UNIVERSITY OF TRENTO - Italy
School of International Studies

Chiara Tea Antoniazzi

PROMOTING THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

THE (POTENTIAL) ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS

Supervisor: Prof. Giuseppe Nesi

Doctoral School of International Studies, University of Trento

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ABSTRACT

The acknowledgment that the European Court of Human Rights (ECtHR) and the Committee of Ministers are flooded with repetitive cases has brought increasing attention to the issue of full and timely execution of the Court's judgments. Efforts have been made to render the system of supervision of the execution more transparent, independent, and participatory. The involvement of actors other than the intergovernmental Committee of Ministers appears particularly significant. This dissertation focuses on specific entities that, while somewhat neglected in the literature, would seem to be ideally situated to promote the execution of ECtHR judgments – i.e., National Human Rights Institutions (NHRIs), which are commonly portrayed as "bridges" between the State and civil society, and between the national and international levels.

The dissertation provides a comprehensive examination of the current level of engagement by NHRIs with the Committee of Ministers for furthering the execution of ECtHR judgments. Participating NHRIs have generally provided detailed information on the state of legislation, administrative practice, and case-law in their respective countries, and they have proposed measures to prevent future human rights violations. Nonetheless, the findings show that a relatively low number of NHRIs have submitted communications to the Committee of Ministers to date and that the impact of these communications on the actions undertaken by States and the decisions adopted by the Committee of Ministers is often difficult to assess. The activities carried out by NHRIs at the domestic level to encourage the execution of ECtHR judgments are also systematically identified with a view to illustrating the multifarious ways in which NHRIs can contribute to the execution process.

On the basis of these findings, the dissertation highlights and accounts for the unfulfilled potential of NHRIs in promoting the execution of ECtHR judgments; it further puts forward proposals to strengthen the involvement of NHRIs in the process.

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LIST OF ACRONYMS AND ABBREVIATIONS

CNCDH	*Commission nationale consultative des droits de l'homme*
CoE	Council of Europe
CRPD	Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ENNHRI	European Network of National Human Rights Institutions
GANHRI	Global Alliance of National Human Rights Institutions
ICC	International Coordinating Committee for National Human Rights Institutions
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
NPM	National Preventive Mechanism
OHCHR	(UN) Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention against Torture
OSCE	Organization for Security and Co-operation in Europe
SPT	Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPR	Universal Periodic Review

CHAPTER 1. SETTING THE SCENE

Dark clouds were floating over Copenhagen in April 2018, when the latest High-level Conference was held by Member States of the Council of Europe (CoE) to discuss the future of the system of the European Convention on Human Rights (ECHR or "the Convention"). Some bellicose statements from members of the Danish Government ahead of the Conference and a controversial Draft Declaration had raised fears of a blow to the legitimacy of the European Court of Human Rights (ECtHR or "the Court"),[1] after years of mounting criticism from various quarters on both legal and political grounds.[2]

In the end, however, the outcome of the Conference was essentially in line with the final declarations of previous meetings and emphasised the need to strengthen the domestic implementation of the Convention – in its dual meaning of *ex ante* fulfilment of the Convention's rights and *ex post* execution of the ECtHR judgments at the national level. Domestic implementation has become a sort of mantra in the debate on the reform of the ECHR system; especially after the amendments introduced by Protocol no. 14 to broaden the scope of inadmissibility criteria and deal with inadmissible applications more expeditiously, tackling repetitive cases and improving domestic implementation have been considered the main priorities to ensure the sustainability of the system by both institutional actors and scholars.[3]

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[1] Jacques Hartmann, "A Danish Crusade for the Reform of the European Court of Human Rights", *EJIL: Talk!*, 14 November 2017, accessed 4 January 2019, https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/. For a critical appraisal of the Draft Declaration, cf. AIRE Centre et al., *Joint NGO Response to the Draft Copenhagen Declaration*, 13 February 2018, accessed 4 January 2019, https://www.amnesty.eu/news/joint-ngo-response-to-the-draft-copenhagen-declaration/. The most controversial elements of the Draft Declaration were nonetheless deleted from the final version of the document: Antoine Buyse, "The Copenhagen Declaration on the ECHR – Final Version Adopted", *ECHR Blog*, 16 April 2018, accessed 4 January 2019, http://echrblog.blogspot.com/2018/04/the-copenhagen-declaration-on-echr.html.

[2] Not all of which ill-founded. Cf., for a comprehensive overview of the main criticisms addressed to the ECtHR (and some responses): Spyridon Flogaitis, Tom Zwart, and Julie Fraser, *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Cheltenham and Northampton: Edward Elgar Publishing, 2013); and Sébastien Touzé, ed., *La Cour européenne des droits de l'homme. Une confiance necessaire pour une autorité renforcée* (Paris: Pedone 2016).

[3] On the importance of the execution of ECtHR judgments, and of the Convention's national implementation more generally, for the sustainability of the system, cf., *inter alia*, Committee of Ministers, *Recommendation CM/Rec(2008)2 of the Committee of Ministers to Member States on efficient domestic capacity for rapid execution of judgments of the*

Indeed, there is little doubt that the effective application of the Convention domestically or, at the latest, the full and timely execution of the Court's judgments (particularly of those requiring structural changes to national laws or practices) would lighten the docket of the Court, reduce the number of future applications, strengthen the legitimacy and credibility of the Convention's system, and, ultimately, ensure greater and lasting respect for human rights within States Parties.[4] How to achieve this outcome in practice is, however, disputed, and official documents are often vague when it comes to putting forward solutions, thus running the risk that references to the need for better domestic implementation become empty words – an ideal, distant goal with little practical significance.

European Court of Human Rights, 1017th meeting of the Ministers' Deputies, 6 February 2008. Cf. also the High-level Conferences convened, starting from 2010, to discuss the future of the ECHR system and referred to in Section 1.1 *infra*. Even before Protocol no. 14, many CoE bodies had taken up the issue and attempted to put forward solutions – cf. footnotes 4 and 28 *infra*.

In the literature, cf., among others: Wouter Vandenhole, "The Execution of Judgments", in *Protocol No. 14 and the Reform of the European Court of Human Rights,* eds. Paul Lemmens and Wouter Vandenhole (Antwerpen: Intersentia, 2005), 105-121; Marinella Marmo, "The Execution of Judgments of the European Court of Human Rights – A Political Battle", *Maastricht Journal of European and Comparative Law* 15, no. 2 (2008): 235-258; and Laurence R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", *European Journal of International Law* 19, no. 1 (2008): 125-159.

The impact of the ECHR and ECtHR judgments on national systems, as well as the issues surrounding the implementation process, have been studied extensively by both lawyers and political scientists. Cf., among others: Elisabeth Lambert Abdelgawad, "L'exécution des arrêts de la Cour européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme*, no. 71 (2007): 669-705; Theodora Christou and Juan Pablo Raymond, eds., *European Court of Human Rights: Remedies and Execution of Judgments* (London: British Institute of International and Comparative Law, 2005); Dia Anagnostou and Alina Mungiu-Pippidi, "Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter", *European Journal of International Law* 25, no. 1 (2014): 205-227; Courtney Hillebrecht, "Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights", *Human Rights Review* 13, no. 3 (2012): 279-301; Jonas Christoffersen and Mikael Rask Madsen, eds., *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University press, 2013); Helen Keller and Alec Stone Sweet, eds., *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford; New York: Oxford University Press, 2008); and Robert Blackburn and Joerg Polakiewicz, eds., *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford: Oxford University Press, 2001).

[4] As put it by the Group of Wise Persons, tasked with submitting proposals for the long-term effectiveness of the ECHR system following the adoption of Protocol no. 14, "the credibility of the human rights protection system depends to a great extent on execution of the Court's judgments. Full execution of judgments helps to enhance the Court's prestige and the effectiveness of its action and has the effect of limiting the number of applications submitted to it" (Committee of Ministers, *Report of the Group of Wise Persons to the Committee of Ministers*, 979bis meeting of the Ministers' Deputies, 15 November 2006, CM(2006)203, para. 25. In CoE, *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention,* 13 May 2004, Council of Europe Treaty Series – No. 19, para. 16, it is stated that "rapid and adequate execution has, of course, an effect on the influx of new cases: the more rapidly general measures are taken by States Parties to execute judgments which point to a structural problem, the fewer repetitive applications there will be". Cf. also Lord Woolf, *Review of the Working Methods of the European Court of Human Rights*, December 2005, 66.

This dissertation tests the role that National Human Rights Institutions (NHRIs), bodies that are seldom considered in connection with the ECHR system, are playing and can play in facilitating the implementation of the Convention within Member States. For the reasons specified in the next sections, the dissertation is particularly concerned with the role of NHRIs in promoting the execution of ECtHR judgments at the domestic level – i.e., in promoting the adoption of all the measures required from Member States to give effect to the ECtHR judgments issued against them, rather than the general conformity of national legal orders with the ECHR or the observance of ECtHR judgments issued against other States.[5]

The first section of this chapter outlines the reforms enacted with a view to ensuring the long-term effectiveness of the ECHR system, with a focus on the more effective implementation of the Convention's standards and of the Court's judgments at the domestic level. Obstacles to these processes and gaps in their outcomes are highlighted. The second section puts these challenges into the broader context of the so-called implementation gap that affects international human rights law and international law more generally; it then refers to the role that NHRIs, as peculiar bodies at the crossroads between the domestic and international levels of human rights promotion and protection, are expected to play to fill this gap. It is thus shown how the activities by NHRIs are also relevant to the ECHR system and to the effective execution of ECtHR judgments. The following sections illustrate the research aims and questions, the research methods, and the structure of the dissertation.

[5] A similar distinction is made in Alexandra Huneeus, "Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights", *University of Wisconsin Law School – Legal Studies Research Paper Series,* Paper No. 1168, 18 August 2011, 117 (footnote 56), accessed 4 January 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911405. Cf. also Elizabeth Mottershaw and Rachel Murray, "National responses to human rights judgments: the need for government co-ordination and implementation", *European Human Rights Law Review,* no. 6 (2012): 639-653 (which, in turn, mentions on the point Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (New York: Open Society Foundations, 2010), 13).

1.1. The overload of the European Court of Human Rights and the issue of domestic implementation of its judgments and of the Convention

At the end of the 1990s, two phenomena triggered a spiralling increase of the number of cases lodged with the ECtHR: Central and Eastern European States joined the CoE *en masse*;[6] and Protocol no. 11 to the Convention, which entered into force on 1 November 1998, established the right of all individuals to have access to the Court.[7] The greater publicity surrounding the Court and increased familiarity with the functioning of the system are also considered to have fuelled the number of applications.[8] The figures speak for themselves: while in the first forty years of operation of the Court (1958-1998) 45,000 applications were allocated to a judicial formation, 60,900 were allocated in the four-year period 1999-2002 (i.e., in a tenth of the time).[9] In 2013, a record number of 65,800 new applications were submitted to the Court.[10]

Moreover, while the attention of commentators and institutional actors has mainly focused until recently on the overburdening of the Court, recurrently described as a "victim of its own success",[11] the Court is not the only body of the Convention's system that is overloaded: the Committee of Ministers, namely the intergovernmental body responsible for the supervision of the execution of ECtHR judgments by States Parties, has also witnessed a massive increase of cases over time.[12] While

[6] On the consequences of the enlargement of the CoE membership, cf. Wojciech Sadurski, "Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments", *Human Rights Law Review* 9, no. 3 (2009): 397-453.
[7] Protocol no. 11 introduced several important changes to the Convention's system. The most significant ones consist in the elimination of the Commission, which used to act as a filter between individuals and the Court, and the obligation for all States Parties to the Convention to accept the jurisdiction of the Court over individual applications. For all innovations brought by Protocol no. 11, cf. CoE, *Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby*, 11 May 1994, European Treaty Series – No. 155.
[8] Cf., among others, Marie-Aude Beernaert, "Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price?", *European Human Rights Law Review*, no. 5 (2004): 544.
[9] ECtHR, *50 Years of Activity – The European Court of Human Rights: Some Facts and Figures* (Strasbourg: Public Relations Unit of the Court, April 2010), 4.
[10] ECtHR, *Analysis of statistics 2017* (Strasbourg: January 2018), 7.
[11] Cf., among others, Linos-Alexander Sicilianos, "La «réforme de la réforme» du système de protection de la CEDH", *Annuaire français de droit international* 49 (2003): 611; and Helfer, *supra* n 3, 125-126.
[12] Among the scholarly works that have highlighted this phenomenon, cf. Elisabeth Lambert Abdelgawad, "L'exécution des arrêts de la Cour européenne des droits de l'homme (2006)", *Revue trimestrielle des droits de l'homme* 71 (2007): 672; and Andrew Drzemczewski, "The Parliamentary Assembly's involvement in the supervision of the judgments of the Strasbourg Court", *Netherlands Quarterly of Human Rights* 28, no. 2 (2010): 166.

in 1998 there were 1,435 cases pending before the Committee, these amounted to 11,099 in 2012.[13] The number has since started to slowly decrease thanks to the grouping and closure of a considerable amount of "clone" cases,[14] but 7,584 cases were still under the supervision of the Committee at the end of 2017.[15]

The overload of the Committee of Ministers is first of all a consequence of the overload of the Court: quite straightforwardly, the more cases the Court deals with, the more judgments whose execution the Committee has to supervise. However, the increase in the workload of the Committee is also the result of trends that are specific to the execution process. In 2016, the CoE Commissioner for Human Rights pointed to two main challenges for the future of the Convention's system: the "prolonged non-implementation of a number of judgments" and the "direct attacks on the Court's authority".[16] In other words, judgments take longer to be executed and respondent States even openly refuse at times to execute the judgments, thus directly challenging the Court's role.

At any rate, the need to tackle the overload of the Court was considered a priority and was at the heart of a reform process of the Convention's system which already started in 2000, shortly after the entry into force of Protocol no. 11, with a Ministerial Conference held in Rome where the call for an "in-depth reflection" on the best means to guarantee the "effectiveness" of the Court was made.[17] The main outcome of this intensive process was Protocol no. 14, which opened for signature in May 2004 but entered into force only in June 2010 at the end of a troubled path.

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[13] Department for the Execution of Judgments, *Overview 1998-2017*, 1, accessed 4 January 2019, https://rm.coe.int/overview-1998-2017-eng/16807b81c9.

[14] The decrease in the number of pending cases was particularly pronounced in 2017, when a record number of 3,691 cases were closed, including 1,975 repetitive cases against Italy; cf. Department for the Execution of Judgments, *Closed cases – State by State. 2017 (compared to 2016),* accessed 4 January 2019, https://rm.coe.int/6-closed-cases-2017-state-by-state/16807b8684.

[15] Department for Execution, *supra* n 13, 1.

[16] CoE Commissioner for Human Rights, "Non-implementation of the Court's judgments: our shared responsibility", *Human rights comment*, 23 August 2016, accessed 4 January 2019, https://www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility.

[17] Committee of Ministers, *Declaration. The European Convention on Human Rights at 50: What Future for the Protection of Human Rights in Europe?,* European Ministerial Conference on Human Rights (Rome, 3-4 November 2000), 729th meeting, 15 November 2000.

The Protocol was the result of constant consultations which were based on the proposals by an Evaluation Group and the Steering Committee for Human Rights and involved all major CoE actors, including the Parliamentary Assembly, as well as the Court and non-governmental organisations (NGOs).[18] The amendments introduced by the Protocol essentially aimed, on the one hand, to allow for a swifter disposal of inadmissible applications by the Court, and, on the other, to reduce the number of incoming applications to the Court by tightening the admissibility criteria.[19]

Under the former tier, the Protocol added the single-judge formation, entrusted with the disposal of manifestly inadmissible applications, whereas committees of three judges (to whom manifestly inadmissible applications were previously allocated) were "upgraded" and given the competence to rule on the merits on admissible applications whose "underlying question … is already the subject of well-established case-law of the Court" (new Article 28 ECHR).

The operation of single judges has indeed been crucial, as inadmissible applications are now dealt with far more rapidly – a huge progress for the Court, considering that inadmissible applications regularly account for over 90% of the ECtHR yearly output.[20] Thanks to the work undertaken by single judges, already in 2015 the Court could assert that "the backlog of inadmissible cases ha[d] been eliminated".[21] The impact of the committees' new competence as regards repetitive applications is also considerable: in the last years, between 50% and 75% of the applications decided by judgment were dealt with by the committees.[22] The fact remains that, whether delivered by three-judge

[18] Beernaert, *supra* n 8, 545-546. On the reform process that led to the drafting of Protocol no. 14, cf. also Martin Eaton and Jeroen Schokkenbroek, "Reforming the Human Rights Protection System Established by the European Convention on Human Rights", *Human Rights Law Journal* 26, nos. 1-4 (October 2005): 2-4. It should be noted here that NHRIs as well took part in the reform process: cf. Section 3.6 of this dissertation.

[19] For commentaries on the amendments introduced by Protocol no. 14, cf. Beernaert, *supra* n 8, 544-557; Eaton and Schokkenbroek, *supra* n 18, 1-17; Sicilianos, *supra* n 11, 611-640; and Lucius Caflisch, "The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond", *Human Rights Law Review* 6, no. 2 (2006): 403-415. See also CoE, *Explanatory Report to Protocol No. 14, supra* n 4.

[20] Cf. the *Analyses of statistics* that have been published by the ECtHR every year since 2006. The percentage of inadmissible applications dropped to 82% in 2017 because of the judgment in *Burmych and others v. Ukraine*, nos. 46852/13 et al., 12 October 2017, whereby the Grand Chamber struck out more than 12,000 applications (ECtHR, *Analysis of statistics 2017*, *supra* n 10, 4-5).

[21] ECtHR, *Analysis of statistics 2015* (Strasbourg: January 2016), 4.

[22] The data refer to the period 2013-2016. For the years 2011 and 2012 no data on the number of applications decided by three-judge committees are available, whereas in 2017 the percentage of applications decided by the committees exceptionally decreased to 17% due to the *Burmych and others v. Ukraine* judgment, mentioned *supra* n 20.

committees, seven-judge chambers, or the Grand Chamber, all rulings ascertaining a violation of the Convention must be supervised by the Committee of Ministers for their execution.

As to the latter tier, Protocol no. 14 introduced a new admissibility criterion, the so-called "significant disadvantage" clause, by which applications are declared inadmissible if the violations suffered by the applicants do not pass a threshold of seriousness.[23] Between 2011 and 2012, when chambers exclusively could apply the criterion, twenty-six cases only were declared inadmissible on this basis, whereas in other sixteen instances the application of the new clause was argued by the respondent governments but rejected by the Court.[24] The number of applications declared inadmissible on this ground rose in the following two years (2013-2014), when the clause was applied by single judges in 1,350 instances.[25]

Finally, while focusing on how to reduce the workload of the Court and of its chambers especially, Protocol no. 14 also intervened in the execution phase. Whereas problems with the execution of ECtHR judgments had already emerged in the "old system",[26] the rapid increase of new applications following the entry into force of Protocol no. 11 and the CoE membership's enlargement made the issue more pressing. In 2000, the Parliamentary Assembly of the CoE issued a well-known resolution on the causes of and possible solutions to implementation issues.[27] The matter was

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[23] Article 35(3) ECHR now reads: "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: … (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal".

[24] ECtHR, *Research Report – The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on* (Strasbourg: 2012), Appendices A and B.

[25] Open Society Justice Initiative, *Legal Update – The Application of the 'Significant Disadvantage' Criterion by the European Court of Human Rights* (New York: November 2015), 3, accessed 4 January 2019, https://www.opensocietyfoundations.org/sites/default/files/briefing-echr-significant-disadvantage-20151120.pdf. No data on the following years could be found.
Concerns have been raised in various quarters regarding the appropriateness of this criterion, in light of the already high number of applications declared inadmissible by the ECtHR on other grounds and of the risks for the right to individual application before the Court: Beernaert, *supra* n 8, 551-554 and 556. For critical appraisals in the literature, cf., among others: Nikos Vogiatzis, "The Admissibility Criterion under Article 35(3)(B) ECHR: A 'Significant Disadvantage' to Human Rights Protection?", *International & Comparative Law Quarterly* 65, no. 1 (2016): 185-211.

[26] The strenuous political opposition by Turkey to the implementation of the Loizidou judgment is recalled by Marmo, *supra* n 3. Cf. also, for other examples of "difficulties" in the previous system, Ronald St. John Macdonald, "Supervision of the Execution of the Judgments of the European Court of Human Rights", in *Mélanges en l'honneur de Nicolas Valticos: droit et justice*, ed. René-Jean Dupuy (Paris: Pedone, 1999), 423 *et seqq*.

[27] Parliamentary Assembly, *Resolution 1226 (2000). Execution of judgments of the European Court of Human Rights*, 30th sitting, 28 September 2000.

thereafter considered by the Court, the Committee of Ministers, the Steering Committee for Human Rights, the Evaluation Group, and the Venice Commission.[28] Various proposals were put forward and discussed and one of them was incorporated in Protocol no. 14 – i.e., the attribution of new powers to the Committee of Ministers. This body can now initiate both "interpretation proceedings" (Article 46(3) ECHR), by way of which the Committee can ask the Court to solve interpretive issues affecting its judgments, and "infringement proceedings" (Articles 46(4) and 46(5) ECHR), by way of which the Committee can refer to the Court instances of non-execution of judgments by States.[29] However, only one set of infringement proceedings and no interpretation proceedings have been brought to date by the Committee.[30] Thus, the ability of these novel instruments to improve the execution process appears – so far – very limited.

Protocol no. 14 was, in a sense, born incomplete – namely, in the awareness that it would not be sufficient in itself to remedy the issues identified as threatening the long-term effectiveness of the Convention's system. Significantly, the Explanatory Report to the Protocol pointed to the strengthening of the national implementation of the Convention and of the execution of the ECtHR judgments as the main areas where further interventions were needed to ensure the survival of the system.[31]

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[28] *Letter of 28 March 2000 from the Mr Luzius Wildhaber, President of the European Court of Human Rights, to Mr Gunnar Jansson, Chairperson of the Committee on Legal Affairs and Human Rights*, included as Appendix II to Parliamentary Assembly – Committee on Legal Affairs and Human Rights, *Execution of judgments of the European Court of Human Rights – Report*, 12 July 2000; Evaluation Group, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, 27 September 2001, EG Court(2001)1, paras. 48 *et seqq*.; Committee of Ministers, *Declaration on the Court of Human Rights for Europe*, 111th Ministerial Session, November 2002, para. 14; Commission for Democracy through Law (Venice Commission), *Opinion on the Implementation of the Judgments of the European Court of Human Rights*, Opinion No. 209/2002, 53rd Plenary Session, 18 December 2002; and Committee of Ministers/Steering Committee for Human Rights, *Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights. Addendum to the final report containing CDDH proposals (long version)*, 14 April 2003, CM(2003)55-Add 2, Section C.

[29] For an examination of these new mechanisms, cf. Vandenhole, *supra* n 3, 113 *et seqq*.; and Elisabeth Lambert Abdelgawad, "L'exècution des jugements: les requêtes en manquement et en interprétation", in *La Cour européenne des droits de l'homme après le protocole 14*, ed. Samantha Besson (Zürich: Schulthess, 2011), 93-113. Cf. also further Section 2.3 of this dissertation.

[30] The Committee of Ministers passed the following Resolution to initiate infringement proceedings against Azerbaijan: "Interim Resolution CM/ResDH(2017)429. Execution of the judgment of the European Court of Human Rights: Ilgar Mammadov against Azerbaijan", *Resolutions,* 1302nd meeting, 5 December 2017, CM/ResDH(2017)429.

[31] CoE, *Explanatory Report to Protocol No. 14*, *supra* n 4, at para. 14 states: "Measures required to ensure the long-term effectiveness of the control system established by the Convention in the broad sense are not restricted to Protocol No. 14.

To this end, some measures were already taken in conjunction with the adoption of Protocol no. 14, even though they were not included in the text of the Protocol. In order to ensure the entrenchment of the Convention in national legal orders and cultures, the Committee of Ministers addressed a number of recommendations to Member States regarding the place of the Convention in national university curricula and professional training, the ascertainment of the compatibility of national laws and administrative practices with the ECHR, and the improvement of domestic remedies.[32] While the Committee of Ministers asked the Deputies to "undertake a review, on a regular and transparent basis, of the implementation" of these recommendations and of two previous ones regarding the reopening of cases at the national level and the dissemination of the Convention and of ECtHR judgments,[33] these remain non-binding instruments and the review of at least some them does not appear so regular and effective.

More concrete results have already been yielded by *Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem,* which was passed during the same meeting and authorised the Court to deliver – under certain conditions – so-called pilot judgments.[34]

Measures must also be taken to prevent violations at national level and improve domestic remedies, and also to enhance and expedite execution of the Court's judgments. Only a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the Court's present overload".

[32] These Recommendations were all adopted by the Committee of Ministers on 12 May 2004, at its 114th session: *Recommendation Rec(2004)4 of the Committee of Ministers to member states on the European Convention on Human Rights in university education and professional training*; *Recommendation Rec(2004)5 of the Committee of Ministers on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down by the European Convention on Human Rights*; and *Recommendation Rec(2004)6 of the Committee of Ministers on the improvement of domestic remedies*.

[33] Committee of Ministers, *Declaration of the Committee of Ministers: Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels*, 114th session, 12 May 2004. The two previous recommendations, which are also directed at promoting the national implementation of the Convention and of ECtHR judgments, are *Recommendation No. R (2000) 2 of the Committee of Ministers on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights*, 694th meeting of the Ministers' Deputies, 19 January 2000; and *Recommendation Rec(2002)13 of the Committee of Ministers on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights,* 822nd meeting of the Ministers' Deputies, 18 December 2002 (the latter Recommendation was accompanied by *Resolution Res(2002)58 of the Committee of Ministers on the publication and dissemination of the case-law of the European Court of Human Rights,* adopted during the same meeting).

[34] The Resolution was adopted on the same day as the above-mentioned recommendations, namely on 12 May 2004, at the 114th session of the Committee of Ministers. The Resolution invites the Court "to identify […] what it considers to be an underlying systemic problem and the source of this problem […], so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments".
In fact, the pilot judgment procedure was firstly proposed by the Court itself within the debate on the drafting of Protocol no. 14: ECtHR, *Position paper of the European Court of Human Rights*, 12 September 2003, CDDH-GDR(2003)024, paras. 43 *et seqq*. in particular. While the proposal was not included in the Protocol, the Committee of Ministers adopted the above-mentioned Resolution and thus legitimised the practice of pilot judgments. Cf., on the point, Markus Fyrnys,

In essence, faced with a case arising from a systemic deficiency of the national system, the Court may issue a judgment through which it does not only declare a violation of the Convention, but it also "identif[ies] the systemic problem and … give[s] the Government clear indications of the type of remedial measures needed to resolve it".[35] These rulings have considerably innovated the system of the supervision of execution by allowing for a greater role of the Court in the post-judgment phase and facilitating the processing and resolution of large numbers of repetitive cases.

Other innovations aimed at strengthening the ability of the ECHR system to deal with repetitive cases and optimise the (supervision of) execution of ECtHR judgments have been brought by amendments to the rules and working methods of the Court and of the Committee of Ministers especially. These changes, which have rarely been examined in-depth in the literature but are of great interest to this dissertation, will be analysed in detail in Chapter 2.

Following the entry into force of Protocol no. 14, two more Protocols were drafted in the context of the ongoing reform efforts of the Convention's system: Protocols nos. 15 and 16. The former one, which is awaiting ratification by the last two CoE Member States to enter into force,[36] deals with a variety of aspects without introducing major changes. First of all, it aims to further reduce the number of incoming applications by shortening the term to submit an application (from six months from the final domestic decision to four months) and broadening the scope of the "significant disadvantage" clause.[37]

"Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights", *German Law Journal* 12, no. 5 (2011): 1231-1260.

[35] ECtHR/Press Unit, *Factsheet – Pilot judgments* (Strasbourg: September 2016), 1.

[36] The CoE Member States that have not yet ratified the Protocol, as of December 2018, are Bosnia and Herzegovina and Italy. Ratification by all forty-seven Member States is necessary for the Protocol to enter into force. An updated list of signatures and ratifications is available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=KfD3MVvg, accessed 4 January 2019.

[37] CoE, *Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms*, 24 June 2013, Council of Europe Treaty Series – No. 213, Articles 4 and 5. For the main changes introduced by Protocol no. 15, cf. CoE, *Explanatory Report to Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms,* 24 June 2013, Council of Europe Treaty Series – No. 213.

Furthermore, as far as the issue of domestic implementation is concerned, amending Protocol no. 15 will add a new recital in the preamble to the Convention recalling the principle of subsidiarity, which places on Member States "the primary responsibility to secure the rights and freedoms defined in [the] Convention", while attributing them "a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights".[38] Beside the fact that such a reference appears to have been inserted more as a reminder to the Court of the prerogatives of States Parties in the implementation of the Convention and of ECtHR judgments than a reminder to States themselves of their responsibilities in the area,[39] it does not seem that the recent insistence on the principle of subsidiarity (which can also be found in all latest High-level Conferences on the reform of the Court) has had major practical effects to date. Indeed, while references to this principle in the judgments of the ECtHR have increased over the last years, subsidiarity has been used by the Court not only as a self-restraint mechanism, but also to highlight the obligations that rest upon States.[40]

Additional Protocol no. 16, on the other hand, is more closely concerned with domestic implementation insofar as it innovates the advisory function of the Court by allowing national

[38] CoE, *Protocol No. 15, supra* n 37, Article 1.

[39] The diverging interpretations of the principle of subsidiarity and of the margin of appreciation doctrine have recently been highlighted within the debate following the publication of the draft Copenhagen Declaration. Cf., among others, the opposing views of Alice Donald and Philip Leach, "A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten", *EJIL: Talk!*, 21 February 2018, accessed 4 January 2019, https://www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten/; and Mikael Rask Madsen and Jonas Christoffersen, "The European Court of Human Rights' View of the Draft Copenhagen Declaration", *EJIL: Talk!,* 23 February 2018, accessed 4 January 2019, https://www.ejiltalk.org/the-european-court-of-human-rights-view-of-the-draft-copenhagen-declaration/.
Cf. further on subsidiarity in the ECHR system, among many: Robert Spano, "The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law", *Human Rights Law Review* 18 (2018):473-494; Alastair Mowbray, "Subsidiarity and the European Convention on Human Rights", *Human Rights Law Review* 15, no. 2 (2015): 313–341; Dean Spielmann, "Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?", *Cambridge Yearbook of European Legal Studies* 14 (2012): 381-418; Gérard Gonzalez, "Bénie soit la subsidiarité! À propos du rapport d'activités 2017 de la Cour EDH", *La Semaine juridique: édition générale* 92, special issue (June 2018): 22-26 (containing some critical remarks on the use of the subsidiarity principle by the Court); Samantha Besson, "L'évolution du contrôle européen: vers une subsidiarité toujours plus subsidiaire", in Touzé, *supra* n 2, 57-82 (which also criticises some recent trends in the application of the subsidiarity principle in the ECHR system); Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law", *American Journal of International Law* 97, no. 1 (2003): 38-79; and Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights. Human rights files No. 17* (Strasbourg: Council of Europe Publishing, 2000).

[40] Mowbray, *supra* n 39. Moreover, it is significant that mentions of the principle of subsidiarity by governments in their submissions to the Court have not increased (ibid.). For a different evaluation, based on a quantitative analysis of the ECtHR case-law following the Brighton Declaration, cf. Mikael Rask Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?", *Journal of International Dispute Settlement* 9 (2018): 199-222.

supreme courts to ask for the opinion of the Court on the interpretation and application of any Convention's provisions.[41] The purpose of this new procedure is to cut down the number of complaints lodged with the Court by ensuring respect for the Convention's rights domestically through national courts. While aimed at strengthening the domestic implementation of the Convention, the reform will unlikely have an immediate and significant impact on the caseload of the Court and the Committee of Ministers, also considering that national courts are not obliged to submit requests (Article 1(1) of the Protocol), that the Court's opinions are not binding on them (Article 5), and that Protocol no. 16 has been ratified by only ten Member States to date.[42]

In parallel with the drafting of the above-mentioned Protocols, the debate about strengthening domestic implementation has continued and has been increasingly emphasised at the CoE level. There is wide agreement, among academics and CoE bodies alike, that the inadequate implementation of the Convention and of the Court's judgments is the root cause of the repetitive cases which keep flooding the Court, and that the high number of repetitive cases constitutes one of the main issues plaguing the Court and questioning the effectiveness of the CoE supervision system.[43] This also means that the formal incorporation of the Convention into national legal systems, which has by now been effected by all CoE Member States,[44] is not in itself sufficient, while representing a step towards its more effective domestic implementation.

The statistics reflect the persistent significance of the issue of repetitive applications: in the last years, repetitive or clone cases have regularly accounted for between 40 and 50% of the applications

[41] For an illustration of the changes introduced by Protocol no. 16, cf. CoE, *Explanatory Report to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* 2 October 2013, Council of Europe Treaty Series – No. 214.
[42] The tenth ratification allowed the entry into force of the Protocol on 1 August 2018. As of December 2018, ratifying States include Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia, and Ukraine. An updated list of signatures and ratifications of Protocol no. 16 is available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=KfD3MVvg, accessed 4 January 2019.
[43] Cf., on the part of institutions, the sources mentioned *supra* n 4. In the literature, cf., among others, Marmo, *supra* n 3; and, on the connection between repetitive cases and failures in the execution of ECtHR judgments, Philip Leach, "On Reform of the European Court of Human Rights", *European Human Rights Law Review*, no. 6 (2009): 729 *et seqq*. in particular.
[44] Committee of Ministers, *Recommendation Rec(2004)6, supra* n 32, para. 7.

pending before the ECtHR.[45] Moreover, after a decline in 2014 and 2015, in 2016 and 2017 the number of new applications submitted to the ECtHR has started to increase again compared to the previous year.[46] From 40,650 new applications allocated to a judicial formation in 2015, the number rose to 50,400 in 2016 and 63,350 in 2017.[47]

That is why the latest five High-level Conferences convened to discuss the way forward for the Convention's system, which were held between 2010 and 2018 and attended by representatives from Member States and relevant CoE bodies as well as from NGOs, consistently put the issue of domestic implementation at the core of their debates. However, the declarations made at the end of these Conferences mostly consist of rather vague recommendations for States to ensure the application of the Convention in their jurisdictions, promote synergies between the competent national authorities, enhance domestic remedies against ECHR violations, and fully execute the ECtHR judgments.[48] The principle of subsidiarity is frequently reiterated.[49] These statements of principle are rarely specific

[45] Cf. the *Analyses of Statistics* for the years 2013-2016 by the ECtHR. Exceptionally, in 2017, the percentage fell to 25.4%, again because of the above-mentioned *Burmych and others* judgment (*supra* n 20); in 2012, the number of repetitive applications was also relatively low (32%). No statistical data by the Court are currently available for the previous years, but some estimates can be found in the literature: e.g., Leach, *supra* n 43, 727, reports that "repetitive or clone cases" accounted for 70% of the ECtHR judgments delivered in 2008.

[46] ECtHR, *The European Court of Human Rights in Facts & Figures 2017*, March 2018, 5.

[47] Ibid.

[48] High-level Conference on the Future of the European Court of Human Rights, *Interlaken Declaration*, 19 February 2010, Section B of the Action Plan; High-level Conference on the Future of the European Court of Human Rights, *Izmir Declaration*, 27 April 2011, Section B of the Follow-up Plan; High-level Conference on the Future of the European Court of Human Rights, *Brighton Declaration*, 20 April 2012, Section A; High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", *Brussels Declaration*, 27 March 2015, Section B of the Action Plan; and High-level Conference, *Copenhagen Declaration*, 13 April 2018, Sections "Effective national implementation – the responsibility of States" (paras. 12 *et seqq*.) and "Execution of judgments – a key obligation" (paras. 19 *et seqq*.).

[49] Cf. especially *Copenhagen Declaration*, *supra* n 48, paras. 6 *et seqq*. Cf. also *Interlaken Declaration*, points 2) and 3), as well as Section E; *Izmir Declaration*, preamble, paras. 5 and 6, and section F; *Brighton Declaration*, Sections A, B and C; and *Brussels Declaration*, preamble (all mentioned *supra* n 48).
On the prominent role played by the subsidiarity principle in the ongoing reform debate, cf. Derek Walton, "Subsidiarity and the Brighton Declaration", in *Judgments of the European Court of Human Rights - Effects and Implementation*, eds. Anja Seibert-Fohr and Mark E. Villiger (Baden-Baden: Nomos, 2014), 193-206; and Martin Kuijer, "The Margin-of-Appreciation Doctrine and the Strengthening of the Principle of Subsidiarity in the Recent Reform Negotiations", *Human Rights Law Journal* 36, nos. 7-12 (2016): 339-347. Walton, at 198, maintains that "the Brighton Declaration … went further than mere exhortation to follow the principle of subsidiarity more closely" by providing for the principle to be inserted in the preamble of the Convention and by putting forward a number of specific measures to implement the principle. Kuijer, on the other hand, argues that a shift occurred with the Brussels Declaration from subsidiarity as a means to allow for a margin of appreciation for States to subsidiarity as a means to place greater responsibilities on States. Nevertheless, the Brussels Declaration mentions the "margin of appreciation" twice and, while the wording of the Copenhagen Declaration has been changed significantly and ample space has been given to the responsibilities of States, the political context in which it was drafted should caution against too optimistic readings (besides, the sections devoted to "Effective national implementation – the responsibility of States" and "Execution of judgments – a key obligation" are

and have seldom translated into clear precepts for Member States. Moreover, as mentioned, the principle of subsidiarity in particular is often used ambiguously, to say the least.[50]

The Court and the Committee of Ministers have also been the addressees of recommendations by these Conferences as regards the execution of judgments and the reduction of repetitive cases; the former especially by making appropriate use of the pilot-judgment procedure and promoting recourse to friendly settlements and unilateral declarations by States, the latter by rendering its supervision of the execution of judgments more effective and cooperating with national authorities to help them remedy structural shortcomings.[51] Again, the operational means to achieve these objectives are rarely set out.

At any rate, the declarations concluding the above-mentioned High-level Conferences make clear that States Parties are not willing to introduce radical changes to the Convention's system, at least for the time being. Bolder proposals to reform the system have been rejected thus far,[52] so that solutions to the issues of overburdening of the Court and of the Committee of Ministers need to be found, realistically, within the existing system.

In this context, the level of domestic implementation appears an essential part of the problem but can potentially play a central role in its solution. This dissertation is particularly concerned with the full and prompt execution of ECtHR judgments, as the first step that States can make towards aligning their legal orders with the Convention (as interpreted by the Court) and preventing the recurrence of violations similar to those ascertained by the Court. The execution of judgments is also exemplary of the need for cooperation between international bodies (in this case, the ECtHR and the Committee of Ministers in particular) and national authorities and thus provides an interesting testing

somewhat offset by the following sections on "European supervision – the role of the Court" and "Interaction between the national and European level – the need for dialogue").

[50] Cf. *supra* n 39.

[51] Cf. *Interlaken Declaration*, Sections D and F; *Izmir Declaration*, Sections B and E; *Brighton Declaration*, Sections D and F; *Brussels Declaration*, Section C; and *Copenhagen Declaration*, Section "The caseload challenge – the need for further action", paras. 42 *et seqq*. (all mentioned *supra* n 48).

[52] Cf. Section 2.1 of this dissertation for more details.

ground for the ability of these two kinds of actors to interact constructively and for the potentialities of NHRIs.

1.2 The implementation gap and the role of National Human Rights Institutions

The issue of domestic implementation of international standards and decisions is as old as international law itself; the latter relies on States for its realisation and the problems deriving from the general lack of higher centralised powers that are able to ascertain and enforce the norms is one of the main reasons why doubts were raised as to the very qualification of international law as "law".[53] This is not the place to examine in-depth a controversy which, while considered settled by international lawyers, might not have completely died away.[54] Nonetheless, it has long been argued convincingly by numerous authors and on various bases, and it is accepted here, that States (the main addressees of international law) regard international law as binding, that they comply with it most of the time and that, while the typical means of enforcement of domestic norms admittedly differ from those of international norms, this does not mean that international law cannot be and is not routinely enforced through international as well as domestic mechanisms.[55]

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[53] Famously, Austin rejected the notion of "international law", "being rules set and enforced by *mere opinion*" and not "by sovereigns as political superiors": John Austin, *The Province of Jurisprudence Determined* (1832; repr., Cambridge: Cambridge University Press, 1995), 20 and 120 *et seqq*.

[54] Anthony D'Amato, "Is International Law Really 'Law'?", *Northwestern University Law Review* 79 (1985): 1293-1314; and John R. Bolton, "Is There Really 'Law' in International Affairs?", *Transnational Law and Contemporary Problems* 10 (2000): 1-48. In a more nuanced way, Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005) does not deny the legal nature of international law, but radically reviews its characteristics. With regard to human rights, cf. J. Shand Watson, *Theory and Reality in the International Protection of Human Rights* (Ardsley, NY: Transnational Publishers, 1999), 15, which disputes the qualification of the "basic norms of international human rights" as "valid norms of international law".

