JUDICIAL PROCEDURE

Introduction

It is perhaps tautological to say that one is elected to sit on the Court in order to decide cases: that is, after all, the *raison d'etre* of a judge. But before a case can come up before a judge for him or her to determine the issue, either alone or together with other judges, the case must, like in any court of law, follow a certain *iter*. The purpose of this chapter is to give a bird's eye view of that *iter*, identifying those stages at which the judge is expected to intervene and to apply his or her mind to determine an issue, procedural or substantive as the case may be. Some judges coming to the Court may be more familiar with this procedure than others; and some of the information in this chapter overlaps with that in other chapters – particularly the chapter "Working with the Registry". Nevertheless, it is important to have a clear idea of how things work in practice at the Court, not least to help reduce one's learning curve. Moreover, as will become clear, the judge is often called upon to act wearing different hats: as a judge in a judicial formation consisting of a number of judges, as a single judge, as a judge rapporteur or as a national judge. In all these instances his or her function is essentially always the same: to ensure the proper application of the Convention.

Introduction of an application

Like in most national courts, the registration of applications is handled by the registry staff, acting according to the Rules of Court and to such Practice Directions as may from time to time be issued by the President of the Court[1] and General Instructions issued by the Registrar,[2] and a judge is not really involved at this stage. Judicial control at this stage is exercised by the President of the Court acting through the Registrar. Leaving aside the rare (but very important) inter-State applications which have a life of their own, and leaving aside also Single Judge cases which are dealt with directly by a registry rapporteur and a Single Judge as will be explained in a moment, once an individual application is registered[3] it is allocated to a particular Section of the Court,[4] which will invariably be the Section in which the national judge elected in respect of the country against which the application has been filed sits.[5] It is worth noting from the start that a Section is not a Chamber.[6] Whereas the Convention speaks of Chambers – Articles 26, 29 and 30 – the Rules of Court – Rule 25 in particular – refer to Sections. The Section is the "pool", as it were, from which the particular Chamber formation is drawn.[7]

In allocating an application to a particular Section, the case-processing lawyer responsible for the registration of the case will also make a preliminary assessment as to whether the application is one

1. These Practice Directions are to be found at the end of the Rules of Court. Unless otherwise stated, "Article" in this chapter refers to an Article of the Convention and "Rule" refers to a Rule of the Rules of Court.
2. These General Instructions, approved by the President of the Court under Rule 17 § 4, are available on Intranet here: http://insite.dhcour.coe.int/Pages/home.aspx?p=judges/registrar&c=#n14060184451154092667703_pointer
3. Registration signifies that the applicant has fully complied with the requirements of Rule 47.
4. Although technically the allocation of applications to Sections is, according to Rule 52 § 1, a matter for the President of the Court, in practice the President delegates that power to the case-processing lawyer through the Registrar.
5. If the application is filed against more than one country it is generally allocated to the Section hosting the country against which the main complaints are directed. However it is possible to assign an application to a Section of which the national judge is not a member. In that case, when the application comes up for consideration before the Chamber, the national judge becomes *ex officio* a member of that other Chamber in compliance with Art. 26 § 4.
6. See also in this respect the chapter "Practical Information for Judges – First Days at the Court".
7. Rule 26.

which is to be assigned to a single judge, or to a Committee of three judges or to a Chamber of seven judges. This is only a preliminary assessment which can be reversed by the judges. Let us take the single judge procedure first.

Single Judge procedure

Although the number of Single Judges may vary (see Rule 27A § 1), the current practice is for all judges, except for Section Presidents,[8] to be assigned by the President of the Court one or more countries (State parties to the Convention) in respect of which they will exercise their functions in Single Judge formation. In respect of some "high count" countries, like Russia and the Ukraine, more than one judge is usually assigned to sit (separately) in such formation. A judge in Single Judge formation is precluded from examining an application against a country in respect of which he or she has been elected to the Court (Art. 26 § 3).

The Single Judge procedure was introduced to weed out at an early stage those applications which are manifestly unmeritorious, and therefore inadmissible either on formal grounds (for example because the application has been filed out of time) or on substantive grounds (for example, the application raises no Convention issue, or the applicant's claims are unsubstantiated, or the matter has been the subject of well-established case law to the effect that in the circumstances as alleged by the applicant there is no violation).[9]

The judge will periodically receive a list of cases, with a summary of what each case is about, and a proposal to declare the application or applications inadmissible. The summaries and proposal/s are made by the case-processing lawyers, but must be approved by a senior registry lawyer who has been designated, also by the Court President, as a non-judicial rapporteur (NJR).[10] There are two types of lists. Cases in list A will generally have a summary of two, three or more paragraphs succinctly outlining the facts of which the applicant complains and the reason or reasons for declaring the complaint or complaints inadmissible. Cases in list B, on the other hand have a much shorter summary, and are sometimes grouped, with one short general summary applicable to a number of cases. Thus, for instance, a number of cases may be grouped in list B because the complaint (or all the complaints) in each application has been submitted to the Court out of time.

