



# BOFAXE

## Re-thinking the Amicable Settlement of Inter-State ECHR Disputes (Part 1)

### A CRITICAL APPROACH

The amicable settlement of inter-State disputes under the European Convention on Human Rights ('ECHR') was thoroughly discussed on Völkerrechtsblog earlier this year, during the 'Inter-State Cases under the ECHR' symposium. In this context, Keller and Piskóty perfectly depicted the numerous advantages of Friendly Settlements ('FS') under the ECHR, while Wenzel pointed to some of their problematic facets. Against this background, this post will follow a different course. It will seek to highlight the differentiated approach adopted by the ECHR-institutions towards inter-State FS to subsequently indicate the systemic risks that this differentiation facilitates.

#### Expectations...

According to ECHR Article 39(1), at any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a FS on the basis of respect for human rights. Once a FS is concluded, the Chamber shall, after verifying that the settlement has indeed been reached on the basis of respect for human rights, strike the case out of the Court's list by means of a decision, which is executed under the supervision of the Committee of Ministers [ECHR 39(3)-(4)]. As the above suggests, respect for human rights is an indispensable prerequisite for the FS' approval by the ECtHR. Indeed, the latter has rejected FS due to the ambiguity surrounding the applicant's consent to the terms of the settlement agreement (*Paladi v. Moldova*, paras. 51-53) and even due to the gravity of the alleged interferences with the applicant's right (*Ukrainian Media Group v. Ukraine*, para. 7). In other words, not only is the ECtHR competent to verify the compatibility of the FS with the ECHR, but it also does so in practice.

#### ... vs. Reality

However encouraging such indications may seem, the ECHR-institutions have adopted a much more tolerant approach towards the standard of 'respect for human rights' in the three inter-State FS that have been concluded in the context of ECHR so far.

Indeed, in *Greece v. the United Kingdom (II)*, Greece complained that the United Kingdom ('UK'), which was a colonial power over Cyprus at the time (*Risini*, p. 70), was in violation of ECHR Article 3 due to the ill-treatment of 49 individuals in Cyprus. Soon, however, the parties requested the European Commission of Human Rights to terminate the proceedings following the agreements reached between Greece and Cyprus and between the UK, Greece and Turkey regarding Cyprus' status. Assessing this request, the Commission noted that the improvement of the situation in Cyprus was closely linked to the solution of the political problems relating to the island's constitutional status (*Report*, p. 21). It further stressed that the termination of proceedings was a measure calculated to contribute to a restoration of the full enjoyment of human rights in Cyprus and was therefore 'in harmony with the aims and objects of the Convention' (*Report*, p. 23). Against this background, the proceedings were terminated and the willingness of the Commission to step back and allow the States to solve the dispute arisen politically became apparent.

Similarly, in *Denmark, France, Sweden, Norway and the Netherlands v. Turkey*, where the applicants alleged violations of ECHR Articles 3 and 15 following the military seizure of governmental power in Turkey, the dispute was amicably settled. The settlement agreement, which was approved by the Commission, provided that Turkey would implement a series of amendments to its national legal framework in order to ensure the implementation and strict observance of ECHR Article 3 by all public authorities [para. 39(A)(1)] and would grant amnesty for politically-motivated criminal cases [para. 39(C)]. Most of all, although the martial law had not been lifted in Turkey at the time, the Commission was satisfied with the Turkish Prime Minister's declarations on the prospect of a total lift of the martial law within a short-term period [para. 39(B)(1)] and found that the requirement of respect for human rights was met. In other words, in order to entertain the States' willingness to discontinue the proceedings, the Commission equated the standard of 'respect for human rights' with 'the prospect of respect for human rights'.



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## Re-thinking the Amicable Settlement of Inter-State ECHR Disputes (Part 2)

### A CRITICAL APPROACH

Although this hands-off approach might perhaps be expected from the Commission, which was, after all, a quasi-judicial organ (*Hannum*, p. 136), the ECtHR subsequently adopted a similar approach. Indeed, evaluating the settlement agreement on *Denmark v. Turkey*, which concerned the torture of a Danish national by the Turkish authorities, the Court underlined the parties' commitment to a continuous political dialogue focusing on human rights issues (para. 23). It further highlighted the changes that were to be made to the Turkish legal and administrative framework and praised the Government's commitment to make further improvements via continuous co-operation with international human rights bodies, in particular the Committee for the Prevention of Torture (para. 24). Against this background, the Court approved the FS and discontinued the proceedings. In this sense, the Court seems to have similarly sufficed itself with the standard of the 'prospect of respect for human rights' and was willing to step back and allow the States to manage realisation of this standard through political means and through the dialogue with other international organs.