[55] Cf., among others, Michael Akehurst, *A Modern Introduction to International Law*, 5th ed. (London: Allen and Unwin, 1985), 1-11; James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace,* 6th ed., edited by Humphrey Waldock (Oxford: Clarendon, 1985), 68-78; and Lassa Francis Lawrence Oppenheim, *Oppenheim's International Law*, 9th ed., edited by Robert Jennings and Arthur Watts (Harlow: Longman, 1992), 8-16.
More specifically on enforcement, cf. Niels Blokker and Sam Muller, eds., *Towards More Effective Supervision by International Organizations* (Dordrecht: Martinus Nijhoff, 1994); Madeleine K. Albright, "Enforcing International Law", *Proceedings of the Annual Meeting (American Society of International Law)* 89 (1995): 574-580; Frederic L. Kirgis, "Enforcing International Law", *ASIL Insights* 1, no. 1, 22 January 1996, accessed 4 January 2019, https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law; and Oona A. Hathaway and Scott J. Shapiro, "Outcasting: Enforcement in Domestic and International Law", *Faculty Scholarship Series. Paper 3850* (2011), accessed 4 January 2019, http://digitalcommons.law.yale.edu/fss_papers/3850.
With regard to enforcement in the area of human rights, cf. John P. Humphrey, "The Implementation of International Human Rights Law", *New York Law School Law Review* 24 (1978): 31-61 (which prefers "implementation" over "enforcement" because of the non-coercive nature of most mechanisms); Manfred Nowak, *Introduction to the*

This notwithstanding, the expression "implementation gap" is commonplace when referring to the discrepancy between the theory and the practice of international law, namely to "the extent to which deeds lag behind words, or compliance falls short of commitment".[56] International human rights law is particularly subject to these problems, as it imposes broad obligations on States vis-à-vis individual rights holders.

In the international human rights context, increasing attention to the issue of implementation has been paid since the impetus for standard-setting has started to decline and the focus has shifted towards the actual realisation of the numerous standards produced – i.e., since the early 1990s. The landmark World Conference on Human Rights held in Vienna in June 1993, while reiterating the substantive components of the human rights obligations of States, put emphasis on the implementation stage. In his opening statement, UN Secretary-General Boutros Boutros-Ghali identified "the three imperatives of the Vienna Conference" as universality, guarantees, and democratisation.[57] "Guarantees" precisely referred to the "suitable machinery and structures to ensure [human rights'] effectiveness, both internally and internationally".[58] Leading human rights lawyer Manfred Nowak has defined the "implementation gap" in the human rights area as "the big challenge of the 21st century".[59]

Notwithstanding the pervasiveness of many international human rights obligations, States have accepted an increasing number of them as well as the refinement of their monitoring mechanisms.

International Human Rights Regime (Leiden; Boston: Martinus Nijhoff, 2003); and Janusz Symonides, *Human Rights: International Protection, Monitoring, Enforcement* (Aldershot: Ashgate and UNESCO Publishing, 2003).

[56] Xinyuan Dai, "The 'compliance gap' and the efficacy of international human rights institutions", in *The Persistent Power of Human Rights: From Commitment to Compliance,* eds. Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (Cambridge: Cambridge University Press, 2013), 88.

[57] World Conference on Human Rights, *World Conference on Human Rights: The Vienna Declaration and Programme of Action, June 1993, with the Opening Statement of United Nations Secretary General Boutros Boutros-Ghali* (New York: United Nations, 1993), 10.

[58] Ibid., 12.

[59] Manfred Nowak, "Challenges to National Implementation of International Human Rights Standards – Background Paper WG I", in *Global standards – Local action. 15 years Vienna World Conference in Human Rights: Conference Proceedings of the International Expert Conference held in Vienna on 28 and 29 August 2008,* eds. Wolfgang Benedek et al. (Antwerpen: Intersentia, 2009), 123. Nowak adds that "we urgently have to move from standard-setting and monitoring to genuine protection, implementation, and enforcement of human rights, and finally to the effective prevention of human rights violations" (ibid.) and points to the potential role of a multiplicity of national actors (judges, NHRIs and other non-judicial mechanisms, national bodies provided for in international treaties, parliaments, and civil society) to this end.

While regional human rights systems are particularly incisive by providing for courts whose rulings are binding on those States that have accepted their jurisdiction, at the UN level too an increasingly sophisticated machinery has been put into place through the drafting of optional protocols as well as an ample reform of the rules of procedures and working methods of the bodies responsible for overseeing the implementation of treaties negotiated at the UN level.[60]

The fact remains that, while a right of individual petition is recognised by some of these treaties and optional protocols, most of the monitoring activities carried out by the UN treaty bodies, as well as by the UN Human Rights Council, are based on the periodic reporting by States themselves and culminate in (mere) recommendations to governments. The dissemination of these recommendations is nonetheless expected to prompt reactions by the public opinions of the States concerned as well as by other States.[61] This kind of monitoring approach has increasingly complemented the cooperative approach also pursued by the UN, consisting of technical and financial assistance programmes in the area of human rights. The Office of the High Commissioner for Human Rights is primarily engaged in these efforts, in partnership with other UN agencies and programmes such as the UN Development Programme.

[60] For a list of the optional protocols to the "core" human rights treaties at the UN level, cf. the following webpage: https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx (accessed 1 March 2019). On the monitoring carried out by UN human rights bodies and its evolution, cf. Gudmundur S. Alfredsson, *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, 2nd rev. ed. (Leiden; Boston: Martinus Nijhoff, 2009); Suzanne Egan, *The United Nations Human Rights Treaty System: Law and Procedure* (Haywards Heath: Bloomsbury Professional, 2011); and Helen Keller and Geir Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge; New York: Cambridge University Press, 2012).

[61] On the non-binding nature of the control exercised by the UN human rights machinery, cf., among others, Conseil d'État, *Les rapports du Conseil d'État: Le droit souple* (Paris: La Documentation française, 2013), 26; nonetheless, the same study describes these recommendations and decisions as "droit souple bénéficiant sous diverses formes d'une reconnaissance par le droit dur … n'allant pas jusqu'à leur conférer une portée obligatoire" (70). Cf. also Michael O'Flaherty, "The Concluding Observations of United Nations Human Rights Treaty Bodies", *Human Rights Law Review* 6, no. 1 (2006): 27-52, which, while reiterating the non-binding nature of the concluding observations by UN human rights treaty bodies, maintains that they "are not without some special status, at least to the extent that they purport to interpret the treaty or consider the treaty obligations of the State Party" (34; on the legal nature of concluding observations cf., more generally, 32-37).

A vast body of literature has dealt with the reasons why States bind themselves to human rights obligations,[62] as well as to what extent and why they comply with these obligations.[63] This literature will not be dissected here; it is however worthy of note that a not insignificant part of the scholarly production on States' commitment to and compliance with international obligations has long tended and still tends to consider States as "wholes" on the international plane and thus identify them with their governments.[64]

Even in relation to the domestic implementation of international obligations, while it is common knowledge that all State organs must abide by the country's human rights obligations and contribute to the implementation of these obligations within the limits of their mandates, this recognition has – until more recently – rarely translated into a careful examination of the roles played by the different national authorities (parliament, government, courts, local authorities) in the implementation process. This trend can be attributed both to the reality on the ground – many national parliaments and courts have long deferred to their governments on the interpretation and implementation of international

[62] Cf., among others: Jay Goodliffe and Darren G. Hawkins, "Explaining Commitment: States and the Convention against Torture", *Journal of Politics* 68, no. 2 (2006): 358-371; Oona A. Hathaway, "Why Do Countries Commit to Human Rights Treaties?", *Journal of Conflict Resolution* 51, no. 4 (2007): 588-621; Emilie M. Hafner-Burton, Kiyoteru Tsutsui, and John W. Meyer, "International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties", *International Sociology* 23, no. 1 (2008): 115–141; and Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009), 57-111 in particular.

[63] Cf., among others: Andrew Moravscik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe", *International Organization* 54 (2000): 217-252; Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?", *Yale Law Journal* 111, no. 8 (2002): 1935-2042; Goldsmith and Posner, *supra* n 54, 107-134; Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?", *Journal of Conflict Resolution* 49, no. 6 (2005): 925-953; and Simmons, *supra* n 62, 112 *et seqq*.

Observance of international rulings is dealt with, among others, by Courtney Hillebrecht, "The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System", *Human Rights Quarterly* 34, no. 4 (2012): 959-985; and Darren Hawkins and Wade Jacoby, "Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights", *Journal of International Law and International Relations* 6, no. 1 (2010): 35-85.

Cf. also, on the challenges of measuring States' compliance with international human rights treaties and rulings: Ryan Goodman and Derek Jinks, "Measuring the Effects of Human Rights Treaties", *European Journal of International Law* 14, no. 1 (2003): 171-183; Todd Landman, "Measuring Human Rights: Principle, Practice, and Policy", *Human Rights Quarterly* 26 (2004): 906-931; Hans-Otto Sano, "Implementing Human Rights. What Kind of Record?", in *Implementing Human Rights. Essays in Honour of Morten Kjaerum*, eds. Rikke F. Jorgensen and Klaus Slavensky (Copenhagen: Danish Institute for Human Rights, 2007); Hawkins and Jacoby, above in this footnote; and Courtney Hillebrecht, "Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals", *Journal of Human Rights Practice* 1, no. 3 (2009): 362–379.

[64] For an important contribution to a change of course and a conceptual shift towards "disaggregated States" on the international plane, cf. Anne-Marie Slaughter, *A New World Order* (Princeton; Oxford: Princeton University Press, 2004).

law;[65] and to the traditional doctrinal conception of international law as the law of inter-State relations.

Nonetheless, to the extent that international law regulates an increasing number of aspects relating to the internal life of States, including the relationship between the State and its citizens, a wider range of national bodies have engaged directly in the implementation process. National parliaments have devised increasingly systematic mechanisms for the review of their governments' international commitments and of the human rights compatibility of their initiatives;[66] domestic judiciaries are also much more sensitive to the existence and impact of international standards and have developed significant experience in their interpretation and application as well as multiplying links with international courts.[67] These phenomena have triggered a more attentive analysis of the national dynamics of the implementation process in the literature, which has highlighted the role that national authorities other than the government can play in facilitating the implementation of international law, while acknowledging that the relationship with their international partners is not always idyllic.[68]

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[65] Cf., for the attitude of national courts, Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts", *European Journal of International Law* 4, no. 1 (1993): 159-183.

[66] Cf., among others, Murray Hunt, Hayley Hooper, and Paul Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Oxford: Hart Publishing, 2015); and Matthew Saul, Andreas Follesdal, and Geir Ulfstein, *The International Human Rights Judiciary and National Parliaments. Europe and Beyond* (Cambridge: Cambridge University Press, October 2017).

[67] Cf. Julia Iliopoulos-Strangas, ed., *Cours suprêmes nationales et cours européennes: concurrence ou collaboration?* (Athens: Ant. N. Sakkoulas; Bruxelles: Bruylant, 2007); Eyal Benvenisti and George W. Downs, "National Courts, Domestic Democracy, and the Evolution of International Law", *European Journal of International Law* 20, no. 1 (2009): 59–72; André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2012); and Thomas Buergenthal, "International Tribunals and National Courts: The Internationalization of Domestic Adjudication", in *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt,* eds. Ulrich Beyerlin et al. (Berlin: Springer, 1995), 687-703.

[68] Cf. Xinyuan Dai, *International Institutions and National Policies* (Cambridge: Cambridge University Press, 2007), Chapter 4 especially; Hillebrecht, "The Domestic Mechanisms of Compliance with International Human Rights Law", *supra* n 63; and Helfer, *supra* n 3. Cf. also Huneeus, *supra* n 5, which interestingly finds "against prevailing theories, that the varying institutional politics of state actors besides the executive, and in particular of justice system actors, are the main contributors to low compliance in the [Inter-American system]" (118); and Alexandra Huneeus, "Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights", in *Cultures of Legality. Judicialization and Political Activism in Latin America*, eds. Javier Couso et al. (Cambridge: Cambridge University Press, 2010), 112-138. An in-depth analysis of the role played by different UK public authorities in implementing international human rights standards, and ECtHR judgments in particular, is provided by David Feldman, "Confrontation and Co-operation between Institutions in the Protection of Human Rights", in *Human Rights Protection: Methods and Effectiveness*, ed. Frances Butler (The Hague: Kluwer Law International, 2002), 1-28.
Greater attention is also being paid to broader social phenomena boosted by the penetration of international law into domestic constituencies, such as the mobilisation of civil society, the human rights education of the population, and the empowerment of victims of human rights violations: e.g., James L. Cavallaro and Stephanie Erin Brewer, "Reevaluating

Similar trends can also be detected in the CoE context, and specifically with respect to the execution of ECtHR judgments. While the execution of these judgments might raise specific issues, which partly differ from those related to the implementation of other international norms and rulings, it is widely believed that the closer involvement of all relevant domestic authorities would benefit the execution process. Accordingly, multiplying calls have been made, by both scholars and institutional actors, including the Court itself, for a closer collaboration between the ECtHR and national courts, as well as for a more prominent role for national parliaments.[69] The High-level Conferences mentioned in the previous section have repeatedly stressed the importance of involving all national authorities, including parliaments and courts, in the implementation of the Convention's standards and the execution of the Court's judgments.[70] Meanwhile, Protocol no. 16 has institutionalised the relationship between the ECtHR and the highest national courts through new advisory opinions.

While the pursuance of these avenues appears crucial for an effective execution process, not insignificant challenges to their full use exist. A first one is an information problem: it is often the case that neither parliaments nor courts are systematically informed of the outcome of ECtHR cases against their countries, let alone others. A second one is a competence problem: on each occasion, the body responsible for the execution of a certain judgment might be a different one, depending on the measures required by the Court or the Committee of Ministers (individual measures only, or a change in the legislation, administrative practice or case-law). Also, more often than not, the

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Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court", *American Journal of International Law* 102, no. 4 (2008): 768- 827; Janet E. Lord and Michael Ashely Stein, "The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities", *Washington Law Review* 83 (2008): 449-479; and Simmons, *supra* n 62. A central role in this respect is certainly played by domestic and international NGOs and the transnational networks that they form: Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (London: Cornell University Press, 1998); and Ann M. Florini, *The Third Force: The Rise of Transnational Civil Society* (Washington: Carnegie Endowment for International Peace, 2000). This section and the dissertation more generally, however, focus on legal and institutional reforms in domestic systems, as a consequence of the execution of specific judgments, which is typically less concerned with social change. Reference will thus be made to the role of NGOs as far as their contribution to change the domestic legal orders and institutional structures is concerned (cf. especially Chapter 4).

[69] Cf. Section 2.5 of this dissertation.

[70] *Interlaken Declaration*, para. 6 of the preamble; *Brighton Declaration*, Section A, para. 9 in particular; *Brussels Declaration*, preamble and Section B; and *Copenhagen Declaration*, paras. 14 and 16 (all mentioned *supra* n 48).

execution of a judgment is a complex matter that requires the coordinated intervention of a multiplicity of national actors.[71]

Governments – which are constantly informed on the developments and outcomes of ECtHR cases, generally represent States at the international level, and specifically interact with the Committee of Ministers on the measures needed to execute the judgments – are expected to involve and coordinate all of the domestic bodies concerned (from the legislature to the various administrative branches and the judiciary) and ensure that these bodies give effect to their States' international obligations.[72] In this connection, in 2008, the Committee of Ministers recommended that States "designate a co-ordinator – individual or body – of execution of judgments at the national level, with reference contacts in the relevant national authorities involved in the execution process";[73] in most cases, the government agents at the CoE have been appointed to this role.[74] Since this practice is not without its problems and there is room for improvement as far as the involvement of all relevant national authorities is concerned,[75] while recognising that governments are well-placed to carry out a coordinating function, it is appropriate to consider whether there exist any actors which could support governments in this function as well as monitor governments' actions in the area of execution and report on them to the international level.

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[71] Hillebrecht, "The Domestic Mechanisms of Compliance with International Human Rights Law", *supra* n 63, 964 *et seqq*.; also in relation to the Inter-American system, Huneeus, *supra* n 5, finds that "it is the coordination of a task between distinct state actors with differing political wills and institutional settings that poses the challenge to implementation" (129).

[72] Mottershaw and Murray, *supra* n 5.

[73] Committee of Ministers, *supra* n 3, para. 1. The Recommendation in turn refers to the previous call by the Parliamentary Assembly for States "to improve or, where necessary, to set up domestic mechanisms and procedures – both at the level of governments and of parliaments – to secure timely and effective implementation of the Court's judgments, through co-ordinated action of all national actors concerned and with the necessary support at the highest political level" (Parliamentary Assembly, *Recommendation 1764 (2006). Implementation of judgments of the European Court of Human Rights*, 24th sitting, 2 October 2006, para. 4).

[74] On the implementation of the Recommendation, cf. Committee of Ministers, *Steering Committee for Human Rights (CDDH) – e. Guide to good practice on the implementation of Recommendation (2008)2 of the Committee of Ministers on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights*, 1293rd meeting of the Ministers' Deputies, 15 September 2017, CM(2017)92-add3final.

[75] For instance, Mottershaw and Murray, *supra* n 5, 645-646, mentions the fact that government agents are already busy following the Court's proceedings and may not pay enough attention to the execution process, and that government agents do not always possess the necessary political authority to elicit prompt and full responses from the relevant domestic bodies.

National human rights institutions (NHRIs) would appear well-suited for both roles, which in a way reflect the monitoring and cooperative approaches mentioned above. On these bases, the UN has strongly promoted the establishment of NHRIs in its Member States. The history, characteristics, roles, and operation of NHRIs will be examined in-depth in Chapter 3 of this dissertation. A general definition of their nature and functions is nonetheless given here in order to show their relevance for the domestic implementation of international human rights norms and rulings.

NHRIs are State bodies, independent from their governments and responsible for promoting and protecting human rights at the domestic level. At the same time, NHRIs are regulated by international standards, which have been endorsed by various UN bodies and are now widely recognised, and which explicitly provide for multiple forms of cooperation between NHRIs and international and regional organisations.[76] It is thus frequently said that NHRIs are "at the crossroads" between the national and international levels, or "bridge" these two planes.[77]

The perceived added value brought by NHRIs to the implementation of international human rights norms lies in the national character of these institutions, which are expected to provide more detailed and well-founded information than that otherwise available to distant international monitoring bodies, and to direct international assistance where it is most needed. But the contribution by NHRIs to the implementation of international human rights standards is not limited to cooperating with international organisations in the above-mentioned ways.

NHRIs undertake a wide range of activities for the promotion and protection of human rights domestically – from advising their governments and parliaments on proposed or existing legislation and practice to providing education and professional training on human rights, from initiating cases before courts to handling human rights complaints themselves. Through all of these activities, NHRIs can and do mainstream international human rights standards into domestic legal, social, and cultural

[76] These are the so-called Paris Principles, officially the "Principles relating to the Status of National Institutions", which were drafted during the first International Workshop on National Institutions for the Promotion and Protection of Human Rights, held in Paris between 7 and 9 October 1991, and were subsequently endorsed, among others, by the UN General Assembly.
[77] Cf. the literature mentioned in Section 3.1 of this dissertation.

systems. The said characteristics and functions of NHRIs and their increasing engagement with international bodies and procedures have led to the observation that NHRIs could provide a "new answer" to the "old question" of effective domestic implementation of international human rights law.[78]

In the context of the domestic implementation of international law, the full and timely execution of international judgments is critical for the effectiveness and credibility of the legal order to which they pertain. Indeed, as put it by a report of the CoE Steering Committee for Human Rights which is frequently cited, "the acid test of any judicial system is how promptly and effectively judgments are implemented".[79] The prompt and effective execution of ECtHR judgments is also essential for relieving the pressure from the Court, overwhelmed with repetitive cases, and thus for ensuring the very survival of the system. This dissertation examines the potentialities in this respect of NHRIs, as peculiar bodies conceived exactly to work as *traits d'union* between the national and international levels of human rights promotion and protection and to facilitate the conformity of domestic legal orders with international norms and rulings.

1.3. Research aims and questions

This dissertation has two primary aims – a theoretical one and a practical one. From a theoretical perspective, the dissertation seeks to contribute to the literature on both NHRIs and the ECHR system, with particular regard to the execution of ECtHR judgments. These strands of scholarly production have seldom been brought together; this appears to be an increasingly significant gap, considering the multiplying interactions between NHRIs and CoE bodies.

The dissertation focuses on the execution of ECtHR judgments as the potentially most fertile ground for this relationship, for three main reasons. Firstly, because the prompt and full execution of ECtHR judgments has come to the forefront of the reform process of the ECHR system. Secondly,

[78] Richard Carver, "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law", *Human Rights Law Review* 10, no. 1 (2010): 1-32.
[79] Committee of Ministers/Steering Committee for Human Rights, *supra* n 28, Section C, para. 1.

because the increasingly complex measures needed for the execution of judgments require the coordination of a wide range of national authorities and the constant interaction between these actors and international supervisors, and NHRIs should, in light of their inherent characteristics and functions, be particularly suited to play a support role in these processes. And thirdly, because definite mechanisms exist for the participation of NHRIs in the promotion and supervision of the execution of ECtHR judgments – mechanisms whose functioning and impact can be specifically assessed.

These considerations highlight the practical aim of the dissertation: i.e., testing existing but apparently underdeveloped instruments by means of which NHRIs can promote the execution of ECtHR judgments. These instruments include both tools traditionally in the hands of NHRIs at the domestic level, which can also be used to facilitate the execution of ECtHR judgments, and procedures that have been specifically devised at the CoE level. The dissertation analyses, for the first time systematically, the use that NHRIs have made of these instruments and their effects (if any) on the execution of ECtHR judgments. In doing so, it offers empirical data to stakeholders (NHRIs themselves, CoE bodies, States, and NGOs) for assessing the performance of these instruments and considering possible adjustments.

In light of the above-mentioned aims, the following research questions are investigated:

Q1: To what extent have NHRIs contributed to promoting the execution of ECtHR judgments?

a) Which NHRIs have interacted with the Committee of Ministers and the Department for the Execution of Judgments to this end?

b) In relation to which cases have NHRIs interacted with these bodies?

c) How have NHRIs interacted with these bodies?

d) What have been the effects of these interactions?

e) What activities have NHRIs carried out at the domestic level to promote the execution of ECtHR judgments?

Q2: Can the current contribution by NHRIs to promoting the execution of ECtHR judgments be strengthened?

i) Are there obstacles that prevent greater engagement by NHRIs and, if so, how can they be removed?

ii) Are there obstacles that prevent greater impact by NHRIs and, if so, how can they be removed?

1.4. Research methods

This dissertation fits in the empirical or evidence-based strand of legal research.[80] If we define empirical legal research as "involving the systematic collection of information ('data') and its analysis according to some generally accepted method",[81] this dissertation systematically collects data on the activities carried out by NHRIs to promote the execution of ECtHR judgments through generally accepted methods – i.e., qualitative methods including document analysis and interviewing.

The dissertation displays further features that are commonly associated with empirical legal research, such as special attention towards "law in action" versus "law in the books",[82] and a focus on the behaviour and beliefs of legal actors and on the functioning of legal institutions rather than on

[80] As opposed to the so-called doctrinal strand; the meaning of the words "empirical" and "doctrinal" as applied to legal research or science is anyway far from settled. On the distinction between "empirical" and "doctrinal", cf. Mike McConville and Wing Hong Chui, "Introduction and Overview", in *Research Methods for Law*, eds. Mike McConville and Wing Hong Chui (Edinburgh: Edinburgh University Press, 2007), 3-6; as well as Robert M. Lawless, Jennifer K. Robbennolt, and Thomas S. Ulen, *Empirical Methods in Law* (Austin: Wolters Kluwer, 2010), 10 *et seqq*.
Much has been written on the "empirical turn" in legal research and on the growing use of the methods employed by the social sciences for the study of law (including international law and human rights law): cf., among others, Anthony Bradney, "Law as a Parasitic Discipline", *Journal of Law and Society* 25, no. 1 (1998): 71–84; Peter Cane and Herbert M. Kritzer, eds., *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010); Gregory Shaffer and Tom Ginsburg, "The Empirical Turn in International Legal Scholarship", *American Journal of International Law* 106, no. 1 (2012): 1-46; Adam Chilton and Dustin Tingley, "Why the Study of International Law Needs Experiments", *Columbia Journal of Transnational Law* 52, no. 1 (2013): 173-237; Alexandra Huneeus, "Human Rights between Jurisprudence and Social Science", *Leiden Journal of International Law* 28, no. 2 (2015): 255–266; and Jakob V.H. Holtermann and Mikael Rask Madsen, "Toleration, Synthesis or Replacement? The 'Empirical Turn' and its Consequences for the Science of International Law", *Leiden Journal of International Law* 29, no. 4 (2016): 1001-1019.
The use of these new methods by legal academics has not come without problems, as evidenced in the extensive review conducted in Lee Epstein and Gary King, "The Rules of Inference", *University of Chicago Law Review* 69, no. 1 (2002): 1-133.

[81] Peter Cane and Herbert M. Kritzer, "Introduction", in Cane and Kritzer, *supra* n 80, 4.

[82] See already Roscoe Pound, "Law in Books and Law in Action", *American Law Review* 44 (1910): 12-37.

rules (only).[83] In other words, the dissertation is less concerned with the "authoritative interpretation"[84] of rules than with the ascertainment of how some rules and rule-based mechanisms work in practice, as implemented by their addressees.

A couple of caveats are warranted at this point. First, the choice for an empirical approach for this dissertation does not imply the rejection of the so-called doctrinal approach as a scientific method; rather, the kind of research problems and questions with which this dissertation is concerned could be answered more appropriately by an empirical approach. It is in any case believed that vast areas of legal research, including human rights research, would benefit from a more extensive use of empirical methods and outward-looking approaches which do not take the worthiness and effectiveness of human rights norms and institutions for granted.

Second, while the dissertation's main contribution consists in offering empirical findings of a descriptive nature, this work does not forego *evaluations* of the mechanisms and activities under scrutiny. This choice, which might be in contrast with some conceptions of empirical legal research as purely descriptive,[85] is in accordance with the opinion of other empirical legal scholars, who also include evaluative and even normative considerations in their work.[86]

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[83] Cf., among others, Frans L. Leeuw with Hans Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Cheltenham, UK; Northampton, Massachusetts: Elgar, 2016), 5; David P. Forsythe, "Human Rights Studies: On the Dangers of Legalistic Assumptions", in *Methods of Human Rights Research*, eds. Fons Coomans, Fred Grünfeld, and Menno T. Kamminga (Antwerp: Intersentia, 2009), 62 ("many human rights lawyers are often too uncritical about international human rights law, too focused on treaty language and court cases, and not appreciative enough about soft law and extra-legal factors that affect policy and behavior related to human rights"); Eric A. Posner, *The Twilight of Human Rights* (Oxford: Oxford University Press, 2014), 143 ("lawyers mainly read and discuss judicial opinions – which hardly affect anyone at all – while ignoring the actual behavior of governments, NGOs, and individuals"); Jakob H. Holtermann and Mikael Rask Madsen, "What is Empirical in Empirical Studies of Law? A European New Legal Realist Conception", *Retfærd* 39, no. 4 (2016): 11-16 (on the "axiological validity of law *perceived by legal agents"* being "one of the key objects of empirical inquiry", emphasis in the text); and Tom Ginsburg and Gregory Shaffer, "How Does International Law Work?", in Cane and Kritzer, *supra* n 80, 755 (which maintains that, for the empirical research of international law, "a central question becomes the *conditions* under which international law is produced and has effects, as well as the *actors* and *mechanisms* involved" (emphasis in the text) and highlights the "importance of qualitative research, particularly for uncovering the mechanisms and key actors involved").

[84] Mark Van Hoecke, "Legal Doctrine: Which Method(s) for What Kind of Discipline?", in *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, ed. Mark Van Hoecke (Oxford and Portland: Hart Publishing, 2011), 1.

[85] Cf., among others, Holtermann and Madsen, *supra* n 83, 3-21, as well as previous works by the same authors mentioned therein.

[86] Leeuw, *supra* n 83, 6, even states that "doing [empirical legal research] often implies asking and answering evaluative questions". Cf. further the same work, at 44 *et seqq*., where various typologies of empirical research questions, drawn up by different authors, are illustrated.

This is not the place for a thorough examination, from an epistemological point of view, of the issue of the fact–value gap (also known as is–ought dichotomy) within legal research, which has long been recognised by some scholars and solved (or not) in various ways.[87] Nonetheless, this dissertation at least partially overcomes this conundrum, and the risk of unfounded evaluations, by assessing norms and mechanisms not in light of subjective notions of how the law ought to be and how best to advance the cause of human rights, but in light of the concrete purposes attributed to the norms by their authors and of the goals pursued by their addressees. Thus, the dissertation does not offer conclusive normative statements[88] but, on the basis of empirical findings, essentially "address[es] the way in which legal arrangements are implemented and what difficulties are experienced during this process"[89] and puts forward possible solutions to overcome these difficulties.[90]

I believe that, in this way, the dissertation remains within the boundaries of empirical legal research. I also maintain that both approaches – descriptive and evaluative – can coexist in the same research, as they address different kinds of questions.[91] Therefore, while the first research question and related sub-questions are essentially descriptive, in that they map the current practice, the second question and its sub-questions are predominantly evaluative, as far as they test the implementation of rules by the bodies concerned against the stated (or implicit) aims of those rules and mandates of those bodies.

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[87] Cf. various contributions in Van Hoecke, *supra* n 84, including the chapter by the editor mentioned in the same footnote; Jaap Hage, "The Method of a Truly Normative Legal Science", 19-44; and Anne Ruth Mackor, "Explanatory Non-Normative Legal Doctrine. Taking the Distinction between Theoretical and Practical Reason Seriously", 45-70. Cf. also Leeuw, *supra* n 83, 225 *et seqq.*; and Holtermann and Madsen, *supra* n 83, 6 *et seqq*.

[88] However, there are admittedly different opinions on how the kind of evaluations included in this dissertation are to be categorised; for some, they would arguably amount to normative statements. It is submitted here that evaluations differ from both descriptions and normative conclusions: cf. *supra* n 86, as well as Malcolm Langford, "Interdisciplinarity and Multimethod Research", in *Research Methods in Human Rights: A Handbook*, eds. Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford (Cheltenham, UK; Northampton, Massachusetts: Elgar, 2017), 173-174, which, however, calls what I would term "descriptive" approaches "empirical".

[89] Leeuw, *supra* n 83, which defines this kind of evaluations as "process evaluations". While evaluations included in this dissertation could predominantly be classified in this way, "impact or effectiveness evaluations" (i.e., "studies … on the effects, consequences or impacts of legal arrangements and interventions on the behavior of persons and organizations", ibid.) might also be present. It is mainly a question of perspectives and there often is a fine line between the two categories.

[90] Cf. the "design [research] questions" included in Van Thiel's typology, mentioned in Leeuw, *supra* n 83, 45.

[91] Robert Cryer, Tamara Hervey, and Bal Sokhi-Bulley, *Research Methodologies in EU and International Law* (Oxford and Portland: Hart Publishing, 2011), 9-10.

While some quantitative data are collected and referred to,[92] this dissertation essentially employs qualitative methods to answer the above-mentioned research questions. Qualitative methods of research, as opposed to quantitative methods, are often understood as consisting in the thick analysis of non-numerical data derived from a relatively small number of observations.[93] More specifically, the dissertation relies on two main kinds of primary sources of data: documents and interviews.

Documents include, first of all, the communications sent by NHRIs to the Committee of Ministers in relation to the execution of ECtHR judgments. These communications, which have rarely been even considered by scholars, are comprehensively analysed together with the replies from the CoE Member States concerned and the relevant decisions by the Committee of Ministers and assessments by the Department for the Execution of Judgments (Chapter 4 of the dissertation). Documents also include the annual and thematic reports, advisory opinions, decisions, training tools, press releases, and other records drafted by NHRIs in the exercise of their mandates (these materials are mainly examined in Chapter 5). Finally, the legal texts that have marked the evolution of the ECHR system, particularly as far as the machinery for the supervision of the execution of ECtHR judgments is concerned (Chapter 2), as well as the range of rules that govern the status, characteristics, functions and operation of NHRIs (Chapter 3), are considered.

The dissertation further relies on another kind of primary data – i.e., interviews with stakeholders. In-depth semi-structured interviews[94] were carried out with representatives from nine European NHRIs. Interviewees include representatives from institutions that have interacted with the

[92] For instance, concerning the number of NHRIs that submitted communications to the Committee of Ministers, the frequency of these communications, and the rate of replies to these communications by States and of references by CoE bodies (cf. Chapter 4 of the dissertation).

[93] David Collier, Jason Seawright, and Henry E. Brady, "Qualitative versus Quantitative: What Might This Distinction Mean?", *Qualitative Methods. Newsletter of the American Political Science Association Organized Section on Qualitative Methods* 1, no. 1 (2003): 4-8, which nonetheless problematises the distinction. Derived from the social sciences, qualitative methods of research have been usefully applied in empirical legal studies: Lisa Webley, "Qualitative Approaches to Empirical Legal Research", in Cane and Kritzer, *supra* n 80, 926-950.

[94] For a definition of this kind of interviews, cf. the entries "In-Depth Interview" and "Semi-Structured Interview" in Lisa M. Given, ed., *The SAGE Encyclopedia of Qualitative Research Methods*, Volumes 1 & 2 (Los Angeles: SAGE, 2008), 422-423 and 810-811.

Committee of Ministers and the Department for Execution in monitoring the execution of ECtHR judgments as well as from institutions that have not done so thus far but might have carried out other activities for assisting in the execution process in their own countries. Respondents belong to geographically diverse institutions, institutions with different model mandates (consultative commissions, commissions with a protection mandate, human rights ombudsmen, and classical ombudsmen; on this classification, cf. *infra* Chapter 3), and institutions that have been accredited with different international statuses (on which also cf. *infra* Chapter 3). Interviewees were normally indicated by their respective home institutions as the most competent in relation to the institutions' activities in the promotion of the execution of ECtHR judgments.

Interviews were based on two sets of mainly open-ended questions – one for NHRIs that have interacted with the relevant CoE bodies and another one for NHRIs that have not to date participated in the procedure. While the initial sets of questions were relatively homogeneous, interviewees were given considerable freedom to elaborate their responses and highlight the aspects that they believed to be more significant. Follow-up questions (probes) were thus asked that vary from one interview to another. Depending on geographical accessibility and the preferences expressed by respondents, in-person, phone, Skype or email interviews were carried out.

While interviews have been conceived as supplementary to the primarily documentary analysis, they are nonetheless critical to shed light on aspects that would hardly emerge from documents – such as the reasons behind the decision of an NHRI to intervene or not to intervene in a case, the usefulness and effectiveness of the procedures as perceived by NHRIs, and any obstacles that these institutions have found in participating in the procedures. In addition to the above-mentioned primary sources, an array of secondary sources (i.e., scholarly works) have been relied on, especially as far as the general features of the ECHR system and of NHRIs are concerned.

1.5. Structure of the dissertation

Chapter 1 has provided the necessary preliminary information on the relevance of the full and prompt execution of ECtHR judgments for the sustainability of the ECHR system and, in turn, on the (potential) relevance of NHRIs for the execution of ECtHR judgments. The chapter has also illustrated what are the broad theoretical and practical aims that guide this dissertation, the specific questions that the dissertation sets out to answer and how it intends to provide such answers.

Chapters 2 and 3 fill the background outlined in Chapter 1 and lay the foundations for the subsequent essentially empirical chapters. Chapter 2 describes the evolution of the CoE machinery for the supervision of the execution of ECtHR judgments – an area which has attracted less scholarly attention than the adoption of Protocols to the ECHR and the much-publicised High-level Conferences for the future of the Convention, but which has a considerable impact on the day-to-day practice of the execution of judgments and its oversight. This machinery, which is centred around the intergovernmental Committee of Ministers, has undergone significant changes in the direction of enhanced transparency and greater participation of actors other than States Parties and the Committee. In this context, the adoption in 2006 of a specific rule allowing for the submission of communications by NHRIs, as well as by NGOs, in relation to the execution of ECtHR judgments is particularly noteworthy for the purposes of this dissertation.

Complementarily, Chapter 3 examines in depth the composition, functions, and operation of NHRIs, as well as the relationship between these institutions and international organisations, with which NHRIs are expected to cooperate especially with a view to promoting the domestic implementation of international standards and decisions. The chapter shows how NHRIs have developed strong ties with multiple UN human rights bodies, which have gradually acknowledged a more prominent role for NHRIs within their procedures. The interactions between NHRIs and the CoE have not yet reached comparable proportions but are growing; nonetheless, they have rarely been institutionalised, with the significant exception of the role that has now been assigned to NHRIs in relation to the execution of ECtHR judgments.

Chapters 4 and 5 systematically collect and analyse data on the activities carried out by NHRIs to promote the execution of ECtHR judgments. Chapter 4 provides a comprehensive examination of all thirty-three communications submitted so far by NHRIs to the Committee of Ministers with respect to the execution of ECtHR judgments delivered against their home countries. The chapter identifies and analyses the authors, rate, content, and impact of these communications. Chapter 5, on the other hand, systematises the activities that NHRIs have undertaken and can undertake at the domestic level, within their well-established national competences, to further the execution of judgments. Due to their extensiveness and to issues of accessibility, these activities are examined systematically but not comprehensively,[95] and examples derived from the practice of different NHRIs are given for each activity.

Chapter 6 evaluates the empirical data presented in Chapters 4 and 5 and draws conclusions on the current level of engagement by NHRIs in the promotion of the execution of ECtHR judgments, on the untapped potential of this engagement, and on the factors that currently hinder greater participation and influence by NHRIs in the process.

[95] That is, while Chapter 4 examines all (available) communications submitted by NHRIs to the Committee of Ministers (comprehensive analysis), Chapter 5 does not (and could not) report on all the activities ever undertaken by all European NHRIs in the area of the promotion of the execution of ECtHR judgments. Instead, the chapter offers a systematic typology of these activities and give concrete examples for each of the types identified. A comprehensive examination of all national activities of NHRIs in the area would not be feasible, *inter alia,* in light of time and linguistic constraints; for further considerations on this point, cf. Chapter 5.

CHAPTER 2. SUPERVISING THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS: MULTIPLE ACTORS AT WORK

It has long been maintained by both CoE bodies and scholars that States almost invariably and rather promptly comply with the judgments delivered against them by the ECtHR and that the system of supervision of the execution, centred around the Committee of Ministers, is thus efficient and does not need to be substantially reformed.[1] This is notwithstanding the apparent paradox that the execution of judgments by the respondent States is monitored by the representatives from other States which have been reprimanded, and will likely be reprimanded again, by the Court for violations of the Convention.[2] Indeed, Protocol no. 11, which considerably innovated the Convention's system, left untouched the primary responsibility of the Committee of Ministers for the supervision of the

[1] Cf., among institutional actors, CoE Steering Committee for Human Rights, *Opinion of the CDDH concerning Recommendation 1477 (2000) of the Parliamentary Assembly on the execution of judgments of the European Court of Human Rights*, 52nd meeting, 9 November 2001, CDDH (2001) 35, Appendix IV; Parliamentary Assembly of the Council of Europe – Committee on Legal Affairs and Human Rights, *Execution of judgments of the European Court of Human Rights – Report*, 12 July 2000, Doc. 8808, Appendix II, "Letter of 28 March 2000 from the Mr Luzius Wildhaber, President of the European Court of Human Rights, to Mr Gunnar Jansson, Chairperson of the Committee on Legal Affairs and Human Rights"; Linos-Alexander Sicilianos, "From the point of view of the Court: its role in the implementation of its judgments, powers and limits", in *Dialogue between judges. Proceedings of the Seminar 31 January 2014: "Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?"*, ed. CoE/ECtHR (Strasbourg: ECtHR, 2014), 18.
In the literature, among others, Rolv Ryssdal, "European Court of Human Rights: The Enforcement System set up under the European Convention on Human Rights", in *Compliance with Judgments of International Courts: Proceedings of the Symposium Organized in Honour of Professor Henry G. Schermers by Mordenate College and the Department of International Public Law of Leiden University*, eds. Mielle Karen Bulterman and Martin Kuijer (The Hague: Martinus Nijhoff, 1996), 55 and 67; Laurence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication", *Yale Law Journal* 107, no. 2 (1997-1998): 296; and, more recently, Elisabeth Lambert Abdelgawad, *The execution of judgments of the European Court of Human Rights. Human Rights Files no. 19*, 2nd ed. (Strasbourg: Council of Europe Publishing, 2008), 64 *et seqq*. and 71 *et seqq*. For the opposing view: Christian Tomuschat, "Quo Vadis, Argentoratum? The Success Story of the European Convention on Human Rights – and a Few Dark Stains", *Human Rights Law Journal* 13, nos. 11-12 (1992): 401-406.

[2] Basak Çalı and Anne Koch, "Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe", *Human Rights Law Review* 14 (2014): 301-325. Cf. also Peter Leuprecht, "The Protection of Human Rights by Political Bodies – The Example of the Committee of Ministers of the Council of Europe", in *Fortschritt im Bewußtsein der Grund- und Menschenrechte: Festschrift für Felix Ermacora*, eds. Manfred Nowak, Dorothea Steurer, and Hannes Tretter (Kehl am Rhein: Engel, 1988), which, while critical over various aspects of the Committee of Ministers' activities, affirms that "although the task of supervision under Article 54 [now Article 46(2) ECHR] is legal in character, there is some logic in its being entrusted to the supreme political authority of the Council of Europe which under the Statute also has the power to suspend or expel a member State from the Organisation" (105-106).

execution of ECtHR judgments (whereas it eliminated the quasi-judicial competence of the Committee under former Article 32 ECHR).

The narrative about the effectiveness of the supervision system has, however, started to change more recently, in the face of an increasing number of cases of delayed execution and even open refusal by CoE Member States to give effect to ECtHR judgments. While radical proposals to renovate the backbone of the supervision system have been rejected, the ongoing debate on the reform of the Convention's system has brought about considerable changes, even though these were often not included in Protocols and were thus paid relatively little attention.

