sup>334</sup> and the decision on admissibility can be regarded as a

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331. *Id.*

332. *See e.g., Cyprus*, 2001-IV Eur. Ct. H.R. at 21-25.

333. European Convention on Human Rights art. 30, *supra* note 2.

334. *Lisnyy v. Ukraine*, App. Nos. 5355/15 et al., Eur. Ct. H.R. ¶ 22 (2016), <http://hudoc.echr.coe.int/eng?i=001-165566> (observing that while the applications were lodged between December 2014 and September 2015, the Court gave its

leading case.

## V. CONCURRENT RESPONDENT STATES

The litigation of a single claim against multiple respondent States in one procedure is not uncommon in the practice of international tribunals.<sup>335</sup> Good administration of justice and judicial economy might justify the adjudication on the responsibility of multiple States in a single judgment.<sup>336</sup>

Separatist areas present a particular case for attributing wrongful acts to multiple respondent States: instead of a vacuum of authorities, in fact many subjects of international law operate in the given region. The relevant actors might be the territorial State or the subject controlling the area, such as an occupying power or several occupying powers, an outside State controlling a leased territory, an outside State controlling or supporting in various means non-state *de facto* authorities, an international organization, or various States administering the territory.<sup>337</sup> However, applicants can address their complaints to the ECtHR only against human rights violations “by one of the High Contracting Parties” to the Convention.<sup>338</sup> This means that applicants can address their claims against more than one respondent

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inadmissibility decision in less than one year on July 28, 2016).

335. See e.g., Panel Report, *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/AB/R (adopted May 18, 2011) (relating to a large-scale case involving multiple members of the European Community and other member states of the WTO); Panel Report, *European Communities and its Member States - Tariff Treatment of Certain Information Technology Products*, WTO Doc. WT/DS375/R (adopted Aug. 16, 2010) (showing that the WTO responded to three different disputes by including the reports from the three different complainants, U.S., Japan, and China, into one large Panel Report); *Monetary Gold Removed from Rome in 1943 (It. v. Fra., Gr. Brit. & N. Ir., & U.S.)*, Preliminary Question, 1954 I.C.J. Rep. 4, 19, 21 (noting that both Italy and Albania had made applications to the ICJ regarding the same issue of Albania’s claim over the gold and who has priority to receive it in the end).

336. Paparinskis, *supra* note 243, at 304.

337. Samantha Besson, *Concurrent Responsibilities under the European Convention on Human Rights: The Concurrence of Human Rights Jurisdictions, Duties and Responsibilities*, in *The European Convention on Human Rights and General International Law* (Anne van Aaken and Iulia Motoc eds., 2018), <https://papers.ssrn.com/abstract=2841203>, at 1, 7 (recognizing that various scenarios exist outside the context of separatist areas as well).

338. European Convention on Human Rights arts. 33-34, *supra* note 2.

State and if each of those States have jurisdiction under Article 1 of the ECHR over the challenged conduct, the ECtHR will pronounce on their “concurrent jurisdiction.”<sup>339</sup> In this case, the Court will determine the responsibility of each of the respondent States and might engage their concurrent (dual or multiple) responsibility.<sup>340</sup> Where more than one State contributes to a single human rights violation, the so-called concurrent responsibility arises between independent wrongdoers.<sup>341</sup> The Court recognized the jurisdiction, a threshold criterion of the applicability of Article 1 of the ECHR, of concurrent States parties, and their concurrent responsibility in various cases in separatist areas. Concurrent respondent States such as the territorial State, the outside State exercising effective control over the *de facto* authorities, or even another third State, can be designated either by the applicant (Part V.A) or exceptionally the ECtHR *proprio motu* (Part V.B). As this Part will explain, coordination is made at the time of the identification of the respondent States: the application can only be made after a pre-determination of the allocation of concurrent jurisdictions, duties and State responsibility among the concerned States parties.

#### A. COORDINATION BY THE APPLICANT

Concurrent respondent States are normally designated by the applicant who shall evaluate, before filing the application, which States can be responsible for the alleged human rights violations. The first application against multiple respondent States submitted from a separatist area was the *Ilaşcu v. Moldova and Russia* case, concerning alleged human rights violations of four Moldovan nationals while detained in the separatist Transnistrian part of Moldova by *de facto*

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339. *Güzelyurtlu v. Cyprus*, App. No. 36925/07, Eur. Ct. H.R. ¶¶ 219, 230, 237 (2017), <http://hudoc.echr.coe.int/eng?i=001-172460>; *Jaloud v. Netherlands*, 2014-VI Eur. Ct. H.R. 229, 302.