Needless to say, the final decision as to whether to accept any or all the proposals of the NJR rests with the Single Judge. If something is not clear in the summary provided, the judge may discuss the case with the case processing lawyer or with the NJR, or with both. The judge may also want to elucidate some features of the case by discussing it with the national judge – Article 26 § 3 is no obstacle to this since the decision as to whether or not an application will be declared inadmissible at this stage will remain with the Single Judge.[11] Cases on List B may present some problems, particularly where they have been grouped. Some judges opt to pick two or three cases at random from list B to discuss with the case lawyer or with the NJR to ensure that the summary (or the general summary where cases have been grouped) is correct. The success of the Single Judge procedure as a proper filtering procedure depends very much on establishing a good working relationship based on trust between the case processing lawyer/s and the NJR on the one hand and the judge on the other.

8. Section Presidents act as Single Judges but in a different context, as will be explained later.
9. For all the admissibility criteria and pertinent case-law, see "Practical Guide on Admissibility Criteria" on the Court's Internet site.
10. See Rules 18 and 27A § 4. The term "non-judicial rapporteur" is used to distinguish the lawyer from the "rapporteur" who, in Court parlance, is always a judge.
11. As we shall see, some national judges ask for "their country's" Single Judge list to be sent to them so that, should they feel the need, they can flag a case which they believe should not be declared inadmissible by the Single Judge.

How are Single Judge cases disposed of? When the judge accepts a proposal by the NJR, a short standard letter is sent to the applicant informing him that the Court in Single Judge formation (the judge's name is indicated) has declared his application inadmissible. The decision of the Single Judge in this respect is final (Art. 27 § 2). Or the judge may adjourn a case for further information from the case processing lawyer or from the NJR.

But the judge may also not accept the NJR's proposals to have a case declared inadmissible by Single Judge procedure. In that eventuality he/she may either refer the case to a Committee of three judges or to a Chamber. Although in taking such decisions[12] the judge is not required to give reasons, good practice suggests that reasons should be given, even if in brief. This will help the rapporteur (who will eventually be appointed) as well as the Committee or the Chamber to appreciate better the problem or the dilemma faced by the Single Judge in that particular case. Cases have been known – although they are very few and far between – to end up in the Grand Chamber, and with a finding of a violation, even though the original proposal was to declare the application inadmissible (these cases generally involve a shift in the Court's case-law). A decision to refer to a Chamber obviously indicates that the Single Judge is of the view that the application is not inadmissible (although it does not necessarily indicate any view as to the merits). A decision to refer to a Committee, on the other hand, does not necessarily reflect the view that the application is admissible: the Single Judge may be of the view that the application is, indeed, inadmissible but for some reason – which should be indicated, e.g. the fact that the application stems from a high profile case in the country of origin – he or she is of the view that the decision should carry behind it the weight of three judges and not just one.

It should be pointed out that, when referring a case to a Committee, unless the Single Judge indicates otherwise, the Committee will receive the same case-note (that is the same brief summary) that the Single Judge received, and if the Committee accepts the NJR's proposal on the basis of that case-note, the same standard letter (but this time bearing the name of three judges and not just one) is sent to the applicant. If the Single Judge is of the view that the case deserves an inadmissibility decision (which is then made public), he/she should indicate that. Such an indication would automatically mean that a judge rapporteur would be assigned to the case, and it will then be up to the judge rapporteur to decide on the future course that the application will take (the only limitation on the judge rapporteur being that he/she will not be able to send the case back to be decided by a Single Judge formation).

One final point before leaving the Single Judge procedure: if a case has been allocated to a Committee or to a Chamber and a judge rapporteur has been appointed, the judge rapporteur may, before the case is communicated to the respondent Government and subject to the Section President directing otherwise, decide to send the case to be decided by a Single Judge formation (Rule 49 § 3 (b)).[13] In that case also the referral to the Single Judge can be made only once.

Appointment of judge rapporteur

If an application has, at the registration stage, been earmarked for consideration by a committee or a chamber, than a judge rapporteur is designated to deal with the case. Where individual applications are concerned,[14] such a designation is made by the Section President. In practice this function is delegated by most Section Presidents to the Section Registrars. In the majority of cases the judge rapporteur will be the national judge. There may, however, be instances where the national judge is not designated as judge rapporteur. The obvious case is where the national judge is precluded from taking cognizance of a particular application for any of the reasons mentioned in

12. As well as in adjourning a case.
13. See further below.
14. In the case of inter-State applications, the procedure is regulated by Rule 48.

Rule 28.[15] In the case of high count countries, it is physically impossible for the national judge to handle all the applications, and therefore other judges from the same Section are designated to act as judge rapporteur. There may also be cases when in the opinion of the Section President it would be preferable to appoint another judge as rapporteur in lieu of the national judge. Such, for instance, would be cases raising sensitive or controversial issues in the respondent State. In practice Section Presidents confer with the national judge before such an application is assigned to another judge. Finally, the national judge may ask to be exempted from being the rapporteur in a given case, and such a request is normally granted unless the Section President has strong grounds for refusing it.[16]

From the moment the judge rapporteur is designated, he or she will work in close liaison with the case-lawyer. The latter is the person who prepares the communication documents (where any are necessary) and the draft judgments or decisions. In doing so the case-lawyer acts under instruction from the judge rapporteur. Some judges, in their capacity as rapporteurs, prefer to leave all the initial drafting in the hands of the case-lawyer and to discuss the case with the case-lawyer only after the latter has come up with a draft. Others prefer to discuss the application with the case-lawyer before the drafting commences, so as to give him or her clear instructions as to how each complaint is to be dealt with. In practice it may not be possible to discuss beforehand all applications, so many judges opt to discuss beforehand at least those applications which have been earmarked for consideration by a Chamber, allowing the case-lawyer to prepare drafts without prior consultation in the case of applications earmarked for consideration by a Committee – the assumption being that an application earmarked for Committee is a straightforward case which requires minimum supervision.