Broadly speaking, these modifications can be categorised into two groups: amendments to the procedures and practice of the Committee of Ministers; and increasing participation by CoE actors other than the Committee in the supervision of the execution of judgments, coupled with enhanced cooperation with domestic authorities such as national parliaments and courts. These innovations are intertwined and mutually reinforcing, as they share the aim to strengthen the supervision process by making it more transparent, independent, participatory, and thus – ultimately – more effective. Some of the efforts in this direction remained declarations or recommendations; few of them took the form of amendments to the Convention; while many more arose from the practice of CoE bodies and were at times crystallised in the bodies' rules of procedures or working methods.

After framing the challenges posed by the growing delays and failures in the execution of ECtHR judgments, this chapter analyses the changes undergone by the supervision system to remedy these phenomena. Particular attention is paid to the role that has been undertaken by actors other than the Committee of Ministers in the oversight of execution, thereby setting the framework in which NHRIs could operate to monitor and facilitate the execution of judgments.

2.1. Non-execution and delayed execution of judgments: challenges and proposed remedies

Notwithstanding the above-mentioned prevailing view that the supervision system performed its task most suitably, CoE bodies such as the Parliamentary Assembly and the Commissioner for

Human Rights highlighted on several occasions their concerns regarding the unsatisfactory execution of ECtHR judgments and the consequent risks for the tenability of the ECHR system.

In a well-known report issued in 2000, the Parliamentary Assembly identified seven reasons that might prevent the full and prompt execution of ECtHR judgments, including political reasons, the breadth of the domestic reforms required, difficulties with national procedures, budgetary reasons, the opposition of the public opinion, lack of clarity on the part of the ECtHR, and conflicts with other obligations (particularly those deriving from membership in the EU).[3] Since then, the Assembly has published various reports focusing on those cases that are taking longer to be executed or otherwise raise important issues.[4]

Interestingly, while the 2000 report found that instances of non-execution caused by political reasons were "the least frequent type",[5] in 2017 the Rapporteur for the Assembly put emphasis on his intention, unlike his predecessors, to also deal with instances of non-execution of judgments due to political opposition, thus signalling their growth over the years.[6]

Moreover, the Commissioner for Human Rights has recently sounded the alarm with regard to the tendency of some countries to more fundamentally put into question the authority of the Court and their obligation to align their legal orders with the Court's judgments.[7] The Commissioner mentioned, as examples of this category, a law passed in the Russian Federation allowing the Constitutional Court to declare ECtHR judgments unconstitutional and therefore inapplicable; a similar proposal in Azerbaijan; an envisaged referendum in Switzerland on the basis of which national law would take precedence over international law, including ECtHR judgments; and the proposal to repeal the Human Rights Act in the United Kingdom.[8] The cross-party attacks in Denmark on the

[3] Parliamentary Assembly, *supra* n 1, Section III.C.2.
[4] Cf. Section 2.4 of this dissertation *infra*.
[5] Parliamentary Assembly, *supra* n 1, Section III, para. 39.
[6] Parliamentary Assembly – Committee on Legal Affairs and Human Rights (Rapporteur: Mr Pierre-Yves Le Borgn'), *The implementation of judgments of the European Court of Human Rights – Report*, 12 June 2017, Doc. 14340, paras. 26 *et seqq*. in particular.
[7] CoE Commissioner for Human Rights, "Non-implementation of the Court's judgments: our shared responsibility", *Human rights comment*, 23 August 2016, accessed 4 January 2019, https://www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility.
[8] Ibid.

ECtHR case-law concerning the expulsion of migrants could also be added to this list;[9] moreover, from a different perspective, some national supreme courts have shown at times a certain reluctance to conform to the rulings adopted by the ECtHR in the event of a potential conflict with the provisions of national constitutions.[10]

The fact remains that most of these threats have been displaced and that instances of outright rejection of ECtHR judgments are a minority (although on the rise);[11] however, delayed execution due to the technical, financial, and political complexity of the national reforms needed is a cause for great concern, as it results in the Committee of Ministers being unable to swiftly process cases, the Court being meanwhile overwhelmed with repetitive applications stemming from the failure to solve the domestic issues raised by previous judgments, and the credibility of both these bodies being threatened.

Increasing awareness of these problems has been shown by other CoE bodies, including the Committee of Ministers itself, which however rejected the most substantial proposals for reform which were put forward, such as the introduction of fines for delays in the execution of judgments and the addition of a quasi-judicial or otherwise independent expert body supporting the Committee of Ministers in its monitoring tasks.[12]

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[9] Jacques Hartmann, "A Danish Crusade for the Reform of the European Court of Human Rights", *EJIL: Talk!*, 14 November 2017, accessed 4 January 2019, https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/.

[10] Paulo Pinto de Albuquerque, "Réflexions sur le renforcement de l'obligation d'exécution des arrêts de la Cour européenne des droits de l'Homme", in *La Cour européenne des droits de l'homme. Une confiance necessaire pour une autorité renforcée*, ed. Sébastien Touzé (Paris: Pedone 2016), 217-218, refers to the German, Russian, and Italian Constitutional Courts in particular. For an examination of the legal underpinnings and consequences of the principle of "conditional execution" (i.e., of the primacy of national constitutions over ECtHR judgments), Sébastien Touzé, "Regard critique sur l'exécution conditionnelle des arrêts de la Cour européenne des droits de l'homme", in *Reciprocité et universalité: sources et régimes du droit international des droits de l'homme. Mélanges en l'honneur du professeur Emmanuel Decaux* (Paris: Pedone, 2017), 761-777. For a thorough comparative study of the criticism levelled at the ECtHR by politicians, judges, academics, and media from several CoE Member States, cf. Patricia Popelier, Sarah Lambrecht, and Koen Lemmens, eds., *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Cambridge: Intersentia, 2016).

[11] Jean-François Flauss, "L'effectivité des arrêts de la Cour Européenne des Droits de l'Homme: Du politique au juridique ou vice-versa", *Revue trimestrielle des droits de l'homme* 77 (2009): 28, according to which "certes, statistiquement, le nombre des hypotheses d'inexécution augmente. Pour autant, si la situation est devenue préoccupante, elle n'est pas encore alarmante. A vrai dire, l'effectivité des arrêts est surtout fragilisée par les retards d'exécution. Or ceux-ci sont loin d'être tous imputables à une inertie déliberée des Etats défendeurs". Cf. also Lambert Abdelgawad, *supra* n 1.

[12] On the proposals mentioned, cf. below in this chapter for more details. Cf. also Committee of Ministers, *Execution of the judgments of the European Court of Human Rights. Reply to Parliamentary Assembly Recommendation 1477 (2000)*, 779th meeting of the Ministers' Deputies, 9 January 2002, where the Committee both declared that it "attaches very great

At first sight, the only momentous change undergone by the supervision system is the prerogative, introduced by Protocol no. 14, of the Committee of Ministers to refer cases back to the Court in the case of persistent non-execution of judgments by States Parties or difficulties in the execution due to interpretive issues. As it will be shown in Section 2.3 *infra*, however, these instruments have been very seldom used, so that they have not been decisive to date.

All latest High-level Conferences on the reform of the Convention's system (starting from the Interlaken Conference), and the lack therein of any ground-breaking innovation concerning the system of supervision of the execution of judgments, show that States Parties do not intend to make any profound change to the monitoring system, at least in the short term. The Brighton Declaration merely invited the Committee of Ministers "to consider whether more effective measures are needed in respect of States that fail to implement judgments of the Court in a timely manner", without any further specification.[13] No mention was made of financial sanctions. As regards the possibility to introduce some form of technical assistance, the Brussels Declaration even explicitly "reaffirm[ed] the intergovernmental nature of the process",[14] so that any delegation of powers to a quasi-judicial body was excluded. More generally, the Committee of Ministers was invited to "continue to use, in a graduated manner, all the tools at its disposal",[15] without thus providing it with new instruments.

Is this evidence of a reckless disregard by CoE Member States for the phenomenon of non-execution of ECtHR judgments? Some observations are in order. Firstly, as mentioned,

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importance to full and diligent execution of Court judgments in performing its functions" and essentially opposed all of the most innovative proposals made by the Parliamentary Assembly. It should be noted that the Committee of Ministers relied, in doing so, on an opinion by the Steering Committee for Human Rights, *supra* n 1, and that the Evaluation Group, composed of the President of the Court, the Deputy Secretary General of the CoE and the Permanent Representative of Ireland, did not endorse these proposals either (CoE/Evaluation Group, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, 27 September 2001, EG Court (2001)1, paras. 48 *et seqq*.).
A growing literature has also been focusing on the problems relating to the execution of judgments: cf., among others, Marinella Marmo, "The Execution of Judgments of the European Court of Human Rights – A Political Battle", *Maastricht Journal of European and Comparative Law* 15, no. 2 (2008): 235-258; and Ed Bates, "Supervising the Execution of Judgments Delivered by the European Court of Human Rights: The Challenges Facing the Committee of Ministers", in *European Court of Human Rights Remedies and Execution of Judgments,* eds. Theodora Christou and Juan Pablo Raymond (London: British Institute of International and Comparative Law, 2005), 49-106.

[13] High-level Conference on the Future of the European Court of Human Rights, *Brighton Declaration*, 20 April 2012, para. 29.d).

[14] High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", *Brussels Declaration*, 27 March 2015, para. C.1.d).

[15] Ibid., para. C.1.a).

notwithstanding the worrying growth of cases of prolonged non-execution, the execution rate of ECtHR judgments remains satisfactory. Secondly, again as noted, the majority of cases of non-compliance appear to have hitherto arisen from the complexity and cost of the measures required to fully put the violations right, and not from the open refusal by the respondent States to execute the judgments; in these instances, a cooperative approach might be preferable.[16] Thirdly, less-heralded but significant amendments have been made to the supervision system over the years, which have begun to transform the control exercised over the execution of ECtHR judgments.

Indeed, in the system set up by the Convention, the supervision of the execution of judgments delivered by the Court is assigned to the Committee of Ministers – i.e., to the intergovernmental decision-making body of the CoE. Article 46(2) of the Convention reads: "The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution".[17] Notwithstanding the apparently clear-cut wording of this provision, the practice has evolved so that

[16] Cf. European Commission for Democracy through Law (Venice Commission), *Opinion on the Implementation of the Judgments of the European Court of Human Rights,* 53rd plenary session, 18 December 2002, Opinion No. 209/2002, CDL-AD (2002) 34, para. 82. The Commission noted that "while [the penalty-imposing system] might be useful in those cases where the State in question has not abided by a judgment out of either a clear political decision or lack of political will, or possibly in cases where reasons of public opinion block the State's execution, it is more questionable whether the Committee of Ministers would have recourse to it in those cases, which are by far more numerous, where the non-enforcement depends on other factors, such as problems or delays relating to the internal democratic processes and procedures, or in cases where a beginning of execution has taken place but it is doubtful whether it is adequate or sufficient, or in cases where the delay is caused by the lack of financial means". This objection had also been raised, in similar terms, by the Steering Committee for Human Rights, *supra* n 1, para. 9, and by the Evaluation Group, *supra* n 12, para. 49.
Other reasons that led the Venice Commission to reject the proposal for *astreintes* include the increasing workload for the Court (para. 84 of the Opinion) and the fact that the measure "would introduce a notion of 'punishment' which does not, at present, exist in the Convention system" (para. 80). Cf. also Luzius Wildhaber, "A Constitutional Future for the European Court of Human Rights?", *Human Rights Law Journal* 23 (2002): 164, according to which, as regards execution, "the emphasis [should be] not only on the pressure to be exerted on the respondent State, but also where appropriate the necessary assistance to deal with the problem raised by the judgment".
[17] This provision marks the difference between the European human rights system and the Inter-American one: in the absence of a body specifically tasked, under the American Convention on Human Rights, with overseeing the execution of judgments delivered by the Inter-American Court, the Court itself has taken over the role of supervisor. Cf. on the point Antônio Augusto Cançado Trindade, "Compliance with judgments and decisions – The experience of the Inter-American Court of Human Rights: a reassessment", in CoE/ECtHR, *supra* n 1, 10-17; and Dinah Shelton, "Enforcement of Judgments", in *Remedies in International Human Rights Law,* 2nd ed. (Oxford: Oxford University Press, 2006), 380-388. Cf. also, on the progressive convergence of the two systems towards a mixed (judicial and political) model: Elisabeth Lambert Abdelgawad, "L'exécution des décisions des juridictions internationales des droits de l'homme: vers une harmonisation des systèmes régionaux", *Anuario Colombiano de Derecho Internacional* 3 Especial (2010): 9-55.

it is now widely recognised and accepted that other actors as well play a role in the supervision process.[18]

First of all, the Court is involved in the execution of its own judgments, insofar as it increasingly recommends or prescribes the adoption of specific individual and general measures to the respondent States. While initially questioned, this practice is by now well-established and its legal basis has been strengthened. Additionally, Protocol no. 14 to the ECHR vested the Court with new powers in the post-judgment phase: on referral by the Committee of Ministers, the Court can clarify the interpretation of a final judgment that it previously gave, or rule whether a State Party has failed to abide by a final judgment.

Furthermore, as mentioned, the Parliamentary Assembly has sought to participate to a greater extent in the supervision process, particularly where structural issues and significant delays are concerned. Thereby a layer of political (and more democratic) control has been added. Additionally, other CoE actors have gradually gained a more prominent role in the supervision of execution process: this is the case for the CoE Commissioner for Human Rights and, especially, for the Department for the Execution of Judgments of the ECtHR.

Therefore, while the Committee of Ministers retains, in accordance with the Convention, the primary responsibility for overseeing the execution of the Court's judgments, a multiplicity of CoE bodies currently support the Committee in carrying out this task. They do so, *inter alia*, by increasingly interacting with relevant national actors. It is argued here that this shift has had an impact on (and was in turn influenced by) the procedures on the basis of which the Committee of Ministers

[18] Cf., among the various commentators that highlighted this general trend: Elisabeth Lambert Abdelgawad, "The Execution of the Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 69 (2009): 471-491; and Fredrik Sundberg, "Le contrôle de l'exécution des arrêts de la Cour européenne des droits de l'homme", in *Libertés, justice, tolerance. Mélanges en hommage du Doyen Gérard Cohen-Jonathan*, vol. II, ed. Georges Wiederkehr (Bruxelles: Bruylant, 2004), 1519 *et seqq*. For a critical appraisal, see Flauss, *supra* n 11, 27-72, which warns against the risks of overlapping competences among CoE bodies and calls for greater clarity in the allocation of roles in the supervision of execution process (72 in particular).
The finding that the Committee of Ministers does not retain the sole prerogative to oversee the execution of the Court's judgments is shared by the Committee itself: as it will be shown, the Committee has explicitly recognised the role of both the Court and the Parliamentary Assembly in this area, and so have done all the latest High-level Conferences on the reform of the ECHR system (cf. Sections 2.3 and 2.4 *infra* for details).

itself performs its supervisory duties – procedures whose transparency and, to a certain degree, independence have been strengthened. The following sections analyse in detail how the Committee of Ministers has reshaped its approach in the supervision of the execution of judgments and how other actors have come to complement the actions of the Committee in this area.

2.2. States supervising States: the role of the Committee of Ministers

The Committee of Ministers is composed of the ministers for foreign affairs or the permanent diplomatic representatives of all CoE Member States. In fact, the day-to-day business of the Committee is performed by the permanent representatives, whereas the ministers only meet twice a year.[19] The Committee is broadly mandated under the CoE Statute to "consider the action required to further the aim of the Council of Europe", and it does so through a range of instruments.[20] In addition to this overarching role, the Committee has been vested with specific functions within the Convention's system.

Until the entry into force on 1 November 1998 of Protocol no. 11, which removed the filter of the European Commission of Human Rights and made the jurisdiction of the Court obligatory for all States Parties to the Convention, the Committee of Ministers used to receive reports from the Commission including the latter's opinion on whether a violation of the rights protected by the ECHR had taken place.

If the case was not referred to the Court (because the Commission had decided not to do so, or because the respondent State had not accepted the compulsory jurisdiction of the Court nor consented to be subject to it on an *ad hoc* basis), the Committee would decide by a two-thirds majority[21] on the

[19] Caroline Ravaud, "The Committee of Ministers", in *The European System for the Protection of Human Rights*, eds. Ronald St. John Macdonald, Franz Matscher, and Herbert Petzold (Dordrecht; Boston: Martinus Nijhoff, 1993), 648.
[20] CoE, *Statute of the Council of Europe*, 5 May 1949, European Treaty Series No. 1, Article 15. For an overview of the composition, functions, and procedures of the Committee, cf. Ravaud, *supra* n 19, 645-656; and Yvonne S. Klerk, "Supervision of the Execution of the Judgments of the European Court of Human Rights: The Committee of Ministers' role under Article 54 of the European Convention on Human Rights", *Netherlands International Law Review* 45 (1998): 66-68.
[21] The required majority has not always been reached by the Committee, giving rise to worrisome instances of "non-decision". Various solutions were sought, such as the amendment of the Rules for the application of Article 32 and the drafting of Protocol no. 10, which would have introduced a simple majority rule. The issue was overcome by the entry

occurrence of a Convention's breach and, if a breach was found, it would "prescribe a period during which the Contracting Party concerned must take the measures required by the decision" (Article 32 of the original version of the Convention).

The Committee of Ministers thus performed a function comparable to that of the Court by deciding with binding effects on the existence of a Convention's violation, even though the Committee mostly endorsed the decisions by the Commission[22] and for a long time refused to award just satisfaction to applicants.[23] At any rate, this power of the Committee ceased to exist following the entry into force of Protocol no. 11, according to which all individuals have the right to petition the Court directly and to obtain from it a final judgment with biding effects (if their applications comply with the admissibility requirements set forth in the Convention).

On the contrary, the prerogatives of the Committee of Ministers as regards the supervision of the execution of judgments of the Court have been maintained unchanged. These powers were originally enshrined in Article 54 of the 1950 version of the Convention and were replicated almost identically in the new Article 46(2), according to which "the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution".[24]

The Convention being particularly concise if not obscure on the scope and implications of this supervisory activity,[25] the Committee of Ministers has developed its own practice and over time drawn up and amended its rules of procedure for the application of Article 46 (and, before, of Article

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into force of Protocol no. 11, which removed the competences of the Committee of Ministers under Article 32. Cf. Ravaud, *supra* n 19, 652-653, and Leuprecht, *supra* n 2, 102-103.

[22] J. G. Merrills and A. H. Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights,* 4th ed. (Manchester: Manchester University Press, 2001), 293-295; and Adam Tomkins, "The Committee of Ministers: Its Roles under the European Convention on Human Rights", *European Human Rights Law Review* (1995): 49-62.

[23] The Committee even adopted a rule by which it recognised that, when a violation was found, it could only "give advice or make suggestions or recommendations to the State concerned" and that "such advice, suggestions or recommendations … would not be binding on the government to which they are addressed" (Rule 5 of the *Rules adopted by the Committee of Ministers for the application of Article 32*). Cf. Leuprecht, "The Execution of Judgments and Decisions", in St. John Macdonald, Matscher, and Petzold, *supra* n 19, 795-796.

[24] Article 54 of the 1950 version of the Convention read: "The judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution".

[25] Or, as put by one scholar, "surprisingly succinct": Hans-Jürgen Bartsch, "The supervisory functions of the Committee of Ministers under Article 54 – a postscript to Luedicke-Belkacem-Koç", in *Protecting human rights: the European dimension – Studies in honour of Gérard J. Wiarda,* eds. Franz Matscher, Herbert Petzold, and Gérard J. Wiarda (Köln: Heymanns, 1988), 47.

54). The latest *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements* date back to 2006 (although they have subsequently been amended), and while their most innovative aspects will be analysed further below, it is worth sketching here the general characteristics of the supervision process as it emerges from these Rules.

All judgments by the Court establishing violations of the Convention's obligations by States Parties, as well as all decisions striking cases out of the Court's list because friendly settlements have been reached, are transmitted to the Committee of Ministers and put on the agenda of its special Human Rights meetings, which normally take place every three months (that is, four times per year).[26] For their part, respondent governments are under the obligation to communicate to the Committee any measures that they have already adopted or plan to adopt with a view to giving effect to the Court's judgments, as well as "to inform it on the execution of the terms of the friendly settlement[s]".[27]

While in the case of friendly settlements the Committee of Ministers confines itself to verifying the actual implementation of the terms of the settlements, its role with respect to judgments finding violations is more extensive and has grown over the years. Indeed, the Committee – which, it should be reminded, is composed of government representatives – was initially reluctant to interfere in the execution process as conducted by the respondent States, and it resolved to simply "[take] note of the information" provided by the governments concerned.[28]

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[26] Committee of Ministers, *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*, 964th meeting of the Ministers' Deputies, 10 May 2006, Rules 2 and 3. For a list of the Human Rights meetings of the Committee and the related documents, cf. "The Committee of Ministers' Human Rights meetings", CoE/Department for the Execution of Judgments, accessed 4 January 2019, http://www.coe.int/en/web/execution/committee-of-ministers-human-rights-meetings.

[27] Committee of Ministers, *supra* n 26, Rules 6 and 12.

[28] Rule 3 of the *Rules concerning the application of Article 54 of the European Convention on Human Rights*. The text of the Rules can be found in Committee of Ministers, *Committee of Experts on Human Rights. 44th Meeting (Rome, 10-14 November 1975). Report*, 12 January 1976, CM(76)12, Appendix I; the Rules were adopted by the Committee of Ministers in February 1976 (Committee of Ministers, *Conclusions of the 254th Meeting of the Ministers' Deputies Held in Strasbourg from 9 to 18 February 1976*, CM/Del/Concl(76)254. Cf. also Bartsch, *supra* n 25, 49-50, and Klerk, *supra* n 20, 73-80. Nonetheless, there have been notable exceptions to this general attitude: cf. *Luedicke, Belkacem and Koç v. Germany*, nos. 6210/73, 6877/75, and 7132/75, 28 November 1978, and the subsequent judgment on just satisfaction, 10 March 1980, analysed in Bartsch, *supra* n 25, 50 *et seqq*. In that instance, the Committee of Ministers explicitly based its resolution closing the case on the legislation adopted by the German Government, even though the Government had not referred to it.

However, it was soon clear that such a control would be essentially useless if interpreted in the sense that the Committee of Ministers could not in any way examine the appropriateness of the measures proposed or taken by States to remedy violations. Therefore, even before the Rules were amended to remove the above-mentioned wording,[29] the Committee started to exercise an increasingly effective scrutiny over the measures put forward by States,[30] while maintaining that the obligation to abide by a final judgment of the Court is an obligation of result, and States therefore enjoy a certain discretion as to the means to execute the judgments.[31]

This practice has been consolidated in the current Rules, which describe in greater detail the prerogatives of the Committee of Ministers in overseeing the execution of judgments. In essence, the Committee shall not only verify (when relevant) that the respondent State has paid the damages awarded by the Court, but also *examine* whether additional individual or general measures have been adopted by the State that are able to put an end to the violation ascertained, reinstate the injured party in her previous situation as far as possible (the so-called *restitutio in integrum*), and prevent future similar violations (Rule 6).

These three obligations are widely recognised as flowing from any internationally wrongful act committed by a State.[32] In the ECHR system, the undertaking of the States Parties to "secure to

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[29] By means of the *Rules adopted by the Committee of Ministers for the application of Article 46, paragraph 2, of the European Convention on Human Rights*, 736th meeting of the Ministers' Deputies, 10 January 2001.

[30] Cf. Flauss, *supra* n 11, 31 *et seqq*. Cf. also Jean-François Flauss, "La pratique du Comité des Ministres du Conseil de l'Europe au titre de l'article 54 de la Convention européenne des Droits de l'Homme (1985-1988)", *Annuaire français de droit international* 34 (1988): 419-420, which underlines the control exercised by the Directorate General Human Rights and Rule of Law.

[31] ECtHR, *Papamichalopoulos and others v. Greece* (Article 50), no. 14556/89, 31 October 1995, para 34: "This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1)".

[32] Cf. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1. While they were never transposed into a treaty, the majority of these provisions are considered to reflect international customary law. The Articles state that internationally wrongful acts entail the international responsibility of States which commit them (Article 1), and that this responsibility has *legal* consequences. These consequences include the obligations to "cease that act, if it is continuing" (Article 30); "offer appropriate assurances and guarantees of non-repetition, if circumstances so require" (Article 30); and "make full reparation for the injury caused by the internationally wrongful act" (Article 31).
The ECtHR clearly has this model in mind when it states, using a recurring formula, that "a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach" (*Papamichalopoulos and others v. Greece*, *supra* n 31, para. 34). In the literature, cf. Jörg Polakiewicz, "The Execution of Judgments of the European Court of Human Rights", in *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000*, eds. Robert Blackburn and Jörg Polakiewicz (Oxford: Oxford University Press, 2001), 55-

everyone within their jurisdiction the rights and freedoms" enshrined in the Convention is explicitly laid down in Article 1 of the Convention itself and triggers the States' international responsibility in case of violation of the said rights and freedoms. It is therefore natural that a meaningful supervision of the execution of judgments establishing the responsibility of States for internationally wrongful acts should imply the actual examination of the measures adopted by the States concerned in light of this tripartite duty.

It could therefore be argued that the importance of the evolution, within the Committee of Ministers, from "taking note of" to "examining" States' measures should not be overestimated – also considering that the Committee mainly bases its evaluations on the information provided by governments, that these evaluations are not immune from political considerations (even though the supervisory activity of the Committee should be legal in nature),[33] and that considerable discretion is allowed to States in the choice of means to comply with the ECtHR judgments. Nonetheless, the current situation represents a significant step forward from the original model of supervision, especially since the 2006 Rules and the ever-evolving practice of the Committee introduced other considerable changes.

The innovations brought in the last decade to the supervision of execution process are numerous and varied.[34] With a view to simplifying and identifying some common threads running through these reforms, I would argue that changes have been effected along three main lines: a closer scrutiny by the Committee of Ministers over the measures adopted by States and the erosion of States' freedom in the choice of means; an increasing publicity and openness of the proceedings before the

65; Valerio Colandrea, "On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdovic Cases", *Human Rights Law Review* 7, no. 2 (2007): 396-411; and Lambert Abdelgawad, *supra* n 1, 10-12.

[33] Cf. in this sense Bartsch, *supra* n 25, 54; Leuprecht, *supra* n 2, 105-106; and Philip Leach, "On Reform of the European Court of Human Rights", *European Human Rights Law Review*, no. 6 (2009): 732. For a different view, cf. Flauss, *supra* n 11, 29 *et seqq*.

[34] For an overview of several of these innovations, but only up to the end of 2008, cf. various contributions in Philippe Boillat et al., *Les mutations de l'activité du Comité des ministres* (Bruxelles: Nemesis, 2012).

Committee; and the participation of other CoE actors in the supervision process, in addition to greater cooperation with domestic bodies such as national parliaments and courts.

Reserving the following sections of this chapter for the last point, the two other developments are analysed here. First, as regards the degree of scrutiny exercised by the Committee of Ministers, not only does the Committee now actually assess the appropriateness of States' measures for giving effect to the Court's judgments, but it also increasingly recommends measures that, in its view, States should adopt in order to comply with their obligations. This approach applies in particular to those judgments that are put under "enhanced supervision", as opposed to "standard supervision", according to a distinction introduced by the Working Methods that entered into force in January 2011.[35]

The "enhanced supervision", which concerns categories of rulings including pilot judgments and other judgments "disclosing major structural and/or complex problems", ensures that the most significant cases are continuously and more closely followed by the Committee of Ministers, which can adopt a range of instruments – such as decisions and interim resolutions – to urge or direct the execution of judgments; this kind of supervision should also entail greater cooperation between the respondent States and the Department for the Execution of Judgments.[36]

Interim resolutions are designed to "provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution" (Rule 16 of the 2006 Rules). While these resolutions might be confined to the provision of information on the state of execution, they frequently suggest measures to be taken by States in

[35] Committee of Ministers/Department for the Execution of Judgments, *Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – Outstanding issues concerning the practical modalities of implementation of the new twin track supervision system*, Information documents, 7 December 2010, CM/lnf/DH(2010)45final. The decision by the Committee of Ministers to give effect to the new procedure was taken at the 1110th meeting of the Ministers' Deputies: Committee of Ministers, "Measures to improve the execution of the judgments of the European Court of Human Rights: Proposals for the implementation of the Interlaken Declaration and Action Plan", *Decisions adopted at the meeting*. *Item e*, 6 December 2010, CM/Del/Dec(2010)1100. By this decision, the Deputies approved the proposals put forward by the Secretariat in two documents (CM/Inf/DH(2010)45 and CM/Inf/DH(2010)37), and "decided to implement the new, twin-track supervision system with effect from 1 January 2011".

[36] Committee of Ministers/Department for Execution, *supra* n 35, paras. 16-17.

order to fully abide by judgments. These indications can then be accompanied either by praise for the progress achieved by the respondent State or (more rarely) by condemnation and "threats" for the persistent inaction of the State.[37] Through interim resolutions, the Committee of Ministers aims to put pressure on the State concerned, or anyway to remind the State that it is following the execution process closely, as well as to direct the government in the adoption of the most appropriate measures. Nonetheless, the efficacy of these resolutions has been put into question.[38]

As it will be shown in Section 2.4, the Department for the Execution of Judgments, which supports the Committee of Ministers in its supervisory task, through its memoranda also provides information on the state of execution of judgments and increasingly suggests measures with a view to guiding the States concerned, especially when structural reforms are at issue. Furthermore, the Department for Execution develops bilateral contacts with the governments concerned and organises thematic meetings on execution issues with representatives from all States Parties.[39]

Since the Committee of Ministers is careful not to impinge upon States' prerogatives in the choice of measures, these practices do not appear to have been openly opposed by governments. What has been the subject of more controversy is the parallel propensity of the Court to also recommend or even prescribe the measures that a State should/must take to remedy its violations, even though the Court lacks an explicit supervisory function under the Convention (except for the new circumscribed powers conferred on the Court by Protocol no. 14). This practice will be examined further in Section 2.3.

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[37] Lambert Abdelgawad uses the terms *résolutions d'encouragement* and *résolutions menaces* respectively: cf. Elisabeth Lambert Abdelgawad, "L'exécution des arrêts de la Cour européenne des droits de l'homme (2006)", *Revue trimestrielle des droits de l'homme* 71 (2007): 673 *et seqq*. On interim resolutions, cf. also Lambert Abdelgawad, *supra* n 18, 501-503.

[38] Cf. Elisabeth Lambert Abdelgawad, "L'exécution des arrêts de la Cour européenne des droits de l'homme (2009)", *Revue trimestrielle des droits de l'homme* 84 (2010): 804-805; and, from the same author, "L'exécution des arrêts de la Cour européenne des droits de l'homme (2010)", *Revue trimestrielle des droits de l'homme* 88 (2011): 951. In both works the author points to the apparent ineffectiveness of these resolutions, which have often remained a dead letter.

[39] To give an example, the Department organised, on 5 and 6 October 2015, a "Round Table on the Reopening of proceedings following a judgment of the European Court of Human Rights", which gathered representatives from almost all CoE Member States. For a list of the conferences held by the Department, including those concerning issues of execution, cf. "Conferences", Department for the Execution of Judgments, accessed 4 January 2019, https://www.coe.int/en/web/execution/conferences.

More broadly, the Committee of Ministers has been placing greater emphasis on the adoption of appropriate individual and general measures, thus going beyond its previous focus on the award of just satisfaction and embracing a more comprehensive concept of "execution". While general measures might consist in reforms of the legislation or changes to the case-law or administrative practice, individual measures specifically address the applicants by putting an end to the violations suffered by them and ensuring appropriate reparation. Individual measures are considerably varied and may range from the reopening of domestic judicial proceedings to the release of detained applicants, from the granting of resident permits to aliens illegally expelled to the opportunity for parties or religious groups to apply again to domestic authorities for registration.[40]

Moreover, the Committee of Ministers now usually adopts resolutions closing cases only when all measures deemed necessary have been enacted, and not simply put forward or promised by governments. It thus takes more for the Committee to "conclud[e] that its functions … have been exercised".[41] Since the enactment of the required general measures might take long, pending the realisation of complex reforms States are increasingly asked by the Committee to adopt provisional measures with a view to immediately putting a stop to continuing violations and preventing new similar violations from happening.[42]

Other instruments developed by the Committee of Ministers in order to be thoroughly and regularly informed on States' progress are action plans and action reports. These documents are drawn up by States and set forth the measures that States respectively intend to adopt or have already

[40] Examples of both general and individual measures recommended by the Committee can be found in all annual reviews compiled by Lambert Abdelgawad in *Revue trimestrielle des droits de l'homme* (e.g., *supra* nn 37 and 38). Cf. also Fredrik G.E. Sundberg, "Control of Execution of Decisions under the European Convention on Human Rights – A Perspective on Democratic Security, Inter-governmental Cooperation, Unification and Individual Justice in Europe", in *International Human Rights Monitoring Mechanisms – Essays in Honour of Jakob Th. Möller,* eds. Gudmundur Alfredsson et al., 2nd rev. ed. (Leiden; Boston: Martinus Nijhoff, 2009), 473-480; and Leo Zwaak, "The Supervisory Task of the Committee of Ministers", in *Theory and Practice of the European Convention on Human Rights*, eds. Pieter Van Dijk et al., 4th ed. (Antwerpen: Intersentia, 2006), 301-317.

[41] CoE Steering Committee for Human Rights, *Committee of Experts for the Improvement of Procedures for the Protection of Human Rights – Report*, 47th meeting, 12-14 April 2000, DH-PR (2000)006, para. 29. Cf. also Flauss, *supra* n 30, 420-421, according to which this shift in the practice of the Committee began to take place in the second half of the 1980s.

[42] Lambert Abdelgawad, *supra* n 37, 680.

adopted to give full execution to judgments. An action plan or report must be submitted by the government concerned ahead of the first meeting of the Committee of Ministers where the case is going to be discussed; further plans and reports are filed with the Committee until the latter is satisfied that the State has taken all the necessary measures and the supervision of the case can be closed.

The requirement to submit action plans and reports, which was introduced by the 2004 Working Methods of the Committee of Ministers[43] and subsequently reinforced through the clarification of its binding nature,[44] compels governments to clearly set out the actions that they intend to take and the timetable that they intend to follow, thus allowing the Committee of Ministers to ascertain the effective execution of judgments more easily and more objectively. These provisions add to the rules on "control intervals" (i.e., on the intervals at which a case and its relating measures are examined), which have been tightened over time.[45]

Finally, Protocol no. 14 has conferred upon the Committee of Ministers the potentially significant power to refer a case back to the Court, when it considers that a problem of interpretation or the respondent State's refusal impede the execution of a judgment (cf. new paragraphs 3, 4 and 5 of Article 46 ECHR). These provisions, which also clearly extend the competences of the Court with regard to the control over the execution of its own judgments (and will therefore be examined in

[43] Committee of Ministers, *Human rights working methods – Improved effectiveness of the Committee of Ministers' supervision of execution of judgments. Information document prepared under the responsibility of the Norwegian Delegation*, 7 April 2004, CM/Inf(2004)8-Final, Appendixes 2 and 3.

[44] Cf. Committee of Ministers/Department for Execution, *supra* n 35, para. 14: "the standard supervision procedure is based on the principle that member states provide an action plan or action report as soon as possible and in any case at the latest within six months from the date upon which the judgment became final".

[45] According to the 1976 Rules, as updated, "if the state concerned informs the Committee of Ministers that it is not yet in a position to inform it of the measures taken, the case shall be automatically inscribed on the agenda of a meeting of the Committee taking place not more than six months later, unless the Committee of Ministers decides otherwise". With the entry into force of the 2001 Rules, this provision only applies to general measures while, regarding just satisfaction and individual measures, it is established that "[u]ntil the State concerned has provided information on the payment of the just satisfaction awarded by the Court or concerning possible individual measures, the case shall be placed on the agenda of each human rights meeting of the Committee of Ministers, unless the Committee decides otherwise" (Rule 4(a), substantially replicated as Rule 7(1) in the current 2006 Rules). Committee of Ministers/Department for Execution, *supra* n 35, para. 4, has interpreted this Rule in the following terms: "as from [1 January 2011], all cases will be placed on the agenda of each DH meeting of the Deputies until the supervision of their execution is closed, unless the Committee were to decide otherwise in the light of the development of the execution process".

greater detail in the following section), give the Committee of Ministers a further means for exerting pressure on recalcitrant States.[46]

Overall, it can be argued that the Committee of Ministers has gradually intensified its scrutiny over the execution measures adopted by States: it now asks respondent governments for detailed plans of action including appropriate individual and general measures, follows the execution process closely, urges governments to take action when the implementation of measures is lagging behind, even strongly condemns States that appear unwilling to execute judgments, and recommends the adoption of specific measures. This is a considerable progress compared to the previous mere "taking note" of the measures presented by States.

This trend can be contrasted with the emphasis that has recently been placed on the principle of subsidiarity, starting from the Interlaken Conference (2010) and especially by means of the Brighton Declaration (2012);[47] reference to this concept and to States' margin of appreciation in implementing the ECHR rights will also be introduced in the preamble of the Convention by forthcoming Protocol no. 15, with the clear intention to reaffirm States' room for manoeuvre.[48] However, it does not seem that the accent put on subsidiarity has had a significant impact on the supervision of execution process, in the sense of a relaxation of the control performed by the Committee of Ministers.[49]

A second general innovation to the supervision system, which is of particular significance in relation to the participation by NHRIs in the process, is the recent trend of rendering the proceedings

[46] CoE, *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, 13 May 2004, Council of Europe Treaty Series – No. 19, paras. 98-100.
[47] *Brighton Declaration*, *supra* n 13. For further details on the principle of subsidiarity, cf. Section 1.1 of this dissertation, nn 39 and 49 in particular.
[48] CoE, *Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms*, 24 June 2013, Council of Europe Treaty Series – No. 213. Cf. also the Explanatory Report to this Protocol.
[49] These concerns had been raised, among others, by Elisabeth Lambert Abdelgawad, "L'exécution des arrêts de la Cour européenne des droits de l'homme (2011)", *Revue trimestrielle des droits de l'homme* 92 (2012): 885-886.

before the Committee of Ministers more open in a twofold sense. First of all, the publicity of the supervision process has been strengthened considerably.[50]

The 2001 Rules of Procedure already established that the agenda of the Committee's Human Rights meetings shall be public (Rule 1; Rule 2 in the current version of the Rules).[51] Those Rules also introduced an important provision concerning access to information, which essentially reversed the previous confidentiality rule by establishing that "information provided by the State to the Committee of Ministers in accordance with Article 46 of the Convention and the documents relating thereto shall be accessible to the public, unless the Committee decides otherwise in order to protect legitimate public or private interests" (Rule 5). The provision has essentially been retained in the new 2006 Rules (as Rule 8) and extended to the information provided by the injured party as well as by the other actors who are now allowed to submit information (see *infra*). It has also been explicitly extended to friendly settlements (Rule 15).

The 2006 Rules, currently in force, have pursued this path of publicity further by stipulating that the Committee of Ministers shall publish an annual report regarding its supervisory activities (Rule 5), as well as the annotated agenda (including information on progress in the execution of judgments) and decisions of its Human Rights meetings ("unless the Committee decides otherwise": Rule 8(4)).

Accordingly, the website of the Department for the Execution of Judgments now displays, in a user-friendly manner, a large number of documents relating to the execution process – from action plans and reports by States Parties to submissions by non-State actors, from memoranda by the Department itself to decisions and resolutions by the Committee of Ministers.[52] Additionally, a new search engine for documents regarding the execution of judgments has been created in order to make

[50] Cf., on the greater publicity of the Committee's proceedings, Bates, *supra* n 12, 60 *et seqq*.; and Agnieszka Szklanna, "The Standing of Applicants and NGOs in the Process of Supervision of ECtHR judgments by the Committee of Ministers", *European Yearbook on Human Rights* (2012): 269-280.
[51] For the 2001 Rules, cf. *supra* n 29.
[52] Visit http://www.coe.int/en/web/execution/home, accessed 4 January 2019.

access to information even simpler.[53] As it is evident from its own name, HUDOC-EXEC, the new tool is based on the successful search engine for judgments and decisions of the Court (HUDOC).

The proceedings before the Committee of Ministers have also become more open in another respect – namely, by allowing the submission of information by actors other than States. The injured party has long been allowed in practice to submit to the Committee of Ministers information concerning the payment of just satisfaction; this practice was codified in the 1970s and subsequently extended to the adoption of other individual measures.[54] While the Committee of Ministers was initially merely "entitled" to consider this kind of communications, under the current Rules the Committee "shall consider" them – i.e., it is now compelled to examine any communications lodged by the applicants in the Court's cases (Rules 9(1) and 15(1) for friendly settlements).