In line with the above, despite that the ECHR does not suggest that a differentiated standard should be employed by the ECHR-institutions, the latter have adopted a 'hands-off' approach, when it comes to inter-State FS, in practice. Unlike in FS conducted between individuals on one hand and States on the other, where even an alleged violation of ECHR Article 10 has been proved serious enough to trigger the rejection of the settlement agreement and the adjudication of the dispute by the ECtHR (*Ukrainian Media Group v. Ukraine*, para. 7), in inter-State FS, which have resolved disputes on alleged violations of even ECHR Article 3, the ECHR-institutions have sufficed themselves at spotting extra-judicial/political measures granting 'the prospect of respect for human rights'. This differentiated attitude may seem rational, if one considers that in individual-State FS the Court seeks to redress the parties' inequality. However, as the following section will evince, this differentiation might turn out being problematic, given the inter-State FS' potential systemic impacts.

#### The Systemic Implications of Inter-State FS

The decisions, in which the ECHR-institutions have assessed the compatibility of settlement agreements with 'respect of human rights' constitute parts of the Court's overall jurisprudence and, therefore, subsidiary means for the determination of rules of law under ICJ Statute Article 38(1)(d). Indeed, as they embody settlement agreements, whose conformity with the standard of 'respect of human rights' they verify through legal reasoning (*Pellet*, p. 856), they entail 'findings of law' (*Croatia v. Serbia*, para. 53) and may thereby guide the ECtHR and/or other fora in the determination of rules of law in subsequent decisions. No wonder the ECtHR has already cited FS in its jurisprudence (*Plakhteyev and Plakhteyeva v. Ukraine*, para. 29; *Belozorov v. Russia and Ukraine*, para. 93)! From this viewpoint, the systemic potential of FS has been already – to some extent – realised in practice.

Additionally, as inter-state settlement agreements presuppose an agreement between States-parties to the ECHR, they also constitute subsequent practice in the application of the convention. When they are acquiesced by the other ECHR-parties, these agreements will constitute a means of ECHR's interpretation in line with Article 31(3)(b) of the *Vienna Convention on the Law of Treaties* ('VCLT'). In any case, even if acquiescence is not achieved and even if objections are raised, the said settlement agreements will surely constitute supplementary means of ECHR interpretation under VCLT Article 32 (*Villiger*, p. 446). Similarly, in an imaginary scenario, whereby all the parties to the ECHR are engaged in a dispute that would be subsequently amicably settled via a settlement agreement, the latter would constitute a means of ECHR authoritative interpretation under VCLT Article 31(3)(a). In other words, aside from the FS, which constitute subsidiary means for the determination of rules of law, the settlement agreements entailed therein will serve as interpretative tools and will influence the subsequent interpretations of the ECHR in multifarious ways.

Hence, the FS of inter-State ECHR disputes, towards which the ECHR-institutions have adopted a more tolerant attitude, are in fact the ones that have a higher impact on the human rights protection regime of the ECHR.

#### Now What?

For the improvement of the quality of FS' systemic impact, a simple step would suffice. If the ECtHR is not willing to equally impose the 'respect for human rights' standard on inter-State FS, then it can simply require that these FS entail a 'responsibility acknowledgement' clause.

Indeed, if the inter-State settlement agreements entail a provision, whereby the allegedly wrongdoing State acknowledges the commitment of the wrongful act, then the political dialogues and further steps for the gradual achievement of respect for human rights will in fact constitute means of reparation. Under this condition, the interpretative value of the settlement agreements and the international law determination value of the inter-State FS will no longer influence the interpretation of ECHR provisions or the determination of the 'respect for human rights' standard under ECHR, but will rather indicate how non-compliance with ECHR is remedied on the basis of respect for human rights. The extent to which such a clause would discourage States from concluding FS, however, is the beginning of a different conversation.