Finally, Rule 49 § 3 provides a general (and non-exhaustive) description of what the judge rapporteur may and is expected to do:

> "In their examination of applications, Judge Rapporteurs
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> (a) may request the parties to submit, within a specified time, any factual information, documents or other material which they consider to be relevant;
>
> (b) shall, subject to the President of the Section directing that the case be considered by a Chamber or a Committee, decide whether the application is to be considered by a single-judge formation, by a Committee or by a Chamber;
>
> (c) shall submit such reports, drafts and other documents as may assist the Chamber or the Committee or the respective President in carrying out their functions."

Communication

Unless a particular application has already been communicated to the respondent Government,[17] the rapporteur must first decide whether the application is to be communicated at all. The rapporteur may be of the view that the case is inadmissible in which case three options are possible. He or she may, subject to the Section President directing otherwise,[18] send it to be dealt with in

15. See also the chapter "Ethics on and off the Bench".
16. See generally the "Guidelines on Assignment of Applications to Sections and Appointment of Judge Rapporteurs in the Sections" approved by the Bureau of the Court on 19 March 1999. Before the Grand Chamber the national judge is not appointed rapporteur, the guiding principle being that the judge presiding the Grand Chamber (who is normally the President of the Court) designates as rapporteur one of the other members of the Grand Chamber. This is done to ensure a fair distribution of rapporteur work in Grand Chamber proceedings. See also Rule 50.
17. This situation may occur if the judge rapporteur is considering an application which had previously been assigned to another judge (as rapporteur) who has since either moved to another Section or ceased to be a member of the Court altogether.
18. Rule 49 § 3 (b).

Single Judge formation.[19] If, however, the application raises some point of inadmissibility which may be of some general interest or which may recur in the future,[20] then the rapporteur may wish to proceed by way of a reasoned decision either before a Committee or before the Chamber. This is known as a *de plano* inadmissibility decision. Whereas in the Chamber the national judge, unless otherwise precluded from considering the application, sits *ex officio*, this is not so in a Committee. Nevertheless the practice is for the draft decision earmarked for a Committee to be sent to the national judge for information. If the national judge signifies his or her disagreement with that decision, the Section President will refer it to the Chamber. Likewise, if there is no unanimity in the Committee,[21] the inadmissibility decision proposed by the rapporteur is referred the Chamber.

If the rapporteur proposes communication of the application earmarked for consideration by the Chamber, the case-lawyer will prepare a document, which will be sent to the respondent Government, outlining the facts of the case as submitted by the applicant. It is also usual for a number of specific questions to be put to the respondent Government in order to help elucidate the facts or the legal issues involved. The case-lawyer will also prepare, under instruction from the rapporteur, another document called "Rapporteur's analysis". This latter document is intended to explain to the Section President, who is ultimately responsible for the communication,[22] why the rapporteur considers that the complaints raised in the application, or some of the complaints, should be communicated. If the rapporteur is not the national judge, these two documents are also sent to the national judge for him or her to signify agreement thereto. If the national judge does not agree with the communication as proposed, or if the Section President does not so agree, the matter is referred to the Chamber.[23] The same procedure is followed where the rapporteur proposes communication of an application earmarked for consideration by a Committee as a WECL (well established case law) case, the only substantial difference generally being that the description of the facts and the "Rapporteur's analysis" are much shorter and, moreover, no questions are put to the respondent Government.

Sometimes, in very difficult or sensitive cases, the rapporteur may himself or herself propose that the matter is first considered by the Chamber. This allows for the applicant's complaints, and the proposed questions to the respondent Government, to be examined collegially.

When the rapporteur proposes the communication of only some of the complaints – because the other complaints are clearly inadmissible – he or she may either propose that the inadmissible complaints be reserved for the final judgment or that those complaints be declared inadmissible straightaway by the Section President acting as a Single Judge[24]. This latter procedure has the advantage of leaving the Court and the parties to focus on what is clearly not inadmissible.

Committee proceedings

Committees of three judges each are set up within a Section pursuant to Article 26 § 1 and Rule 27. The number of Committees within a given Section varies, and the composition of the various Committees is reviewed every twelve months. A Section President is never a member of a

19. This, as we have seen, is not possible if the Single Judge has already rejected the NJR's proposal to declare it inadmissible.
20. See, for example, *Tucka v. the United Kingdom* (dec.), 18 January 2011.
21. All Committee decisions require that the three judges are unanimous in their decision – see Art. 28.
22. Rule 51 § 3.
23. A communication made by the Section President directly upon a proposal by the rapporteur is known as a Presidential Communication. If the matter has been referred to a Chamber before communication, it is known as a Chamber Communication.
24. See Rules 27A § 2 (a) and 54 § 2 (b)(3).