Moreover, the current Rules introduced the opportunity for non-governmental organisations (NGOs) and NHRIs to also submit information, which the Committee of Ministers "shall be entitled to consider" (Rules 9(2) and 15(2)).[55] More recently, the same prerogative has been recognised to human rights international intergovernmental organisations, the CoE Commissioner for Human Rights, and third-party interveners before the Court (for the latter, the opportunity to submit information is limited to those cases in relation to which they were allowed to intervene by the Court).[56]

In the absence of any further specification, it is to be understood that NGOs, NHRIs, and the newcomers can present information relating to any kind of measures to be taken in order to execute

[53] The search engine can be found at: http://hudoc.exec.coe.int/eng#{"EXECDocumentTypeCollection":["CEC"]}, accessed 4 January 2019. The service has been available since January 2017.
[54] Again, initially in practice (since the 1990s) and subsequently through the amendment of the Rules of the Committee of Ministers (Rule 6 of the 2001 Rules): cf. Mikhail Lobov, "L'accès des personnes privées – requérant et ONG – au Comité des ministres", in Boillat et al., *supra* n 34, 97-100.
[55] As reminded in Sundberg, *supra* n 18, 1522-1523, before this opportunity was explicitly introduced in the Rules of the Committee of Ministers, NGOs and entities other than the injured party would in practice submit information to the Department for Execution, which would examine it and decide *whether* to communicate it to the government concerned and to the Committee of Ministers. Under the new Rule 9(2), the Department is obliged to bring submissions by these entities to the attention of the State and of the Committee; the latter is free to consider them or not.
[56] Cf. new Rules 9(3) and 9(4), as amended by Committee of Ministers, "Securing the long-term effectiveness of the system of the European Convention on Human Rights − Implementation of the Brussels Declaration. Amendments to Rule 9 of the Ministers' Deputies' Rules for the supervision of the execution of judgments and of the terms of friendly settlements", *Decisions*, 1275th meeting of the Ministers' Deputies, 18 January 2017, CM/Del/Dec(2017)1275/4.1.

the Court's judgments, including general measures, in contrast with the injured party. Indeed, while nothing prevents those entities from submitting communications in relation to the individual situation of the applicants, it is clear that their added value lies in their knowledge of the wider framework – what national laws and practices govern a certain aspect, how many people might be affected by the violations established by the Court, what possible solutions exist and what kind of reforms could be advanced to put the violations right.

Therefore, while the right of the injured party to intervene in the process can be regarded as a way to protect her personal interest in seeing her rights to restitution and compensation enforced, the injection of different sources of information under Rule 9(2) rather relates to the general interest of the community of the State concerned (and of the communities of other Member States) in the effective execution of the Court's judgment in all of its implications.

The potential of the provision of reliable information by third parties in an otherwise intergovernmental process of supervision is clear. This should be particularly true in the case of NHRIs, which are not only independent from governments, but do not have any vested interest[57] and possess a thorough knowledge of the internal legal order and of the domestic human rights situation. The extent to which NHRIs have actually made use of this instrument and the extent to which their submissions have been considered by the Committee of Ministers when deciding on a case lie at the heart of this dissertation and will be investigated in Chapter 4.

[57] That is, compared to NGOs. Cf. Antoine Buyse, "The Court's Ears and Arms: National Human Rights Institutions and the European Court of Human Rights", in *National Human Rights Institutions in Europe: Comparative, European and International perspectives*, eds. Jan Wouters and Katrien Meuwissen (Cambridge: Intersentia, 2013), 173-186, which focuses in particular on third-party interventions by NHRIs before the ECtHR; and Office of the UN High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Role and Responsibilities*, Professional Training Series No. 4 Rev. 1 (New York and Geneva: UN, 2010), 20.
As it will be explained further in Chapter 3 of this dissertation, the fact that NHRIs are created and funded by governments, while being at the same time independent from them, should give these institutions more legitimacy and authority compared to NGOs and allow them easier access to governmental information. On the point, cf. Anne Smith, "The Unique Position of National Human Rights Institutions: A Mixed Blessing?", *Human Rights Quarterly* 28 (2006): 909.

2.3. The role of the Court

Apart from awarding just satisfaction to the applicants (when it is deemed appropriate), the ECtHR rulings are essentially declaratory in nature: i.e., they cannot quash judicial or administrative decisions, nor can they repeal national legislation directly. The Court itself has long reiterated this concept and, on this basis, refused to grant any consequential order asked by the applicants, highlighting the freedom of the respondent States in the choice of means to remedy the violations found.[58] This approach has, however, gradually changed.[59]

The right to property was selected by the Court as the most appropriate starting point for its new case-law. The Court initially suggested, in a judgment delivered in July 1995, that "the best form of redress would in principle be for the state to return the land".[60] A few months later, in another case, the ECtHR went forward by ordering, in the operative part of the judgment, that the respondent State either return the land to the applicants or pay them the amount of money indicated.[61] While an alternative was left to the State, its margin of manoeuvre was thus restricted.

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[58] ECtHR, *Marckx v. Belgium*, no. 6833/74, 13 June 1979, para. 58: "the decision cannot of itself annul or repeal these provisions: the Court's judgment is essentially declaratory and leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligation under Article 53 [current Article 46.1]". For other examples of judgments where the Court refused to order States the adoption of certain measures: Ryssdal, *supra* n 1, 51-53; and Colandrea, *supra* n 32, 397 n 4.

[59] A considerable body of literature has dealt with the growing propensity of the Court to indicate the measures that States should adopt in order to comply with their obligations under Article 46. Cf., among others: Alastair Mowbray, "An Examination of the European Court of Human Rights' Indication of Remedial Measures", *Human Rights Law Review* 17, no. 3 (2017): 451–478; Corneliu Bîrsan, "Les aspects nouveaux de l'application des articles 41 et 46 de la Convention dans la jurisprudence de la Cour Européenne des Droits de l'homme", in *Trente ans de droit européen des droits de l'homme: études à la memoire de Wolfgang Strasser*, ed. Hanno Hartig (Bruxelles: Nemesis and Bruylant, 2007); Lucius Caflisch, "New Practice Regarding the Implementation of the Judgments of the Strasbourg Court", *Italian Yearbook of International Law* 15, no.1 (2005): 3-23; Colandrea, *supra* n 32; Philip Leach, "Beyond the Bug River – A New Dawn for Redress Before the European Court of Human Rights", *European Human Rights Law Review*, no. 2 (2005): 148-164; Luzius Wildhaber, "The Execution of Judgments of the European Court of Human Rights: Recent Developments", in *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat*, eds. Pierre-Marie Dupuy et al. (Kehl am Rhein: N.P. Engel, 2006), 671-680; Hans-Joachim Cremer, "Prescriptive Orders in the Operative Provisions of Judgments by the European Court of Human Rights", in *Judgments of the European Court of Human Rights – Effects and Implementation*, eds. Anja Seibert-Fohr and Mark E. Villiger (Baden-Baden: Nomos, 2014), 39-59; Flauss, *supra* n 11, 58 *et seqq*.; Loukis G. Loucaides, "Reparation for violations of human rights under the European Convention and restitutio in integrum", *European Human Rights Law Review,* no. 2 (2008) 182-192; and Sergio Bartole, Pasquale De Sena, and Vladimiro Zagrebelsky, *Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali* (Padova: Cedam, 2012), 744-765.

[60] ECtHR, *Hentrich v. France* (Article 50), no. 13616/88, 3 July 1995, para. 10.

[61] ECtHR, *Papamichalopoulos and others, supra* n 31, operative part. A similar stance was taken by the Court in other cases concerning the right to property: e.g., ECtHR, *Brumărescu v. Romania* (just satisfaction), no. 28342/95, 23 January 2001, operative part.

In the following years, the Court both detailed increasingly the individual measures recommended to States and even prescribed the adoption of specific ones. One of the most renowned cases in this respect is *Assanidze v. Georgia*, concerning the persistent illegal detention of the applicant; on that occasion, the Court held that "by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it", and that "having regard to the particular circumstances of the case and the urgent need to put an end to the violation … the respondent State must secure the applicant's release at the earliest possible date".[62]

The *Assanidze* case also shows that the indication of specific individual measures has not been limited to the violation of the right to property, but it has been extended over time to various other rights protected by the Convention – from the right to life[63] to the right to respect for private and family life[64] and the right to a fair trial. With regard to the latter, the Court has increasingly recommended the reopening of domestic proceedings, upon request of the applicants, when this possibility is provided for in the national systems; on the other hand, the Court has refused to order States to introduce such an avenue in the legislation if not already present.[65] Nonetheless, provisions

[62] ECtHR, *Assanidze v. Georgia*, no. 71503/01, 8 April 2004, paras. 202-203. For a thorough analysis of the *Assanidze* case, cf. Colandrea, *supra* n 32. A similar conclusion was reached by the ECtHR in *Ilaşcu and others v. Russia and Moldova*, no. 48787/99, 8 July 2004; in addition to awarding damages, the Court held that "the respondent States must take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release" (para. 490).

[63] In ECtHR, *Abuyeva and others v. Russia*, no. 27065/05, 2 December 2010, concerning the killing of civilians in Chechnya, the Court acknowledged that it had "so far refused to give any specific indications to a Government that they should, in response to a finding of a procedural breach of Article 2, hold a new investigation" but, in light of the particular circumstances of the case, it asserted that it considered "it inevitable that a new, independent, investigation should take place" (paras. 240-243).

[64] In ECtHR, *Mužević v. Croatia*, no. 39299/02, 16 November 2006, the Court ordered, in the operative part of the judgment, that the respondent State secure the enforcement of an in-court settlement and of a judgment concerning the division of assets of a divorced couple. Cf. similarly ECtHR, *V.A.M. v. Serbia,* no. 39177/05, 13 March 2007, where the Court ordered (this time, under the headings "Damage") that the respondent State enforce a previous interim judicial order that granted the applicant's access to her daughter (para. 166).

[65] For cases where the reopening of domestic proceedings was recommended cf., among others, ECtHR, *Gençel v. Turkey,* no. 53431/99, 23 October 2003, para. 27 (available in French only); *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, para. 210; and *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, para. 126.
For a case where the Court refused to order the reopening of the proceedings, cf. *Hostein v. France*, no. 76450/01, 18 July 2006, where the Court held: "En ce qui concerne la demande du requérant relative à l'introduction en droit interne d'un mécanisme de révision en matière civile, la Cour rappelle qu'un tel droit n'est pas garanti en tant que tel par la Convention" (para. 49 of the judgment, available in French only).

of the kind are now in place in almost all States Parties, also in light of Recommendation (2000) 2 of the Committee of Ministers.[66]

A similar evolution of the Court's case-law can be traced as regards general measures as well; in this area, the development of so-called pilot judgments has added a layer of complexity. The practice of pilot judgments was initiated by the ECtHR at the instigation of the Committee of Ministers which, by means of Resolution (2004) 3, invited the Court "to identify … what it considers to be an underlying systemic problem and the source of this problem … so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments".[67] In essence, faced with a case arising from a structural deficiency of the national system, the Court may issue a judgment by means of which it not only declares a violation of the Convention, but also pinpoints the underlying deficiency and, according to a now well-established practice, indicates the measures whose enactment could help solve the problem.[68]

Since the adoption of the first pilot-judgment in *Broniowski v. Poland* in June 2004, the Court has consolidated its practice[69] and adopted a new detailed rule of procedure on the matter, Rule 61,

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[66] Committee of Ministers, *Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights*, 694th meeting of the Ministers' Deputies, 19 January 2000.

[67] Committee of Ministers, *Resolution Res(2004)3 on judgments revealing an underlying systemic problem*, 114th session, 12 May 2004. In fact, the pilot-judgment procedure had been proposed initially by the Court itself within the debate on the drafting of Protocol no. 14: Steering Committee for Human Rights, *Position paper of the European Court of Human Rights on proposals for reform of the European Convention on Human Rights and other measures as set out in the report of the Steering Committee for Human Rights of 4 April 2003 (CDDH(2003)006 final)*, 26 September 2003, CDDH-GDR(2003)024, paras. 43-46. While the proposal was not included in the Protocol, the Committee of Ministers adopted the above-mentioned resolution and thus legitimised the practice of pilot judgments; on the point, cf. Markus Fyrnys, "Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights", *German Law Journal* 12, no. 5 (2011): 1239 *et seqq*. in particular. On the origins of the procedure, cf. also Philip Leach et al*., Responding to Systemic Human Rights Violations: An Analysis of Pilot Judgments of the European Court of Human Rights and Their Impact at National Level* (Antwerp: Intersentia, 2010), 9-13.

[68] The first pilot judgment issued, in ECtHR, *Broniowski v. Poland*, no. 31443/96, 22 June 2004, is already illustrative in this respect: "with a view to assisting the respondent State in fulfilling its obligations under Article 46, the Court has sought to indicate the type of measure that might be taken by the Polish State in order to put an end to the systemic situation identified in the present case" (para. 194).

[69] For an analysis of the practice developed by the Court as regards pilot judgments, cf. among others: Leach et al., *supra* n 67; Antoine Buyse, "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima* 57, no. 8 (2009): 78-90; Elisabeth Lambert Abdelgawad, "La Cour européenne au secours du Comité des ministres pour une meilleure exécution des arrêts pilotes", *Revue trimestrielle des droits de l'homme* 61 (2005): 203-224; Fyrnys, *supra* n 67; Erik Fribergh, "Pilot judgments from the Court's perspective", in *Towards stronger implementation of the European Convention on Human Rights at national level: Colloquy organised under the Swedish chairmanship of the Committee of Ministers of the Council of Europe, Stockholm, 9-10 June 2008. Proceedings*, ed. CoE/Directorate General of Human Rights (Strasbourg: CoE, 2008), 86-93; Luzius Wildhaber, "Pilot Judgments in Cases of Structural or Systemic Problems on the National Level", in *The European Court of Human Rights Overwhelmed by*

in order to provide pilot judgments with a more solid legal basis. This new provision first of all clarifies that "the Court *shall* in its pilot judgment identify … the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the *operative provisions* of the judgment" (emphases added), and that "the Court may direct in the operative provisions of the pilot judgment that the remedial measures … be adopted within a specified time".

Moreover, Rule 61 sets out a peculiar – although optional – characteristic of the pilot-judgment procedure: the so-called freezing of similar applications. This means that the Court may stay its examination of applications arising from the same structural shortcoming, pending the adoption by the respondent State of the measures indicated in the pilot judgment, with a view to "returning" cases to the national level once appropriate remedial measures have been put in place by the State.[70] Ideally, this mechanism should contribute to reducing the workload of the Court, which is flooded with repetitive cases.

Notwithstanding the fact that the pilot-judgment procedure is now on firm ground, its use has been criticised from various viewpoints. The two main reservations concern, on the one hand, the restriction of States' discretion in the choice of means and the partial overlapping of competences between the Committee of Ministers and the Court, in the sense that the latter would enter the realm of the supervision of execution;[71] on the other, the long delays that similarly situated applicants might face in the event of freezing of comparable applications.[72] At any rate, the legal basis of the procedure

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Applications: The Problems and Possible Solutions, eds. Rudiger Wolfrum and Ulrike Deutsch (Berlin, Heidelberg: Springer-Verlag, 2009), 69-75; and Laurent Sermet, "L'obscure clarté de la notion pretorienne d'arrêt pilote", *Revue générale de droit international public* 111, no. 4 (2007): 863-878.

[70] For instance, in *Broniowski v. Poland*, *supra* n 68, it was decided that "pending the implementation of the relevant general measures, which should be adopted within a reasonable time, the Court will adjourn its consideration of applications deriving from the same general cause" (para. 198).

[71] Concerns in relation to the alleged encroachment of the Court on the prerogatives of the Committee of Ministers were voiced by Judge Zagrebelsky in his partly dissenting opinion in ECtHR, *Hutten-Czapska v. Poland* [GC], no. 35014/97, 19 June 2006: "I consider that judgments such as the present one undermine the relationship between the two pillars of the Convention system – the Court and the Committee of Ministers – and entrust the Court with duties outside its own sphere of competence". Cf. also, on the delicate balance between the Court's and the Committee's competences, as well as between the Court's powers and States' margin of appreciation, Fyrnys, *supra* n 67, 1247-1251.

[72] Cf. Lambert Abdelgawad, "L'exécution des arrêts de la Cour européenne des droits de l'homme (2009)", *supra* n 38, 806-807. Additionally, the Parliamentary Assembly noted "with some concern that this procedure has been conducted in respect of certain complex systemic problems on the basis of a single case which may not reveal the different aspects of the systemic problem involved" (Parliamentary Assembly, *Resolution 1516 (2006). Implementation of judgments of the*

is now solid, and it does not seem that either the Court or States Parties are planning to curtail or modify the current practice,[73] even though the need is felt to overcome the persistent subjectivity in the selection of cases to which the pilot-judgment procedure is applied.[74]

At times the Court issues judgments that, in a way or another, do not present all characteristics of pilot judgments (for instance, they do not indicate the measures to be taken by the State in the operative part of the judgment or do not adjourn similar cases) but share with pilot judgments essential features such as the identification of a systemic problem and the recommendation to take general measures to remedy the violation (without specifying them). These judgments are known as semi- or quasi-pilot judgments.[75] In addition and conversely, the Court has increasingly recommended the adoption of general measures regardless of the existence of structural deficiencies,[76] with varying degrees of specificity in the indication of the measures.[77]

European Court of Human Rights, 24th sitting, 2 October 2006, para. 21). For an overview of the various concerns raised with respect to pilot judgments, see Leach et al., *supra* n 67, 28-31, and Buyse, *supra* n 69, 86-89.

[73] By means of the *Interlaken Declaration*, the Court was encouraged to "pursue its policy of identifying priorities for dealing with cases and continue to identify in its judgments any structural problem capable of generating a significant number of repetitive applications" (High-level Conference on the Future of the European Court of Human Rights, *Interlaken Declaration*, 19 February 2010, para. 10.b of the Action Plan). More recently, the Declarations concluding the High-level conferences of Brighton (2012) and Brussels (2015) respectively "welcome[d] the continued use by the Court of proactive measures, particularly pilot judgments" (*Brighton Declaration*, *supra* n 13, para. 20.c), and "support[ed] further exploration and use of efficient case-management practices by the Court in particular its prioritisation categories for the examination of cases … and its pilot-judgment procedure" (*Brussels Declaration*, *supra* n 14, para. A.2.a).

[74] Leach et al., *supra* n 67, 34-39.

[75] These qualifications are used by several scholars, even though there is no unanimous agreement on what exactly constitutes a pilot judgment and, consequently, a quasi-pilot judgment. The Rules of the Court have at least partially clarified the issue, but judgments remain rather varied and often display only some of the features typically associated with pilot judgments. Leach et al., *supra* n 67, 13-28, distinguishes between pilot judgments, quasi-pilot judgments, and other judgments addressing systemic issues. Wildhaber, *supra* n 69, identifies, on the basis of the *Broniowski* judgment, eight constitutive elements of pilot judgments, while admitting that the subsequent practice gave rise to "several variants"; Fribergh, *supra* n 69, 90-92, also refers to "variations of the original [pilot judgment procedure] template". Buyse, *supra* n 69, 84, conceives "the range of pilot-like judgments as a continuum". Linos-Alexander Sicilianos, "The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Development under Article 46 ECHR", *Netherlands Quarterly of Human Rights* 32, no. 3 (2014): 240, concludes that "the clearest difference between pilot and quasi-pilot judgments seems to be of a procedural rather than of a substantive nature, namely that parties are invited to comment upon the application of the pilot judgment procedure according to Rule 61 para. 2 of the Rules of Court".

[76] Sicilianos, *supra* n 75, 241, speaks of "ordinary judgments".

[77] Ibid., 244: with regard to both individual and general measures, the author identifies a "continuum", "a broad spectrum of indications ranging from pure recommendations … to real injunctions". Numerous examples of this variety of indications from the Court can be found in this article, as well as in the annual reviews of the execution of ECtHR judgments compiled by Lambert Abdelgawad (*supra* nn 37, 38 and 49). See also, for a collection of Court's judgments prescribing individual or general measures between January 2013 and December 2014: Open Society Justice Initiative, *Case Digest – Recent Remedies Decisions from the European Court of Human Rights* (New York: Open Society Foundations, June 2015), accessed 4 January 2019, https://www.opensocietyfoundations.org/sites/default/files/case-digests-echr-remedies-2013-2014-20150708.pdf.

At this point, it should be highlighted that all these kinds of judgments – from judgments simply suggesting the measures to be adopted to complex pilot-judgments recommending legislative changes and judgments prescribing specific individual measures – currently coexist, and that in most cases the Court still avoids to spell out precisely the actions to be undertaken, even though it not infrequently reminds States of their obligation to adopt all necessary individual and general measures under the supervision of the Committee of Ministers.[78] At any rate, there is a clear trend towards more detailed indications from the Court as far as implementation measures are concerned; in other words, towards a "judicialisation" of the execution process.[79] While initially contested by some States Parties,[80] the legitimacy of this practice of the Court is not seriously put into question any more, even though few recalcitrant States from time to time raise specific objections.[81]

According to the Court's *Priority Policy*, "applications raising questions capable of having an impact on the effectiveness of the Convention system", including those to be decided by way of the

[78] ECtHR, *Scozzari and Giunta v. Italy*, nos. 39221/98 and 41963/98, 13 July 2000, para. 249: "a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order".

[79] Helen Keller and Cedric Marti, "Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments", *European Journal of International Law* 26, no. 4 (2015): 829–850. The authors show how the phenomenon of "judicialisation" is wide-ranging and is not limited to the judgment phase (through the issuing of pilot judgments or the indication of general and individual measures), but it also extends to the pre-judgment phase (through the adoption of interim measures by the Court) as well as to the post-judgment one. Cf. also Flauss, *supra* n 11, 58 *et seqq*.

[80] In the *Sejdovic* case, *supra* n 65, the Italian Government "stated that they were not opposed in principle to the Court's giving fairly detailed indications of the general measures to be taken. However, the new practice pursued by the Court ran the risk of nullifying the principle that States were free to choose the means of executing judgments. It also ran counter to the spirit of the Convention and lacked a clear legal basis" (para. 115). The Government also contended that the Committee of Ministers was the only body competent to assess the general measures adopted or envisaged by States and that such a division of labour between the Committee and the Court was confirmed by new Article 46 as amended by Protocol no. 14 (paras. 116-117). The Government concluded that "in any event, if the practice of indicating general measures were to be continued, it should at least become institutionalised in the Rules of Court or in the questions which the Court put to the parties, so that the parties could submit observations on whether a violation was 'systemic'" (para. 118). As shown, the latter requests have subsequently been met by the Court.

[81] The Ukrainian Government, for instance, opposed the application of the pilot-judgment procedure in ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, no. 40450/04, 15 October 2009, by arguing that "the measures aimed at resolving the problems of prolonged non-enforcement had already been determined by the Committee of Ministers in its Interim Resolution" and that "the application of such a procedure in the present case would amount to the performance of a supervisory function by the Court" (para. 77). The Court rejected this interpretation.
Sicilianos, *supra* n 75, 249 *et seqq*., argues that the legal bases for the increasing involvement of the Court in the execution of its judgments are now clear and solid and include: Article 46 ECHR, as interpreted in light of Article 1; Articles 19 and 32 ECHR; various resolutions and recommendations by the Committee of Ministers, starting from Res(2004)3 on judgments revealing an underlying systemic problem; and the practice of the Court, largely uncontested by States.

pilot-judgment procedure or anyway highlighting structural problems, are dealt with by the Court as a matter of priority.[82]

Incidentally, it should be noted that the adoption of pilot judgments is not only relevant to the role of the Court in the supervision of the execution of its judgments, but it can also be read in the context of the debate, increasingly popular since the entry into force of Protocol no. 11, over the "individual justice-constitutional justice" dichotomy – a debate which is not confined to the academic arena but has directly involved CoE stakeholders as well.[83]

It has been claimed by some authoritative voices that the ECtHR is at a crossroads: given the practical impossibility for the Court to deal with all cases submitted to it, either it confines itself to deciding upon "constitutional cases" or it will perish.[84] By allowing the Court to focus on "decisions of 'principle', decisions which create jurisprudence",[85] it is argued, the efficiency of the system would considerably improve and a higher number of people would eventually be reached and benefit from Strasbourg's judgments.

Along these lines, specific proposals for reform have been made, such as the establishment of a Supreme European Court of Human Rights above the current Court,[86] the attribution of

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[82] These applications are included in category II, together with "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)": cf. ECtHR, *The Court's Priority Policy*, June 2009 as amended with effect from 22 May 2017, accessed 4 January 2019, http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

[83] Cf., among others, Wildhaber (former President of the ECtHR), *supra* n 16, 161-165; and Robert Harmsen, "The European Court of Human Rights as a 'Constitutional Court': Definitional Debates and the Dynamics of Reform" in *Judges, Transition, and Human Rights*, eds. John Morison, Kieran McEvoy, and Gordon Anthony (New York: Oxford University Press, 2007), 33-53.
Some have proposed to overcome this dichotomy, often by referring to the concept of "pluralism": Nico Krisch, "The Open Architecture of European Human Rights Law", *The Modern Law Review* 71, no. 2 (March 2008): 183-216; Stéphanie Hennette-Vauchez, "Constitutional v International? When Unified Reformatory Rationales Mismatch the Plural Paths of Legitimacy of ECHR Law", in *The European Court of Human Rights between Law and Politics,* eds. Jonas Christoffersen and Mikael Rask Madsen (Oxford: Oxford University Press, 2013), 144-163; and, in the same volume, Jonas Christoffersen, "Individual and Constitutional Justice: Can the Power Balance of Adjudication Be Reversed?", 181-203. More recently, Steven Greer and Luzius Wildhaber put forward a fourth model of "constitutional pluralism" in "Revisiting the debate about 'constitutionalizing' the European Court of Human Rights", *Human Rights Law Review* 12, no. 4 (2012): 655-687.

[84] Greer and Wildhaber, *supra* n 83, 4.

[85] Luzius Wildhaber, "The Role of the European Court of Human Rights: An Evaluation", *Mediterranean Journal of Human Rights* 8, no. 1 (2004): 9-31.

[86] Paul Mahoney (former ECtHR Registrar and Judge) and Jonathan Sharpe (former member of the ECtHR Registry), "The Legacy of Carlo Russo: Creation of a Supreme European Court of Human Rights", in *I diritti umani di fronte al giudice internazionale – Atti della giornata di studio in memoria di Carlo Russo*, eds. Tullio Scovazzi, Irini Papanicolopulu, and Sabrina Urbinati (Milano: Giuffrè, 2009).

unmeritorious applications to "subordinate judges" (i.e., rapporteurs from the Registry),[87] the establishment of a European Fair Trial Commission,[88] or the discretion of the Court in selecting those cases to be adjudicated on the merits.[89]

However, none of these proposals have been embraced by States Parties, which have reiterated, on all occasions, "their strong attachment to the right of individual application to the European Court of Human Rights … as a cornerstone of the system for protecting the rights and freedoms set forth in the Convention", at least in principle.[90] Nor have other stakeholders proved to be more receptive: NGOs and NHRIs have repeatedly proclaimed the need to preserve the right to individual application,[91] and the Court has never backed radical proposals such as that giving it the discretionary power to choose the cases to rule upon.[92] Thus, a "constitutionalisation" of the Court's role, beyond the adoption of pilot judgments and the above-mentioned prioritisation of cases highlighting systemic deficiencies, does not appear likely.

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[87] Paul Mahoney et al., *Case-Overload at the European Court of Human Rights* (Vienna: European Law Institute, 2012), 26-28. In Helen Keller, Andreas Fischer, and Daniela Kühn, "Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals", *European Journal of International Law* 21, no. 4 (2011): 1035-1037, other proposals for an additional judicial or non-judicial filtering mechanism are examined which have been put forward by CoE organs and States after the adoption of Protocol no.14; none of them was followed up.

[88] Based on the model of the Venice Commission or of the European Committee for the Prevention of Torture: Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2008), 282-289.

[89] Mahoney et al., *supra* n 87, 32-35.

[90] High-level Conference*, Copenhagen Declaration,* 13 April 2018, para. 1. Paragraphs have been dedicated to the "right of individual petition" in the Declarations concluding all previous High-level Conferences.

[91] For the position of NGOs, cf. among others: AIRE Centre et al., *Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights*, 28 March 2003, paras. 2 and 3, accessed 4 January 2019, https://www.amnesty.org/download/Documents/108000/ior610082003en.pdf; Amnesty International et al., *Human rights in Europe: Decision time on the European Court of Human Rights (Joint NGO appeal),* 11 December 2009, 2, accessed 4 January 2019, http://www.amnesty.org/en/library/info/IOR61/009/2009/en; and, more recently, AIRE Centre et al., *Joint NGO Response to the Draft Copenhagen Declaration*, 13 February 2018, accessed 4 January 2019, https://www.amnesty.eu/news/joint-ngo-response-to-the-draft-copenhagen-declaration/.
For the position of NHRIs, cf. the latest *Submission of the European Network of National Human Rights Institutions on draft Declaration of Copenhagen*, 1 March 2018, 1, accessed 4 January 2019, http://ennhri.org/IMG/pdf/ennhri_submission_on_draft_copenhagen_declaration.pdf; cf. also the position expressed by the then European Coordinating Group of NHRIs on the occasion of the drafting of Protocol no. 14, mentioned in Philip Leach, "Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery?", *Human Rights Law Journal* 27 (2006): 21.

[92] The divisions of the Court on the point and the strong opposition by some of the judges to further restrictions on the right of individual application are reported in Leach, *supra* n 91, 21-22. Various academics too objected to the limitations on the right of individual application that have been proposed or implemented: e.g., Leach, *supra* n 91, 11-25; Nikos Vogiatzis, "The Admissibility Criterion under Article 35(3)(B) ECHR: A 'Significant Disadvantage' to Human Rights Protection?", *International & Comparative Law Quarterly* 65, no. 1 (2016): 185-211; and Lambert Abdelgawad, "L'exécution des arrêts de la Cour européenne des droits de l'homme (2009)", *supra* n 38, 806-807, which holds that the inappropriate use of the pilot-judgment procedure risks undermining the right to individual application.

The role of the Court in the execution of its judgments has been further strengthened by Protocol no. 14, which introduced the so-called interpretation proceedings and infringement proceedings. According to new paragraph 3 of Article 46 ECHR, if a problem of interpretation of a final ECtHR judgment arises during the supervision of its execution, the Committee of Ministers can ask the Court to resolve the interpretive issue. As clarified by the Explanatory Report to Protocol no. 14, the aim of this new provision is "to enable the Court to give an interpretation of a judgment, not to pronounce on the measures taken by a High Contracting Party to comply with that judgment".[93]

New paragraphs 4 and 5 of Article 46, for their part, regulate the so-called infringement proceedings, which are initiated by the Committee of Ministers in the event of refusal by a State Party to comply with a final judgment of the Court. After formal notice to the respondent State, the case is submitted to the Grand Chamber, which rules on whether the State concerned has failed to abide by its obligations under Article 46(1) ECHR.

During the drafting of Protocol no. 14, the possibility was discussed to impose fines on those States recognised as non-compliant; the Parliamentary Assembly had put forward since 2000 a system of *astreintes,* defined as "daily fines for a delay in performance of a legal obligation",[94] while the Steering Committee of Human Rights proposed to allow the Court, invested with infringement proceedings, to impose a "financial penalty (in the form of a lump sum) payable to the Council of Europe".[95] Ultimately, all proposals to introduce the payment of fines were rejected, in the belief that

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[93] CoE, *Explanatory Report to Protocol No. 14*, *supra* n 46, para. 97.

[94] Parliamentary Assembly, *Resolution 1226 (2000) – Execution of Judgments of the European Court of Human Rights*, 30th sitting, 28 September 2000, para. 11.1.2; and *Recommendation 1477 (2000) – Execution of judgments of the European Court of Human Rights*, 30th sitting, 28 September 2000, para. 2.

[95] The proposal was included in Committee of Ministers/Steering Committee for Human Rights, *Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights. Addendum to the final report containing CDDH proposals (long version)*, 14 April 2003, CM(2003)55-Add 2, Proposal C. 4. This formulation was subsequently embraced by the Parliamentary Assembly in its *Opinion 251 (2004) – Draft Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention,* 13th sitting, 28 April 2004, para. 14.9. However, the Steering Committee had already abandoned the idea and declared itself "in favour of eliminating the financial penalty clause", considering infringement proceedings and the finding of the Court against the respondent State sufficiently persuasive (Steering Committee for Human Rights, *Guaranteeing the long-term effectiveness of the European Court of Human Rights – Implementation of the Declaration adopted by the Committee of Ministers at its 112th Session (14-15 May 2003): Interim Activity Report*, 26 November 2003, CDDH(2003)026 Addendum I Final, para. 44).
Admittedly, the Steering Committee for Human Rights has been rather erratic on the point: in 2001, requested to give its opinion on the system of *astreintes* put forward by the Assembly, it concluded that it was "not convinced that the

"the political pressure exerted by proceedings for noncompliance in the Grand Chamber and by the latter's judgment should suffice to secure execution of the Court initial judgment by the state concerned".[96]

Such an assumption has been tested to date only once, when infringement proceedings were initiated by the Committee of Ministers against Azerbaijan for its failure to implement the ECtHR judgment in the *Ilgar Mammadov* case. An interim resolution was adopted by the Committee on 25 October 2017, by means of which the Azerbaijani Government was given until 29 November to execute the judgment (in particular, by releasing the applicant), failing which a further interim resolution would be adopted to refer the case back to the Court.[97] On 5 December 2017 such a resolution was adopted and Article 46(4) applied for the first time, the Committee of Ministers being unsatisfied with the explanations provided by the Azerbaijani Government.[98] The adoption of the latter resolution appears to have had the desired effect, as the Azerbaijani Government communicated

introduction of a system of monetary fines would bring about any important improvement" (*Opinion of the CDDH concerning Recommendation 1477 (2000) of the Parliamentary Assembly*, *supra* n 1, para. 9); more recently, its Committee of Experts on the Reform of the Court (DH-GDR) invoked, in a draft contribution to the Brighton Conference, "greater application of pressure, including in the form of sanctions, on States that do not execute judgments", but then deleted any reference to sanctions at the request of Turkey (Steering Committee of Human Rights/Committee of Experts on the Reform of the Court, *Report – 1st meeting, 17-20 January 2012*, 27 January 2012, DH-GDR(2012)R1, Appendix VI, para. 13).

[96] CoE, *Explanatory Report to Protocol No. 14*, *supra* n 46, para. 99. In the following paragraph, it is also stated that "the procedure's mere existence, and the threat of using it, should act as an effective new incentive to execute the Court's judgments". Other bolder suggestions, such as the imposition of punitive damages by the Court, do not appear to have even been considered: cf. Yonko Grozev, "How Human Rights Protection Has Evolved. A Critical Analysis of Ten Years of Case-Law", in ECtHR, *Ten Years of the "New" European Court of Human Rights 1998-2008: Situation and Outlook. Proceedings of the Seminar, 13 October 2008, Strasbourg* (Strasbourg: ECtHR, 2009), 38.

Infringement proceedings as regulated by Protocol no. 14 thus differ considerably from their EU equivalent: Article 260 of the Treaty on the Functioning of the European Union stipulates that "if the Court [of Justice of the European Union] finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it". For a comparison between the infringement proceedings as introduced by Protocol no. 14 to the ECHR and those established within the EU context, cf. Elisabeth Lambert Abdelgawad, "L'exécution des décisions des juridictions européennes (Cour de justice des Communautés européennes et Cour européenne des droits de l'homme)", *Annuaire français de droit international* 52, no. 1 (2006): 677-724.

[97] Committee of Ministers, "Interim Resolution CM/ResDH(2017)379. Execution of the judgment of the European Court of Human Rights: Ilgar Mammadov against Azerbaijan", *Resolutions*, 1298th meeting, 25 October 2017, CM/ResDH(2017)379.

[98] Committee of Ministers, "Interim Resolution CM/ResDH(2017)429. Execution of the judgment of the European Court of Human Rights: Ilgar Mammadov against Azerbaijan", *Resolutions,* 1302nd meeting, 5 December 2017, CM/ResDH(2017)429.

that the applicant had been finally released, even though conditionally, in August 2018, following further proceedings before domestic courts.[99]

However, the fact that infringements proceedings were employed only once and interpretation proceedings never used several years after the entry into force of Protocol no. 14, even though major cases of persistent non-compliance certainly took place, raises questions about their usefulness.[100] Thus, a call to "de-dramatise" these sets of proceedings has been made, with a view to rendering recourse to them less exceptional.[101]

It should be added that the use of these new tools might also help alleviate the issue of fresh complaints submitted by successful applicants alleging that the respondent State failed to execute the judgments in their favour.[102] On these occasions, the Court usually rejects the applications as inadmissible, declaring its incompetence *ratione materiae*; however, it has accepted to examine applications raising "a new issue", even though what constitutes "a new issue" is not always clearly discernible.[103] It also seems that the circumstance that the case is still under examination by the

[99] Secretariat General/Committee of Ministers, *1324 meeting (September 2018) (DH), Case of Ilgar Mammadov v. Azerbaijan (Application No. 15172/13)*, 5 September 2018, DH-DD(2018)816.

[100] Even considering that the Committee of Ministers only is competent to trigger the two sets of proceedings by a two-thirds majority and that the Explanatory Report expressly refers to the "sparing" use of the interpretation proceedings and to the "exceptional" use of the infringement proceedings (cf. paras. 96 and 100). For an analysis of the reasons preventing a wider use of the two instruments, cf. Elisabeth Lambert Abdelgawad, "L'exècution des jugements: les requêtes en manquement et en interprétation", in *La Cour européenne des droits de l'homme après le protocole 14*, ed. Samantha Besson (Zürich: Schulthess, 2011), 93-113

[101] Lambert Abdelgawad, "L'exécution des arrêts de la Cour européenne des droits de l'homme (2010)", *supra* n 38, 949: "Assurément, le recourse en manquement d'Etat au niveau du Conseil de l'Europe mériterait d'être dédramatisé à la lumière de ce qui s'est fait au niveau de l'Union européenne". Cf. also Pinto de Albuquerque, *supra* n 10, 226; and Parliamentary Assembly, *Recommendation 2079 (2015). Implementation of judgments of the European Court of Human Rights*, 33rd sitting, 30 September 2015, para. 1.1, whereby the Assembly called on the Committee to make use of the new tools introduced by Protocol no. 14 in case of persistent failure of the respondent States to execute the judgments.

[102] Cf. Ryssdal, *supra* n 1, 56-60; and Sibrand Karel Martens, "Commentary", in Bulterman and Kuijer, *supra* n 1, 71-79.

[103] In ECtHR, *Verein Gegen Tierfabriken Schweiz (VGT) v Switzerland (No. 2)* [GC], no. 32772/02, 30 June 2009, the Court stated: "it cannot be said that the powers assigned to the Committee of Ministers by Article 46 are being encroached on where the Court has to deal with relevant new information in the context of a fresh application" (para. 67). In that specific case, the Committee had closed its supervision of the case without examining a judgment by the Swiss Federal Court that refused to reopen the relevant domestic proceedings. According to the Court, "the refusal in issue constitutes a new fact. If the Court were unable to examine it, it would escape all scrutiny under the Convention" (ibid.). For a critical appraisal of the *VGT 2* case, cf. Maya Hertig Randall and Xavier-Baptiste Ruedin, "'Judicial activism' et exécution des arrêts de la Cour européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme* 82 (2010): 421-443.
However, in ECtHR, *Lyons and others v. the UK* (dec.), no. 15227/03, 8 July 2003, the Court did not accept the applicants' argument that the refusal by the domestic court to quash their convictions or to order a retrial constituted "new facts" and thus a new violation of Article 6: "it must be observed that the reference proceedings did not give rise to a determination of a new 'criminal charge' against the applicants. In so far as it can be said that Article 6 is applicable to those proceedings, the point of departure must be the applicants' original trial and convictions … On that account, the Court does not accept the applicants' argument that the reference proceedings gave rise to a new breach of Article 6 of the Convention".

Committee of Ministers does not prevent the Court from deciding on the new application.[104] The approach of the Court in these instances is far from straightforward, and the use of interpretation and – especially – infringement proceedings should contribute to clarify the "division of labour" between the Court and the Committee, even though doubts have been raised on the suitability of the new instruments.[105]

At any rate, new Article 46 does not solve all uncertainties determined by the increasing powers of the Court in the execution phase. The Committee of Ministers and the Court have hitherto developed a cooperative relationship and no conflict regarding the allocation of responsibilities has arisen.[106] Nonetheless, a clarification of the respective competences – for instance, by developing objective criteria to identify cases where the Court should specify the measures to be adopted by the respondent State or apply the pilot-judgment procedure – would be opportune.[107]

Cf. also ECtHR, *Emre v. Switerzland (No. 2*), no. 5056/10, 11 October 2011, where the Court considered the decision by the Swiss Federal Tribunal to reduce the duration of the ban imposed on the applicant as a "new fact" to be examined. In that case, as underlined by Keller and Marti, *supra* n 79, 847, for the first time the Court also found a violation of Article 46 and not only of the substantive right concerned (whereas in *Lyons and others v. UK*, the fact that the complaint was qualified by the Court as falling under Art. 46 resulted in its inadmissibility). However, the *Emre 2* ruling is, to date, an isolated case, as the Court usually examines complaints raising "new issues" under the substantive rights whose violation is alleged.

[104] While the circumstance appeared to be relevant in the *Emre 2* case, *supra* n 103 (para. 42: "en l'espèce le Comité des Ministres n'a pas encore entamé sa procédure de surveillance de l'exécution de l'arrêt de la Cour du 22 mai 2008 par l'adoption de mesures concrètes: aucune résolution, même intermédiaire, n'a été adoptée dans cette affaire"), in ECtHR, *Liu v. Russia (No. 2*), no. 29157/09, 26 July 2011, the Court maintained that "it is not prevented from examining the applicants' complaints concerning the new developments which occurred after the Court's judgment … while that judgment is still pending before the Committee of Ministers under Article 46" (para. 65; in this respect the Court made reference to the previous *Mehemi v. France (no. 2),* no. 53470/99, 10 April 2003). The Court added that "the domestic re-examination of the case gave rise to new issues under the Convention which, in the absence of any assessment by the Court, may not be resolved in the context of the Committee of Ministers' current supervision. In particular, a new question arises as to whether the extended procedural guarantees afforded to the applicants during the fresh examination were adequate and sufficient" (para. 67).
In general, on the issue of the competence of the Court to examine this kind of complaints, cf. Ryssdal, *supra* n 1, 56-60; Martens, *supra* n 102, 71-79, according to which applicants should be able to raise these complaints under former Article 53 (current Article 46(1)) in light of the right to individual application; and Lambert Abdelgawad, *supra* n 49, 878-880.