340. *Sargsyan v. Azerbaijan*, App. No. 40167/06, Eur. Ct. H.R. ¶ 1 (2015) (*Yudkivska, G.*, concurring), <http://hudoc.echr.coe.int/eng?i=001-155662>.

341. See Maarten den Heijer, *Shared Responsibility Before the European Court of Human Rights*, 60 NETH. INT'L L. REV. 411, 414-416 (2013); see also Besson, *supra* note 337, at 14-16 (acknowledging that concurrent responsibilities that arise from the same wrongful act are called ‘shared responsibilities,’ or *stricto sensu*, but that the latter term is used to refer to different types of concurrent responsibilities independently of the same wrongful act).

authorities.<sup>342</sup> The applicants argued that “the Moldovan authorities were responsible under the Convention for the alleged infringements of their human rights enshrined in the ECHR, since they had not taken any appropriate steps to put an end to them.”<sup>343</sup> Furthermore, they alleged that the Russian Federation shared responsibility since the territory of Transnistria was under *de facto* Russian control, on account of the Russian troops and military equipment stationed there, and the support allegedly given to the separatist regime by Russia.<sup>344</sup> The applicants also claimed that Moldova and Russia had obstructed the exercise of their right of individual application to the Court (Article 34 of the ECHR).<sup>345</sup> The Court accepted the applicants’ argumentation and held both States individually responsible for their own conduct. Moldova was held responsible for its own failure to discharge its positive obligations under Articles 3 and 5 of the ECHR vis-à-vis individuals within its territory, notwithstanding its lack of effective control over the separatist region, as far as it had the means to take appropriate steps.<sup>346</sup> The Russian Federation was held responsible for the same violations of the applicants’ human rights on account of the effective authority or decisive influence it exerted over the separatist regime.<sup>347</sup> Furthermore, both respondent States incurred responsibility for the breach of Article 34 of the Convention.<sup>348</sup> Because the applicants could effectively establish that both States had jurisdiction over the situation – Moldova on account of its sovereignty over the region out of its effective control, and Russia on the basis of its *de facto* control over the subordinated administration – the respondent States had concurrent obligations under the Convention and the violations led to their independent responsibility.<sup>349</sup> The attribution of conduct of non-state actors to an outside State and the residual positive obligations of the territorial State goes hand in hand with concurrent

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342. *Ilascu v. Moldova*, 2004-VII Eur. Ct. H.R. 179, 195-97 (2004).

343. *Id.* at 192.

344. *Id.*

345. *Id.*

346. *Id.* at 293-96.

347. *Id.* at 290-93.

348. *Id.* at 298-99.

349. See *den Heijer*, *supra* note 341, at 416 (raising issues about the allocation of damages based on a single harmful outcome that has established independent violations).

jurisdictions and duties, and might be applicable to any comparable situations where the territorial State has lost effective control over a part of its territory and another outside State exercises various forms (military, economic, political etc.) of control over the local authorities.

Since the *Ilaşcu* judgment until the end of 2017, twelve other cases submitted from Transnistria both against Moldova and the Russian Federation have been decided on the merits by the ECtHR.<sup>350</sup> In all but one subsequent cases,<sup>351</sup> only Russia incurred responsibility for the human rights violations directly caused by the Transnistrian *de facto* authorities, based on its effective control or decisive influence over the subordinated administration. Moldovan authorities, however, have progressed in providing positive measures towards individuals in the separatist region, and the Court found in most cases that Moldova fulfilled its positive obligations. This means that the division of concurrent jurisdictions established in the *Ilaşcu* case not only has been adopted by subsequent applicants as a litigation strategy, but has led to better compliance by the Moldovan authorities with the ECHR. Furthermore, applicants from other separatist regions have started to rely on this litigation strategy and to file their case against both the territorial State and the outside State controlling the *de facto*

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350. See generally *Draci v. Moldova*, App. No. 5349/02, Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-177651>; *Braga v. Moldova*, App. No. 76957/01, Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-177650>; *Eriomenco v. Moldova*, App. No. 42224/11, Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-173465>; *Vardanean v. Moldova*, App. No. 22200/10, Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-173802>; *Soyma v. Moldova*, App. No. 1203/05, Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-173797>; *Apcov v. Moldova*, App. No. 13463/07, Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-173798>; *Paduret v. Moldova*, App. No. 26626/11, Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-173464>; *Turturica v. Moldova*, App. Nos. 28648/06 & 18832/07, Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/eng?i=001-166480>; *Mozer v. Moldova*, App. No. 11138/10, Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/eng?i=001-161055>; *Pisari v. Moldova*, App. No. 42139/12, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-153925>; *Catan v. Moldova*, App. Nos. 43370/04, 8252/05, 18454/06, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-114082>; *Ivanțoc v. Moldova*, App. No. 23687/05, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-107480>.