Committee. Every Committee is presided by its most senior member, seniority being determined according to the date on when the judge took up office.[25]

A Committee deals basically with three types of applications: (1) those referred to it by a Single Judge, in order for the inadmissibility decisions to be taken by three judges instead of one; (2) applications referred to it by a rapporteur proposing inadmissibility *de plano* or in some instances after communication; (3) applications referred to it by a rapporteur proposing a violation when the question at issue is already the subject of well-established case law (WECL) of the Court. A Committee also deals with strike-outs. An application may be struck-out of the list by a Committee (even after the application has been communicated to the respondent Government)[26] for a number of reasons,[27] the most common being the applicant's failure to pursue his application, or that the matter has been resolved either through a friendly settlement – Article 39 – or after a unilateral declaration by the respondent Government made pursuant to Rule 62A.

Within a given Section, cases are assigned by the Section Registrar to the various Committee formations by rotation. Although the judge rapporteur in respect of a particular application as well as the national judge need not be a member of the Committee dealing with that application, in practice Section Registrars endeavour to ensure that both the rapporteur and the national judge are members of the Committee. In any case, a committee may, at any stage of the proceedings invite the national judge to take the place of one of its members.[28]

The Committee agenda, together with the proposed draft (inadmissibility or strike-out) decisions or the proposed draft WECL judgments, are distributed to the members of the Committee well in advance (between one to two weeks) of the date when the Committee is to meet to consider the drafts. The general practice is that the members of the Committee signify to each other (and to the Section Registrar)[29] by email that they have no problem with any of the proposals, indicating at most minor changes or correction which they may wish to see made in a particular draft. If agreement is reached in this way, the Committee members need not actually meet on the appointed day. If, on the other hand, a judge wishes to discuss a particular proposed draft, the Committee will meet on the appointed day.[30]

All decisions taken in Committee – that is whether in respect of a strike-out or in respect of an inadmissibility decision or in respect of a WECL judgment – require a unanimous vote. If the three judges are not unanimous in their conclusion, the matter is referred automatically to the Chamber.[31]

Decisions and judgments of a Committee are, like the decisions of the Single Judge, final.

Chamber proceedings

The procedure before a Chamber commences very much in the same way as when the rapporteur has decided to propose a draft (inadmissibility or strike-out) decision or a draft (WECL) judgement before a Committee, that is, with the drafting of the proposed decision or judgment by the case-

25. See Rule 5.
26. If the reason for a strike out arises after a Chamber has already commenced examining the application, the decision to strike out is taken by the Chamber.
27. Article 37 spells out when a strike-out can be ordered. A strike-out may be ordered even by the Single Judge, see Article 27 § 1 and Rule 52A § 1.
28. Unless, of course, the national judge is otherwise precluded from taking cognizance of the application. If he or she is so precluded, an *ad hoc* judge is not appointed for Committee cases. *Ad hoc* judges are appointed only for Chamber and Grand Chamber cases – see Article 26 § 4 and Rule 29.
29. Committee cases are generally handled by the Deputy Section Registrar, who is therefore to be kept in cc.
30. Committee meetings are generally held on the same day, and immediately after, the Section (Chamber) meeting.
31. The requirement of unanimity means in effect that there can never be a separate (dissenting or concurring) opinion in a WECL judgment.

lawyer. As already outlined above, the rapporteur may opt to become aware for the first time of a particular application after the draft has already been prepared, and it lands on his or her desk together with the case file. If, on the other hand, the rapporteur has already discussed the application with the case-lawyer and given instructions to him or her, the case-lawyer proceeds to draft the decision or judgment. The draft then goes for language check (LC) and quality check (QC) before it is presented to the rapporteur for his or her approval. This approval is signified by the rapporteur's signature (Visa) in the top right-hand on the front page of the draft. Quality check – normally carried out by the Section Registrar[32] – is not meant to be a form of check or control of the rapporteur's view on a particular case or of his instructions to the case-lawyer, but is meant to ensure that the case-lawyer has produced a draft that is, both in form and content, up to standard. It is for this reason that the final draft goes to the rapporteur for his signature *after* it has been quality checked.

Some judges prefer to see the draft before it is sent for QC, so as to ensure that it reflects exactly the instructions given and also, if necessary, to make certain modifications to the draft. This is perfectly permissible, but it is important that the rapporteur does not sign the draft at this stage. If the person responsible for QC has doubts about the solution proposed or the treatment of a particular legal issue raised in the draft, he or she will normally discuss the matter with the case-lawyer in order to try and reach a solution on which they can agree. However, as the Lawyers' Manual points out, "where the solution proposed in the draft is based on unequivocal instructions from the rapporteur with which the checker does not agree, or where the checker and the case-lawyer cannot agree on the solution to a legal problem, the matter must be brought orally, or in a brief memo, to the attention of the rapporteur, who shall have the last word on the solution he/she prefers to submit to the Court."[33]

Once the rapporteur has signed the draft, the Section Registrar will assign it to a Chamber formation for its consideration. The composition of these formations – each with seven voting judges and two or three substitutes[34] – is predetermined, usually whenever a new judge joins a particular Section. The assignment of a draft to a Chamber formation is done on a rotation basis. Every such formation must, however, include the Section President, the rapporteur and, if the national judge is not the rapporteur, the national judge. When the Section President is the national judge in respect of a particular application, the Chamber is chaired by the Section Vice-President.[35] Occasionally the Section President has to set up an *ad hoc* Chamber formation (for example, when a national judge is required to sit in a Section to which he does not belong).[36]

A few days before the Section is due to meet, judges will receive by email a note from the Jurisconsult.[37] In this note the Jurisconsult, for the purpose of assisting the Court in Chamber formation, may comment on a proposed draft, making suggestions as to what the Chamber may wish to consider adding to or removing from the draft judgment or decision. Of course the final decision as to the text rests with the Chamber.