[105] In 2001, the Evaluation Group concluded that the proposal by the Parliamentary Assembly regarding interpretation proceedings was liable to "result in a blurring of the respective responsibilities of the Court and the Committee of Ministers as assigned by the Convention and draw the Court into an arena outside its purview" (CoE/Evaluation Group, *supra* n 12, para. 49). In the literature, cf. Marmo, *supra* n 12, 250, which highlights the additional pressure put on an already overstretched system and also points to the ambiguity of the term "refusal" referred to in Article 46(4).

[106] Vincenzo Starace, "Modifications Provided by Protocol No. 14 Concerning Proceedings before the European Court of Human Rights", *Law and Practice of International Courts and Tribunals* 5 (2006): 191.

[107] A somewhat different but connected concern is expressed by Flauss, *supra* n 11, 69-71, according to which the problem lies not much in the overlapping of competences between the Committee of Ministers and the Court, but in their divergent approaches to certain matters (e.g., the qualification of a case as revealing an "underlying systemic problem", or the reopening of national proceedings).

2.4. The role of the Parliamentary Assembly, the Commissioner for Human Rights and the Department for the Execution of Judgments

In addition to the Committee of Ministers and the Court, a number of other CoE bodies are increasingly engaged in the supervision of the execution of ECtHR judgments. This section identifies the following ones as key actors: the Parliamentary Assembly, the Commissioner for Human Rights, and the Department for the Execution of Judgments. Their activities in this area arewill thus analysed in greater detail.

It has been suggested that the CoE Secretary General might also play a role under Article 52 (former Article 57) of the Convention, according to which the Secretary General can ask any State Party to "furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention". Until now, the Secretary General has made use of this provision only to request reports from all States collectively on the implementation of some Convention's rights;[108] in 2015, exceptionally, he sought explanations from Azerbaijan only.[109] At any rate, the Secretary General has never followed up the execution of specific judgments on this basis. Nonetheless, it cannot be ruled out that s/he might do so in the future, also in light of the 2015 Brussels Declaration, which encouraged this kind of intervention.[110]

The Parliamentary Assembly was created by the CoE Statute as the deliberative body of the organisation.[111] It is currently composed of three hundred and twenty-four members, drawn from the

[108] Cf. Ryssdal, *supra* n 1, 65-66; and Jeroen Schokkenbroek, "The Supervisory Function of the Secretary General of the Council of Europe", in Van Dijk et al., *supra* n 40, 323-332.
[109] CoE Secretary General, "Azerbaijan human rights inquiry: Secretary General launches inquiry into respect for human rights in Azerbaijan", *Press release*, 16 December 2015, accessed 4 January 2019, http://www.coe.int/en/web/secretary-general/news.
[110] *Brussels Declaration*, *supra* n 14, para. C.3.d, whereby the Conference encourages "the Secretary General to continue, on a case-by-case basis, to use his/her authority in order to facilitate the execution of judgments raising complex and/or sensitive issues at the national level, including through the exercise of the powers entrusted to him/her under Article 52 of the Convention".
[111] CoE, *Statute*, *supra* n 20, Article 22. The original name of the body was "Consultative Assembly"; as reported in footnote 1 to Article 10 of the Statute, since February 1994 the Committee of Ministers has used the denomination "Parliamentary Assembly" in all official documents.

representatives of States Parties' parliaments.[112] While broadly mandated to "discuss and make recommendations [to the Committee of Ministers] upon any matter within the aim and scope of the Council of Europe",[113] the only task explicitly conferred on the Assembly by the ECHR consists in the election of the ECtHR judges (Article 22).

Nonetheless, the Assembly has shown an increasing willingness to be involved in the supervision of the execution of ECtHR judgments, and its role in this area is by now well-established. While a clear trend in this direction is usually traced back to the early 2000s, expressions of interest by the Assembly came even before.[114] In 1993, the Assembly mandated its Committee on Legal Affairs and Human Rights "to report to it when problems arise on the situation of human rights in member States, including their compliance with judgments by the European Court of Human Rights",[115] whereas in 1997 it created an *ad hoc* Monitoring Committee entrusted with supervising compliance by Member States with the undertakings assumed under any CoE treaties, including the ECHR.[116]

It was, however, only in 2000 that the Assembly resolved to play a more prominent role in monitoring the execution of ECtHR judgments. Preceded in 1998 by a Written Question to the Committee of Ministers that pointed to a number of problematic cases of non-compliance with judgments,[117] a Report was released in July 2000 by the Assembly's Committee on Legal Affairs and

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[112] Ibid., Articles 25 and 26.
[113] Ibid., Articles 22 and 23.
[114] For an account of the evolution of the Assembly's engagement with the supervision of the execution, cf. among others: Andrew Drzemczewski, "The Parliamentary Assembly's involvement in the supervision of the judgments of the Strasbourg Court", *Netherlands Quarterly of Human Rights* 28, no. 2 (2010): 164-178; Bates, *supra* n 12, 57-59; and Lambert Abdelgawad, *supra* n 1, 59-63. Cf. also the annual reviews by Lambert Abdelgawad, *supra* nn 37, 38 and 49.
[115] Parliamentary Assembly, *Order 485 (1993) – General policy of the Council of Europe*, 25th sitting, 3 February 1993.
[116] By way of Parliamentary Assembly, *Resolution 1115 (1997) – Setting up of an Assembly committee on the honouring of obligations and commitments by member states of the Council of Europe (Monitoring Committee),* 5th sitting, 29 January 1997. As highlighted by the Resolution itself, a monitoring procedure already existed within the Assembly and was governed by *Order 508* (1995). However, there did not exist a special committee specifically entrusted with this monitoring function, but "several general committees" (paras. 2 and 3 of the Resolution). For a thorough account of the historical evolution of the Assembly's monitoring activities, cf. Jan Kleijssen, "The Monitoring Procedure of the Council of Europe's Parliamentary Assembly", in Alfredsson et al., *supra* n 40, 523-528.
[117] Parliamentary Assembly, *Execution of certain cases pending before the Committee of Ministers – Written Question No. 378 by Mrs Ragnarsdóttir, MM. Clerfayt, Hagård and Jurgens*, 10 September 1998, Doc. 8186. More specifically, the Written Question made reference to seven "old cases" (that is, cases "pending before the Committee of Ministers for more than 3 years without any resolution having been issued explaining what measures have been taken or are envisaged") and three "cases appearing to require special measures for the applicant" (that is, cases "in which mere payment of just satisfaction does not appear sufficient to repair fully the damage caused by the violation found").

Human Rights regarding the execution of the Court's judgments.[118] The Report, expressing concern for the increasing number of cases of delayed or incomplete execution, analysed the causes of that state of affairs and put forward possible solutions addressed at all actors involved – from national authorities to the Committee of Ministers and the Court.

Moreover, the Resolution adopted by the Assembly on the basis of that Report called for a stronger role of the Assembly itself in the area. It was envisaged that the Assembly should, *inter alia*, be kept informed on the execution of judgments and devote debates to the issue, address recommendations to the Committee of Ministers concerning the most worrisome cases of delayed execution or non-execution, encourage the active involvement of national parliamentary delegations in execution matters, call the relevant ministers from the respondent States to answer questions before the Assembly, open monitoring procedures in case of delayed execution or non-execution, and have recourse to increasingly severe sanctions in the event of persistent failure by a State to execute (e.g., by challenging the credentials of the recalcitrant State's parliamentary delegation, or by inviting the Committee of Ministers to suspend the State from its rights of representation or, as a last resort, to expel it from the CoE).[119] While the Report and the Resolution recognised that the supervisory task is primarily entrusted to the Committee of Ministers, they portrayed a system where the Court and the Parliamentary Assembly also play a significant role.[120]

From that moment onwards, the Assembly has regularly contributed to overseeing the execution of the Court's judgments in a variety of ways. Between 2000 and 2017, nine reports were drafted by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights, usually followed by

[118] Parliamentary Assembly – Committee on Legal Affairs and Human Rights, *supra* n 1.
[119] Parliamentary Assembly, *Resolution 1226 (2000), supra* n 94.
[120] It is notable that one of the Report's sections, *supra* n 1, is titled "Shared responsibility" (paras. 18 *et seqq*.).

resolutions and recommendations by the Assembly regarding the problems facing the execution of judgments.[121] Among these reports, some focus on the situation of a specific country.[122]

Moreover, since 2006, the Assembly has sought to strengthen its scrutiny by "giv[ing] priority to the examination of major structural problems";[123] in practice, it has done so through *in situ* visits conducted by its rapporteurs and through written requests for information to the Assembly's national delegations.[124] In January 2015, a new sub-committee specifically responsible for the execution of the Court's judgments was established within the Committee on Legal Affairs.

Other tools employed by the Assembly to intervene in the supervision process include written questions to the Committee of Ministers and oral questions to the Chair of the Ministers' Deputies, as well as the inclusion of an agenda item regarding the execution of judgments in one of the Assembly's four annual sessions.[125] The Assembly has also actively contributed to the reform process of the ECHR system by submitting its views and proposals on the occasion of the drawing up of new ECHR Protocols.[126]

It is noteworthy that the control exercised by the Parliamentary Assembly on the execution of judgments has been welcomed from the outset by both the Court and the Committee of Ministers,[127]

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[121] The importance of the role played by the Committee on Legal Affairs and Human Rights is underlined in Drzemczewski, *supra* n 114, 169 *et seqq*.; and in Andrew Drzemczewski, "Quelques observations sur le rôle de la Commission des questions juridiques et droits de l'homme de l'Assemblée parlementaire dans l'exécution des arrêts de la Cour de Strasbourg", in Hartig, *supra* n 59, 55-63. Cf. also Flauss, *supra* n 11, 54-56. For the references of the last report, cf. *supra* n 6.

[122] Until now, these country-specific reports have concerned Turkey: cf. Parliamentary Assembly – Committee on Legal Affairs and Human Rights, *Implementation of decisions of the European Court of Human Rights by Turkey – Report*, 5 September 2002, Doc. 9537; and *Implementation of decisions of the European Court of Human Rights by Turkey*, 1 June 2004, Doc. 10192.

[123] Parliamentary Assembly, *Resolution 1516 (2006)*, *supra* n 72, para. 5. At para. 4, it is stated that "the Assembly feels duty-bound to further its involvement in the need to resolve the most important problems of compliance with the Court's judgments".

[124] Ibid., paras. 5 and 6 in particular.

[125] Lambert Abdelgawad, *supra* n 1, 59-60.

[126] Cf. the *Explanatory Reports* to Protocols nos. 14, 15 and 16.

[127] During an Assembly's debate in 2000, the then President of the Court Judge Wildhaber stated *inter alia*: "My colleagues and I therefore welcome the initiative taken by the Parliamentary Assembly in [respect of the execution of judgments]. I believe that the Assembly has a role to play in encouraging states to comply with their obligations under the Convention, particularly as regards the execution of judgments" (cf. the verbatim records of the debate, taking place on 28 September 2000 at 10 a.m.). As to the Committee of Ministers, in its *Reply to Parliamentary Assembly Recommendation 1477 (2000)*, *supra* n 12, it "welcome[d] the Assembly's interest in the execution of Court judgments". Subsequently, in its *Declaration "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels*", 114th session, 12 May 2004, the Committee "pa[id] tribute to the significant contribution" of the Assembly to improve the execution process (preamble of the Declaration).

commended by various CoE experts and working groups[128] and valued by the latest Brighton and Brussels Conferences on the reform of the Convention's system.[129] It can therefore be said that the Assembly has become a fully-fledged actor in the supervision of execution process; indeed, one of the most resolute ones, even though room to boost its impact exists.[130]

Established in 1999 by means of a resolution by the Committee of Ministers,[131] the Commissioner for Human Rights can be seen as a "facilitator" and "promoter" of respect for human rights in Member States. To this end, the Commissioner advances education in human rights, advises States Parties on and assists them in the implementation of human rights standards, cooperates with States' human rights structures, and reports on the status of human rights and on persisting shortcomings in the protection of human rights.[132]

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[128] The Evaluation Group, *supra* n 12, noted the wide recognition of the "valuable role" of the Parliamentary Assembly in the area of the execution of judgments, welcomed its growing interest in the matter, and concluded that "the supervision process may be facilitated and accelerated as a result of contacts made or questions raised in national Parliaments by members of the Assembly and the resultant publicity" (para. 52).
In 2003, the Steering Committee of Human Rights proposed, as a means to improve and accelerate the execution of ECtHR judgments, "to associate the Parliamentary Assembly more closely" with overseeing the execution of judgments revealing a systemic problem (Committee of Ministers/Steering Committee for Human Rights, *Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights*, *supra* n 95, proposal C.2). In a subsequent report, the Steering Committee emphasised the need to share information on the execution of judgments between all relevant actors, including the Assembly (Steering Committee for Human Rights, *Reform of the European Convention on Human Rights – Declaration of the Committee of Ministers "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels: Activity Report,* 7 April 2006, CDDH(2006)008, para. 25).

[129] The *Brighton Declaration*, *supra* n 13, praised the "important work" by the Assembly in ensuring the well-functioning of the Convention's system (para. 4) and "welcome[d] the Assembly's constant attention to the execution issue through regular reports and debates" (para. 29.e). For its part, the *Brussels Declaration*, *supra* n 14, encouraged the Committee to "promote the development of enhanced synergies with the other Council of Europe stakeholders", including the Assembly (para. C.1.c), and the Assembly "to continue to produce reports on the execution of judgments, to organise awareness-raising activities for members of national parliaments on implementation of the Convention and to encourage national parliaments to follow in a regular and efficient manner the execution of judgments" (para. C.3.f).

[130] One of the most potentially far-reaching implications of the Assembly's engagement consists in the consequent involvement of national parliaments, which could urge their respective governments to execute the Court's judgments and swiftly adopt the necessary legislative amendments. The then President of the Parliamentary Assembly, Ms Anne Brasseur, declared in her opening address at the 2015 Brussels High-level Conference: "the double mandate of parliamentarians – as members of the Assembly and of our respective national parliaments – is of fundamental importance in ensuring that Convention standards are effectively protected and implemented domestically". For more on the role of national parliaments, cf. Section 2.5 of this chapter *infra*.

[131] Committee of Ministers, *Resolution (99)50 on the Council of Europe Commissioner for Human Rights*, 104th session, 7 May 1999.

[132] Ibid., Article 3. For an overview of the Commissioner's mandate and activities, cf. Thomas Hammarberg and John Dalhuisen, "The Council of Europe Commissioner for Human Rights", in Alfredsson et al., *supra* n 40, 515-521. In the original proposals, the Commissioner was conceived as an ombudsman-type institution with complaint-handling functions complementing those of the ECtHR; for an analysis of the evolution of the body's configuration, cf. Jeroen Schokkenbroek, "The Preventive Role of the Commissioner for Human Rights of the Council of Europe", in *The*

Gradually, the Commissioner has assumed a significant role within the Convention's system. While it was already possible under Protocol no. 11 that the President of the Court invited the Commissioner to intervene as a third party in pending cases, after the entry into force of Protocol no. 14 the Commissioner is *entitled to* submit his or her views, without the need for a request to do so from the Court.[133] Whereas only three interventions were submitted by the Commissioner upon invitation by the Court between the establishment of the Commissioner's office and 1 June 2010, following the entry into force of Protocol no. 14 and up until December 2018, observations have been submitted in respect of twenty cases.[134] On the contrary, the proposal to empower the Commissioner to file applications with the ECtHR in cases where a "serious issue of a general nature" is at stake was ultimately rejected.[135]

As regards the post-judgment phase, the Commissioner is vested with limited formal powers but has shown an increasing interest to be involved in the supervisory task. His involvement is in any case consistent with the body's mandate to assist States in the implementation of CoE human rights standards (including the ECHR as interpreted by the Court) and to help them remedy any non-compliance with these standards. With this in view, former Commissioner Thomas Hammarberg affirmed the potential of the body's engagement by highlighting its constant dialogue with national authorities, its awareness of the ECtHR case-law, its power to deliver concrete recommendations to governments (as opposed to "the sort of constitutional principles set out by the Court"), its ability to

Prevention of Human Rights Violations. Contribution on the occasion of the Twentieth Anniversary of the Marangopoulos Foundation for Human Rights, eds. Linos-Alexander Sicilianos and Cristiane Bourloyannis Vrailas (Athens: Ant. N. Sakkoulas; The Hague: Martinus Nijhoff, 2001), 201-213.

[133] Under Article 36(2) as introduced by Protocol 11, the President of the Court could "in the interest of the proper administration of justice, invite … any person concerned who is not the applicant to submit written comments or take part in hearings". The Commissioner could therefore submit his/her views only upon invitation of the Court, like any other "person concerned". By means of Protocol no. 14, a new para. 3 has been added according to which "in all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings". As mentioned in the *Explanatory Report to Protocol no. 14*, *supra* n 46, the inclusion of this provision was backed by both the Commissioner and the Parliamentary Assembly (para. 86).

[134] Cf. the website of the Commissioner at: https://www.coe.int/en/web/commissioner/third-party-interventions, accessed 4 January 2019.

[135] Steering Committee for Human Rights, *Guaranteeing the long-term effectiveness of the European Court of Human Rights, supra* n 95, para. 22.

go beyond the *petitum* and the specific circumstances of the case, and – last but not least – its cooperation with NHRIs.[136]

These characteristics make the action of the Commissioner potentially most significant in those instances where systemic deficiencies were highlighted by the ECtHR and cooperation with national authorities on wide-ranging reforms is thus needed.[137] From another but related viewpoint, the Commissioner could guide the Court in identifying these structural shortcomings,[138] or – preliminarily and proactively – pinpoint these shortcomings and aim to resolve them at the national level before they overwhelm the Court.[139]

Institutionally, the 2006 Rules of the Committee of Ministers provided for the adoption by the Committee of an annual report regarding its supervisory activities, "which shall be made public and transmitted to the Court and to the Secretary General, the Parliamentary Assembly and the Commissioner for Human Rights" (Rule 5). Additionally, the same report by the Steering Committee for Human Rights that proposed the adoption of the new Rules also included – among some other "practical suggestions" – the set up of a "yearly tripartite meeting" including the Chairman of the Committee of Ministers, the Chairman of the Parliamentary Assembly's Committee on Legal Affairs and Human Rights, and the Commissioner, to be held following the publication of the annual report.[140] The suggestion was accepted by the Committee of Ministers through a declaration; however, there is no evidence of these meetings actually taking place.[141]

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[136] Thomas Hammarberg, "The Commissioner's role", in CoE/Directorate General of Human Rights, *supra* n 69, 111-116. More precisely, Hammarberg refers to "National Human Rights Structures"; for the use of this term in the CoE context, cf. Section 3.6 of this dissertation *infra*.

[137] Cf. Parliamentary Assembly, *Resolution 1581 (2007): Council of Europe Commissioner for Human Rights – stock-taking and perspectives,* 36th sitting, 5 October 2007, para. 13 in particular.

[138] *Explanatory Report to Protocol no. 14*, *supra* n 46, para. 87: "The Commissioner's experience may help enlighten the Court on certain questions, particularly in cases which highlight structural or systemic weaknesses in the respondent or other High Contracting Parties".

[139] Committee of Ministers, *Report of the Group of Wise Persons to the Committee of Ministers*, 979bis meeting, 15 November 2006, CM(2006)203, para. 113. Both this Report and *Resolution 1581 (2007)*, *supra* n 137, make reference to the close cooperation between the Commissioner and National Human Rights Structures in carrying out these tasks.

[140] Steering Committee for Human Rights, *Reform of the European Convention on Human Rights*, *supra* n 128, para. 23.

[141] Cf. Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (New York: Open Society Foundations, 2010), 51; and Committee of Ministers, *Declaration of the Committee of Ministers on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels*, 116th session, 19 May 2006.

More generally, the Brussels Declaration invited the Committee of Ministers to "promote the development of enhanced synergies with the other Council of Europe stakeholders", including the Commissioner, in the area of the oversight of execution, and it encouraged the Commissioner "in the exercise of his/her functions – and in particular in his/her country visits – to continue to address with the States Parties, on a case-by-case basis, issues relating to the execution of judgments".[142]

The Commissioner has therefore been recognised as a component of the ever more complex system of supervision of the execution of ECtHR judgments, especially in light of the body's consolidated ties with national authorities.[143] In order to build such a relationship, the Commissioner has traditionally availed himself of the support from NHRIs, with a view to better understanding a country's situation and its difficulties in implementing the Convention or in executing the Court's judgments.

The Department for the Execution of Judgments, which is part of the CoE Directorate General Human Rights and Rule of Law, is mandated to support the Committee of Ministers in its supervisory task by advising it on the appropriateness of the measures planned or effected by States in order to comply with the Court's judgments. At the same time, the Department assists Member States in devising the solutions best suited to executing the judgments.[144] In short, the Department acts as an independent technical advisor to both the Committee of Ministers and States Parties in the post-judgment phase by helping them carry out their respective tasks.

While this supporting role has always been played by the Department for Execution, it has notably been enhanced since States have been required to adopt increasingly complex measures to

[142] *Brussels Declaration*, *supra* n 14, paras. C.1.c and C.3.e in particular.
[143] However, Lambert Abdelgawad, *supra* n 18, 486-487, warns against too an enthusiastic view of the role of the Commissioner in the field of supervision of the execution: "it seems to us that the action of the Commissioner will be inevitably limited by the high degree of technicality of these issues, the limited means, and the need, in this sensitive matter, of synergy with the Court, the Committee of Ministers and the Parliamentary Assembly". Flauss, *supra* n 11, 58, warns against the risk of a "cacophony" of different viewpoints, considering the increasing number of actors involved in the oversight of execution.
[144] Cf., for the mandate of the Department, its website at: http://www.coe.int/en/web/execution/presentation-of-the-department, accessed 4 January 2019.

comply with the Court's judgments and the Committee of Ministers has strengthened its scrutiny over the appropriateness of the measures taken.[145] Therefore, the Department currently analyses and comments upon governments' action plans and reports, keeps under assessment the state of execution of implementing measures, drafts interim and final resolutions as well as other kinds of decisions concerning cases under supervision, proposes to prioritise or debate particular cases, and receives information from non-State entities (victims, NHRIs, NGOs, and the other entities authorised more recently).[146]

The Department for Execution therefore ensures, as far as possible, that the supervisory task entrusted to the Committee of Ministers is not (overly) politicised. The reinforcement of the role of the Department might explain why the establishment of a quasi-judicial body that would have assisted or even substituted the Committee of Ministers in its monitoring functions was rejected (the reluctance by Member States to give up even part of their prerogatives is an alternative convincing explanation).

In 2008, the then Registrar of the Court, Erik Fribergh, argued that especially in situations where the Court is confronted with cases whose underlying issues have already been dealt with repeatedly in previous judgments, it would be more reasonable to refer the new cases directly to the Committee of Ministers, since these cases show failure on the part of the respondent States to execute previous judgments effectively.[147] Fribergh then proposed either to endow the Committee of Ministers with the necessary competences and resources to undertake this function or, more radically, to assign the task to "a more quasi-judicial organ. This could be a separate body, or one operating

[145] Cf., for the already significant role played by the Department in the pre-Protocol 11 system, Flauss, *supra* n 30, 420; and Leuprecht, *supra* n 2*,* 106: "if there is reason to doubt whether the measures taken by a State as a consequence of a Court judgment are pertinent or sufficient, there is little chance of such doubt being expressed by representatives of other States. This uncomfortable task is left to the Directorate of Human Rights". See also Ravaud, *supra* n 19, 655, which defines support to the Committee of Ministers as "one of [the] most difficult and thankless tasks" of the Directorate of Human Rights, "because it is called on to play the role of a watchdog, that is, to remind the Committee of Ministers, whenever necessary, that under the Convention … it must act as a judicial body and not as a political one".
[146] Cf. the webpage of the Department, *supra* n 144.
[147] Fribergh, *supra* n 69, 92-93.

under the auspices of the [Committee]", in the belief that "enforcement issues are becoming more and more judicial".[148]

The idea was abandoned, until the Steering Committee for Human Rights suggested in 2012 that the Brighton High-level Conference could consider "providing the Committee of Ministers with the assistance of an independent expert body".[149] However, as Turkey asked to remove the proposal from the final version of the document, no mention of it was made in the final declaration of the Conference.

Thus, today, as put it by two scholars, "the delegation of formal and informal powers to the Department for the Execution of Judgments … is the pivotal guardian against the politicisation of the monitoring of human rights compliance".[150] On these bases, it has been argued that the Department for Execution should be endowed with adequate funding[151] and encouraged in its contacts with NHRIs and civil society with a view to ensuring an effective and unbiased overseeing of the execution of judgments by States Parties.

2.5. The involvement of national actors: national parliaments and courts

At this juncture, the involvement of domestic actors such as national parliaments and courts is to be mentioned. As shown in Chapter 1, the recent awareness of the centrality of domestic implementation for the sustainability of the Convention's system has triggered significant efforts on the part of the CoE to engage with national bodies. The CoE is thus approaching Member States not

[148] Ibid. Specifically, Fribergh proposed the creation of a "Panel of five to seven legal/judicial experts".
[149] Steering Committee of Human Rights/Committee of Experts on the Reform of the Court, *supra* n 95, Appendix VI, para. 13.
[150] Çalı and Koch, *supra* n 2, 304. The article identifies the Department for Execution as one of the main "institutional constraints" that ensure the effectiveness of the CoE supervisory system.
[151] For instance, the Evaluation Group, *supra* n 12, para. 73, already called for an "urgent reinforcement" of the Department, which was considered seriously understaffed compared to its workload. More recently, in the *Brussels Declaration*, *supra* n 14, the Committee of Ministers was encouraged to "support an increase in the resources of the Department for the Execution of Judgments, in order to allow it to fulfil its primary role, including its advisory functions, and to ensure co-operation and bilateral dialogue with the States Parties", including by increasing the permanent staff and seconding national judges or officials (para. C.1.j).

only as a whole, through their representatives at the international level (i.e., governments), but also in their various branches, thereby "disarticulating" the international unity of States.[152]

The topic is complex and has been discussed extensively by both scholars and European and national stakeholders.[153] Nonetheless, it will only be touched upon here, since it is halfway between the supervision of execution and the actual execution of ECtHR judgments. Indeed, national parliaments and courts are encouraged to put pressure on their governments and monitor their compliance with the Convention and the Court's rulings; at the same time, whenever possible and within the limits of their competences, they are also called upon to implement the Convention and the Court's judgments directly.

As far as the execution of ECtHR judgments is concerned, national parliaments are asked to table and adopt the legislative proposals that are required to bring their domestic legal orders in line with the Court's judgments – even though, admittedly, it will often be the case that a legislative provision needs administrative regulations to be effectively implemented as well as funding from the government. National courts, for their part, must align their rulings to the Court's case-law, when legislative or regulatory changes are not needed. Indeed, all branches (the legislature, the executive, and the judiciary) are bound by the international obligations undertaken by the State and shall give effect to these obligations as far as they are concerned. This state of affairs also implies, for the system under examination, that there is sometimes a fine line between execution and monitoring of execution.

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[152] Cf. Helfer and Slaughter, *supra* n 1, 288-289, which regards the "ability to penetrate the surface of the state" as an attribution of effective supranational organisations and adjudicatory bodies in particular. Cf. also Wojciech Sadurski, "Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments", *Human Rights Law Review* 9, no. 3 (2009): 421, which uses the same paradigm to describe the relationship between the ECtHR and national courts.

[153] Cf. in the literature, among others: Philip Leach and Alice Donald, *Parliaments and the European Court of Human Rights* (Oxford: Oxford University Press, 2016); and Janneke H. Gerards and Joseph Fleuren, *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law* (Cambridge: Intersentia, 2014). Cf. also, as regards debates between stakeholders: Julia Iliopoulos-Strangas, ed., *Cours suprêmes nationales et cours européennes: concurrence ou collaboration?* (Athens: Ant. N. Sakkoulas; Bruxelles: Bruylant, 2007); CoE/Directorate General of Human Rights, *supra* n 69; and the "dialogues" mentioned at n 159 *infra*.

Contacts between the Parliamentary Assembly and the Court on the one hand and their national counterparts on the other have multiplied over the years. Since declaring its keen interest in overseeing the execution of the Court's judgments, the Assembly has made clear that such an engagement would imply a parallel involvement of national delegations to the Assembly and, by extension, of national parliaments.[154] National delegations have been repeatedly invited to scrupulously monitor the execution of judgments as carried out by their respective governments, and national parliaments encouraged to introduce appropriate procedures at the domestic level to ensure the effective supervision of the execution process.[155]

These recommendations were developed and reinforced in a 2011 Resolution by the Parliamentary Assembly, which was specifically devoted to the role that national parliaments could play in monitoring the implementation of international norms and judgments and included some "basic principles for parliamentary supervision of international human rights standards".[156] As an explicit follow-up to this Resolution, a number of training seminars were organised for parliamentarians and their staff with a view to boosting their general knowledge of the Convention's system and their engagement in the oversight of the execution of the Court's judgments.[157]

While the role played by the Parliamentary Assembly in the supervision of execution has long been recognised at the CoE level, support for a proactive approach by national parliaments in this field has been less explicit until recently, when the 2015 Brussels Declaration acknowledged "that

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[154] In its *Resolution 1226 (2000)*, *supra* n 94, the Assembly noted that "members of national delegations to the Assembly have a role to play" (para. 6) and invited them "to carefully follow the execution of judgments of the Court in which their governments are involved in their respective parliaments and to take all necessary measures for their quick and efficient execution" (para. 12.2).

[155] Parliamentary Assembly, *Resolution 1516 (2006)*, *supra* n 72, para. 22.1. An examination of the existing national procedures that allow parliaments to monitor the implementation of the Convention's standards and of the Court's judgments has recently been carried out: Parliamentary Assembly/Parliamentary Project Support Division, *The role of parliaments in implementing ECHR standards: overview of existing structures and mechanisms – Background memorandum prepared by the Secretariat*, 8 September 2015, PPSD (2014) 22 rev. The Memorandum shows that good practices exist, but it highlights the need to strengthen and extend them.

[156] Parliamentary Assembly, *Resolution 1823 (2011) – National parliaments: guarantors of human rights in Europe*, 25th sitting, 23 June 2011. The resolutions and recommendations adopted on the subject are numerous: cf. *Resolution 2075 (2015) – Implementation of judgments of the European Court of Human Rights,* 33rd sitting, 30 September 2015, for an overview of the relevant legal acts (para. 2 in particular).

[157] Parliamentary Assembly/Parliamentary Project Support Division, *The role of Parliaments in implementing the European Convention on Human Rights standards – Interparliamentary cooperation activities 2013-2016*, 20 April 2016, PPSD(2016)11 (updated version of PPSD(2014)07 rev. 4).

the execution of the Court's judgments may require the involvement of the [national] judiciary and parliaments" and invited States Parties to "encourage the involvement of national parliaments in the judgment execution process", for instance by submitting reports to them or holding debates.[158]

For its part, the Court has long sought a closer interaction with domestic judicial bodies, especially with high-ranking ones. This has been realised, first of all, through the setup of "dialogues" that take place every year on the day of the official opening of the Court's judicial year.[159] Additionally, outside the framework of these meetings, other opportunities have been organised with a view to sharing opinions and experiences, including conferences and visits of the Court by delegations of national judges. On a test basis since 2015 and more firmly since 2017, these interactions have been reinforced and formalised through the establishment of the Superior Courts Network, which, by means of an intranet site, allows for regular exchanges between the ECtHR and national supreme courts regarding the Convention and the Court's jurisprudence on the one hand and domestic laws and case-law on the other.[160]

It should also be reminded that a dialogue between the ECtHR and national courts also routinely takes place through (ECtHR and national) judgments.[161] In this respect, a potentially significant innovation has been brought by Protocol no. 16 to the Convention. Entered into force in August 2018 for the States that ratified it, Protocol no. 16 allows national highest courts to ask for the opinion of

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[158] *Brussels Declaration*, *supra* n 14, preamble and para. B.2.h. Additionally, a more general call was made for enhanced awareness-raising of and dialogue with national parliaments (as well as other national actors: cf. paras. B.1.b, B.2.a and B.2.j). The *Brighton Declaration*, *supra* n 13, already made reference to "the important role of national parliaments in scrutinising the effectiveness of implementation measures taken", but rather incidentally (para. 29.a.3).

[159] The practice has been in place since 2005. In 2014, the dialogue specifically concerned the interaction between the ECtHR and national courts in the execution of judgments: CoE/ECtHR, *Dialogue between judges, supra* n 1. Cf. also the 2010 Dialogue, titled *The Convention is yours* (Strasbourg, January 2010) and the 2012 one, even more explicit: *How can we ensure greater involvement of national courts in the Convention system?* (Strasbourg, January 2012).

[160] For an overview of the Network, as well as of its Charter, Operational Rules, and annual reports, cf. the Network's webpage at https://www.echr.coe.int/Pages/home.aspx?p=court/network, accessed 4 January 2019.

[161] Cf. Lech Garlicki, "Some Observations on Relations between the ECtHR and the Domestic Jurisdictions", in Julia Iliopoulos-Strangas, *supra* n 153, 305-325; and Michael O'Boyle, "The Role of Dialogue in the Relationship between the European Court of Human Rights and National Courts", in *The Realisation of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak,* eds. Yves Haeck et al. (Cambridge: Intersentia, 2013), 94-96, which more generally offers an overview of the various means of interaction between the ECtHR and national courts. For an examination of the dialogue, through judgments, between the ECtHR and UK courts, cf. Lord Kerr, "The Need for Dialogue between National Courts and the European Court of Human Rights", in *The European Court of Human Rights and its Discontents: Turning Criticism into Strength,* eds. Spyridon Flogaitis, Tom Zwart, and Julie Fraser (Cheltenham and Northampton: Edward Elgar Publishing, 2013), 104-115.

the ECtHR on the interpretation and application of any Convention's provisions.[162] Drawing on the EU preliminary ruling procedure, this new tool clearly aims to reinforce the cooperation between the Court and its national judicial interlocutors with a view to promoting the domestic application and ownership of the Convention as well as reducing the Court's overload.

It is worth mentioning that the Court also directly engages in formal and informal dialogues with other national actors, including parliaments and governmental representatives, as well as with non-governmental organisations.[163]

2.6. Preliminary conclusions

For a long time, the system of supervision of the execution of ECtHR judgments centred around the Committee of Ministers has run smoothly and has been hailed as a success story. In the face of a growing trend of non-execution or delayed execution of judgments by the respondent States, calls have been made for the Committee of Ministers to adopt a firmer stance against non-compliant States by making use of the instruments introduced by Protocol no. 14 (especially, the infringement proceedings) or, in the most extreme cases, of the suspension or expulsion of the non-compliant State from the CoE (Article 8 of the CoE Statute).[164]

However, the Committee has proved reluctant to activate either interpretation or infringement proceedings, let alone the ultimate expulsion of States from the CoE.[165] Other proposals to tackle the failure by States to execute judgments, such as the imposition of fines on non-compliant States and

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[162] CoE, *Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 2 October 2013, Council of Europe Treaty Series – No. 214. Cf. also its related *Explanatory Report*.

[163] Martin Kuijer, "The Margin-of-Appreciation Doctrine and the Strengthening of the Principle of Subsidiarity in the Recent Reform Negotiations", *Human Rights Law Journal* 36, nos. 7-12 (2016): 346-347.

[164] The Parliamentary Assembly has been particularly vocal in this respect. Initially vague (see, for instance, *Recommendation 1764 (2006). Implementation of judgments of the European Court of Human Rights*, 24th sitting, 2 October 2006, para. 5), the recommendations to the Committee of Ministers in this respect have become increasingly specific by making explicit reference to Article 8 CoE Statute (e.g., *Recommendation 1955 (2011) Final version. Implementation of judgments of the European Court of Human Rights*, 6th sitting, 26 January 2011, para. 1.5) and to new Article 46 paras. 3, 4 and 5 (*Recommendation 2079 (2015)*, *supra* n 101, para. 1.1).

[165] Cf., for instance, Committee of Ministers/Steering Committee for Human Rights, *Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights*, *supra* n 95, proposal C.4, according to which "the latter measure [recourse to Article 8] is an extreme one and its application would be counterproductive in most instances. In fact, such a State, more than any other, needs to be subjected to the discipline of the Council of Europe, and not be excluded from it". Cf. also Lambert Abdelgawad, *supra* n 1, 40-45; and Bates, *supra* n 12, 89.

the substitution of the Committee of Ministers with a quasi-judicial body, did not meet with more enthusiasm and were never followed up.

Even though no major reform of the Convention has been enacted with a view to changing the model of supervision, this chapter has shown that the system has been amended in various respects and made more efficient, independent, transparent, and participatory. In practice, the Committee of Ministers does not hold a monopoly on the supervision of execution anymore and is constrained by a multiplicity of actors which de-politicise its supervisory task. Also thanks to increasingly specific indications from the Court, as well as to the information provided by third parties, the examination by the Department for Execution of the appropriateness of the measures enacted or envisaged by States Parties should be less one-sided. The Parliamentary Assembly and the Commissioner for Human Rights are willing to be involved to a greater extent in the monitoring of the execution of judgments and can put additional pressure on recalcitrant States.

The increasing engagement by national actors is also noteworthy with a view to strengthening domestic implementation. National parliaments and courts can urge their governments to take action, as well as intervene themselves directly in order to give effect to the Court's judgments. Indeed, the coordination of multiple national actors is not infrequently required to give full execution to a judgment.[166]

What is the place for NHRIs in this picture? This chapter has shown that new paths have been opened for the participation by NHRIs, which are now formally entitled to provide independent

[166] Cf. Sundberg, *supra* n 40, 480. Cf. also Lambert Abdelgawad, *supra* n 18, 487, which also makes reference to Committee of Ministers, *Recommendation CM/Rec(2008)2 of the Committee of Ministers to Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights*, 1017th meeting of the Ministers' Deputies, 6 February 2008. In this Recommendation, States are invited to "designate a co-ordinator – individual or body – of execution of judgments at the national level, with reference contacts in the relevant national authorities involved in the execution process" in order to enhance synergies between all national actors involved. As shown in the responses by CoE Member States to a questionnaire on the domestic mechanisms for the execution of ECtHR judgments, most States have designated the government agents in Strasbourg as their national coordinators: CoE, *Round-table on Recommendation (2008)2 of the Committee of Ministers to Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights. Responses to the Questionnaire on the domestic mechanisms for rapid execution of the Court's judgments. 15-16 December 2011, Tirana Hotel International, Albania*, 15 November 2011. For an assessment of this choice and its consequences, cf. Elizabeth Mottershaw and Rachel Murray, "National responses to human rights judgments: the need for government co-ordination and implementation", *European Human Rights Law Review,* no. 6 (2012), 639-653, as well as Section 1.2 of this dissertation.

information to the Committee of Ministers regarding the state of execution of ECtHR judgments in their respective States and thus potentially contribute to a more accurate and balanced monitoring on the part of the Committee. The analysis of the means and effects of this participation will be at the core of Chapter 4. Additionally, as Chapter 5 will illustrate, NHRIs can act at the national level – before, after or independently from the said supranational intervention – by applying their traditional domestic functions to facilitate the execution of ECtHR judgments.

Nonetheless, before empirically examining all of these activities, it is necessary to clarify why NHRIs are believed to be ideally situated to carry out both monitoring and cooperative functions, at the international and national levels, in relation to the implementation of international law and rulings, and thus in relation to the execution of ECtHR judgments as well. It is time, in other words, to explore the "unique position" of NHRIs.

CHAPTER 3. PROMOTING AND PROTECTING HUMAN RIGHTS: THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS

National Human Rights Institutions (NHRIs) are a rather recent phenomenon. Before the so-called Paris Principles, i.e., the international non-binding standards governing the composition and functions of NHRIs, were adopted in October 1991,[1] sixteen of these bodies had been created.[2] The Paris Principles considerably encouraged the establishment of NHRIs by States: between the end of 1991 and December 1993, when the Principles were endorsed by the UN General Assembly, fourteen other institutions were founded.[3] Since the General Assembly's Resolution, the number of NHRIs at least partially compliant with the Paris Principles has risen to one hundred and twelve.[4] Additional institutions have been created but considered non-compliant with the Principles, while still others have not asked for accreditation by the competent body.

The significant rise in the number of NHRIs indicates a fast-growing interest on the part of States to establish these institutions, as well as on the part of international organisations to promote their creation.[5] The literature has somewhat struggled to keep the pace with the evolution of NHRIs. While an increasing body of research examines multiple aspects of NHRIs' structure, functioning, networks, and impact on human rights promotion and protection, the concept of "national human rights institution" itself has proved difficult to define and still forms the subject of debate.

[1] Officially: "Principles relating to the Status of National Institutions", drafted during the first International Workshop on National Institutions for the Promotion and Protection of Human Rights, held in Paris between 7 and 9 October 1991.
[2] The number is derived from Jeong-Woo Koo and Francisco Ramirez, "National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004", *Social Forces* 87, no. 3 (2009): 1352-1353. The first NHRIs were established right after World War II – e.g., the French *Commission nationale consultative des droits de l'homme* was instituted in 1947.
[3] Ibid. The Principles were endorsed by means of UN General Assembly, *Resolution 48/134. National institutions for the promotion and protection of human rights*, 20 December 1993, A/RES/48/134.
[4] Global Alliance of National Human Rights Institutions (GANHRI), *Chart of the Status of National Institutions Accredited by the Global Alliance of National Human Rights Institutions: Accreditation Status as of 8 August 2018*, 1.
[5] The reasons for these trends will be analysed in greater detail in Sections 3.3 and 3.5 of this chapter.