351. See *Braga*, App. No. 76957/01, Eur. Ct. H.R. ¶¶ 46, 60, 68 (identifying this as the exception case where Moldova was found responsible for the violation of Articles 3, 5, and 34).

administration.<sup>352</sup>

Arguably, any civil or criminal proceedings conducted in an area out of the territorial State's effective control might give rise to the concurrent jurisdictions of the territorial State and the State controlling the subordinated administration. This was the case in the recently decided *Güzelyurtlu v. Cyprus and Turkey* judgment,<sup>353</sup> concerning the simultaneous criminal proceedings of the Republic of Cyprus and the *de facto* "TRNC" against eight persons accused of the abduction of three Cypriot nationals of Turkish-Cypriot origin from Northern Cyprus and their killing in the Cypriot Government-controlled area. The Court found that the suspected perpetrators of the murder of the applicants' relatives were within Turkey's jurisdiction, either in the "TRNC" or in mainland Turkey,<sup>354</sup> whereas the applicants' relatives' deaths had taken place in the territory controlled by the Republic of Cyprus and under that State's jurisdiction; therefore, a procedural obligation arose in respect of Cyprus.<sup>355</sup> Consequently, as both States have jurisdiction, they had procedural obligations under the right to life (Article 2), especially the duty to cooperate with inquiries or hearings conducted within the jurisdiction of another Contracting State concerning the use of unlawful force resulting in death.<sup>356</sup> The novelty of the *Güzelyurtlu* was the State party's obligation to cooperate, even with *de facto* authorities. This means that in cases involving concurrent jurisdictions with an alleged violation of the right to life (Article 2) or the right to physical integrity (prohibition of torture under Article 3, prohibition of slavery and forced labour under Article 4), the concerned States parties have a duty to cooperate in the prevention, and the investigation, of the human rights violations. With this conclusion, the Court went well beyond the independent

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352. See, e.g., *Güzelyurtlu v. Cyprus*, App. No. 36925/07, Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-172460>; see also ECtHR Press Release, Case Concerning Events in Crimea and Eastern Ukraine, *supra* note 20; *Parastayev v. Russia*, App. No. 50514/06, Eur. Ct. H.R. 2 (2011).

353. See generally *Güzelyurtlu*, App. No. 36925/07, Eur. Ct. H.R.

354. *Id.* ¶ 187.

355. *Id.* ¶ 262.

356. *Id.* ¶ 284; see also *Rantsev v. Cyprus*, 2010-I Eur. Ct. H.R. 65, 120, 126-27 ("Member States are also subject to a duty in crossborder trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories.").

examination of the respondent States' jurisdiction and responsibility and established a coordination of the States' positive obligations.

Furthermore, concurrent jurisdictions might be multiplied if the applicant is not a national of the territorial State or the outside State controlling the subordinated *de facto* administration, but of a third State. Some applications from Transnistria have extended the scope of respondent State beyond Moldova and Russia, and complained that the applicant's State of nationality breached also the Convention by not complying with its positive obligations towards its national.<sup>357</sup> However, the Court's precedents do not confirm such a third State jurisdiction based only on the victim's nationality. Whereas citizens of the State might be under the authority of consular and diplomatic agents and might ask for consular or diplomatic protection against alleged human rights violations abroad, this hypothesis does not lead to due diligence obligations because the ECtHR does not recognize a human right to diplomatic protection.<sup>358</sup> In a case where the applicant similarly relied on the *Ilaşcu* judgment about the State's positive obligations under Article 1 of the ECHR, including, *inter alia*, to take diplomatic measures, the Court held that there was a fundamental difference between the *Ilaşcu* judgment and other claims related to diplomatic protection.<sup>359</sup> Contrary to human rights violations occurring abroad, in the *Ilaşcu* case, the Court asserted the territorial State's jurisdiction over individuals in a part of its territory, out of its effective control, because the State "does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State."<sup>360</sup> In another more recent Transnistrian case, the applicants tried to establish the jurisdiction of the victim's State of nationality (Ukraine), beyond that of the territorial State (Moldova), and the outside State controlling the

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357. *Soyma v. Moldova*, App. No. 1203/05, Eur. Ct. H.R. ¶ 16 (2017), <http://hudoc.echr.coe.int/eng?i=001-173797>; *Totchi v. Moldova*, App. No. 8833/10, Eur. Ct. H.R. ¶ 12 (2010), <http://hudoc.echr.coe.int/eng?i=001-116634>.