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32. In the case of draft decision of judgments intended for a Committee, the QC is usually carried out by the Deputy Section Registrar.
33. See Lawyers' Manual *ref: #1798864 – Quality Check*, page 4, point 2.1.
34. A substitute may have to replace a voting judge, who is indisposed, at short notice, so it is always advisable for substitute judges to read the documents of cases in which they are substitutes in advance of the Section meeting. If there is more than one substitute judge, the judge "upgraded" to voting status is the next in line according to the list.
35. The Section President is elected by the Plenary; the Section Vice-President is elected by the members of the Section.
36. This situation occurs, for instance, when an application is filed against more than one State Party to the Convention, requiring the presence in a particular formation of more than one national judge.
37. See Rule 18B.

The standard pattern of deliberation in Chambers is as follows: the Section President will invite the rapporteur to present the case and his proposal. After the rapporteur, the national judge is invited to express his views. The floor is then opened for any judge who may wish to express his views. The practice is for the Section President to speak last. Substitute judges may also participate in the discussion. In the course of the discussion suggestions may be made by the judges as to changes in the draft decision or judgment. After all the judges have expressed their views, the Section President asks first the national judge and then rapporteur for their views on the proposed changes. The rapporteur's final proposal in connection with any particular proposed change may also be put to an indicative vote. Whenever an indicative vote is taken (by the judges entitled to vote), a judge may abstain. However no abstentions are possible when the final vote on the admissibility of a particular complaint or on the merits is taken.[38] In the Chamber (as also in the Grand Chamber) decisions and judgments are adopted by a majority of the voting judges. In the Chamber the vote is generally taken by a show of hands (in the Grand Chamber the more formal procedure of a roll-call vote in reverse order of precedence is adopted).

If in the course of the deliberations it becomes clear that the rapporteur's proposal (some of them) is not going to be accepted by the majority, he or she may withdraw the proposal so that a new one, in line with the majority's views, is presented at a subsequent Section meeting. The rapporteur may, at this point, also request to be replaced by another judge in the role of rapporteur.

When the majority has agreed on the proposal as submitted by the rapporteur but has also indicated that substantial changes are required in the text of the decision or judgment, the pigeon-hole procedure[39] may be adopted. This allows for the final decision on the admissibility and/or merits to be taken, but the final text will only be approved after it has been circulated by email to all the judges, who will then be asked to make their comments by a stated date. Of course there may be cases where the changes to the text are so important that it may not even be possible to proceed to a final vote before these are available to the judges – in such a situation the pigeon-hole procedure should not be resorted to, and the case should be adjourned either on a proposal by the rapporteur or by the Section President. Minor changes to the text (grammatical, orthographical, references to case law, and other minor changes generally) agreed upon during the deliberations are left in the hands of the rapporteur working in conjunction with the case-lawyer and the Section Registrar.

Of course, as with the deliberations in Committee, these may start between the members of the Section before the date of the meeting. It is common practice for judges to exchange views, verbally or through email, about the cases they will be discussing, particularly where a judge has some strong views on a particular point. Rapporteurs also prefer to be told in advance of any substantial difficulty a colleague may have in connection with the draft that he or she is proposing – such advance notice would often obviate the need for an adjournment to verify some particular point of fact or of law, or to make substantial modifications to the proposed draft. Needless to say, such exchanges before the actual Section meeting are also covered by the confidentiality envisaged in the oath or declaration of office.[40] Moreover every judge in the Section may request to see the case-file regarding an application coming up for discussion in a Chamber formation, and may also contact the case-lawyer for clarifications on points of law or of fact.

Where a case before a Chamber raises a serious question affecting the interpretation of the Convention or its Protocols, or where the resolution (as proposed by the rapporteur or by the majority of the judges) of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may relinquish jurisdiction in favour of the

38. See generally Rule 23.

39. This pigeon-hole procedure is a variation of the "Decision by tacit agreement" procedure outlined in Rule 23A.

40. Rule 3 § 1.

Grand Chamber, provided that none of the parties to the case objects.[41] This relinquishment may be made at any time before the Chamber renders its judgment. The proposal to relinquish in favour of the Grand Chamber may also be made by the rapporteur himself or herself.

Separate opinions

If a judgment which has been adopted does not represent, in whole or in part, the views of all the judges, any judge who is not in full agreement either with the final outcome or with the text of the judgment, may put in a separate opinion.[42] This opinion will be appended to the majority judgment. Separate opinions may be dissenting, concurring, or partly dissenting and partly concurring. A partly concurring opinion is also used to express disagreement with the court's case-law even when the judges are unanimous in their decision.[43] When more than one judge disagrees on some particular point, it is not infrequent that the judges who are in disagreement put in a *joint* separate opinion;[44] alternatively, one of them may write the opinion and the other or the others declare that they join in that opinion.[45] Separate opinions are subject to LC. The language checker, however, will always seek the approval of the judge or judges concerned for any changes he or she proposes before these are integrated in the final draft of the separate opinion.