Far from being a doctrinal controversy, the issue of which institutions can be identified as NHRIs has substantive implications, including for the participation by NHRIs in international fora, and it is thus dealt with at the outset of this chapter.

Subsequently, in order to give further substance to the concept of NHRIs, a typology of these institutions is put forward and the dynamics of their proliferation worldwide are sketched. Another section is devoted to the system of international accreditation of NHRIs and its evolution over time; the extent to which this system manages to take into account the effectiveness of NHRIs is given special consideration.

Finally, the chapter examines the role that NHRIs have played at the UN level, where these institutions have long been involved and have been vested with increasing prerogatives, and at the CoE one, where participation by NHRIs to date is comparatively less extensive and formalised but on the rise. This overview is intended to contextualise the specific role that NHRIs can play at the CoE level in respect of the execution of ECtHR judgments, which will be examined in-depth in Chapter 4.

3.1. Definitional issues and fundamental characteristics of National Human Rights Institutions

The Paris Principles, essential point of reference for any existing or future institutions, do not define NHRIs. The closest to an official definition of NHRIs was first put forward in a Handbook published by the UN Centre for Human Rights in 1995,[6] which broadly identifies an NHRI as "a body established in the constitution or by law to perform particular functions in the field of human rights".[7] Some more details were given in a revised edition of the Handbook, according to which NHRIs are

[6] The UN Centre for Human Rights was consolidated into the Office of the United Nations High Commissioner for Human Rights (OHCHR) in 1997.

[7] UN Centre for Human Rights, *National Human Rights Institutions – A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No. 4 (New York and Geneva: UN, 1995), 6, para. 38.

"State bodies with a constitutional and/or legislative mandate to protect and promote human rights. They are part of the State apparatus and are funded by the State".[8]

A few fundamental features of NHRIs emerge from these general definitions. First of all, NHRIs are established and funded by States and they must be enshrined in the country's legislative – if not constitutional – framework. The fact that NHRIs are, in essence, State bodies separates them from NGOs. At the same time, NHRIs must be independent from the governments that create them; in this sense, NHRIs can also be distinguished from other State organs that, in one way or another, deal with human rights – such as *ad hoc* inter-ministerial or parliamentary committees.

While independence from the rest of the State apparatus is a common feature of NHRIs and the judiciary, there remain important differences between the two: indeed, the judiciary does not focus on human rights exclusively nor does it have the broad mandate that is conferred upon NHRIs, as it is only concerned with applying human rights norms to individual cases (with a wider impact in the case of constitutional or supreme courts).[9]

Whereas independence is not explicitly reflected in the above-mentioned definitions, it is unanimously recognised as a crucial characteristic of NHRIs, as made clear by the Paris Principles. This "unique position"[10] of NHRIs – as independent State bodies – is what constitutes their added value, first of all compared to NGOs: while the independence of NHRIs from the rest of the State structures is required to ensure that these latter's conduct is overseen and abuses are sanctioned, the

[8] Office of the United Nations High Commissioner for Human Rights (OHCHR), *National Human Rights Institutions: History, Principles, Role and Responsibilities*, Professional Training Series no. 4, rev. 1 (New York and Geneva: UN, 2010), 13.

[9] C. Raj Kumar, "National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights", *American University International Law Review* 19, no. 2 (2003-2004): 293-296. Even when the functions of NHRIs and the judiciary come closest (for instance, when an NHRI has a quasi-judicial mandate and decides upon individual complaints), differences remain, as noted by Raj Kumar: while the judiciary has stronger enforcement capacities, NHRIs are often not hindered by rules (e.g. on standing or statute of limitations) which limit their ability to deal with human rights violations (295-296 in particular).

[10] The expression is used in Anne Smith, "The Unique Position of National Human Rights Institutions: A Mixed Blessing?", *Human Rights Quarterly* 28 (2006): 904-946; but also in the General Observations by the Global Alliance of National Human Rights Institutions (GANHRI), where the concept is thus summarised: "The character and identity of an NHRI serves to distinguish it from both government bodies and civil society. As independent, pluralistic institutions, NHRIs can play an important role" (GANHRI, *General Observations of the Sub-Committee on Accreditation*, 21 February 2018, G.O. 1.5; for more on GANHRI, cf. *infra* in this section and chapter).
In Gérard Fellous, *Les Institutions nationales des droits de l'homme: acteurs de troisième type* (Paris: La Documentation française, 2006), 11, NHRIs are defined as "'organes de troisième type', entre l'État et la société civile".

"official status" of NHRIs should give them stronger legitimacy in the eyes of the public, allow them to have a more cooperative relationship with other State organs and agencies, and prevent them from pursuing any particular agenda.[11]

This is not to suggest that NHRIs are in any way "better" than NGOs; as different entities, they perform distinct but complementary tasks. Indeed, one of the main functions of NHRIs is precisely to bridge the gap[12] between civil society on the one hand and the State and international organisations on the other by conveying the former's concerns to the latter, which are not always readily accessible to NGOs, especially to smaller local ones.[13]

This objective can be attained in various ways. The preferable model, according to the Paris Principle, would be a "pluralist representation of the social forces" in the NHRI's membership: the Principles mention representatives from NGOs, "trends in philosophical or religious thought", universities, and parliament as examples.[14] Nonetheless, as clarified by the international association of NHRIs, the Global Alliance of National Human Rights Institutions (GANHRI), and specifically by its Sub-Committee on Accreditation, there exist other solutions to ensure the involvement of civil society, aside from direct incorporation in the NHRI's membership: these include participation by civil society groups in the appointment procedures, the creation of bodies (such as advisory

[11] Various authors have underlined the different contributions that NHRIs and NGOs make to the promotion and protection of human rights: cf., among others, Smith, *supra* n 10, 908-909 especially; and, on the complementarity of such contributions, Raj Kumar, *supra* n 9, 296-298. Brice Dickson, former Chief Commissioner of the Northern Irish NHRI, describes the added value of NHRIs compared to NGOs in the following terms: "first, [NHRIs] can influence parliamentarians and administrators in a manner which it is hard for NGOs to emulate. Second, they can operate on the judicial stage in a uniquely versatile way. Third, they can – or at least should be able to – investigate allegations of human rights abuses. Fourth, they can seek to appeal to a broad spectrum of society, making human rights a concept which is attractive to all, rather than to a narrow elite or to those who have vested interests" (Brice Dickson, "The contribution of human rights commissions to the protection of human rights", *Public Law* (Summer 2003): 278).

[12] The "bridge" metaphor, together with the "crossroads" one, frequently recurs in the literature regarding NHRIs: e.g., in OHCHR, *supra* n 8, 13; Smith, *supra* n 10, 908-909; and Gauthier de Beco, "National Human Rights Institutions in Europe", *Human Rights Law Review* 7, no. 2 (2007): 361 *et seqq*.

[13] NHRIs can also act as drivers and venues for activism and mobilisation by civil society: cf. David S. Meyer, "National Human Rights Institutions, Opportunities, and Activism", in *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, eds. Ryan Goodman and Thomas Pegram (Cambridge: Cambridge University Press, November 2011), 328-333, which also outlines potential obstacles.

[14] Paris Principles, *supra* n 3, Section B ("Composition and guarantees of independence and pluralism"), para. 1.

committees) or fora allowing for effective cooperation between the NHRI and NGOs, or a pluralistic staff.[15]

The fact remains that, if an NHRI must be independent from the State apparatus, it must also be independent from NGOs and any other external influences. This aspect – even though not adequately stressed by the Paris Principles nor by the General Observations of GANHRI, which focus on the independence of NHRIs from their governments – is crucial, inasmuch as an NHRI must be perceived by the public as not having any vested interests as well as retain the trust of State authorities in order to cooperate with them.[16]

Admittedly, the relationship between NHRIs and NGOs can become complicated for various reasons. In authoritarian or semi-authoritarian States, where civil society organisations find it hard to operate, governments may establish puppet NHRIs to silence these organisations further. Even without going that far, the establishment of NHRIs may take much needed resources (of both national and international origin) and thus influence from NGOs. The increasing space reserved to NHRIs within the UN system might also go to the detriment of NGOs.[17] It is critical for the well-functioning and legitimacy of both NHRIs and NGOs that a cooperative relationship, respectful of the different roles, is established between them.

As to the independence of NHRIs from their governments, the Principles partially clarify its meaning – own staff and premises and a stable mandate for members – and how to achieve it – adequate funding and the indication of the duration of the term of office in an official act. Further criteria for assessing the independence of NHRIs have been developed by the GANHRI Sub-Committee on Accreditation.[18]

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[15] GANHRI, *supra* n 10, G.O. 1.7, "Ensuring pluralism of the NHRI".

[16] Smith, *supra* n 10, 910, describes the potential difficulties in the relationship between NHRIs and their main partners in the following terms: "if a NHRI is seen as being too close to the government or holding an agenda dictated by government departments … then they will be viewed by NGOs and the civil society at large as simply a puppet of the government and, therefore, damage their credibility. Conversely, if a NHRI allows NGOs to influence its workings such that an overly close relationship develops between the two, a NHRI will simply be seen as another 'pro-NGO'".

[17] Gauthier de Beco, "Networks of European National Human Rights Institutions", *European Law Journal* 14, no. 6 (November 2008): 869.

[18] GANHRI, *supra* n 10, G.O. nos. 1.8, "Selection and appointment of the decision-making body of NHRIs"; 1.9, "Political representatives on NHRIs"; 1.10, "Adequate funding of NHRIs"; 2.1, "Guarantee of tenure for members of the

If pluralism and independence are inherent in the composition of NHRIs, the promotion and protection of human rights are the cornerstone of the functions of these institutions. After specifying that NHRIs "shall be given as broad a mandate as possible",[19] the Paris Principles articulate the responsibilities of NHRIs in terms of promoting and protecting human rights. These include: advising the government, parliament, and any other relevant authorities on human rights matters by examining existing laws and practices or bills, by recommending amendments, and more generally by submitting opinions; promoting the ratification of international human rights treaties and domestic compliance with them; contributing to State reports to international monitoring bodies; cooperating with international and regional organisations; researching on human rights; and promoting knowledge of human rights in schools and within the public at large.[20]

A last function set out in the Principles, although almost *en passant*, is that of receiving individual complaints of human rights violations; placed under the heading "additional principles concerning the status of commissions with quasi-jurisdictional competence", this task is considered optional by the Principles, for historical reasons.[21] The fact that the complaint-handling function is left by the Principles to the discretion of States has been criticised by many and identified as one of the main shortcomings of the Principles – and areas for change.[22] At any rate, a high number of

NHRI decision-making body"; 2.2, "Full-time members of an NHRI"; and 2.3, "Protection from criminal and civil liability for official actions and decisions undertaken in good faith". GANHRI General Observations marked with number 1 constitute "essential requirements of the Paris Principles" and are considered "direct interpretations of the Paris Principles", whereas those marked with number 2 are classified as "practices that directly promote Paris Principles compliance" and "are drawn from the [Sub-Committee on Accreditation]'s extensive experience in identifying proven practices to ensure independent and effective NHRIs" (cf. GANHRI, *supra* n 10, "Introduction", para. 9).

[19] Paris Principles, *supra* n 3, Section A ("Competence and responsibilities"), para. 2.

[20] Ibid., Section A, para. 3.

[21] Ibid., Section D. At the time when the Principles were drafted, not all NHRIs were entrusted with this responsibility; for instance, the French commission, one of the most active organisers of the Paris Workshop, was not.

[22] On the importance of the quasi-judicial function of NHRIs and of appropriate investigative powers: Linda C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection", *Harvard Human Rights Journal* 13 (2000): 24 in particular; Smith, *supra* n 10, 914 *et seqq*.; Gauthier de Beco and Rachel Murray, *A Commentary on the Paris Principles on National Human Rights Institutions* (Cambridge: Cambridge University Press, 2014), 138. Amnesty International, in its *National Human Rights Institutions: Amnesty International's recommendations for effective protection and promotion of human rights*, 30 September 2001, urges governments to entrust NHRIs with investigative and complaint-handling powers (section 4). In Katerina Linos and Tom Pegram, "What Works in Human Rights Institutions?", *American Journal of International Law* 111, no. 3 (2017): 628-688, empirical support is found to the argument that the attribution of complaint-handling powers to NHRIs contributes to the effectiveness of these institutions. A different view is expressed in Richard Carver, "National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law", in Goodman and Pegram, *supra* n 13, 200 *et seqq*.

NHRIs are currently entrusted with this responsibility by their governments and the trend is likely to increase in light of the obligation for States which have ratified the Optional Protocol to the Convention against Torture (OPCAT) to establish National Preventive Mechanisms.[23]

In sum, in terms of the competences of NHRIs, the Paris Principles call for a broad mandate, which should equally involve promotion and protection functions (whose boundaries are in any case often blurred)[24] and concern all human rights. For this requirement to be upheld, in principle, only one NHRI could exist in each State – as clarified by GANHRI,[25] which has only exceptionally accredited more than one NHRI in a country, the main example to date being the United Kingdom in light of its peculiar devolution regime.[26]

Another conclusion that can be drawn from the analysis of the Principles is that a major part of the responsibilities of NHRIs extend to the international level. In other words, not only are NHRIs called upon to connect civil society with domestic authorities, but they are also required to bridge the

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[23] The tendency of States to designate existing or future NHRIs as their National Preventive Mechanisms is analysed in greater detail in Section 3.5 *infra*.

[24] The GANHRI Sub-Committee on Accreditation draws the distinction along the following lines: "The Sub-Committee understands 'promotion' to include those functions which seek to create a society where human rights are more broadly understood and respected. Such functions may include education, training, advising, public outreach and advocacy. 'Protection' functions may be understood as those that address and seek to prevent actual human rights violations. Such functions include monitoring, inquiring, investigating and reporting on human rights violations, and may include individual complaint handling". The distinction is not, however, crucial, as long as NHRIs are entrusted with a broad mandate including most if not all of the above-mentioned functions. Sonia Cardenas, "Emerging Global Actors: The United Nations and National Human Rights Institutions", *Global Governance* 9, no. 1 (2003): 25 *et seqq*., uses a different classification, according to which "regulative functions are those focused on eliciting conformance with international norms and rules", whereas "constitutive functions are those intended to transform the identity of state or societal actor".

[25] Current Rule 6(3) of GANHRI *Rules of Procedure* (see *infra* n 56) reads: "Should more than one NHRI from a UN Member State seek accreditation by the GANHRI, the conditions precedent for consideration of the application are the following: i. Written consent of the Government of the UN Member State. ii. Written agreement between all concerned national human rights institutions on the rights and duties as a GANHRI member including the exercise of the one voting and the one speaking right. This agreement shall also include arrangements for participation in the international human rights system, including the Human Rights Council and the Treaty Bodies". Previously, GANHRI Sub-Committee on Accreditation had more explicitly maintained that it "acknowledges and encourages the trend towards a strong national human rights protection system in a State by having one consolidated and comprehensive national human rights institution" (ICC/GANHRI, *General Observations of the Sub-Committee on Accreditation*, May 2013, G.O. 6.6). The stance of the Sub-Committee on the matter has not, at any rate, substantially changed, as the coexistence of multiple NHRIs in a State is still considered exceptional.

For an examination of the arguments in favour and against the establishment of either a single or multiple domestic institutions tasked with the promotion and protection of human rights, cf. Richard Carver, "One NHRI or Many? How Many Institutions Does It Take to Protect Human Rights? – Lessons from the European Experience", *Journal of Human Rights Practice* 3, no. 1 (2011): 1–24.

[26] The United Kingdom has three NHRIs, which have all been recognised as fully compliant with the Paris Principles: the Equality and Human Rights Commission (Great Britain), the Northern Ireland Human Rights Commission, and the Scottish Human Rights Commission (GANHRI, *supra* n 4, 8). Bulgaria is, currently, the only other State that has more than one accredited NHRIs; however, both the Commission for Protection Against Discrimination and the Ombudsman have been considered by GANHRI only partially compliant with the Paris Principles (ibid., 10).

national and international levels: by promoting the adoption of international instruments by their respective governments, harmonising national legislation and practice with these instruments, reporting to international and regional bodies, and cooperating more generally with them. This link should work as a two-way connection by which NHRIs ensure the local implementation of international standards and decisions, while at the same time bringing domestic issues – and solutions – to an international audience.

To conclude, NHRIs can be defined as independent and pluralist State bodies whose mandate is to promote and protect human rights. They carry out this mandate in many ways, in cooperation with national authorities and civil society as well as with international and regional organisations. Before focusing on the supranational dimension of the work of NHRIs and on their relationship with international and regional bodies (aspects which are especially relevant to this dissertation), a brief outline of the forms that these institutions can take and of the patterns of their spreading is warranted.

3.2. Categories of National Human Rights Institutions

As mentioned, as far as the composition of NHRIs is concerned, the Paris Principles merely require that pluralism and independence of the body be ensured, and they suggest potential categories of members. The vagueness of the Principles on this point, as on others, is a deliberate choice.

The watchword of the 1991 Paris Workshop, where the Principles were drafted, was flexibility, in order to allow for States to devise their national institutions in accordance with their own legal and cultural traditions, as well as with their own institutional frameworks, thereby respecting sovereignty and boosting national ownership over NHRIs.[27] Moreover, the national institutions which were already in place when the Workshop was held, and which contributed to drafting the Principles, varied

[27] This concept is underlined in Resolution 48/134, *supra* n 3, para. 12: "recognizing that it is the right of each State to choose the framework that is best suited to its particular needs at the national level". Cf. also Raj Kumar, *supra* n 9, 263: "even states that are over-zealous in their sovereignty may favor NHRI formation".

greatly as to their institutional characteristics.[28] These two factors mainly explain the wide range of structures of current NHRIs.

While it could be argued that each NHRI is a model on its own, showing a unique mix of formal and functional characteristics, an approximate categorisation of NHRIs is possible – and useful to some ends. Indeed, various classifications of NHRIs exist in the literature, which usually combine institutional features and the main tasks performed. A four-type classification is adopted here whereby consultative commissions and human rights ombudsmen are at the two ends of the spectrum.[29]

Consultative commissions are normally characterised by a large and diversified membership. The French *Commission nationale consultative des droits de l'homme*, created in 1947 and thus the model for this kind of institutions, is composed of sixty-four members; the Greek National Commission for Human Rights consists of thirty-one. Consultative commissions can also be found in some African States, such as Morocco, Senegal, and Egypt. A substantial number of members often corresponds to predominantly advisory functions: that is, the main task of these institutions is to submit recommendations and opinions to the government, parliament, and other domestic authorities.

Symmetrically, the human rights ombudsman is a single-headed institution, or anyway one with a restricted membership.[30] This NHRI type is clearly rooted in the classical Swedish ombudsman of the XIX century and its successors – i.e., bodies whose main responsibility is to oversee the public

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[28] Chris Sidoti, "National Human Rights Institutions and the International Human Rights System", in Goodman and Pegram, *supra* n 13, 96. On the role of NHRIs themselves in drafting the Paris Principles, and on the importance of this contribution to the legitimacy of national institutions, cf. also de Beco and Murray, *supra* n 22, 3-5.
A list of the participants in the 1991 Paris Workshop can be found in UN Commission on Human Rights, *Further promotion and encouragement of human rights and fundamental freedoms, including the question of the programme and methods of work of the Commission: National institutions for the promotion and protection of human rights – Note by the secretariat*, 23 January 1992, E/CN.4/1992/43/Add.1.

[29] A similar categorisation is adopted by Valentin Aichele, *National Human Rights Institutions: An Introduction* (Berlin: German Institute for Human Rights, 2010), 15-16, which refers to consultative commissions as "the committee type"; Anna-Elina Pohjolainen, *The Evolution of National Human Rights Institutions – The Role of the United Nations* (Denmark: Danish Institute for Human Rights, 2006), 16-20; and Morten Kjærum, "National human rights institutions implementing human rights", in *Human Rights and Criminal Justice for the Downtrodden - Essays in Honour of Asbjørn Eide,* ed. Morten Bergsmo (Leiden; Boston: Martinus Nijhoff, 2003), 636-637.

[30] The Austrian Ombudsman Board, for instance, is composed of three members, as is the Institute of Human Rights Ombudsmen of Bosnia and Herzegovina.

administration and reprimand its illegal or unfair conduct. The new human rights ombudsmen (or hybrid ombudsmen) combine this traditional function with a human rights mandate; and while they might carry out various activities in the human rights area, including promotional and advisory ones, their most prominent task is to receive complaints of human rights violations, in addition to complaints of maladministration. The human rights ombudsman model was first adopted in the Iberian Peninsula and since spread in Latin America and, after the fall of the Soviet Union, in Eastern Europe as well as in the Balkans.[31]

Some commentators argue that this model is somewhat neglected in the Paris Principles in favour of the consultative commission one; the reference to pluralism (which arguably is not a characteristic of ombudsman offices) and the optional nature of the quasi-judicial mandate (which is, on the other hand, typically part of the ombudsman's functions) would suggest so. Nonetheless, even though the quasi-judicial mandate remains facultative, GANHRI has devoted a General Observation to it[32] and at times explicitly encouraged the attribution of complaint-handling functions to NHRIs;[33] moreover, an increasing number of human rights ombudsmen have been created and accredited as fully compliant with the Principles, and so have commissions with a protection mandate, which are often entrusted with the handling of individual complaints.

Commissions with a protection mandate might be conceived as a middle ground between the two above-mentioned NHRI types: they combine a collective membership (albeit usually not as extensive as in the consultative commission's model) with a predominantly protective mandate, even though explicit advisory and promotional functions are increasingly conferred upon them. The British

[31] Out of 14 A-status institutions in Latin America, all are human rights ombudsmen (*Defensorías* or *Procuradurías*), except for the Mexican, Chilean, and the Uruguayan ones (this latter is mixed: *Institución Nacional de Derechos Humanos y Defensoría del Pueblo*). In Eastern Europe and the Balkans, ombudsman-type institutions have been created in Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Hungary, Latvia, Lithuania, Poland, the Russian Federation, Serbia, Ukraine (to name A-status institutions only).

[32] GANHRI, *supra* n 10, G.O. 2.9, "The quasi-judicial competency of NHRIs (complaints-handling)", included in the "practices that directly promote Paris Principles compliance".

[33] E.g., in a report regarding the re-accreditation of the German Institute for Human Rights, the Sub-Committee on Accreditation underlined "the importance for the [German Institute] to further broaden its mandate to include complaint handling functions" (International Coordinating Committee for NHRIs (ICC, as GANHRI was previously called), *Report and Recommendations of the Session of the Sub-Committee on Accreditation. Geneva, 3-6 November 2008* para. 4.3).

Equality and Human Rights Commission is an illustration of this model: vested with a wide range of monitoring, advisory, educational, and research responsibilities, the Commission has considerably engaged in the investigation into human rights complaints, the institution of proceedings in court, and the provision of legal assistance to individuals who have applied to court.[34] In relation to the conduct of investigations, the Commission is given considerable powers in terms of securing evidence and ensuring the implementation of its decisions.[35] This model is widespread across Commonwealth countries.[36]

Another model, which cannot be easily accommodated within the above-mentioned categories, is that of research institutes, focusing on human rights research and education. The German Institute for Human Rights and the Danish Institute for Human Rights are among the best-known examples. While these bodies are accepted as NHRIs, there remains the risk that they are considered non-compliant with the Paris Principles, if they are not entrusted with tasks other than strictly promotional and educational ones.[37]

The significance of this categorisation of NHRIs should not be overestimated; the above-mentioned distinctions are increasingly blurred, and NHRIs not infrequently develop their mandates beyond the letter of their founding instruments. Nonetheless, classifications might be helpful to understand proliferation dynamics of NHRIs (States of the same region, or with historical ties, tend to adopt a similar NHRI model) and to exclude institutions that should not be considered NHRIs – namely, to define the outer boundaries of the concept of NHRI.

[34] Parliament of the United Kingdom, *Equality Act 2006*, ss. 13-32. The functions and powers and of the Equality and Human Rights Commission are laid down under the headings "General powers" and "Enforcement powers".
[35] Ibid., ss. 20 *et seqq*., and Schedule 2 of the same Act, ss. 9 *et seqq*.
[36] E.g., Canada, Australia, New Zealand, India, Malaysia, Sri Lanka, South Africa, Cameroon, Nigeria, Uganda, and Rwanda all have commissions with a protection mandate.
[37] Again in relation to the re-accreditation of the German Institute, GANHRI found the protection mandate of the Institute "to be somewhat limited" (ICC, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA). Geneva, 16-20 November 2015*, para. 3.1). Similar remarks were made on the occasion of previous re-accreditations (in November 2008 and November 2013, when re-accreditation was deferred).

This dissertation adopts a notion of NHRI which is essentially carved out of the characteristics enshrined in the Paris Principles, as interpreted by GANHRI. This notion excludes, among others, institutions that do not have a human rights mandate *sensu stricto* (such as the classical ombudsman), have a restricted human rights mandate (e.g., institutions that only deal with non-discrimination, or women or children rights), or are not independent from the authorities that create them (e.g., parliamentary committees). This is notwithstanding the fact that some of these bodies have been included as NHRIs by other authors, who deem it important to highlight their role in the promotion and protection of human rights at the domestic level.[38]

Nonetheless, I believe that a clearly delimited notion of NHRIs has emerged from the Paris Principles as well as from GANHRI General Observations and its body of accreditation decisions. To dilute this notion seems unadvisable, at a time when increasing international recognition is given to NHRIs and to their accreditation. Moreover, while it is true that other national bodies contribute to further the promotion and protection of human rights in a country, certain specificities of NHRIs – such as a broad and explicit human rights mandate, institutional cooperation with both State authorities and civil society, and strong links with international organisations – justify the separate consideration of these institutions.[39]

These considerations do not detract from the fact that the scope of the investigation can be widened according to the research objectives,[40] and that different organisations and bodies might use different – and broader – definitions for their particular purposes (e.g., the Committee on the Rights of the Child cooperates with, and encourages the establishment of, children ombudsmen or commissions). Indeed, as will be shown below in Section 3.6, the CoE has traditionally adopted the

[38] The classical ombudsman is included among NHRIs by Koo and Ramirez, *supra* n 2; Reif, *supra* n 22; Thomas Pegram, "Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions", *Human Rights Quarterly* 32 (2010): 729-760. In Sonia Cardenas, "Adaptive States: The Proliferation of National Human Rights Institutions", *Carr Center for Human Rights Policy Working Paper T-01-04* (Cambridge, MA: Harvard Kennedy School, November 2004): 11 *et seqq.,* the following bodies are also categorised as NHRIs, in addition to classical ombudsmen: specialised human rights commissions, parliamentary bodies, and national bodies dealing with international humanitarian law.

[39] Cf., in support of this choice, Emmanuel Decaux, "Le dixième anniversaire des principes directeurs des institutions nationales des droits de l'homme dits «Principes de Paris»", *Droits fondamentaux* 3 (2003): 11-29.

[40] On this point, see Linda C. Reif, "The Shifting Boundaries of NHRI Definition in the International System", in Goodman and Pegram, *supra* n 13, 71-72.

more comprehensive notion of "national human rights structures" to include entities such as classical ombudsmen and equality bodies, and these bodies' interactions with the CoE will also be examined. Nonetheless, NHRIs are increasingly considered distinctive institutions in the CoE context as well, and as such they will be analysed in this dissertation.

3.3. The proliferation of National Human Rights Institutions: causes and patterns

While adopting partially different notions and categorisations, almost all accounts of the proliferation of NHRIs acknowledge the substantive role played by the UN in this respect.[41] The UN-sponsored 1991 Paris Workshop and its resulting Principles were decisive for the emergence of an internationally-shared notion of NHRIs; and the endorsement of the Principles by the UN General Assembly in 1993, following the endorsement by the UN Commission of Human Rights in 1992 and reference to them in the 1993 Vienna Declaration by the World Conference on Human Rights,[42] definitively legitimised NHRIs, by then perceived by States as a UN-blessed and not too intrusive instrument to comply with their international human rights obligations.

Moreover, the UN has strongly supported the development of NHRIs by devoting a not insignificant part of its technical cooperation's resources to the creation of national institutions in developing countries and by recognising an increasingly significant role for NHRIs within the procedures of its bodies and agencies. These factors (which constitute the focus of Section 3.5 below) were critical in boosting the worldwide spreading of NHRIs, together with broader international

[41] Among others: Cardenas, *supra* n 24 (which details the UN contribution in terms of standard setting, capacity building, network facilitating, and membership granting); Raj Kumar, *supra* n 9; Sidoti, *supra* n 28; and Katerina Linos and Thomas Pegram, "Architects of Their Own Making: National Human Rights Institutions", *Human Rights Quarterly* 38, no. 4 (November 2016): 1109-1134.

[42] UN Commission on Human Rights, *National institutions for the promotion and protection of human rights*, 3 March 1992, E/CN.4/RES/1992/54; and UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, Part I, para. 36. The Declaration further refers to NHRIs in Part II, paras. 83 *et seqq*. (under the heading "Implementation and monitoring methods"). On the relationship between NHRIs and the Vienna World Conference, cf. Jennifer Lynch, "Fifteen Years after Vienna: The Role of National Human Rights Institutions", in *Global standards – Local action. 15 years Vienna World Conference in Human Rights: Conference Proceedings of the International Expert Conference held in Vienna on 28 and 29 August 2008,* eds. Wolfgang Benedek et al. (Antwerpen: Intersentia, 2009), 156-160.

dynamics including the end of the Cold War and the surge of international human rights norms and monitoring mechanisms.[43]

Whereas the above-mentioned international pressures undoubtedly contributed to the success of NHRIs, the influence of domestic factors should not be overlooked. Governments might be compelled to establish NHRIs primarily by strong civil society movements and public opinions; changes in government regimes might also boost the creation of NHRIs. Indeed, vigorous national input for the establishment of NHRIs is probably most evident in transitional or democratising States.[44]

Additionally, the local context (in its political, legal, social, and cultural aspects) plays an important part in shaping the structure and mandate of the national institution, as well as the concrete impact of the NHRI on the country's human rights situation. NHRIs were not invented by the UN from scratch, and various historical national precedents have been identified: the clearest one is the classical ombudsman, with respect to the human rights ombudsman; predecessors to the commission model can also be found (such as commissions of inquiry or traditional advisory commissions).[45]

The local context is also relevant to the extent that any new NHRI has to integrate into an existing national framework for the promotion and protection of human rights, so that the characteristics and functions of the new institution will inevitably be influenced by those of the bodies already in place and ideally allow to avoid problematic overlapping of competences.[46] As mentioned,

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[43] Cardenas, *supra* n 24, 27-28. On the influence of "world polity" factors, cf. also Koo and Ramirez, *supra* n 2. Dongwook Kim, "International Nongovernmental Organizations and the Global Diffusion of National Human Rights Institutions", *International Organization* 67, no. 3 (2013): 505-539, attributes a decisive role to international NGOs.

[44] Sonia Cardenas, "National Human Rights Institutions and State Compliance", eds. Goodman and Pegram, *supra* n 13, 42-43.

[45] On commissions of inquiry: Pegram, *supra* n 38, 735. Cf. also Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (Philadelphia: University of Pennsylvania Press, 2014), 19 *et seqq.*, which deals with the "institutional precursors" of NHRIs.

[46] The establishment of several NHRIs raised issues because of the pre-existence of bodies entrusted with the promotion and protection of human rights *sensu lato*, such as classical ombudsmen and/or equality bodies. Cf., for instance, the debate surrounding the creation of the Equality and Human Rights Commission in Great Britain: Sarah Spencer, "Equality and Human Rights Commission: A Decade in the Making", *Political Quarterly* 79, no. 1 (2008): 6-16; and Colm O'Cinneide, "The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times", *Industrial Law Journal* 36, no. 2 (2007): 141-162. As a further example, cf. the absorption of the Dutch Equal Treatment Commission into the new Netherlands Institute for Human Rights, as described in Yvonne Donders and Marjolijn Olde Monnikhof, "The Newly Established Netherlands Institute for Human Rights: Integrating Human Rights and Equal

the Paris Principles leave a wide margin of discretion as to the form that NHRIs can assume, with the deliberate intention to make the domestic context matter.

Finally, at an intermediate level, the regional dimension should be considered when examining the patterns of establishment of NHRIs. First of all, regional organisations – in a similar way to international ones – have promoted the creation of NHRIs in their member States and strengthened cooperation with these institutions over time.[47]

In addition, and from a different perspective, a mimetic process has led to the establishment of similar NHRIs in the same region.[48] Accordingly, almost all Latin American States opted for the human rights ombudsman type, while commissions with a protection mandate prevail in Commonwealth States and consultative commissions have been created mostly in francophone countries. In Europe, a greater variety of models can be found, but similarities within sub-regions are not infrequent: the ombudsman model characterises Central and Eastern Europe States, in addition to Spain and Portugal, whereas the commissions in the United Kingdom and in Ireland have been given strong protective mandates.

Thus, a mix of domestic, regional, and international factors explain the establishment of NHRIs and affect their shape and ability to deliver results. National pressures might play a greater role in some instances (e.g., in respect of transitional States), whereas international influence might be more evident in other ones (e.g., in the context of internationally-driven peace processes).[49] It is often the case that national and international pressures are mutually reinforcing: international

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Treatment", in *National Human Rights Institutions in Europe: Comparative, European and International Perspectives*, eds. Jan Wouters and Katrien Meuwissen (Cambridge: Intersentia, 2013), 83-103.
Additionally and more generally, the very need for NHRIs in democratic countries with independent judicial systems and lively civil societies has been put into question: Richard Carver, *Performance & Legitimacy: National human rights institutions,* 2nd ed. (Versoix: International Council on Human Rights Policy, 2004), 64-67; and Gauthier de Beco, *Non-Judicial Mechanisms for the Implementation of Human Rights in European States* (Bruxelles: Bruylant, 2010), 81-90.

[47] All major regional organisations – the African Union, the Organization of American States, the CoE, the European Union, and the Organization for Security and Cooperation in Europe (OSCE) – have done so. Cf. Section 3.6 below on the CoE and Section 6.4 for a brief account of the experiences of other regional organisations.

[48] Linos and Pegram, *supra* n 41, 1116 and 1120; and Pegram, *supra* n 38, 737-739. An analysis of NHRIs by region is offered in Reif, *supra* n 22, 30 *et seqq*.

[49] Reif, *supra* n 22, 13-16, mentions the peace agreements concerning El Salvador, Guatemala, Bosnia and Herzegovina, Kosovo, Sierra Leone, East Timor and Northern Ireland as examples. Cf. also, on NHRIs and peace agreements: Michelle Parlevliet, *National Human Rights Institutions and Peace Agreements: Establishing National Institutions in Divided Societies* (Versoix: International Council on Human Rights Policy, 2006).

recommendations to institute an NHRI might be taken up at the national level by local human rights activists, whereas domestic demands for the advancement of human rights might be channelled by international organisations in the form of support for the establishment of an NHRI. At any rate, all of these levels matter, and the creation of each NHRI is the result of a unique combination of these factors.

As strong as the above-mentioned pressures might be, the deeper question remains why States would establish a body whose primary function is to monitor the human rights situation in the country and report on it at the international level. Whether they mainly advise national authorities, receive individual complaints, or conduct research, NHRIs limit the discretion of governments and make their human rights violations known.

There is indeed evidence that some States, particularly those with repressive regimes, created NHRIs to ingratiate themselves with the international community and international monitoring bodies or to satisfy national demands while keeping in fact control over these institutions.[50] There have been examples of NHRIs shielding their governments from international reprimand or attacking NGOs,[51] and many more of weak or "toothless" institutions – inadequately funded or insufficiently independent to properly carry out their tasks.[52] As long as NHRIs are established by governments, the risk exists that such cases occur.

This dissertation does not ignore this reality nor other shortcomings that NHRIs indeed display. Nonetheless, it should be considered that while it might well be that some States are not genuinely

[50] Cf. the extensive report Human Rights Watch, *Protectors or Pretenders: Government Human Rights Commissions in Africa*, 1 January 2001, accessed 4 January 2019, https://www.hrw.org/report/2001/01/01/protectors-or-pretenders/government-human-rights-commissions-africa. Cf. also, with a focus on Asian States: Cardenas, *supra* n 38, 28 *et seqq*.

[51] For instance, the Rwandan Commission harshly criticised NGOs before both the African Commission and the UN Commission on Human Rights: Rachel Murray, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa* (Oxford: Hart Publishing, 2007), 24.

[52] Cf. Human Rights Watch, *supra* n 50, for various examples in Africa; for an example in Asia, cf. Li-Ann Thio, "Panacea, Placebo, or Pawn? The Teething Problems of the Human Rights Commission of Malaysia (Suhakam)", *George Washington International Law Review* 40, no. 4 (2008-2009): 1271-1342. Cf. also the allegations of lack of independence levelled at the Mexican NHRI, reported in Richard Carver, "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law", *Human Rights Law Review* 10, no. 1 (2010): 1-32.

committed to establish strong and independent NHRIs, in the same way that they are not genuinely committed to respect the human rights treaties which they ratify, once an NHRI has been created there is no guarantee that it will not advance human rights by developing powers that are not explicitly conferred upon it by its founding legislation, by mobilising civil society, or by otherwise gaining the public confidence. Various NHRIs demonstrably overcame their authentic weaknesses (or "tainted origins", as they have been called)[53] and developed into strong institutions. These might be long-term changes, but notable ones.

Furthermore, GANHRI should accredit – and consequently allow into the international human rights machinery – only those institutions that prove to be independent and effective in their operation. While room for improvement exists, the accreditation process carried out by GANHRI has been enhanced over time with a view to ensuring that worthy institutions only receive international support and legitimacy (while exerting pressure on the governments of those institutions that do not qualify).[54]

At any rate, when examining the contents and effects of the participation by NHRIs in the promotion of the execution of ECtHR judgments, it is not taken for granted that the information provided and the actions undertaken by NHRIs are always relevant, unbiased, and helpful to the execution process. The fact remains that all of the national human rights structures that have intervened to date before the Committee of Ministers are either A-status institutions or institutions that have established themselves as credible and independent, as is the case for many other structures that exist today in CoE Member States, even though with different degrees of effectiveness.

[53] Peter Rosenblum, "Tainted Origins and Uncertain Outcomes: Evaluating NHRIs", in Goodman and Pegram, *supra* n 13, 297-323. Cf. also, on the ability of NHRIs to make an impact despite the circumstances of their establishment, various contributions in the same book: Ryan Goodman and Thomas Pegram, "Introduction", 19 *et seqq*., and references therein. Even the above-mentioned critical report by Human Rights Watch, *supra* n 50, concedes that "even in the most repressive regimes, the establishment of an official state body devoted to human rights may, on occasion, create an official space for a human rights discourse and may foster greater, even if limited, activism and awareness" (Summary).

[54] On GANHRI accreditation process, cf. Section 3.4 below.

3.4. The accreditation of National Human Rights Institutions

As mentioned, the international association of NHRIs, GANHRI (or International Coordinating Committee for NHRIs, ICC, until recently),[55] accredits NHRIs on the basis of their compliance with the Paris Principles: A status for NHRIs that are fully compliant with the Principles, B status for institutions that only partially comply with the Principles, and C status for non-compliant institutions.

ICC/GANHRI began its activities in 1993 and was subsequently formally established as a private-law association under Swiss law in 2008. The accreditation procedure, which is governed by a complex set of norms including the GANHRI Statute, Rules of Procedures, and some Practice Notes,[56] was carried out for the first time in 1999, but the Sub-Committee on Accreditation was only created as a permanent body in 2004.

The accreditation process gives substance to one of the main statutory functions of GANHRI – i.e., that "to promote the establishment and strengthening of NHRIs in conformity with the Paris Principles".[57] The assessment of the compliance of individual institutions with the internationally-agreed standards for NHRIs serves many purposes: it puts pressure on governments, which are responsible for the implementation of many requirements of the Principles and are therefore called upon (although indirectly) to carry out the necessary changes; it makes NHRIs accountable by pointing to improvements that they can effect themselves and by encouraging them to lobby their governments;[58] and it enhances the legitimacy of NHRIs at both the domestic and international levels.

[55] The decision to change the name was adopted at the General Meeting of the Association on 22 March 2016. The documents produced by the Association will thus appear under one or the other name depending on the date on which the documents were published.

[56] GANHRI, *Rules of Procedure for the GANHRI Sub-Committee on Accreditation*, as amended on 22 February 2018; and GANHRI, *Statute*, as amended on 22 February 2018. During the same session, revised *General Observations of the Sub-Committee of Accreditation* were adopted (cf. *supra* n 10; General Observations were adopted for the first time in 2006 and have subsequently been amended various times), whereas four *Practice Notes* were issued between 2016 and 2017. Other relevant instruments include the *Sub-Committee on Accreditation's Working Methods* and the *Guidelines for Accreditation Applications* (both last updated in 2009).

[57] GANHRI, Statute, *supra* n 56, Article 7(1)(b).

[58] It is somewhat paradoxical that the Paris Principles are mainly addressed to governments, whereas it is NHRIs that are under scrutiny in the accreditation process and receive recommendations by the Sub-Committee on Accreditation; cf., on this point, de Beco and Murray, *supra* n 22, 24-25 and 136-138.

Indeed, the exercise of such a control has become critical also in light of the increasing significance of the role played by NHRIs in international fora, particularly within the UN system; it is deemed essential that independent and effective institutions only are entrusted with the new, considerable prerogatives conferred upon accredited NHRIs. That is also why the accreditation procedure has been revised in many respects with a view to enhancing transparency, objectivity, and participation.