358. *M. v. Italy*, App. No. 40020/03, Eur. Ct. H.R. ¶ 127 (2012), <http://hudoc.echr.coe.int/eng?i=001-112576>; *see also Orel v. Croatia*, App. No. 51506/13, Eur. Ct. H.R. ¶ 73 (2016), <http://hudoc.echr.coe.int/eng?i=001-164657>.

359. *Orel*, App. No. 51506/13, Eur. Ct. H.R. ¶ 74.

360. *Id.*

territory (Russia), arguably based on the *Ilaşcu* case about Moldova's positive obligations towards individuals in its territory outside its effective control.<sup>361</sup> However, the Court held that the applicants did not adduce any evidence in support of the allegation that Ukraine had jurisdiction in the case, so it rejected this complaint with respect to the State of nationality.<sup>362</sup> Therefore, the difference lies in the territorial State's sovereignty over the given area; whereas other third States without sovereignty over the area, effective control, or decisive influence over the subordinated *de facto* authorities, do not seem to have jurisdiction, unless the applicant can prove some more direct causality with the human rights violation. Such a direct causality can be, for example, a continuous cross-border act constituting a human rights violation such as human trafficking,<sup>363</sup> asylum transfer,<sup>364</sup> custody procedures to restore the bond between a parent and a child being in another country,<sup>365</sup> abduction or deportation of persons or any incident of unlawful violence leading to loss of life.<sup>366</sup> Such cross-border cases might involve the jurisdiction of a State party if its domestic conduct produces extraterritorial effects. Under a progressive interpretation of jurisdiction, the State's jurisdiction might be instigated on account of its omission to take due diligence measures to prevent and mitigate foreseeable violations.<sup>367</sup>

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361. *Soyma*, App. No. 1203/05, Eur. Ct. H.R. ¶ 16.

362. *Id.*

363. *See Rantsev v. Cyprus*, 2010-I Eur. Ct. H.R. ¶ 207 (finding that “[i]n light of the fact that the alleged trafficking commenced in Russia and in view of the obligations undertaken by Russia to combat trafficking,” Russia had jurisdiction over the death of the victim, even though it occurred abroad).

364. *See M.S.S. v. Belgium*, 2011-I Eur. Ct. H.R. 255, 336-343 (2011) (asserting that a state deciding on the transfer of an asylum seeker incurs responsibility, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country).

365. *See Monory v. Hungary*, App. No. 71099/01, Eur. Ct. H.R. ¶¶ 89-92 (2005), <http://hudoc.echr.coe.int/eng?i=001-68713> (considering that the overall length of the custody procedures initiated in a country other than the State of residence of the child was excessive and failed to meet the “reasonable time” requirement).

366. *Güzelyurtlu v. Cyprus*, App. No. 36925/07, Eur. Ct. H.R. ¶ 186 (2017), <http://hudoc.echr.coe.int/eng?i=001-172460>.

367. *See Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 101-02 (Nov. 15, 2017) (listing the States' obligations and responsibilities that are necessary to avoid future violations,



The court rejected some later applications directed against multiple respondent States other than the State of nationality, either because the conduct was attributable not to the respondent States, but to an international organization administering the territory,<sup>368</sup> or because the applicant failed to challenge a particular action or inaction by those States or to substantiate any breach by the respondent State of its positive duty to take all the appropriate measures with regard to the applicant's rights.<sup>369</sup> For instance, some applicants allegedly used the jurisdictional link based on causality to complain that one of the guarantor States of the Budapest Memorandum on Security Assurances<sup>370</sup> (providing security assurances relating to Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons), namely the United Kingdom, was responsible for its omission to prevent human rights violations by Russia in Ukrainian territory.<sup>371</sup> In some Northern Cyprus disappearance cases, the application was directed not only against the territorial State, Cyprus, but also against Greece, claiming that in the incidents of 1963-1964 in Northern Cyprus, Greek soldiers or militia were acting under the orders of the Republic of Greece alongside the Cypriot forces and consequently, the case instigated also the jurisdiction of Greece.<sup>372</sup> The Court held that

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specifically discussing environmental damages); Vassilis P. Tzevelekos and Elena Katselli Proukaki, *Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?*, 86 NORDIC J. INT'L L. 427, 445-47 (2017) (summarizing that while States' have the discretion in determining the method they take to offer protection, they still must do the best they can in offering protection).

368. See *Behrami v. France and Saramati v. France*, App. Nos. 71412/01 & 78166/01, Eur. Ct. H.R. ¶¶ 141, 143 (2007), <http://hudoc.echr.coe.int/eng?i=001-80830> (finding that the conduct of the international security and civil presences administrating Kosovo were attributable to the UN).