Separate opinions are not subject to QC. Nevertheless some judges ask either the case-lawyer or the Section Registrar to read the draft separate opinion to ensure, for instance, that any facts stated are entirely correct,[46] and that references to case-law and cross-references to paragraphs in the majority judgment are correct. Needless to say, while a separate opinion may express disagreement, even strong disagreement, with the opinion of the majority, it must also be ensured that such disagreement is expressed in both a judicial and a judicious manner, in particular with a view to ensuring compliance with the judge's duty "to uphold the standing and reputation of the Court".[47]

Separate opinions are not possible in the case of decisions, since Article 45 § 2 envisages separate opinions only in the case of judgments. When, as part of a judgment, one or more complaints are declared inadmissible, a judge should be guided by the Recommendation Concerning the Separate Opinions of Judges adopted at the 115th Plenary Administrative Session on 21 October 2013. According to this recommendation the Plenary invited judges to avoid as far as possible addressing in their separate opinions complaints that have been declared inadmissible.[48] That same recommendation, however, also invited "the Sections to convert the rejection of a communicated complaint as manifestly ill-founded into a finding of non-violation whenever a dissenting judge so requests". According to the Explanatory Note attached to the recommendation, the language used in the first limb of the recommendation "is not prescriptive" and therefore does not conflict with an interpretation of Article 45 § 2 to the effect that in a *judgment* in which one or more complaints are declared *inadmissible* a judge *may*, in his or her separate opinion, address those complaints. The note further states that the second limb of the recommendation gives "a 'soft' guarantee that,

41. See Article 30. When Protocol No. 15 comes into force, the requirement that neither party object to the relinquishment will be dispensed with.
42. Separate opinions are also possible when the Court is called upon to deliver an advisory opinion pursuant to Articles 47 to 49. See also Rule 88(2). However when the Committee of Ministers refers a matter to the Court, in terms of Article 46 § 3, for the Court's interpretation, no separate opinion is possible according to Rule 93.
43. See, for instance, the joint partly concurring opinion in *Yoh-Ekale Mwanje v. Belgium*, 20 December 2011.
44. "Joint separate opinion of judges…"
45. "Separate opinion of judge…joined by judge/s…"
46. This may be particularly important where the documents in the case file are in a language with which the judge is not familiar.
47. See the Resolution on Judicial Ethics adopted by the Plenary 23 June 2008, para. III.
48. A "bare statement of dissent", as is mentioned in Rules 74 § 2 and 88 § 2, is not a separate opinion. See, for example, *Battista v. Italy*, 2 December 2014.

where the majority, in the context of a judgment to be adopted under Article 29 § 1, decide to declare a communicated complaint inadmissible as being manifestly ill-founded, the door to a separate opinion would be open to a dissenting judge on simple request to transfer the conclusion of ill-foundedness from the admissibility part of the judgment to the merits part. Such move would enable a dissenting opinion to be taken into account in the event of a referral request to the Grand Chamber".

When a case has been referred to the Grand Chamber by the Grand Chamber Panel, it is always determined (by the Grand Chamber) by means of a judgment,[49] even if in effect the outcome amounts to a finding that the complaint is inadmissible for any reason. In such a case, therefore, a separate opinion is possible.[50] The position appears to be different if the case has reached the Grand Chamber by way of relinquishment.[51]

A dissenting judge may, instead of filing a separate opinion, file merely a "bare statement of dissent" – see Rules 74 § 2 and 88 § 2. Although these rules are couched in optional terms – "shall be entitled to", "may, if he or she so desires" – to reflect the wording of Articles 45 § 2 and 49 § 2, the accepted practice is that when a judge dissents in whole or in part from a judgment in such a way that the dissent is reflected in the voting, if that judge does not file a (reasoned) separate opinion he or she *is expected* to make a bare statement of dissent.

The Grand Chamber

The Grand Chamber is composed of *ex officio* members (the President of the Court, the Vice-Presidents and Section Presidents[52] and the national judge), with the remaining members chosen by ballot in a slightly complicated process described in Rule 24. Apart from the seventeen voting judges, three substitute judges are also chosen by ballot, as well as three reserve judges. In the case of the relinquishment of jurisdiction by a Chamber in favour of the Grand Chamber, the members of that Chamber are automatically part of the seventeen member composition.

Like in the Chamber, the substitute judges also participate fully in the public hearing[53] and in the subsequent *in camera* deliberations. The reserve judges, on the other hand, do not participate in the proceedings – one or more of them steps in as a substitute, and in the order in which they have been balloted, in the event that on the day appointed for the hearing one or more of the voting judges or of the substitutes is unable to attend. In that way the number of substitute judges is preserved at least for the day of the hearing and first deliberations.[54]

Weeks before the day scheduled for the hearing the voting judges and the substitutes (but not the reserve judges) will start receiving the documents in connection with the Grand Chamber hearing. These will invariably include the note by the judge rapporteur as well as a note by the national judge. As has already been indicated, the practice in the Grand Chamber is for the national judge not to be appointed as rapporteur.