Some commentators maintain that the role of GANHRI in promoting the establishment and reinforcement of NHRIs is inconsistent with its (supposedly impartial) accreditation role.[59] While this consideration has some substance, it should be noted that it is in the interest of NHRIs (and GANHRI) that A status is reserved to credible institutions only; and that the alternatives to the current peer-review process might be riskier. At any rate, as will be shown below, GANHRI is making increasing efforts to strengthen the accreditation process.

Before examining the accreditation procedure, it is worth mentioning that the other main statutory function of GANHRI is that to "coordinate at an international level the activities of NHRIs established in conformity with the Paris Principles".[60] In this respect, GANHRI promotes the exchange of information and best practices among NHRIs, fosters their cooperation, develops guidelines and policies, and organises conferences and workshops.

Increasingly, these activities revolve around – even though they are not limited to – the participation of NHRIs in the UN system and, more generally, in international fora. Training and information on the subject are continuously provided,[61] frequently in collaboration with the OHCHR, as well as in partnership with the four regional networks of NHRIs: i.e., the Network of African

[59] According to Rosenblum, *supra* n 53, 300-301, "the ICC has improved its grading system for accrediting NHRIs, but as a body whose stated purpose is to 'promote and strengthen' NHRIs, it can only go so far". Cf. also, in the same contribution, 314 *et seqq*.

[60] GANHRI, Statute, *supra* n 56, Article 7(1)(a). On the variety of functions that are performed by GANHRI, cf. Anne-Marie Garrido and Birgitte Kofod Olsen, "Coordination of the Work of NHRIs – From Liaison to Joint Achievements", in *Implementing Human Rights: Essays in Honour of Morten Kjaerum*, eds. Rikke Frank JJørgensen and Klaus Slavensky (Copenhagen: Danish Institute for Human Rights, 2001), 190-203.

[61] Cf., for instance, the activities mentioned in GANHRI, *2017 Annual Report: Advancing human rights with National Human Rights Institutions and our partners* (Geneva: GANHRI, 2018), 18-19; and GANHRI, *2018 Annual Report: 25 years, Advancing human rights with National Human Rights Institutions and our partners* (Geneva: GANHRI, 2019), 31.

National Human Rights Institutions, the Network of National Human Rights Institutions of the Americas, the Asia-Pacific Forum of National Human Rights Institutions, and the European Network of National Human Rights Institutions.

These networks not only represent NHRIs from their respective regions within GANHRI (regional distribution is relevant, *inter alia,* for the designation of members of the GANHRI Bureau and Sub-Committee on Accreditation), but they also provide support to their member NHRIs in a number of ways, such as through capacity-building, training, and exchanges of information (in a manner similar to GANHRI). Moreover, both regional networks and GANHRI take part in the activities of various UN bodies and mechanisms, in place of or in addition to their member NHRIs.

In short, the GANHRI accreditation process can be outlined as follows. The GANHRI Secretariat – i.e., a unit in the Office of the UN High Commissioner for Human Rights (OHCHR) – receives the application and the relevant documentation by the interested NHRI.[62] The Secretariat reviews the information and prepares a report, which is forwarded to the Sub-Committee on Accreditation, composed of four representatives from A-status institutions. The Sub-Committee then issues its recommendation on the status to be attributed to the applicant NHRI – A, B or C. The final decision on the accreditation status is taken by the GANHRI Bureau, which is composed of representatives from sixteen A-status NHRIs, evenly distributed among the four regional groupings (Africa, Americas, Asia-Pacific, and Europe). More specifically, the recommendation by the Sub-Committee is considered to be accepted by the Bureau unless a member of the latter raises an objection (at the instigation of the applicant NHRI), and that objection is supported by at least four Bureau members in total coming from at least two different regions.[63]

[62] The accreditation procedure as described below is mainly laid down in GANHRI, Rules of Procedure, *supra* n 56, Rules from 6 to 10. For a detailed description of the accreditation procedure, cf. also GANHRI/Canadian Human Rights Commission, *A Practical Guide to the Work of the Sub-Committee on Accreditation (SCA)*, December 2017 – updated November 2018.
[63] GANHRI, Statute, *supra* n 56, Article 12(1).

Over time, the accreditation procedure succinctly described above has undergone various amendments. First of all, as an additional due process guarantee, the Secretariat's report and any third-party submissions are forwarded to the applicant NHRI, which can comment on them.[64] Also, the applicant institution can challenge the recommendation issued by the Sub-Committee on Accreditation within twenty-eight days; the challenge is brought to the attention of the GANHRI Bureau, whose members might decide to support the challenge in the manner mentioned above.[65]

The quantity and quality of the information received by the Sub-Committee has also been upgraded: all applicant NHRIs have to submit a "Statement of Compliance with the Paris Principles" in accordance with a template, together with other documentation regarding their organisational structure, mandate, activities, and budget.[66] Third-party submissions are now provided for and encouraged during the accreditation procedure,[67] and the Sub-Committee is required to consider the relevant recommendations or observations made by UN bodies and mechanisms (including treaty bodies, Special Procedures, and the Universal Periodic Review).[68]

Reasons for the determinations by the Sub-Committee are outlined in greater detail and the recommendations by the Sub-Committee for further improvements have become much more focused and specific with a view to facilitating both remedial actions by NHRIs and governments and submissions by third parties. The re-accreditation procedure also benefits from such a practice, which allows to scrutinise more effectively the implementation of previous recommendations.

Re-accreditation itself is one of the most significant innovations introduced. Every five years, A-status and B-status NHRIs have to seek confirmation of their status through a process of re-accreditation which is essentially analogous to the accreditation of new institutions, with the

[64] GANHRI, Rules of Procedure, *supra* n 56, Rules 6(7) and 7.
[65] GANHRI, Statute, *supra* n 56, Article 12(1).
[66] Ibid., Article 10; and GANHRI, Rules of Procedure, *supra* n 56, Rule 6(1). The "Template of the Statement of Compliance" can be found in the *Compilation of the Rules and Working Methods of the SCA* (2010), section 5.
[67] GANHRI, Rules of Procedure, *supra* n 56, Rule 6(7). On the potential of NGOs in this respect and for some examples of actual engagement, cf. Catherine Shanahan Renshaw, "National Human Rights Institutions and Civil Society Organizations: New Dynamics of Engagement at Domestic, Regional, and International Levels", *Global Governance* 18, no. 3 (2012): 308 *et seqq*.
[68] GANHRI, Rules of Procedure, *supra* n 56, Rule 8(1).

additional requirement that (re-)applicant NHRIs need to "provide information to show how they have addressed recommendations made by the [Sub-Committee on Accreditation] in the previous accreditation review".[69] If an NHRI fails to re-apply for accreditation, its status is suspended; if it still has not lodged the application one year after the suspension, the status will lapse.[70] Moreover, if the (re-)applicant NHRI cannot show concrete progress in relation to past recommendations, "the [Sub-Committee] may, depending on the seriousness of the issues previously raised, interpret such lack of progress as an indication of non-compliance with the Paris Principles".[71]

Amendments to GANHRI Statute and Rules of Procedure also introduced a "special review": "where the circumstances of any NHRI change in any way that may affect its continued compliance with the Paris Principles", the NHRI concerned has to notify GANHRI, and a review of its status takes place;[72] such a review can also be initiated by the GANHRI Chairperson or any member of the Sub-Committee.[73] If the continued conformity of the NHRI under review with the Paris Principles is not demonstrated, the status of the NHRI will lapse.[74]

Additional measures have been adopted to respond to rapid changes in the circumstances or uncertain situations, which include the power of the GANHRI Bureau to immediately suspend accreditation in exceptional circumstances (Statute, Article 18(2)), criteria to examine applications from NHRIs "in volatile contexts" (Rules of Procedure, Rule 8(4)), and a Practice Note on "NHRIs in transition".[75]

[69] Ibid., Rule 6(1).
[70] GANHRI, Statute, *supra* n 56, Articles 19 and 20.
[71] GANHRI, Rules of Procedure, *supra* n 56, Rule 8(3).
[72] GANHRI, Statute, *supra* n 56, Article 16(1).
[73] GANHRI, Statute, *supra* n 56, Article 16(2). A Practice Note on the issue has recently been adopted by GANHRI: *Practice Note 2: Special Reviews*, adopted at the GANHRI Bureau Meeting held in Geneva on 6 March 2017.
[74] GANHRI, Statute, *supra* n 56, Article 20.
[75] GANHRI, *Practice Note 4: NHRIs in Transition*, adopted at the GANHRI Bureau Meeting held in Geneva, 6 March 2017.

Finally, the dissemination of the recommendations by the Sub-Committee has been enhanced, as they are now circulated widely among NHRIs and other stakeholders and published on the GANHRI website.[76]

The Sub-Committee on Accreditation has therefore developed over time a stronger accreditation procedure, which is open to the contribution by external actors (civil society and UN bodies in particular), more transparent to both stakeholders and applicant NHRIs themselves, and based on stricter and continuous scrutiny.[77] That the accreditation procedure has become more rigorous is reflected in the increasing number of NHRIs which are downgraded or suspended,[78] even though GANHRI still abides by an essentially cooperative approach whereby NHRIs are given time to solve issues and comply with the Principles.[79]

Increasingly, the Sub-Committee seeks to carry out an examination which is not only concerned with the formal adherence by the founding statutes of NHRIs to the Paris Principles, but also with the performances of the institutions and their results in the promotion and protection of human rights. As put it by the amended Rules of Procedure of the Sub-Committee, "the [Sub-Committee] assesses an applicant's compliance with the Paris Principles in both law and practice. In doing so, it considers

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[76] Reports and recommendations by the Sub-Committee on Accreditation since 2006 can be consulted at the following GANHRI webpage: http://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/SCA-Reports.aspx (accessed 4 January 2019).

[77] On the strengthening of the accreditation process, cf. in the literature: Linos and Pegram, *supra* n 41; Sidoti, *supra* n 28; Sulini Sarugaser-Hug, "How a Peer-Review Mechanism Can Influence the Implementation of Human Rights Standards: Why the Work of the Sub-Committee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights Matters", *Australian Journal of Human Rights* 18, no. 2 (2012): 45-68, which also interestingly surveys the actual implementation of the recommendations by the Sub-Committee on Accreditation. Meg Brodie, "Progressing Norm Socialisation: Why Membership Matters. The Impact of the Accreditation Process of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights", *Nordic Journal of International Law* 80 (2011): 143-192, highlights and analyses the shift "from a very inclusive membership process to one which regulates and excludes".
Cf. also de Beco and Murray, *supra* n 22, 17, which however notes that "while information from the OHCHR and civil society organisations is now permitted, it is still a process of peer review based principally on the documents that the NHRI submits to the [Sub-Committee]. The process of analysis of these documents, the extent to which alternative information is provided by others and how the [Sub-Committee] questions this information and arrives at its conclusion is not publicly available".

[78] Linos and Pegram, *supra* n 41, 1125. Further recent examples include the Human Rights Commissioner of Azerbaijan and the Human Rights Commission of Mauritania, which were downgraded from A to B status in May 2018 and October 2018 respectively.

[79] For instance, through the deferral, an NHRI can ask for its re-accreditation review to be postponed; the request must in any case be justified (GANHRI, Rules of Procedure, *supra* n 56, Rules 12(1) and 12(2)).

whether … an applicant's actions demonstrate that it is effectively fulfilling its mandate to promote and protect human rights".[80]

Indeed, the issue of effectiveness of NHRIs – i.e., their ability to deliver results in the promotion and protection of human rights –[81] is increasingly under the spotlight in the literature.[82] Moreover, the need appears to be felt by NHRIs themselves and their proponents to establish institutions that not only are useful in theory, but advance human rights in practice. One of the main criticisms levelled at the Paris Principles is that they focus on institutional aspects, while largely ignoring the actual impact of the work by NHRIs; the risk is thus to accredit institutions that are formally compliant with the Principles regardless of their performances.

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[80] Ibid., Rule 8(1).

[81] Richard Carver, *Assessing the Effectiveness of National Human Rights Institutions* (Versoix: International Council on Human Rights Policy, 2005), 34, makes the following distinction: "performance indicators measure whether the institution has actually achieved what it set out to do; impact indicators assess whether those activities effectively changed the human rights situation". A similar distinction can also be found in Julie Mertus, "Evaluating NHRIs: Considering Structure, Mandate, and Impact", eds. Goodman and Pegram, *supra* n 13, which puts forward various approaches to evaluate NHRIs.

[82] Cf., among others, Stephen Livingstone and Rachel Murray, "The Effectiveness of National Human Rights Institutions", in *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context*, eds. Simon Halliday and Patrick Schmidt (Oxford; Portland: Hart Publishing, 2004): 137-164; Carver, *supra* n 46; Richard Carver, *Measuring the Impact and Development Effectiveness of National Human Rights Institutions. A Proposed Framework for Evaluation* (Bratislava: United Nations Development Programme, 2014); Reif, *supra* n 22, 23 *et seqq.;* Linos and Pegram, *supra* n 22; and Steven L. B. Jensen, *Lessons from Research on National Human Rights Institutions – A Desk Review on Findings Related to NHRI Effectiveness* (Copenhagen: Danish Institute for Human Rights, 2018), for a useful overview of the studies conducted on the effectiveness of NHRIs.

Besides, NHRIs are not the only human rights bodies in relation to which the issues of effectiveness and its assessment have been raised: cf., for instance, David L. Cingranelli and David L. Richards, "Measuring the Impact of Human Rights Organizations", in *NGOs and Human Rights: Promise and Performance*, ed. Claude E. Welch Jr. (Philadelphia: University of Pennsylvania Press, 2001), 225-237, referring to NGOs; and Mila Versteeg, "Performance Measures for Human Rights Commissions", *Executive Session Papers: Human Rights Commissions and the Criminal Justice System* (Cambridge, MA: Harvard University, 2007), regarding civil rights commissions in the United States.

The new focus on the effectiveness of NHRIs is partially linked to a growing interest for these institutions on the part of political and social scientists, who are complementing the work undertaken by legal scholars: cf., in addition to the works cited above in this footnote, Pegram, *supra* n 38; Cardenas, *supra* n 38; Goodman and Pegram, *supra* n 13; and, on NHRIs in the broader context of international relations theories, Noha Shawki, "A New Actor in Human Rights Politics? Transgovernmental Networks of National Human Rights Institutions", in *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics*, eds. Michaelene Cox and Noha Shawki (Farnham: Ashgate, 2009), 41-57.

Finally, it is worth mentioning that multidisciplinary research is being undertaken on NHRIs with a view to studying the complex impact that these institutions can have on a variety of issues and processes – e.g. democratic transitions (cf., among others, Cardenas, *supra* n 45, Chapters 6 and 7), good governance (Raj Kumar, *supra* n 9; and Reif, *supra* n 22), human rights diplomacy (Kirsten Roberts, "National Human Rights Institutions as Diplomacy Actors", in *Human Rights Diplomacy: Contemporary Perspectives*, eds. Michael O'Flaherty et al. (Leiden; Boston: Martinus Nijhoff, 2011), 223-249), conflict resolution and peace agreements (Michelle Parlevliet, Guy Lamb and Victoria Maloka, eds., *Defenders of Human Rights, Managers of Conflict, Builders of Peace? National Human Rights Institutions in Africa* (Cape Town: University of Cape Town, 2005); and the literature mentioned *supra* n 49), and human rights education (Sonia Cardenas, "Constructing Rights? Human Rights Education and the State", *International Political Science Review* 26, no. 4 (2005): 363-379).

Accountability is crucial to the well-functioning of any organisation, and especially of a public body mandated to promote and protect human rights. While there is thus no doubt that NHRIs should be held accountable, particularly in light of the public (and international) funds they receive and of the increasingly significant role they play at the national and international levels, the question arises as to whom NHRIs should be answerable to, and how.

Commonly, the following are indicated as entities to which an NHRI should be accountable: the government, the parliament, civil society, the public at large, and donors (where different).[83] But how are NHRIs to answer to this multiplicity of stakeholders while maintaining their independence? The relationship with the government is especially delicate, and that is why it has been recommended that parliaments – instead of executives – receive the reports by NHRIs and oversee their performances.[84] In general terms, it can be said that it is once again a question of striking a fair balance between two potentially conflicting principles – accountability and independence – which are both essential to NHRIs: their independence from both their governments and NGOs is pivotal, as is their ability to deliver results through a proper management of the resources received.

A further problem that arises when assessing the effectiveness of NHRIs has to do with the difficulties of establishing a causal link between the actions by the NHRI on the one hand and changes in the human rights situation in the country on the other. Progress in a country's human rights conditions can hardly be attributed with certainty to this or that specific actor; the impact of the initiatives undertaken by NHRIs, however commendable, depends on a number of external factors, including the ability of other actors (primarily domestic authorities and NGOs) to take up these initiatives and act on them.[85]

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[83] Smith, *supra* n 10, 937-944, outlines four "layers" of accountability: formal accountability, public/popular accountability, broad accountability, and government accountability. The accountability issue is also central in Murray, *supra* n 51, Chapter 6 in particular.
[84] GANHRI, *supra* n 10, G.O. 1.11, "Annual reports of NHRIs". Cf. also de Beco and Murray, *supra* n 22, 141-143.
[85] Goodman and Pegram, *supra* n 53, 14-15. Cf. also Meyer, *supra* n 13, 328 *et seqq*.; and Livingstone and Murray, *supra* n 82, 140.

Nonetheless, solutions are being put forward from various quarters: criteria have been developed by UN agencies and research centres with a view to enabling NHRIs to carry out a self-assessment of their effectiveness;[86] and at least some NHRIs are subject to thorough reporting and audit procedures at the national level.[87] At the same time, the GANHRI Sub-Committee on Accreditation has sought to specify and give more substance to the requirements in the Paris Principles as well as to encourage the provision of external information. Moreover, a Practice Note on *Assessing the Performance of NHRIs* has recently been adopted, although it appears that much remains to do in this respect, in the absence of clear benchmarks and indicators to measure the effectiveness of NHRIs. Greater attention to the concrete performance of NHRIs appears critical for GANHRI to perform its gatekeeper function effectively[88] and for NHRIs to maintain their legitimacy and credibility at both the national and international levels.

The almost complete silence of the Paris Principles on the issues of effectiveness and accountability of NHRIs has been noted[89] and identified as one of the main reasons justifying the amendment, if not the overcoming, of the Principles. The Principles have also been accused of being too vague on various crucial requirements, such as independence,[90] and not bold enough when they consider quasi-judicial functions optional,[91] but too ambitious when they depict ideal institutions (independent, pluralistic, with an array of competences and powers) with the risk of raising exaggerated social expectations.[92]

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[86] Carver, *supra* n 81; and Asia Pacific Forum of National Human Rights Institutions, the UNDP Asia-Pacific Regional Centre, and OHCHR, *Capacity Assessment Manual for National Human Rights Institutions*, rev. (August 2014). More recently, the following document has been produced: GANHRI, OHCHR, and UNDP, *Global Principles for the Capacity Assessment of National Human Rights Institutions* (New York: UNDP, 2016), which indicates awareness on the part of GANHRI of the need to promote and assess the effectiveness of NHRIs.

[87] In Europe, the UK commissions are probably the most advanced in this respect, with clear obligations in terms of activity and financial reporting; they normally have an internal audit committee and are also subject to external audit.

[88] GANHRI is characterised as the Paris Principles' "gatekeeper" in Reif, *supra* n 40, 72; Sidoti, *supra* n 28, 97-98; and Linos and Pegram, *supra* n 41, 1122 *et seqq*.

[89] De Beco and Murray, *supra* n 22, 20 and 26.

[90] Raj Kumar, *supra* n 9, 271-272. On the vagueness of the Principles on several substantial issues, see also Linos and Pegram, *supra* n 41, 1119.

[91] On the criticism levelled at the optional nature of quasi-judicial functions, cf. the literature mentioned *supra* n 22.

[92] As summarised in Carver, *supra* n 46, 2: "On the one hand [the Paris Principles] lay down a maximum programme that is met by hardly any national institution in the world … On the other hand, the Paris Principles do not even take it as given that a national institution will deal with individual complaints". On the risk of too high expectations surrounding

The suitableness of the Paris Principles as the touchstone for NHRIs, more than twenty years after their drafting, has thus been questioned by some authors.[93] It is undeniable that the Principles have flows; *inter alia*, this has to do with the fact that, at the time of their issuance, there were not many NHRIs in place; the role of NHRIs at the national and international levels was less significant; and the Principles were the result of an inclusive process, whereby various kinds of national human rights bodies were involved.

Nonetheless, there a number of factors that militate against a revision of the Principles: the Principles are the constant point of reference for the establishment and strengthening of NHRIs as recommended in all relevant international and regional documents and as implemented by States; there is no request for their amendment by stakeholders – not by governments, nor by NGOs or NHRIs themselves; the Principles are only minimum standards;[94] and GANHRI General Observations, which interpret the Principles and form the basis for the international accreditation of NHRIs, are gradually filling the gaps that emerge. Moreover, to review the Principles could incur the risk of greater governmental interference; indeed, one of the most significant advantages of the Paris Principles is that they have been drafted mainly by NHRIs themselves.[95] This and a peer-review process of accreditation protect NHRIs from unduly State encroachment and add to their legitimacy and credibility.

NHRIs: Meyer, *supra* n 13, 325 *et seqq*., which nonetheless maintains that this risk extends to virtually all institutions; Raj Kumar, *supra* n 9, 275 *et seqq*.; and Cardenas, *supra* n 24, 38.

[93] For instance, Raj Kumar, *supra* n 9, 275, argues that "the Paris Principles are, at best, a good starting point for discussions relating to the formation of NHRIs, but it is not in the human rights movement's best interest to give them more importance than they deserve in light of their weaknesses and limited nature". Parlevliet, *supra* n 49, 7, holds a more nuanced view and concludes that especially in post-conflict settings, but also more generally, "while it is important to assess institutions in light of the Paris Principles, compliance with these formal requirements alone does not translate into effectiveness; other factors must also be considered. In particular, the difficult conditions within which national institutions often work must be recognised …".

[94] Brian Burdekin, "National Human Rights Institutions", in *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, eds. Gudmundur Alfredsson et al., 2nd ed. (Leiden; Boston: Martinus Nijhoff, 2009), 663.

[95] Mertus, *supra* n 81, 89; and Sidoti, *supra* n 28, 96-98.

3.5. National Human Rights Institutions and the United Nations

NHRIs carry out their mandate to promote and protect human rights in many ways, but an important component of it consists in "localising" and "appropriating" international human rights standards and decisions. In other words, they help fill the notorious "implementation gap" that affects international human rights law, by which norms risk resulting in statements of principle that are not followed by actual implementation.[96] In this respect, NHRIs are not only expected to monitor and encourage compliance by States with their international obligations, but also to entrench the substance of these obligations in the domestic legal, social, and cultural contexts.

NHRIs also respond to other needs, such as that to address human rights violations which do not otherwise ring an international bell, also because of the difficulties for victims to have access to international fora;[97] or that to promote human rights norms and cultures that are, as far as possible, coherent with local values, traditions, and laws. Again, these functions are not exhausted at the national level; ideally, NHRIs should bring local issues and concerns, as well as denounce local violations, to the international level, so that the latter is not completely detached from national realities.

The significance of the international dimension of NHRIs was clear from their origins. While it is only with the 1991 Paris Principles that a precise notion of NHRI emerged, its roots lie in the early years of the UN history.[98] In the context of the establishment of the Commission on Human Rights in 1946, the UN Economic and Social Council invited Member States "to consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human

[96] On the point, cf. Section 1.2 of this dissertation.
[97] Burdekin, *supra* n 94, 660; and Raj Kumar, *supra* n 9, 263.
[98] A detailed account of the historical development of NHRIs and of their relationship with the UN system can be found in Decaux, *supra* n 39, 13 *et seqq.*; Pohjolainen, *supra* n 29; and Fellous, *supra* n 10, 51 *et seqq*. Cf. also Mutaz M. Qafisheh, "The International Status of National Human Rights Institutions: A comparison with NGOs", *Nordic Journal of Human Rights* 31, no. 1 (2013): 60 *et seqq*; and Birgit Lindsnaes, Lone Lindholt, and Kristine Yigen, eds., *National Human Rights Institutions: Articles and Working Papers* (Copenhagen: Danish Centre for Human Rights, 2000), Section 1.2, 5 *et seqq*.

Rights".[99] These "local committees" were never created, and the idea of national bodies collaborating with the UN in the promotion and protection of human rights was seemingly abandoned for several years.[100]

A renewed interest resulted in the 1978 *Guidelines for the structure and functioning of national institutions*, which were adopted at a seminar organised by the UN Commission on Human Rights and subsequently endorsed by the UN General Assembly.[101] While the Guidelines themselves did not boost the establishment of NHRIs, they did create a fertile ground for further reflection on NHRIs at the UN level and served as a model for the Paris Principles.[102]

A growing interest on the part of the UN, coupled with acceptance on the part of States (for which NHRIs arguably represented a less intrusive and more adaptable monitoring mechanism), led to the first International Workshop on National Institutions for the Promotion and Protection of Human Rights, held in Paris from 7 to 9 October 1991. The Workshop was attended among others by various UN agencies[103] and organised with the decisive contribution of the UN Centre for Human Rights. Thereafter, the Office of the UN High Commissioner for Human Rights (OHCHR, successor to the UN Centre for Human Rights) would become one of the strongest proponents of the development of NHRIs through its technical and financial assistance programmes.[104] The role that the OHCHR plays to support GANHRI and its accreditation procedure is also considerable.[105]

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[99] UN Economic and Social Council, *Resolution 2/9. Commission on Human Rights*, 21 June 1946, para. 5 ("Information groups").

[100] With the exception of UNESCO "national cooperating bodies" (UNESCO, *Constitution*, Article VII). In the period between the 1946 Resolution by the Economic and Social Council and the 1978 Guidelines, on which see *infra*, very few UN documents and initiatives referred to the establishment of NHRIs or similar bodies; for the reasons of such a trend, cf. Pohjolainen, *supra* n 29, 32 *et seqq*.

[101] UN Secretariat, *Seminar on national and local institutions for the promotion and protection of human rights*, 15 November 1978, ST/HR/SER.A/2 (the text of the Guidelines can be found under Chapter V, paras. 184 *et seqq*.). The Guidelines were endorsed by UN General Assembly, *National institutions for the promotion and protection of human rights*, 14 December 1978, A/RES/33/46.

[102] Decaux, *supra* n 39, 15-16; and Pohjolainen, *supra* n 29, 43-47.

[103] The UN Interregional Crime and Justice Research Institute (UNICRI), UNESCO and ILO.

[104] On the active role played by the OHCHR in promoting NHRIs, cf. Pohjolainen, *supra* n 29, 67-74; Cardenas, *supra* n 24, 30-32; OHCHR, *supra* n 8, 8-10; Roberts, *supra* n 82; and Gianni Magazzeni, "The Role of OHCHR in Promoting National Human Rights Institutions", in Benedek et al., *supra* n 42, 169-176. Cf. also, in witness of the engagement by the OHCHR with NHRIs, the *UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions* (New York; Geneva: UNDP and OHCHR, December 2010); and Francesca Jessup and Koffi Kounte, *Evaluation of OHCHR Support to National Human Rights Institutions – Final Report*, October 2015. For a criticism of the allegedly unconditional support provided by the OHCHR to NHRIs, cf. Rosenblum, *supra* n 53, 302 *et seqq*.

[105] Cf. Section 3.4 above.

While current NHRIs do not mirror the Economic and Social Council's notions of "local committees" or "information groups" (which would have basically been UN focal points within Member States), the importance of the collaboration by NHRIs with international and regional organisations is clearly spelled out in the Paris Principles.[106] Moreover, since the adoption of the Principles, the international activities of NHRIs have increased, and so have their international recognition and status, as the remainder of this section will show.

Given the significance of the international dimension of NHRIs in the Paris Principles, it is unsurprising that international organisations have been the main sponsors for NHRIs. The promotional efforts by the UN are particularly noteworthy and have moved in two directions: on the one hand, Member States have been increasingly recommended to establish NHRIs in compliance with the Paris Principles; on the other, compliant institutions have been vested with a growing number of responsibilities and prerogatives within the UN framework.

The UN Commission on Human Rights and its successor the Human Rights Council (which replaced the Commission in 2006) are a case in point. In 1996, the Commission officially welcomed the participation by NHRIs in its meetings; at that time, however, NHRIs were allowed to intervene as part of the government delegations and only in relation to the Commission's agenda item that specifically concerned NHRIs.[107] While the right to speak from a floor separate from that of their respective governments was secured by NHRIs a couple of years later,[108] it took until 2005 for them

[106] As put it by Dickson, *supra* n 11, 276: "Of the seven responsibilities which the Paris Principles say national human rights institutions should perform, no fewer than four relate to international human rights". Cf. also, on the international responsibilities of NHRIs: Carver, *supra* n 52, 11 *et seqq*.

[107] UN Commission on Human Rights, *National institutions for the promotion and protection of human rights*, 19 April 1996, E/CN.4/RES/1996/50; and UN Commission on Human Rights, *National institutions for the promotion and protection of human rights*, 11 April 1997, E/CN.4/RES/1997/40 (paras. 15-16 of both documents). Cf. also UN Commission on Human Rights, *National institutions for the promotion and protection of human rights – Report of the Secretary-General submitted in accordance with Commission on Human Rights resolution 1996/50*, 5 February 1997, E/CN.4/1997/41, paras. 40-42.

[108] UN Commission on Human Rights, *Effective Functioning of Human Rights Mechanisms: National Institutions for the Promotion and Protection of Human Rights – Report of the Secretary-General Submitted in Accordance with Commission on Human Rights Resolution 1998/55*, 3 February 1999, E/CN.4/1999/95, paras. 55-58; and UN Commission on Human Rights, *National institutions for the promotion and protection of human rights*, 28 April 1999, E/CN.4/RES/1999/72, paras. 14-15.

to obtain the right to speak on all of the Commission's agenda items.[109] It is to be noted that these prerogatives were and are reserved to NHRIs that comply with the Paris Principles and have been duly accredited by GANHRI; they are also granted to GANHRI and to the four regional networks of NHRIs.

The above-mentioned arrangements have been maintained by the Human Rights Council, so that NHRIs are provided with ample opportunities to engage with this body through the submission of documents and the issuance of oral and written statements. Nonetheless, the involvement of NHRIs in the Council's sessions is still rather low, although on the rise.[110] Engagement by NHRIs with the Universal Periodic Review (UPR), a new mechanism established within the Human Rights Council, is, however, a different matter.[111]

In short, the UPR – instituted on the occasion of the establishment of the Council – is a process of comprehensive review of the human rights situation in UN Member States, whereby each State is examined every four and a half years. It is a peer-review process, inasmuch as the examination is carried out by the forty-seven States that make up the Council and is open to participation by all other Member States. The review is based on several documents including the governmental report, a compilation of the information contained in UN documents (e.g., concluding observations by human

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[109] UN Commission on Human Rights, *National institutions for the promotion and protection of human rights*, 20 April 2005, E/CN.4/RES/2005/74, para. 11. On the interactions between NHRIs on the one hand and the Commission on Human Rights and the Human Rights Council on the other, cf. the exhaustive accounts in Sidoti, *supra* n 28, 104 *et seqq*.; and Fellous, *supra* n 10, 68-76.

[110] OHCHR, *Survey on National Human Rights Institutions: Report on the findings and recommendations of a questionnaire addressed to NHRIs worldwide* (Geneva: OHCHR, July 2009), 45, according to which about 20% of respondent NHRIs interacted with the Human Rights Council (data refer to the period 2006-2008; sixty-one NHRIs worldwide responded to the questionnaire). Sidoti, *supra* n 28, 106, also puts into question the quality and usefulness of some contributions by NHRIs.
Yet, it would seem that in more recent years statements by NHRIs to the Human Rights Council have grown in number and increasingly concern substantial issues. A list of all submissions by NHRIs to the Council, divided by session, can be found at http://nhri.ohchr.org/EN/IHRS/HumanRightsCouncil/Pages/Human-Rights-Council.aspx, accessed 4 January 2019. Examples of individual and collective statements by NHRIs before the Council (including statements by GANHRI and regional networks) are provided in Kirsten Roberts, "The Role and Functioning of the International Coordinating Committee of National Human Rights Institutions in International Human Rights Bodies", in Wouters and Meuwissen, *supra* n 46, 235-236.

[111] Cf., on the UPR, UN General Assembly, *Human Rights Council*, 15 March 2006, A/RES/60/251, para. 11; and UN Human Rights Council, *Institution-building of the United Nations Human Rights Council*, 18 June 2007, A/HRC/RES/5/1, Annex, Section I. An important revision of the procedures of the Human Rights Council, including the UPR, took place by means of UN Human Rights Council, *Review of the work and functioning of the Human Rights Council*, 25 March 2011, A/HRC/RES/16/21; the revision also affected the participation by NHRIs, in the sense of specifying and strengthening it (cf. below in this section for more details).

rights treaty bodies, reports by Special Procedures), and information submitted by "other stakeholders". The latter include NGOs, regional organisations (such as the CoE, OSCE, the Inter-American Commission on Human Rights), and NHRIs.

Significantly, a distinction has been introduced in 2011 in relation to NHRIs, so that the contributions by A-status institutions are to be enshrined in a "separate section", whereas "information provided by other accredited national human rights institutions will be reflected accordingly, as well as information provided by other stakeholders".[112] Additionally, it is the right of fully compliant NHRIs only "to intervene immediately after the State under review during the adoption of the outcome of the review by the Council plenary".[113]

NHRIs and other relevant stakeholders are also expected to monitor the implementation of the recommendations laid down in the outcome of the review and possibly to deliver mid-term reports on the subject, as well as to cooperate with governments in furthering the implementation process. The apparent ambiguity between the monitoring task and the cooperation one, which also affects the reporting phase,[114] is even more evident with respect to the interactions between NHRIs and UN human rights treaty bodies, and it will thus be illustrated in more detail below.

Various notes have been issued and workshops organised by both the OHCHR and GANHRI with a view to clarifying the potential contribution by NHRIs to the UPR process and encouraging

[112] UN Human Rights Council, *Review of the work and functioning of the Human Rights Council, supra* n 111, Annex, para. 9.
[113] Ibid., para. 13.
[114] For instance, during an ICC panel meeting held in March 2014 on the engagement by NHRIs with the UPR, it emerged that some NHRIs had consulted with their respective governments in the preparation of their reports or (more often) had been involved in the preparation of the governmental reports. Cf., for a summary of the panel meeting, UPR Info, "NHRIs share best practices on UPR engagement", *News*, 17 March 2014, accessed 4 January 2019, https://www.upr-info.org/en/news/nhris-share-best-practices-on-upr-engagement.

their participation therein.[115] On the other hand, studies on the extent of the involvement by NHRIs in the process and especially on the effects of such an involvement are surprisingly lacking.[116]

For the limited purposes of this dissertation, namely to draw a comparison between the participation by NHRIs in the UN procedures and their participation at the CoE level, the summaries of stakeholders' information compiled on the occasion of the UPR first and second cycles of CoE Member States have been reviewed with a view to measuring – from a purely quantitative perspective – the extent of the participation by European NHRIs within the UPR mechanism.

During the first cycle (2008-2011), twelve out of sixteen A-status NHRIs[117] and four out of nine B-status NHRIs[118] submitted information to the UPR Working Group. At times, other national human rights structures lodged submissions and were put under the same heading "National Human Rights Institution", as is the case for various ombudsmen, both from States that had a compliant NHRI (e.g., Croatia and Ireland) and from States that did not have such an institution (Czech Republic).

During the second cycle (2012-2016), the trend of participation by fully compliant institutions consolidated, possibly because of greater familiarity with the mechanism, considerable efforts on the part of the OHCHR to involve NHRIs through guidelines and technical support, and the 2011 reform

[115] The OHCHR issues practical instructions for participation before every UPR sessions; for the most recent ones, cf. OHCHR, *Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders' written submissions*, published at https://www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx (accessed 4 January 2019). As for meetings and workshops, cf. the ICC panel meeting mentioned *supra* n 114, as well as the panels organised within the May 2011 ICC General Meeting (a summary of the discussion has been made available at UPR Info, "International Coordinating Committee on NHRIs holds a discussion on treaty bodies and UPR follow-up", *News*, 2 June 2011, accessed 4 January 2019, https://www.upr-info.org/en/news/international-coordinating-committee-nhris-holds-discussion-treaty-bodies-and-upr-follow).

[116] Reports by the UN Secretary-General on NHRIs contain some figures: among the most recent documents is UN General Assembly, *National institutions for the promotion and protection of human rights. Report of the Secretary-General*, 3 August 2017, A/72/277, paras. 78-80 and Annex II. Other figures, which are not limited to the submission of information by NHRIs as stakeholders, can be found in OHCHR, *supra* n 110, 43-44, highlighting that the UPR mechanism is the privileged venue for engagement by NHRIs within the UN system.

[117] NHRIs from Azerbaijan, Bosnia and Herzegovina, Croatia, Denmark, France, Georgia, Germany, Greece, Ireland, Luxembourg, Spain, and the United Kingdom (i.e., the Northern Ireland Human Rights Commission) submitted information; whereas NHRIs from Albania, Armenia, Poland, and Portugal did not. The Northern Ireland Commission was considered an A-status institution by the OHCHR, even though formally still accredited with B status (as the ICC/GANHRI Sub-Committee on Accreditation had recognised its compliance with the Paris Principles already in 2006, even though the upgrade from B to A status was sanctioned officially in May 2011 only). In general, the accreditation status which is being considered for participation in the UPR is that retained by the NHRI at the time when its home State underwent the review.

[118] NHRIs from Austria, Moldova, Norway, and Slovenia submitted independent reports, contrary to NHRIs from Belgium, Hungary, the Netherlands, Slovakia, and the Russian Federation.

by which information submitted by A-status NHRIs is presented at the outset, separately from information from all other stakeholders (in a section titled "Information provided by the national human rights institution of the State under review accredited in full compliance with the Paris Principles").

Nineteen out of twenty-three A-status institutions submitted information;[119] the increase was determined by newly accredited institutions which immediately took part in the review process (the Latvian Ombudsman, the Scottish Human Rights Commission, the British Equality and Human Rights Commission, the Hungarian Commissioner for Fundamental Rights, and the Ukrainian Parliament Commissioner for Human Rights) as well as by a long-time A-status NHRI which had not participated in the previous cycle (the Armenian Human Rights Defender). Additionally, the Commissioner for Human Rights in the Russian Federation, which had not participated in the previous cycle as a B-status institution, submitted information as an A-status NHRI during the second cycle.

As to B-status institutions, the increase is less marked, as five out of nine institutions took part in the UPR second cycle by filing independent submissions.[120] At any rate, it would seem that the emphasis put on the contribution by A-status NHRIs and the intense lobbying by both the OHCHR and GANHRI have led to considerable involvement by NHRIs (particularly, of fully compliant ones) within this UN mechanism, where dialogue with the government under review is key.[121]

[119] A-status institutions that participated in the procedure include institutions from Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Denmark, France, Georgia, Germany, Greece, Hungary, Ireland, Latvia, Luxembourg, the Russian Federation, Spain, Ukraine, and the United Kingdom (all three NHRIs). NHRIs from Albania, Poland, Portugal, and Serbia (whose NHRI was accredited by GANHRI for the first time in March 2010, with A status) did not participate.
[120] B-status NHRIs from Austria, North Macedonia, Moldova, the Netherlands, and Norway lodged submissions. The two B-status institutions from Bulgaria, as well as NHRIs from Slovenia and Sweden, did not participate.
[121] It therefore seems difficult to share the opinion expressed in Qafisheh, *supra* n 98, 67-68, according to which "despite the efforts to open the door for their involvement in the [UPR] process, there has been little participation by NHRIs", especially compared to NGOs. Indeed, as recognised by the author himself, the quantitative difference is mainly explained by the fact that only one NHRI is allowed for each State, save for exceptional cases (cf. *supra* n 25), and that NHRIs would typically comment on the records of their respective States only (on which their knowledge and expertise focus). These are inherent characteristics of NHRIs; moreover, the fact that not all States have established NHRIs to date should not weigh in the assessment of participation by existing NHRIs.

UN Special Procedures too operate within the Human Rights Council and, before, operated within the Commission on Human Rights. They are independent experts mandated to report and advise either on specific human rights issues (such as arbitrary detention or discrimination against women) at a global scale or on specific countries.[122] As of December 2018, forty-four thematic mandates and twelve country mandates are in place, which are entrusted to individual experts (so-called Special Rapporteurs) or groups of them (Working Groups).

In relation to Special Procedures, NHRIs are encouraged to provide them with relevant information before their country visits, meet and assist them during such visits, contribute to the formulation of recommendations following the visits, and follow up on the implementation of these recommendations.[123] More generally, NHRIs can act as information channels for Special Procedures.

In an effort to enhance the role of NHRIs in this mechanism, A-status institutions have recently been vested with additional prerogatives, including the right to nominate candidates as Special Rapporteurs or members of Working Groups and the right to intervene immediately after the State concerned during the so-called interactive dialogue (which follows the presentation of a country mission report by the Special Rapporteur/Working Group).[124]

Conversely, Special Procedures have at times recommended that specific States establish or strengthen NHRIs;[125] recommendations of the kind have also frequently been included in UPR

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[122] Cf. the resolutions by the General Assembly and the Human Rights Council mentioned *supra* n 111. For more details on the history, characteristics, and activities of the Special Procedures, cf. the dedicated webpage of the OHCHR: http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx (accessed 4 January 2019).