369. *Stephens v. Cyprus*, App. No. 45267/06, Eur. Ct. H.R. 7 (2008), <http://hudoc.echr.coe.int/eng?i=001-90868>.

370. See generally Letter dated 7 Dec. 1994 from the Permanent Reps. of Russia, Ukraine, the U.K., and the U.S. to the U.N. addressed to the Secretary-General (Budapest Memorandum), U.N. Doc. A/49/765 (Dec. 19, 1994).

371. EUR. PARL. ASS., Comm. on Legal Aff. & Hum. Rts., *Legal Remedies for Human Rights Violations on the Ukrainian Territories Outside the Control of the Ukrainian Authorities*, Doc. 14139, ¶ 57 (2016) (discussing the potential difficulty in establishing "that the United Kingdom not only had a legal duty to intervene against Russia [...] but also somehow exercised 'effective control' over the conflict zone by merely failing to intervene in the conflict" under the Budapest Memorandum).

372. *Emin v. Cyprus*, App. No. 59623/08, Eur. Ct. H.R. ¶ 1 (2012),

it lacked temporal jurisdiction over those acts, because Greece ratified the ECHR only on November 20, 1985.<sup>373</sup> All these instances show that the creative designation of concurrent respondent States if concomitant with a proper jurisdictional basis for each co-respondent is likely to enhance the applicant's chances of obtaining remedy at the ECtHR. Various past cases submitted against a single respondent State could have been directed against other co-respondents too.<sup>374</sup>

Once the applicant directs the application against multiple respondent States, the Court's final judgment on concurrent State responsibility of independent wrongdoers will influence the subsequent applicants' litigation strategy. After the *Ilaşcu, Catan, Mozer*, and recently the *Güzelyurtlu* judgments, individuals are encouraged to direct their applications against both the territorial State and the State controlling the separatist area, or even a third State on the basis of a properly identified jurisdictional link. Those concurrent respondent States are likely to have concurrent jurisdiction, concurrent positive obligations, and therefore arguably concurrent State responsibility.<sup>375</sup> The Court's engagement not to leave any area of the European "legal space" in a vacuum, without the applicability of the Convention,<sup>376</sup> also confirms this likely scenario.

#### B. COORDINATION BY THE ECtHR *PROPRIO MOTU*

All the above-mentioned precedents show that it is the applicant rather than the Court who decides on the concurrent respondent States. Where the applicant failed to do so and designated only one respondent State, the Court did not consider it entitled to direct *ex officio* the application against another State party involved in the

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<http://hudoc.echr.coe.int/eng?i=001-99466>.

373. *Id.*; *Gunesel v. Cyprus*, App. No. 30979/10, Eur. Ct. H.R. ¶ 9 (2013), <http://hudoc.echr.coe.int/eng?i=001-118970>.

374. *See, e.g., Ravlo v. Moldova*, App. No. 31747/03, Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=001-148043> (nothing the facts clearly revealed human rights violations by the *de facto* "MRT" authorities whose conduct was attributed to Russia in later cases).

375. Besson, *supra* note 337, at 2.

376. *Sargsyan v. Azerbaijan*, App. No. 40167/06, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-155662> (Yudkivska, G., concurring) ("It is a long-standing approach both by the Court and by the Council of Europe that no *de facto* black holes are allowed to exist in Europe.").

situation.<sup>377</sup> This shows that in the past, procedural economy prevailed, and the Court examined only the claims against the respondent State that the applicant designated. However, the effectiveness of the Convention, and the intention to eliminate a vacuum of responsibility, might justify the re-direction of the application against a co-respondent State not designated by the applicant.<sup>378</sup> Such a judicial activism has already appeared in the case law: in the recent Transnistrian case *Kireev*, filed by the applicant against Russia, the Court decided that “the application also needs to be examined in respect of Moldova.”<sup>379</sup> However, the re-direction of an application against a new co-respondent State by the Court is problematic for two reasons. First, it can run against the procedural autonomy of the applicant under which principle the individual has the choice against which Contracting Party he or she wishes to introduce an application.<sup>380</sup> One can foresee situations where the applicant voluntarily did not designate a State party as co-respondent, for example, out of fear of retaliation or because he or she is public servant of the same State.<sup>381</sup> This is the reason why the draft agreement on the

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377. See *Jaloud v. Netherlands*, 2014-VI Eur. Ct. H.R. 229, 302 (focusing on the jurisdiction of the Netherlands in this case, and not of the United Kingdom); see also *Khlebnik v. Ukraine*, App. No. 2945/16, Eur. Ct. H.R. ¶ 16 (2017) (directing the scope of the Court’s examination to Ukraine and not the concurrent international mechanisms of Ukraine and another High Contracting Party); *Sargsyan*, App. No. 40167/06, Eur. Ct. H.R. (Yudkivska, G., concurring) (stressing that “the Court is obviously unable to examine *proprio motu* the issue of responsibility of a State which was not party to the case at hand”).