Since only the more important, and possibly the more legally complex, cases end up before the Grand Chamber,[55] the rapporteur's role is here slightly different from that in Chamber proceedings. Before the Grand Chamber the rapporteur does not present a draft judgment with his or her

49. See Article 43 § 3.
50. See, by way of example, *Vučković and Others v. Serbia*, [GC] 25 March 2014.
51. See, by way of example, *Chigarov and Others v. Armenia* (dec.) [GC] 14 December 2011.
52. Unless a Vice-President or Section President has already taken cognizance of the case in a Chamber and before it was referred to the Grand Chamber.
53. A public hearing may also be held before a Chamber, but this is a rare occurrence.
54. Reserve judges are not provided for in the Rules of Court. The idea of balloting three reserve judges was a "presidential initiative" pf President Jean-Paul Costa. It is today part of the unwritten practice of the Court.
55. See Articles 30 and 43 § 1 (2).

proposals as to how the issues are to be determined.[56] In the Grand Chamber the rapporteur is expected, in cooperation with the Grand Chamber President and the national judge, to play an active role in helping the Grand Chamber reach conclusions which are supported by the largest possible majority. Of course, the rapporteur's written report should also contain his/her personal views on the issues raised in the case, along with a skeleton outline of the underlying reasoning; moreover, where appropriate, alternative solutions should be discussed in the report.[57] In Grand Chamber more than in Chamber proceedings, the rapporteur is likely to request the research division of the Court to compile reports, such as comparative law reports or reports on the Courts own case-law.[58]

After the parties (and third parties, if any) have, through their respective counsel, made their oral submissions before the Grand Chamber, the judges (including the substitutes) are asked by the President whether they have any questions to put to them. Questions may be directed to one or other of the parties, or to both. If a judge has, on the basis of the documents in the case file, already made up his mind to put a particular question or questions, it would assist the interpreters if the question or questions are handed in writing to them prior to the commencement of the hearing.

When the public hearing is concluded, the judges retire to commence deliberation. The procedure is not unlike that in the Chamber, with the rapporteur taking the floor first, followed by the national judge, and then the judges who request the floor. The judge presiding the Grand Chamber is the last to take the floor. These first deliberations are generally concluded on the same day, but there have been exceptions when they have had to be adjourned to another day. At the end of the deliberations an indicative vote is taken on the issue or issues raised in the particular case. This indicative vote is intended to be a guide to the drafting panel.[59]

The judge presiding the Grand Chamber then proposes the names of two or three judges who, together with the rapporteur and the national judge, will form the drafting committee tasked with preparing the draft judgment (or decision) to be considered at second deliberations. The drafting committee is presided by the most senior among the judges present. Even if the proposal of the rapporteur has been rejected by the majority (through the indicative vote mentioned above) and even if the national judge may be in disagreement with the majority view thus far expressed, he or she also participates in the drafting.[60] If, when the indicative vote is taken at the end of first deliberations, the Court is sharply split on one or more issues, or where the indicative vote is peppered with many abstentions, the drafting committee may be tasked by the presiding judge to prepare one or more alternative drafts.

When the draft decision has been finalised by the drafting committee, it is sent to all the voting judges as well as to the substitutes two or more weeks in advance of second deliberations. The judges may comment – usually by email – making suggestions as to the text in advance of the date set for second deliberations.[61] The fact that a judge has not commented on the text does not, of course, preclude him or her from making such comments on the day that the Grand Chamber meets for second deliberations.

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56. The same is true when a Chamber undertakes a public hearing.

57. See generally the Final Report of the Working Group on the Grand Chamber, *ref: #2185745* 22 February 2008, paras. 30 and 31.

58. See Rule 49 § 3 (c).

59. Since it is an indicative and not a final vote, a judge may abstain. The votes of the substitute judges are also recorded at this stage.

60. It is unusual for the rapporteur to ask, in such a situation, to be replaced, although technically this is possible.

61. If the comments refer to minor grammatical or orthographical issues, these may be addressed to the rapporteur or to the case-lawyer; anything beyond that, however, should in principle be addressed to all the sitting judges.

During second deliberations the draft judgment or decision is examined paragraph by paragraph or page by page. The rapporteur plays an important role at this stage since after every change that is proposed to the draft, he or she is asked for his or her views, and if there is no clear majority for or against the proposed change, the judge presiding puts the issue to a vote by show of hands.

Second deliberations proceed on the assumption that the indicative vote previously taken (at the end of first deliberations) still reflects the opinion of the majority. However, no judge is bound by the first indicative vote, and therefore it is possible (especially if there have previously been several abstentions) for the final vote to go entirely the other way, in which case a new draft may have to be prepared. This, fortunately, is a very rare occurrence.

Grand Chamber Panel

During a judge's term of office, he or she will be asked on several occasions to sit on the Grand Chamber Panel set up pursuant to Article 43. The composition of this panel is described in Rule 24(5). In effect, on the date set for a meeting of the Grand Chamber Panel, several "panels" or "panel compositions" meet to decide upon referral requests in a number of cases, each panel dealing with one or more of the referral requests on the agenda.