378. See CDDH Ad Hoc Group (CDDH-UE), *Final Report for the CDDH - Fifth Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights*, 47+1(2013)008rev2, app. V ¶ 39 (2013) [hereinafter *Final Report for the CDDH – Fifth Negotiation Meeting*] (intending to eliminate a vacuum of responsibility by binding co-respondents under Article 46 of the Convention in order to serve the proper administration of justice).

379. *Kireev v. Moldova*, App. No. 11375/05, Eur. Ct. H.R. 2 (2008), <http://hudoc.echr.coe.int/eng?i=001-88175>.

380. Report Adopted by the Steering Comm. for Human Rights (CDDH) at its 53rd Meeting, *Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights*, 010 Addendum 2, ¶ 61 (2002) [hereinafter *CDDH Study of Technical and Legal Issues*].

381. *C.f. Parastayev v. Russia and Georgia*, App. No. 50514/06, Eur. Ct. H.R. 2 (2011), <http://hudoc.echr.coe.int/eng?i=001-108451> (describing the inverse scenario where the applicant, after being appointed to a high-ranking post at the Ministry of

accession of the European Union (EU) to the ECHR, which empowered the Court to designate and hold responsible the EU or a State Party as co-respondent, provided that before such a decision the Court shall seek the views of the applicant.<sup>382</sup> Thus, the Court shall designate *ex officio* a new co-respondent State, only after duly taking into account the interests of the applicant. Where the applicant did not consider or simply forgot the possibility of directing the application against the co-respondent State, the judicial activism to do so might most often serve his or her interest.

Second, as commentators observed regarding the proposal to grant the Court power to designate *proprio motu* the EU or a Contracting Party as co-respondent, such a re-direction of the application would often involve a pre-judgment as to the responsibility for a violation,<sup>383</sup> and could render inoperative certain admissibility criteria in respect of the new co-respondent (for example, the 6 months rule).<sup>384</sup> In the recent Transnistrian *Kireev* case, the Court did not need to decide whether the exhaustion rule was satisfied with regard to Moldova, but did not exclude that the rule applied.<sup>385</sup> Examining the exhaustion rule with regard to an *ex officio* designated co-respondent State seems like a reasonable guarantee against improper judicial activism, while the criticism on the predetermination of the responsibility for the alleged violation is a necessary condition rather than a consequence of this judicial technique. In fact, coordination between concurrent respondent States requires that the Court, especially its Registry, assesses the likely outcome of the Court's procedure on the merits. Only with the possible outcome in mind, can the Court decide on the *proprio motu* designation of a concurrent respondent State.

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Justice of Georgia, withdrew his application against Georgia).

382. *Final Report for the CDDH – Fifth Negotiation Meeting*, *supra* note 378, app. I arts. 3(5), 3(7).

383. *CDDH Study of Technical and Legal Issues*, *supra* note 382, ¶¶ 59, 61; accord Tobias Lock, *EU Accession to the ECHR: Implications for Judicial Review in Strasbourg*, 35 EUR. L. REV. 777, 786 (2010).

384. *CDDH Study of Technical and Legal Issues*, *supra* note 382, ¶¶ 59, 61; see *Final Report for the CDDH – Fifth Negotiation Meeting*, *supra* note 378, app. 1 art. 3.1 (stating “[t]he admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings”).

385. *Kireev v. Moldova*, App. No. 11375/05, Eur. Ct. H.R. 2 (2008), <http://hudoc.echr.coe.int/eng?i=001-88175>.

Another closely related coordinating function of the Court is the invitation of third party interventions. The Convention empowers the President of the Court, “in the interest of the proper administration of justice,” to “invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.”<sup>386</sup> The third party intervention serves to allow the third party intervenor to defend its interests, or one of its nationals, and to help the Court in establishing the facts.<sup>387</sup> Third party interventions by the State of nationality of the applicants are especially common in individual applications from separatist areas, also called “quasi interstate applications,”<sup>388</sup> due to the underlying inter-state territorial conflict between the respondent State and the third party intervenor. Third party intervention was allowed, for example, in the *Chiragov v. Armenia* and *Sargsyan v. Azerbaijan* cases wherein each case, the other State made use of its right to intervene under Article 36(1) of the Convention.<sup>389</sup> Similarly, in various Northern Cyprus cases, the Cypriot Government participated in the proceedings against Turkey as third party intervenor,<sup>390</sup> while the Turkish Government did the same when Turkish-Cypriot applicants complained about their right to property in the government controlled area or the investigation by Cypriot authorities into the disappearance of their relative and/or the discovery of the remains.<sup>391</sup> The evidence and arguments that the intervening

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386. European Convention on Human Rights art. 36(2), *supra* note 2.