Two weeks before the panel (or panels) are due to meet, the judge will receive two bundles of documents: one bundle of cases "not requiring a separate note" and another bundle of cases "requiring a separate note".[62] The former are usually referral requests which are clearly inadmissible for one reason or another. As regards these cases the President of the Court, who presides over each panel,[63] will ask whether any member of the panel has anything to say in connection with the first bundle and if, as is generally the case, no judge requests to take the floor, the referral requests in this first bundle are dismissed *en bloc*. On the contrary, the referral requests in the bundle "requiring a separate note" are examined individually. But even here the procedure is quite summary. The President (who, as is standard practice, is the last to take the floor) will ask the judges in a particular panel to state whether they think that the referral request should be allowed. If it is clear that there is unanimity one way or the other among the five judges of the panel, no vote is taken; otherwise a vote is taken and the outcome is decided by majority. It should be recalled that a referral request is to be accepted only "if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto" or if the case raises "a serious issue of general importance".[64]

Generally speaking, a serious question affecting the *interpretation* of the Convention is raised when a question of importance not yet decided by the Court is at stake, or when the decision is of importance for future cases and for the development of the Court's case-law. This may also be the case where the impugned judgment is not consistent with a previous judgment of the Court. A serious question affecting the *application* of the Convention, on the other hand, is generally raised when a judgment necessitates a substantial change to national law or administrative practice. This may happen in cases in which the Court has initiated the "pilot-judgment procedure" in accordance with Rule 61 and has therefore considered that the facts of the application disclosed the existence, in the State Party concerned, of a "structural or systemic problem or other similar dysfunction". However, the mere fact that a Chamber judgment has been adopted following the pilot-judgment procedure does not, in itself, mean that the case *must* be referred to the Grand Chamber.

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62. The "separate note" is a document prepared by the case-lawyer outlining briefly the facts of the case, the conclusions reached by the Chamber and the reasons for which the party or parties is or are requesting referral to the Grand Chamber. The bundle will also include the referral request or requests.

63. Unless he is prevented from taking cognizance of a particular referral request, in which case he is replaced by the senior Vice-President.

64. Article 43 § 2.

As to a "serious issue of general importance", this could involve a substantial political issue or an important issue of policy. The mere fact that a case is factually complex, politically delicate, or has given rise to dissenting opinions does not, as such, justify referral to the Grand Chamber. However, under certain circumstances, these same facts may be factors militating in favour of the existence of one or more of the statutory grounds for referral mentioned in Article 43 § 2.

The members of the panel consider whether the case warrants referral to the Grand Chamber on the grounds that it is exceptional, as indicated in the text of Article 42. They should not seek to impose their views on the merits of the case, nor should they vote to refer a case solely because they disagree with the Chamber's reasoning or with the final outcome. The members of the panel should not assess the merits of the case but, as in national "leave-to-appeal" procedures, express views as to whether the case should be referred to the Grand Chamber because it meets the statutory criteria set out in Article 43 § 2.[65]

The national judge

Apart from the role as rapporteur and the specific functions in the course of Chamber and Grand Chamber proceedings (already outlined above), the national judge has also an important role in helping the registry (in practice, the case-processing lawyers dealing with incoming applications) identify those cases which are to be given, for one or other reason, priority, or which are to be dealt with as "lead-cases", or which would justify a "pilot-judgment procedure" under Rule 61. It is clearly not possible, nor desirable, for most judges to see each and every application concerning their country which is received in the Registry – a judge's time is better spent dealing with important cases and other judicial and administrative functions assigned to him or her from time to time. However, many judges instruct the case-processing lawyers handling cases against their country to bring at least the more important cases or those which are likely to be of a repetitive nature to their immediate attention so that they can advise as to whether the application is to be dealt with by a Chamber or by a Committee, or whether to give priority to a particular case or group of cases. In all these matters, however the final decision is in effect that of the Section President.

Rule 39

Another procedure usually requiring consultation with the national judge is that in respect of an interim measure which may be sought under Rule 39. Rule 39 requests are processed by a centralised unit (called the Rule 39 Unit) in the Registry. Since in many cases time is of the essence in connection with such requests, these are quickly processed by the unit for a decision to be taken – usually within hours of the application having been received by the Registry – by one of three duty-judges. These duty-judges are all Section Vice-Presidents appointed for the purpose of Rule 39 by the President of the Court.

When a Rule 39 request concerns a new application – and most Rule 39 requests belong to this category – the proposal prepared by the case-processing lawyer in the unit is submitted to the national judge for his or her comment. This comment is then communicated to the duty-judge for him or her to make the final decision. This consultative role is, however, optional; national judges may chose not to be consulted, or only to receive checklists for information after decision. Some judges indicate that they wish to be consulted only in connection with the most outstanding and important requests. During the weeks of light schedule, national judges are, as a general rule, not contacted in connection with Rule 39 requests, unless they specifically request to be so consulted.

65. See also "The General Practice followed by the Panel of the Grand Chamber when Deciding on Requests for Referral in accordance with Article 42 of the Convention", October 2011, http://www.echr.coe.int/Documents/Note_GC_ENG.pdf

Where the national judge expresses strong disagreement with the proposal prepared by the case-processing lawyer, or where the duty judge is of the view that a wider consultation is necessary or desirable, the duty-judge may refer the matter of the requested interim measure to the Section.

If the Rule 39 request concerns a case which has already been allocated to a judicial formation and/or communicated, the national judge as well as the rapporteur (if they are not the same person) are consulted before the duty-judge takes the required decision.