387. den Heijer, *supra* note 341, at 415-16.

388. Apostol, *supra* note 134, ¶¶ 67-68; see Dean Spielmann, President, Eur. Court of Human Rights, The European Court of Human Rights as Guarantor of a Peaceful Public Order in Europe (Nov. 7, 2014).

389. See *Sargsyan v. Azerbaijan*, App. No. 40167/06, Eur. Ct. H.R. ¶ 4 (2015), <http://hudoc.echr.coe.int/eng?i=001-155662> (reporting that the Armenian Government intervened here under Article 36 of the Convention); see also *Chiragov v. Armenia*, App. No. 13216/05, Eur. Ct. ¶ 4 (2015), <http://hudoc.echr.coe.int/eng?i=001-155353> (reporting that the Azerbaijani Government intervened here under Article 36 of the Convention).

390. *E.g.*, *Charalambous v. Turkey*, App. No. 46744/07, Eur. Ct. H.R. ¶ 41 (2012), <http://hudoc.echr.coe.int/eng?i=001-110459>; *Demopoulos v. Turkey*, 2010-I Eur. Ct. H.R. 365, 374; *Varnava v. Turkey*, 2009-V Eur. Ct. H.R. 13, 24.

391. *E.g.*, *Emin v. Cyprus*, App. 59623/08, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-99466>; *Kazali v. Cyprus*, App. No. 49247/08, Eur. Ct. H.R. ¶ 130 (2012), <http://hudoc.echr.coe.int/eng?i=001-109812>; *Sofi v. Cyprus*, App. No. 18163/04, Eur. Ct. H.R. (2010), <http://hudoc.echr.coe.int/>

governments provided facilitate the legal analytical and fact-finding burden of the Court in legally and factually complex cases such as “quasi inter-state applications,” even if the case is not directed against concurrent respondent States. The coordinating role of the Court is to identify and inform the interested States parties of the proceedings.<sup>392</sup>

Therefore, one can say that the coordinating method between concurrent respondent States plays its main role in the designation of the respondent governments by the applicant or by the Court *proprio motu* on the basis of a properly identified jurisdictional link. Furthermore, the Court should coordinate between concurrent interested States by inviting third party interventions of States factually linked to the underlying separatist conflict. These types of coordinations favor judicial economy, good administration of justice, and the effectiveness of the Convention in the sense that concurrent jurisdictions and responsibilities will help to eliminate a vacuum of responsibility in separatist areas.

## VI. CONCLUSION

The method of coordinated settlement in the procedure of the ECtHR is likely to enhance the efficiency of the Court’s working methods and allocate its scarce resources in a manner that allows it to effectively respond to the most pressing general issues arising from concurrent applications. The procedural techniques and substantive law conclusions in precedents from separatist areas have shown that the Court does not consider those applications isolated from each other, but tries to settle them in a coordinated way, taking into account the related procedural and substantive issues.

Facing the tendency towards forum shopping by applicants from areas out of the territorial State’s effective control, the Court should continue to interpret the *lis pendens* and *res judicata* rules in a restricted manner. Article 35(2)(b) of the ECHR only excludes admissibility where the application before the Court concerns

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eng?i=001-96984.

392. *E.g.*, Joannou v. Turkey, App. No. 53240/14, Eur. Ct. H.R. ¶ 5 (2017), <http://hudoc.echr.coe.int/eng?i=001-179420> (observing that since the application was submitted by a British and Cypriot national, the Court informed the British Government and the Cypriot Government of the proceedings).

substantially not only the same facts and complaints but also introduced by the same persons. Concurrent procedures of international investigation or settlement should only exclude the admissibility of individual, rather than inter-state applications, and only if those procedures are conducted by judicial and quasi-judicial bodies. Furthermore, while deciding on the individual circumstances of the cases before it, the Court should rely on the legal and factual conclusions of other international bodies on the broader factual and legal background of the underlying circumstances in the conflict area.

To treat concurrent applications submitted by numerous applicants in a coordinated, rather than isolated way, the ECtHR should join cases with identical legal and factual backgrounds and examine applications simultaneously, whenever the cases present “symmetrical” situations—when they are factually similar but slightly different. The Court should moreover identify the existence of a structural or systemic problem, or other similar dysfunction, so as to treat them in a pilot procedure. For instance, the pilot procedure would be advisable in matters of compensation procedures for lost property or the reform of the investigation by *de facto* authorities on disappearance. Representative individual applications or the pending inter-state cases should serve as the major leading decisions to address general problems such as jurisdiction *ratione loci*, *ratione personae*, victim status, or the availability and effectiveness of domestic remedies in the given separatist area.

Facing concurrent respondent States, the Court should continue to rely on general international law and recognize concurrent State responsibility of independent wrongdoers for their own conduct leading to the same injury. Its coordination role should encompass the designation of the co-respondent State(s) as an exception and the invitation of third-party intervention. This eases the legal analytical and fact-finding burden of the Court in legally and factually complex cases.

The three different concurring elements require coordination at different stages of the procedure: while concurrent procedures of international investigation or settlement shall be assessed for the sake of the Court’s proceedings at the time of rendering its decision on the admissibility (coordination of procedures) or the merits (coordination

of findings), the concurrence of applicants and respondent States requires a coordination at an earlier stage of the proceedings. As explained, the grouping or prioritization of concurrent applications from several applicants requires a principled decision and the designation of the responsible Court formation at the early stage of the case. This procedural decision will be strategic as it may determine the outcome of the concurrent cases. Furthermore, the choice of the concurrent respondent States operates at the litigation strategy level of the applicant before submitting the application. Precedents show that the Court will likely establish multiple State responsibility in separatist areas, where an outside State has effective control or decisive influence over the *de facto* authorities. Thus, it is in the applicants' interest to prepare a litigation strategy against multiple States involved in the territorial situation.

The coordinated method of settling concurrent applications has various examples in the procedural tools used by the Court in recent years: the coordination of procedures and findings of other dispute settlement bodies, the grouping of similar applications for a single judgment or decision, the prioritization of individual cases (the *stricto sensu* priority policy, the pilot judgment procedure, and leading cases), as well as the designation of co-respondent States. While all of those procedural tools might be considered as further steps towards constitutional justice,<sup>393</sup> coordination should be followed by procedural guarantees evaluating the specific circumstances of each individual application. If coupled with such a principled caution, coordination can be considered as a method fitting in the framework of individual justice. Therefore, coordination as a method is confirmation for those commentators who claim that individual and constitutional justice do not exclude each other, but are interdependent functions.<sup>394</sup>

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393. Doc. 13719, *supra* note 60, ¶ 65; Greer & Wildhaber, *supra* note 33, at 671-72 (analyzing that the Convention must select and adjudicate cases effectively, in order to follow through with the concept of constitutional justice and recognizing that this is already slowly occurring).

394. EUR. PARL. ASS., Comm. on Legal Aff. & Hum. Rts., *Guaranteeing the Authority and Effectiveness of the European Convention on Human Rights*, Doc. 12811, ¶ 10 (2012); accord Patricia Egli, *Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a More Effective Control Mechanism?*, 17 J. TRANSNAT'L L. & POL'Y 1,



All coordination techniques between concurrent applications require that the Court assesses the likely outcome of the Court's procedure with regard to the merits. Decisions on the joined or simultaneous examination of applications, the prioritization of cases, the selection of a leading case, the relinquishment of jurisdiction in favor of the Grand Chamber, or the exceptional case of designation of the co-respondent State *proprio motu* all suppose some preliminary assessment of the likely outcome as to the admissibility and the merits of the concurrent applications. Arguably, this is a task delegating power from the judges to the Registry: it is at the phase of the registration and classification of the applications that the method of coordination is primarily operated. Therefore, the Registry staff should link together the interconnected legal and factual background along with procedural and substantive law questions of concurrent cases, which suppose some prejudgment on the merits of the case. The consequence of this method is "secretarization"<sup>395</sup> beyond the already widely recognized "judicialization"<sup>396</sup> of international relations and especially of human rights, i.e. the increased importance of the registry of international courts in the adjudication.

In sum, the Court should act in its coordinator function in settling thousands of pending applications from separatist areas outside the territorial State's effective control. Coordinating between concurrent applications ensures the coherence of the case law and the effectiveness of the Convention, while easing the Court's workload from the same conflict-torn regions.

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25-27 (2007); Kanstantsin Dzehtsiarou & Alan Greene, *Restructuring the European Court of Human Rights: Preserving the Right of Individual Petition and Promoting Constitutionalism*, PUB. L. 710, 712-13, 716-718 (2013).

395. I am grateful to Jean d'Aspremont for introducing this notion in the discussion about the topic.

396. THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION xi (Cesare Romano et al. eds., Oxford Univ. Press 2015).