[123] Cf. OHCHR, *Discussion Paper on Interaction Between National Human Rights Institutions and Special Procedures*, May 2007; and OHCHR, *Manual of Operations of the Special Procedures of the Human Rights Council* (Geneva: UN, 2008).
In the literature, cf. Minerva Martinez Garza, "National Human Rights Institutions and Their Collaboration with the Special Procedures of the Human Rights Council", in *The Special Procedures of the Human Rights Council: A Brief Look from the Inside and Perspectives from Outside*, ed. Humberto Cantu Rivera (Cambridge: Intersentia, 2015). Dickson, *supra* n 11, 277, speaks of meetings between the Northern Ireland Human Rights Commission and various UN Special Rapporteurs; other examples of interaction can be found in Qafisheh, *supra* n 98, 66-67.

[124] UN Human Rights Council, *Review of the work and functioning of the Human Rights Council*, *supra* n 111, Annex, paras. 22(a) and 28. Figures on the engagement by NHRIs with Special Procedures are scant: one of the few sources is OHCHR, *supra* n 110, 44-45, according to which "generally, less than 35% of respondents had provided information to a [Special Procedure Mandate Holder] or met with them during a country visit, although this percentage was over 50% in the Asia Pacific region. Follow up to the country missions of [Special Procedure Mandate Holders] was even lower, with less that 20% publicizing mission reports, monitoring recommendations and reporting on their implementation, on average".

[125] As an example, cf. the concerns expressed in Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns. Addendum: Mission to Turkey*, 18 March 2013,

outcomes, and they have normally been accepted by the governments concerned (even though not always implemented promptly).[126] Finally, the Human Rights Council routinely issues resolutions supporting the role of NHRIs, whereby it invites States to establish these institutions or improve existing ones.[127]

NHRIs also interact, in several ways, with UN human rights treaty bodies.[128] This expression refers to a wide range of committees that are composed of independent experts and mandated to monitor the implementation of UN-negotiated human rights treaties; most of these committees are also tasked with receiving complaints by individuals who allege violations of the rights enshrined in the treaties.

Nonetheless, it is in relation to the monitoring functions of these committees that NHRIs have come to play a most significant role by submitting information on the status of implementation of the various treaties and on the most serious issues that their respective governments should deal with.

A/HRC/23/47/Add.2, paras. 82-84. The OHCHR has explicitly encouraged Special Procedures to include this type of recommendations into their reports: OHCHR, *Discussion paper*, *supra* n 123, para. 7.

[126] In the Outcome Report of Italy's UPR 2nd cycle, no less than twenty-three recommendations concerned the creation of an NHRI in compliance with the Paris Principles (Human Rights Council, *Report of the Working Group on the Universal Periodic Review. Italy*, 10 December 2014, A/HRC/28/4, paras. 145.26-145.48). While Italy accepted these recommendations, it had already done so during the 1st cycle, without much concrete progress. Sweden, which currently has a B-status NHRI, was encouraged to establish a fully-compliant institution during its UPR 2nd cycle (Human Rights Council, *Report of the Working Group on the Universal Periodic Review. Sweden*, 13 April 2015, A/HRC/29/13, paras. 146.14-146.25).

[127] Among the latest ones: UN Human Rights Council, *National institutions for the promotion and protection of human rights*, 29 September 2016, A/HRC/RES/33/15; and UN Human Rights Council, *National human rights institutions*, 28 September 2018, A/HRC/RES/39/17.

[128] On the relationship between NHRIs and UN treaty bodies, cf. OHCHR, *Information Note: National Human Rights Institutions interaction with the UN Treaty Body System*, 5 April 2011; and GANHRI, *National Human Rights Institutions and United Nations Treaty Bodies. GANHRI Background Paper*, May 2016, accessed 4 January 2019, http://nhri.ohchr.org/EN/IHRS/TreatyBodies/Annual%20Meeting%20of%20Chairpersons%20of%20Human%20Rights%20Tre/GANHRI%20background%20paper%20FINAL.pdf. For some figures on this interaction, cf. OHCHR, *supra* n 110, 42-43.

In the literature, cf. Carver, *supra* n 52, 19-29; Sidoti, *supra* n 28, 116-120; Qafisheh, *supra* n 98, 73-81; Ineke Boerefijn, "Partnership between National Human Rights Institutions and Human Rights Treaty Bodies in the Implementation of Concluding Observations", in *The Realisation of Human Rights: When Theory Meets Practice*, eds. Yves Haeck et al. (Cambridge: Intersentia, 2013), 437-459; and Katrien Meuwissen, "NHRI Participation to United Nations Human Rights Procedures: International Promotion Versus Institutional Consolidation?", in Wouters and Meuwissen, *supra* n 46, 271 *et seqq*. Cf. also the following detailed handbook: Amrei Müller and Frauke Seidensticker, *The Role of National Human Rights Institutions in the United Nations Treaty Body Process* (Berlin: German Institute for Human Rights, December 2007).

This information appears to be taken into consideration by the treaty bodies, whose concluding observations not infrequently reflect the remarks by the NHRIs that have intervened.

Additionally, the concluding observations of these bodies often include a recommendation to the government concerned to institute or strengthen the State's NHRI.[129] Finally, NHRIs are also involved at the follow-up stage, as they are encouraged to closely monitor the implementation of the concluding observations and report on it.[130] The idea behind these multiple interactions between NHRIs and treaty bodies is that the proximity of NHRIs to the domestic level, coupled with their independence from governments, should make them an ideal source of information both in the preparatory phase and in the implementation one.

Treaty bodies have sought both to clarify the role that NHRIs can play in the advancement of the rights protected in the conventions and to formalise the relationship between themselves and NHRIs to a varying degree of detail. As the results are divergent, the need for a clearer and more consistent approach by treaty bodies in these respects has been invoked from various quarters.[131]

In March 1993, when the Paris Principles had already been adopted but not yet endorsed by the UN General Assembly, the Committee on the Elimination of Racial Discrimination issued a General Recommendation whereby it called upon States to establish NHRIs in compliance with the Principles and illustrated their potential contribution to the implementation of the Convention. In terms of the interaction between the Committee and NHRIs, the General Recommendation indicated that NHRIs "should be associated with the preparation of reports and possibly included in government delegations

[129] As reported by Brodie, *supra* n 77, 152, UN treaty bodies issued a total number of 356 recommendations to States with regard to the creation or strengthening of NHRIs in the period 2000-2007.

[130] An example of sustained engagement in the follow-up of concluding observations is illustrated in Frauke Seidensticker, *Examination of State Reporting by Human Rights Treaty Bodies: An Example of Follow-Up at the National Level by National Human Rights Institutions* (Berlin: German Institute for Human Rights, April 2005).

[131] NHRIs and treaty bodies themselves have highlighted this need. Cf., for instance, GANHRI, *supra* n 128, 16: "Notwithstanding treaty bodies' specificities in terms of their mandates, GANHRI – and treaty bodies themselves – have continuously encouraged the harmonisation of treaty body working methods with respect to NHRIs, as also encouraged in the draft harmonised approach adopted in Berlin, Germany, in 2006, and in the Marrakech Statement, adopted in Marrakech, Morocco, in 2010". Cf. also UN General Assembly, *Implementation of human rights instruments – Note by the Secretary-General. Report of the Chairs of the human rights treaty bodies on their 29th meeting*, 20 July 2017, A/72/177, paras. 45 *et seqq*. ("Common approach to engagement with national human rights institutions"); and UN Human Rights Council, *National institutions for the promotion and protection of human rights, supra* n 127, para. 22.

in order to intensify the dialogue between the Committee and the State party concerned".[132] Thus, NHRIs were and still are (at least formally) conceived by the Committee on the Elimination of Racial Discrimination essentially as part of the State apparatus, even though their expertise on human rights and independence arguably make them a promising "ally" in the furtherance of the Committee's objectives.

Other human rights treaty bodies have highlighted the importance of the establishment and proper functioning of NHRIs for the promotion and protection of the rights contained in their respective conventions. That is the case for the Committee on Economic, Social and Cultural Rights, whose General Comment on "the role of national human rights institutions in the protection of economic, social and cultural rights" illustrates the functions that NHRIs can perform in the area.[133] The Comment, however, does not specify the relationship between the Committee and NHRIs.

More recently, the Committee on the Elimination of Discrimination Against Women adopted a Decision recognising the role of NHRIs for the implementation of its Convention.[134] The relationship between the Committee and NHRIs is also touched upon in the Decision, but in terms that leave the door open both to the contribution by NHRIs to State reports and to alternative reports by NHRIs along the lines of the so-called shadow reports by NGOs ("national human rights institutions may provide comments and suggestions on a State party's reports in any way they see fit").[135] The Committee Against Torture and the Committee on Migrant Workers only mention NHRIs in their

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[132] Committee on the Elimination of Racial Discrimination, *General Recommendation 17: The establishment of national institutions to facilitate the implementation of the Convention,* 19 March 1993.
[133] Committee on Economic, Social and Cultural Rights, *General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights*, 10 December 1998, E/C.12/1998/25. The General Comment states, *inter alia*, that "national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights … It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions" (para. 3).
[134] Cf. the *Statement by the Committee on the Elimination of Discrimination against Women on its relationship with national human rights institutions*, included as Annex II to UN Commission on the Status of Women, *Results of the fortieth session of the Committee on the Elimination of Discrimination against Women*, 11 February 2008, E/CN.6/2008/CRP.1. Already in 1988, the Committee issued a General Recommendation underlining the importance of a national infrastructure to implement international human rights treaties (Committee on the Elimination of Discrimination against Women, *General recommendation No. 6: Effective national machinery and publicity*, 7th session, 1988). While the instrument does not refer to NHRIs explicitly (as it pre-dates the adoption of the Paris Principles), it can be and has been interpreted as including NHRIs too.
[135] Committee on the Elimination of Discrimination against Women, Statement, *supra* n 134, para. 6.

rules of procedure and in equally vague terms, as entities that can (together with UN bodies and specialised agencies or NGOs) submit information to the Committees upon invitation by the latter.[136]

On the other hand, the Committee on the Rights of the Child has been more specific. Its General Comment no. 2 explicitly states that the Committee "considers the establishment of [NHRIs] to fall within the commitment made by States parties upon ratification to ensure the implementation of the Convention".[137] Moreover, the Comment details the requirements for NHRIs in terms of composition, mandate and powers with specific reference to the promotion and protection of children's rights; *inter alia*, conferring a quasi-judicial mandate on NHRIs is considered essential.[138] Finally, the document sets out the nature of the partnership between NHRIs and the Committee on the Rights of the Child in unequivocal terms: "NHRIs should contribute independently to the reporting process under the Convention … and monitor the integrity of government reports".[139] While it is accepted that governments might consult with NHRIs with a view to drafting their reports to the Committee, governments are warned that they "must respect the independence of [NHRIs] and their independent role in providing information to the Committee. It is not appropriate to delegate to NHRIs the drafting of reports or to include them in the government delegation when reports are examined by the Committee".[140]

A similar approach has seemingly been adopted by the Human Rights Committee, whose recent Paper on the subject is, however, couched in somewhat less clear-cut terms.[141] In the Paper, the Committee "recognizes the value of States parties organizing broad national consultations when

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[136] Committee against Torture, *Rules of Procedure*, updated on 1 September 2014, CAT/C/3/Rev.6, Rule 63; and Committee on Migrant Workers, *Rules of Procedure*, updated on 7 May 2004, HRI/GEN/3/Rev.1/Add.1, Rule 28.
[137] Committee on the Rights of the Child, *General Comment No. 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child,* 15 November 2002, CRC/GC/2002/2, para. 1.
[138] Ibid., para. 13: "NHRIs must have the power to consider individual complaints and petitions and carry out investigations, including those submitted on behalf of or directly by children".
[139] Ibid., para. 20.
[140] Ibid., para. 21.
[141] Human Rights Committee, *Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session (15 October–2 November 2012),* 13 November 2012, CCPR/C/106/3. Before this Paper, the Human Rights Committee had used its General Comment no. 3 (*Article 2 (Implementation at the National Level*)) and subsequently its General Comment no. 31 (*The nature of the general legal obligation imposed on States Parties to the Covenant*, adopted in 2004 to replace the former) as the basis to ask States Parties to establish or enhance NHRIs.

drafting their reports under the Covenant" (read: involving NHRIs), at the same time "welcom[ing] the submission of alternative reports and oral presentations" by NHRIs.[142] Nevertheless, the Paper explicitly acknowledges the independence of NHRIs and thus their "distinct relationship with the Committee" compared to States and NGOs;[143] additionally, it circumscribes this special relationship to NHRIs accredited as fully compliant by GANHRI.[144] It is worth noting in this respect that the Paper by the Human Rights Committee was issued in 2012, at a time when the ICC/GANHRI accreditation procedure had been functioning for years and recently strengthened.[145]

This Paper served as a model for a 2014 Document issued by the Committee on Enforced Disappearances, which emphasises that "the role played by national human rights institutions in providing information for the State party's report should not exclude the possibility of submitting an alternative report to the Committee".[146] Aside from reporting, both the Human Rights Committee and the Committee on Enforced Disappearances outline the relationship between themselves and NHRIs in broad terms by highlighting the potential role for NHRIs in following up the concluding observations by the Committees, in assisting in the individual communications' procedures, and in contributing to the general comments drafted by the Committees.

The position expressed in the documents by the Committee on the Rights of the Child, the Human Rights Committee, and the Committee on Enforced Disappearances conforms more closely to the Paris Principles as interpreted by the GANHRI Sub-Committee on Accreditation,[147] as the most respectful of the independence of NHRIs from their governments and the most aware of their broad competences and expertise. While the issue of a common approach by treaty bodies to engagement with NHRIs has been discussed by the Chairs of the treaty bodies in the context of the ongoing reform

[142] Human Rights Committee, Paper, *supra* n 141, paras. 11 and 14.
[143] Ibid., para. 7.
[144] Ibid., paras.7-8.
[145] Nonetheless, it might also be the case that treaty bodies do not want to limit their cooperation to A-status NHRIs, but extend it to specialised national bodies that, while not in compliance with the Paris Principles, might provide useful inputs: for instance, as mentioned, the Committee on the Rights of the Child receives and encourages submissions by children ombudsmen.
[146] Committee on Enforced Disappearances, *The relationship of the Committee on Enforced Disappearances with national human rights institutions*, 28 October 2014, CED/C/6, para. 15.
[147] GANHRI, *supra* n 10, G.O. 1.4, "Interaction with the international human rights system".

of the system, and "the particular value of national human rights institutions accredited with 'A' status by the Global Alliance in the reporting process" has been acknowledged,[148] it does not appear that specific uniform rules of engagement have been adopted to date.[149] Nor have other proposals been endorsed which would facilitate participation by NHRIs in the reporting process, such as the "advance notification" of the examination of a State to the respective NHRI, guidelines for the submission of independent reports by NHRIs, and the closer involvement of these institutions in the dialogue with the State under review.[150] On the other hand, progress has been made in other areas of the relationship between NHRIs and treaty bodies (i.e., beyond reporting),[151] the debate on the reform of the treaty bodies' system continues, and the approaches by treaty bodies appear to increasingly converge in practice.[152]

The spreading of NHRIs worldwide and the strengthening of the relationships between them and various UN organs have led to a further innovation in two recent conventions – i.e., the Optional Protocol to the Convention against Torture (OPCAT) and the Convention on the Rights of Persons with Disabilities (CRPD).[153] The breakthrough lies in the inclusion of national mechanisms with

[148] UN General Assembly, *supra* n 131, para. 46(a).
[149] Ibid., paras. 45 *et seqq*., while agreeing on some general indications, did not harmonise the rules of procedures and working methods which regulate the interactions between NHRIs and the various treaty bodies. Cf. also Boerefijn, *supra* n 128, 342 *et seqq.,* which illustrates in detail not only the array of written rules governing the area, but also the divergent "working relations" and concrete ways of interaction which have been developed in practice.
[150] Cf. the "points for consideration" submitted to the Chairs of the treaty bodies in International Human Rights Instruments, *Common approach to engagement with national human rights institutions. Note by the Secretariat*, 9 June 2017, HRI/MC/2017/3, para. 57(b)-(d) in particular, which were not endorsed in General Assembly, *supra* n 131. More generally, it is interesting to compare the two documents in order to ascertain which proposals have ultimately been endorsed by the Chairs of the treaty bodies.
[151] Especially as regards the potential role of NHRIs in the inquiry procedures and in the follow-up of treaty bodies' recommendations, as well as with respect to "other avenues for engagement": cf. General Assembly, *supra* n 131, paras. 46-48.
[152] For instance, the Committee on the Elimination of Racial Discrimination has been receiving independent reports from NHRIs, notwithstanding the terms of its General Recommendation mentioned *supra* n 132.
[153] This latest development has been noted and analysed, among others, by Carver, *supra* n 52, 25-29. On the relationship between NHRIs and OPCAT, cf. Rachel Murray, "National Preventive Mechanisms under the Optional Protocol to the UN Convention against Torture: One Size Does Not Fit All", *Netherlands Quarterly of Human Rights* 26, no. 4 (2008): 485-516; and University of Bristol/OPCAT Team, *The Relationship between Accreditation by the International Coordinating Committee of National Human Rights Institutions and the Optional Protocol to the UN Convention Against Torture,* November 2008, accessed 4 January 2019, http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/iccnhrirelationshipandopcat.pdf. Cf. also Asia Pacific Forum of NHRIs, Association for the Prevention of Torture, and OHCHR, *Preventing Torture: An Operational Guide for National Human Rights Institutions* (Sidney; Geneva: APF, APT and OHCHR, May 2010).

monitoring and implementation competences within the treaties themselves; and while it is not required that the responsibilities of the national mechanisms be entrusted to an existing or future NHRI, both treaties provide for States to "take into account" (CRPD) or "give due consideration to" (OPCAT) the Paris Principles in the set up of these mechanisms.[154]

OPCAT devotes an entire Part (Articles from 17 to 23) to National Preventive Mechanisms (NPMs), which shall be composed of independent experts.[155] NPMs are generally mandated to prevent torture at the national level and they do so by performing a number of functions which are typical of NHRIs, such as advising the competent authorities and reporting.[156] The most significant task of NPMs, at any rate, is to "regularly examine the treatment of the persons deprived of their liberty in places of detention";[157] to this end, they must be vested with appropriate powers, including those to visit all places of detention, have access to all information concerning the number and treatment of detainees, and conduct private interviews with them.[158]

The work by NPMs is intended to complement that by the Subcommittee on Prevention (SPT), an international body also created by OPCAT (Parts II and III), whose main function is to visit places of detention in States Parties and make recommendations to remedy or prevent instances of torture.[159] The liaison between the SPT and NPMs appears central to the implementation of the Protocol.[160]

On the relationship between NHRIs and the CRPD, cf. Gauthier de Beco, "Article 33(2) of the UN CRPD: Another Role for National Human Rights Institutions", *Netherlands Quarterly of Human Rights* 29, no. 1 (2011): 84-106; and Meredith Raley, "The Drafting of Article 33 of the Convention on the Rights of Persons with Disabilities: The Creation of a Novel Mechanism", *International Journal of Human Rights* 20, no. 1 (2016): 140-142. Cf. also, on the national dimension of the CRPD (including the role foreseen for NHRIs), Janet E. Lord and Michael Ashley Stein, "The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities", *Washington Law Review* 83 (2008): 449-479.

[154] UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment,* 9 January 2003, A/RES/57/199, Article 18(4); and UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 24 January 2007, A/RES/61/106, Article 33(2).

[155] OPCAT, *supra* n 154, Article 18. Articles 3, 4, and 35 of OPCAT also deal with NPMs.

[156] Ibid., Articles 19, 22 and 23.

[157] Ibid., Article 19(a).

[158] Ibid., Article 20.

[159] Ibid., Article 11 in particular.

[160] Article 11(b) details a list of tasks that the SPT is to perform with regard to NPMs, which include maintaining direct contact with, advising, and training them. From another perspective, the right of NPMs to maintain contact with the SPT is also laid down in the Protocol (Article 20(f)). More generally, the SPT and NPMs are entrusted with similar tasks (visiting places of detention and making recommendations to governments), which they should carry out in a coordinated manner.

The approach taken by the CRPD is somewhat more nuanced: while showing greater awareness – compared to older human rights treaties – of the pivotal role of national implementation, the Convention requires, in general terms, that States Parties "maintain, strengthen, designate or establish … a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention" (Article 33(2)). There is no further specification of the mandate or powers of these mechanisms, except for the reference to the Paris Principles.

As mentioned, States Parties to the said treaties are not obliged to confer these additional functions on their existing NHRIs, nor are they obliged to create an NHRI as such. But that these functions could be performed suitably by NHRIs is reflected in the number of States that designated their NHRIs as part of their NPMs and CRPD monitoring frameworks,[161] as shown below.

While older than the CRPD, OPCAT has been ratified by a smaller number of States – 88, against 177 States that ratified the CRPD. As far as the forty-seven CoE Member States are concerned, thirty-eight of them ratified the Protocol, four States only signed it (Belgium, Iceland, Ireland, and Slovakia), and five States did not ratify nor sign the Protocol (Andorra, Latvia, Monaco, the Russian Federation, and San Marino).[162]

Out of twenty-four A-status NHRIs from States that ratified the Protocol, eleven have been chosen by their governments as part of the State's NPM.[163] As regards the remaining States, in one

[161] Both treaties explicitly state that national monitoring/implementation mechanisms may be composed of more than one body: cf. CRPD, *supra* n 154, Article 33(2); and OPCAT, *supra* n 154, Article 17. As specified by the CRPD, in those instances, "all mechanisms are required to be independent from the Executive Branch and at least one of these mechanisms is required to be compliant with the Paris Principles" (CRPD Committee, *Guidelines on Independent Monitoring Frameworks and their participation in the work of the Committee*, 16th session (August-September 2016), para. 12; on which cf. *infra* for more details).

[162] The status of signatures and ratifications has been checked through the dedicated webpage of the UN Treaty Collection: https://treaties.un.org/pages/viewdetails.aspx?src=IND&mtdsg_no=IV-9-b&chapter=4&lang=en (accessed 4 January 2019).

[163] These are the NHRIs from Albania, Armenia, Croatia, Georgia, Hungary, Lithuania, Poland, Portugal, Serbia, Spain, and Ukraine. The "OPCAT" Database compiled by the Association for the Prevention of Torture, which contains up-to-date and complete information on all NPMs designated by their respective governments, has been used as the primary source of information. The Database can be consulted at http://apt.ch/en/opcat-database/ (accessed 4 January 2019). A database based on the submissions by States Parties is kept by the SPT and is available at http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx (accessed 4 January 2019). The status of NHRIs considered here is based on the latest *Chart of the Status of NHRIs* made available by GANHRI and updated on 8 August 2018: cf. GANHRI, *supra* n 4.

case the government has not designated an NPM yet (Bosnia and Herzegovina); in six other cases, the existing (classical) ombudsman or a similar institution was appointed;[164] and in three cases, an *ad hoc* body was instituted anew.[165] Finally, the NPM of the United Kingdom is made up of twenty-one bodies, most of which are ombudsman-like institutions; the Scottish Human Rights Commission is the only UK NHRI included in the mechanism.[166]

Out of nine B-status NHRIs from States that ratified the Protocol, seven are part of their countries' NPMs.[167] As for the remaining two, Bulgaria decided to include only its Ombudsman and not its Commission for Protection Against Discrimination in the NPM (both bodies are accredited as B-status institutions by GANHRI), while Sweden preferred its Parliamentary Ombudsmen over its B-status Equality Ombudsman.

Thus, several GANHRI-accredited NHRIs have been appointed as their countries' NPMs.[168] This is especially the case for human rights ombudsmen; on the other hand, where the country's NHRI is a consultative commission or research institute, the choice has often fallen upon a pre-existing classical ombudsman or a new body with specific mandate and powers. This is not surprising considering that the inspection mandate and related powers inherent in the NPM are particularly well-suited for ombudsman-like institutions, which often already enjoy these prerogatives.

As to the CRPD, all CoE Member States but Liechtenstein ratified it.[169] Out of twenty-seven A-status NHRIs from States that ratified the Convention, fifteen have been designated as part of the

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[164] This is the case for Denmark (whose Danish Parliamentary Ombudsman, designated NPM, nonetheless closely cooperates with the Danish NHRI in the performance of its NPM functions), Finland, Greece, Luxembourg, the Netherlands (whose NPM is comprised of four bodies, coordinated by the Inspectorate of Security and Justice), and Norway.

[165] In France (General Controller of Places of Deprivation of Liberty), Germany (National Agency for the Prevention of Torture), and Moldova (Council for the Prevention of Torture). More specifically, the Moldovan Government had initially designated the country's NHRI as its NPM, but more recently decided to establish an *ad hoc* body, where the NHRI also sits.

[166] A complete list of UK NPM bodies is available at https://www.nationalpreventivemechanism.org.uk/members/ (accessed 4 January 2019).

[167] NHRIs from Austria, Azerbaijan, Bulgaria (Ombudsman only), Cyprus, North Macedonia, Montenegro, and Slovenia have been designated as NPMs.

[168] Linos and Pegram, *supra* n 41, 1131, reports that – as of April 2016 – out of fifty-seven designated NPMs around the world, thirty-seven are NHRIs.

[169] In the absence of a comprehensive database collecting all designations of national bodies under Article 33(2), the following sources have been used: the Concluding observations by the CRPD Committee, together with State reports as well as information from NGOs and NHRIs; for EU States, a table compiled by the EU Agency for Fundamental Rights,

national framework under Article 33(2),[170] whereas in three instances no national mechanism has been appointed yet by the government,[171] and in nine instances national bodies different from NHRIs have been designated (either *ad hoc* bodies created on the occasion of the ratification of the CRPD or ombudsmen/non-discrimination commissions already in place).[172] As to B-status institutions, the Azerbaijani, Belgian, Cypriot, and Montenegrin NHRIs have been formally designated as the national mechanisms for the monitoring and implementation of the CRPD; in two States no designation has taken place yet,[173] whereas four other States created or chose a different body.[174]

It is worth mentioning that, even when they have not been formally appointed under Article 33(2) CRPD, NHRIs might nonetheless contribute to the monitoring and implementation of the Convention;[175] that in some States where national bodies have not been designated yet, NHRIs are being considered as the most appropriate bodies to assume the task;[176] and that in some instances where a different body has been preferred over the existing NHRI, the CRPD Committee pointed out the body's lack of compliance with the Paris Principles and even expressly suggested the designation of the NHRI instead.[177]

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updated on 31 December 2017 and published at https://fra.europa.eu/en/publications-and-resources/data-and-maps/intobsun-0?mdq1=dataset (accessed 4 January 2019), as well as "DOTCOM" – a database sponsored by the European Commission and run by the Academic Network of European Disability Experts, available at https://www.disability-europe.net/dotcom (accessed 24 March 2019). Finally, the annual reports of NHRIs as well as their websites have been consulted. One of the most complete overviews, which is not confined to Europe, is ICC and Canadian Human Rights Commission, *Survey of National Human Rights Institutions on Article 33.2 of the Convention on the Rights of Persons with Disabilities*, August 2011, accessed 4 January 2019, https://nhri.ohchr.org/EN/Themes/PersonsDisabilities/DocumentsPage/SurveyReport33.2.pdf. The Survey, however, is already a few years old and only 55% of NHRIs ranging from A to C status responded.

[170] States that have included NHRIs in their CRPD national frameworks are Denmark, Finland, France, Georgia, Germany, Ireland, Latvia, Luxembourg, Moldova, the Netherlands, Poland, the Russian Federation, and the United Kingdom (where all three NHRIs are part of the national mechanism).

[171] This is the case for Armenia, Bosnia and Herzegovina, and Ukraine.

[172] In Albania, Croatia, Greece, Hungary, Lithuania, Norway, Portugal, Serbia, and Spain.

[173] Namely in Bulgaria and Sweden.

[174] These are Austria, North Macedonia, Slovakia, and Slovenia.

[175] For instance, the Austrian Ombudsman Board closely cooperates with the designated CRPD Monitoring Committee; more generally, NHRIs with quasi-judicial competences routinely receive complaints alleging the violation of the rights of the disabled.

[176] This is the case, among others, for Armenia and Bulgaria (with reference to both of its B-status NHRIs).

[177] Cf., for instance, CRPD Committee, *Concluding observations on the initial report of Lithuania*, 11 May 2016, CRPD/C/LTU/CO/1, para. 67(b): "The Office of Equal Opportunities Ombudsperson and the Council for the Affairs of the Disabled, which have been appointed to function as the State party's independent monitoring mechanisms, are not in full compliance with the [Paris Principles]". Cf., for similar considerations, the concluding observations issued by the CRPD with respect to Croatia and Hungary. In its *Concluding observations on the initial report of Serbia*, 23 May 2016, CRPD/C/SRB/CO/1, para. 67, the CRPD Committee criticised the fact that "the national human rights institution does not act as an independent mechanism as outlined in article 33 (2)".

At any rate, it clearly emerges from the concluding observations by the CRPD Committee that the compliance by national frameworks with the Paris Principles is thoroughly scrutinised. In this respect, the concluding observations also make reference to the recent *Guidelines on independent monitoring frameworks and their participation in the work of the CRPD*,[178] where the significance of the Paris Principles for assessing Article 33(2) bodies is stressed and "States Parties are encouraged to appoint NHRIs compliant with the Paris Principles as the monitoring framework or as a mechanism that forms part of the monitoring framework".[179] The Guidelines also regulate the participation by Article 33(2) bodies in the activities of the CRPD Committee,[180] along the lines of the approach adopted by the Human Rights Committee and the Committee on the Rights of the Child.

The SPT too adopted a set of *Guidelines on national preventive mechanisms*;[181] these, however, differ from those by the CRPD Committee in many respects, primarily because the SPT performs peculiar functions compared to other UN treaty bodies. Indeed, the SPT does not receive regular reports by States Parties to OPCAT, but – as mentioned – it conducts visits into States Parties' places of detention and makes recommendations on how to strengthen the protection of detainees. Furthermore, it advises States on the establishment and strengthening of NPMs as well as NPMs themselves on how to carry out their tasks in compliance with OPCAT.

The relationship between the SPT and NPMs (and NHRIs) is thus inherently different, and the Guidelines have another purpose – i.e., integrating the already detailed rules that are included in

[178] Cf., for instance, CRPD Committee, *Concluding observations on the initial report of the Republic of Moldova*, 18 May 2017, CRPD/C/MDA/CO/1, para. 59: "Taking into account its guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities (2016), the Committee recommends that the State party designate an independent monitoring mechanism in accordance with the [Paris Principles], that it provide adequate funding for its functioning and that organizations of persons with disabilities fully participate in the monitoring process". Cf. also CRPD, *supra* n 161.

[179] CRPD, *supra* n 161, para. 15.

[180] Ibid., Chapter 2, paras. 21-31. The Guidelines provide for a wide-ranging involvement of the independent monitoring frameworks – from the preparation of reports to the follow-up of the Committee's recommendations and activities other than monitoring (such as assisting in the communication procedure and contributing to the drafting of the Committee's General Comments). As far as the reporting phase is concerned, consultation of the monitoring frameworks in the preparation of State reports is permitted, but the submission of an "alternative report" is also encouraged (para. 21(c) and (d)).

[181] SPT, *Guidelines on national preventive mechanisms*, 9 December 2010, CAT/OP/12/5.

OPCAT regarding the institutional characteristics and powers of NPMs.[182] Additionally, the SPT recently adopted an *Analytical assessment tool for national preventive mechanisms*, conceived as an instrument for NPMs and States to carry out self-evaluations.[183]

The practice of designating accredited NHRIs as NPMs or CRPD national monitoring mechanisms would appear suitable for various reasons, insofar as it confers the significant powers and responsibilities deriving from these treaties on independent bodies with human rights expertise, and it avoids the multiplication of State bodies with similar tasks (NHRIs routinely deal with disabled people's and detainees' rights). On the other hand, the appointment of NHRIs under the said treaties might give rise to risks: primarily, that NHRIs are not given the necessary financial and staff resources to carry out the additional tasks and/or that there is insufficient focus and expertise on the new areas.[184]

In sum, and notwithstanding some outstanding issues, OPCAT and the CRPD have considerably strengthened the role of NHRIs and of the Paris Principles on the international plane; at the same time, the UN committees supervising the implementation of other human rights treaties have upgraded their relationship with NHRIs and frequently cooperate with them in carrying out their monitoring functions. While there arguably is room for development as far as the engagement of NHRIs with treaty bodies in the post-examination phase is concerned,[185] national institutions

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[182] The Guidelines, *supra* n 181, are organised into the following sections: "Basic principles", "Basic issues regarding the establishment of an NPM", and "Basic issues regarding the operation of an NPM" (divided into "Points for States" and "Points for NPMs").

[183] SPT, *Analytical assessment tool for national preventive mechanisms*, 25 January 2016, CAT/OP/1/Rev.1.

[184] This complaint is often raised by NHRIs themselves: e.g., the Polish Ombudsman reported, during its re-accreditation process in 2012, "that it does not have adequate resources to effectively fulfil its role as NPM, and that it has an insufficient number of employees fulfilling this role" (ICC, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)*, Geneva, 19-23 November 2012, section 3.9, sub-section 6). This pitfall has also been noted by the SPT: cf., for instance, SPT, *Visit to Ukraine undertaken from 19 to 25 May and from 5 to 9 September 2016: observations and recommendations addressed to the State party. Report of the Subcommittee*, 18 May 2017, CAT/OP/UKR/3, para. 19.

De Beco and Murray, *supra* n 22, 27-29, points to another interesting issue – namely, the overlap (and potential conflict) between the accreditation by GANHRI of an NHRI and the assessment by the SPT or CRPD Committee of the same body as NPM or national framework. Other potential problems are highlighted in Carver, *supra* n 52, 28. On the advantages and disadvantages of NHRIs being designated as NPMs, cf. also Association for the Prevention of Torture, *National Human Rights Institutions as National Preventive Mechanisms: Opportunities and challenges* (Geneva: Association for the Prevention of Torture, December 2013).

[185] There are, nonetheless, positive examples in this respect: cf. the experience of the German NHRI reported in Seidensticker, *supra* n 130. Cf. also the follow-up reports drafted by the Irish NHRI: Irish Human Rights and Equality Commission, *Submission to UN Human Rights Committee on Ireland's One-Year Follow-up Report to its Fourth Periodic*

increasingly submit their own reports to treaty bodies. The figures provided by the UN Secretary-General and GANHRI clearly show that the extent of the phenomenon in practice does not currently match the extent of its formal regulation and that a straightforward and uniform set of rules for the interaction of NHRIs with UN treaty bodies is urgently needed.[186]

In closing and in passing, it is worth mentioning that NHRIs are expanding their reach at the UN level by undertaking new activities, such as participation in the drafting of UN-negotiated treaties and declarations,[187] and by building ties with additional UN mechanisms. In the latter respect, a recent resolution by the UN General Assembly has sought to strengthen the collaboration between NHRIs and UN structures by calling upon "all relevant United Nations mechanisms and processes, in accordance with their respective mandates … to further enhance the participation of national human rights institutions compliant with the Paris Principles and to allow for their contribution to these United Nations mechanisms and processes".[188]

Review under ICCPR, September 2015, accessed 4 January 2019, https://www.ihrec.ie/app/uploads/download/pdf/ihrec_submission_on_irelands_oneyear_followup_fourth_periodic_review_under_iccpr.pdf; and the joint submission by all three UK NHRIs under the Convention against Torture: Equality and Human Rights Commission, Northern Ireland Human Rights Commission, and Scottish Human Rights Commission, *Follow-up regarding Concluding Observations adopted by the Committee Against Torture on the 5th periodic report of the UK,* September 2014, accessed 4 January 2019, https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/convention-against-torture-and-other.

[186] GANHRI, Background Paper, *supra* n 128, 15, contains figures on the participation by NHRIs during the years 2012 to 2015. The UN Secretary-General has been issuing reports on NHRIs since the 1980s, with increasing frequency in recent years; the latest ones also include figures on the participation by NHRIs in the UN system. Cf., for instance, UN General Assembly, *supra* n 116, para. 82, which, *inter alia*, highlights that, during the period from September 2016 to August 2017, "the treaty bodies reviewed 157 States parties, out of which 124 had national human rights institutions. Of those institutions, 117 interacted with treaty bodies by submitting reports, providing briefings before the review or attending the sessions".

[187] In addition to OPCAT and the CRPD, NHRIs contributed to the drafting of the Optional Protocol to the International Covenant on Economic Social and Cultural Rights, the Third Optional Protocol to the Convention on the Rights of the Child, the Declaration on the Rights of Indigenous Peoples, and the Global Compact for Safe, Orderly and Regular Migration.

[188] UN General Assembly, *National institutions for the promotion and protection of human rights,* 17 December 2015, A/RES/70/163, para. 16. The Resolution mentions, by way of example, some of the UN mechanisms that are expected to step up their cooperation with NHRIs: these are the Commission on the Status of Women, the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, the 2030 Agenda for Sustainable Development, and the Open-ended Working Group on Ageing (which granted participation rights to NHRIs in December 2016: GANHRI, 2017 Annual Report, *supra* n 61, 14). The General Assembly has long supported the establishment of NHRIs and their greater involvement in the UN system by way of resolutions issued on an almost annual basis.

3.6. National Human Rights Institutions and the Council of Europe

Out of the forty-seven CoE Member States, twenty-five established institutions that are currently accredited with A status (i.e., institutions in full compliance with the Paris Principles),[189] whereas NHRIs from ten other States are accredited with B status (partially compliant institutions).[190] The Romanian Institute for Human Rights and two Swiss commissions (the *Commission fédérale pour les questions féminines* and the Federal Commission Against Racism) asked for accreditation by GANHRI but were considered non-compliant with the Principles and thus given C status. As for other CoE Member States, several of them are considering the creation of NHRIs, in addition to existing ombudsmen or equality bodies that, in part, exercise functions similar to those of NHRIs.

Various CoE bodies, including intergovernmental ones, have long advocated for the establishment of NHRIs by CoE Member States and for the involvement of NHRIs in the CoE system as national partners in the monitoring and implementation of human rights standards. Interest in NHRIs *sensu lato* by the CoE can be traced back to the 1980s, when seminars and roundtables were convened to discuss the usefulness of establishing national structures for the promotion and protection of human rights in Member States. As has been noted, those first meetings mostly gathered representatives from classical ombudsman offices, which at the time were the prevailing model of national structures dealing with human rights in the broad sense; Member States were thus encouraged to assign explicit competences in the promotion and protection of human rights to these institutions.[191] The human rights commission model was mentioned in the preparatory documents of the meetings, but not in the outcomes.[192]

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[189] These are Albania, Armenia, Bosnia and Herzegovina, Croatia, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Moldova, the Netherlands, Norway, Poland, Portugal, the Russian Federation, Serbia, Spain, Ukraine and the United Kingdom (which, as mentioned, exceptionally has three NHRIs: one for Great Britain, one for Northern Ireland and one for Scotland). Cf. GANHRI, *supra* n 4, 6-8; cf. also Section 3.4 of this dissertation for more information on GANHRI and the accreditation of NHRIs.

[190] GANHRI, *supra* n 4, 10-11. CoE Member States with B-status institutions are Austria, Azerbaijan, Belgium, Bulgaria (with two national institutions: a commission and an ombudsman), Cyprus, North Macedonia, Montenegro, Slovakia, Slovenia, and Sweden.

[191] Pohjolainen, *supra* n 29, 57-58 and 78-80.

[192] For a categorisation of NHRIs, cf. Section 3.2 of this dissertation.

In the absence of a clear notion of NHRIs, and of relevant international standards, reliance on the familiar ombudsman type is not surprising. It is nonetheless true that, even after the adoption of the Paris Principles and their endorsement by the UN General Assembly, the CoE maintained an inclusive approach. In a 1997 Recommendation drafted by the Steering Committee for Human Rights and adopted by the Committee of Ministers, CoE Member States were asked to "consider, taking account of the specific requirements of each member state, the possibility of establishing effective national human rights institutions, in particular human rights commissions which are pluralist in their membership, ombudsmen or comparable institutions".[193]

On the same day, a Resolution was adopted by the Committee of Ministers regarding the cooperation between these national structures and between them and the CoE; *inter alia*, the organisation of regular meetings of national institutions within the CoE framework was provided for in order to allow for the exchange of information between national institutions themselves and between them and CoE bodies dealing with human rights.[194] The Resolution also invited the CoE Secretary General to keep national human rights structures updated on relevant activities in the CoE context.[195]

The 1997 Recommendation and Resolution were indicative of an increasing recognition of the role of NHRIs by the CoE, which had already started to sponsor meetings among European NHRIs,

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[193] Committee of Ministers, *Recommendation No. R (97) 14 on the establishment of independent national institutions for the promotion and protection of human rights*, 602nd meeting of the Ministers' Deputies, 30 September 1997, para. a). The Recommendation invites States to "have regard" to the Paris Principles, but also to its own previous Recommendation R (85) 13 on the institution of ombudsmen as well as to the experiences of both existing national human rights commissions and ombudsmen (para. b) of the Recommendation). Cf. also the Explanatory Memorandum to the Recommendation in Steering Committee for Human Rights, *42nd meeting, Strasbourg, 3-6 June 1997. List of items discussed and decisions taken – Addendum*, 17 June 1997, CM(97)105 Addendum. For a criticism of the excessively broad notion of "national human rights institutions" as adopted by the Recommendation, cf. Emmanuel Decaux, "Evolution and Perspectives for National Institutions for the Promotion and Protection of Human Rights: Their Contribution to the Prevention of Human Rights Violations", in *The Prevention of Human Rights Violations: Contribution on the Occasion of the Twentieth Anniversary of the Marangopoulos Foundation for Human Rights*, eds. Linos-Alexander Sicilianos and Cristiane Bourloyannis Vrailas (Athens: Ant. N. Sakkoulas; The Hague: Martinus Nijhoff, 2001): 241-243.

[194] Committee of Ministers, *Resolution (97) 11 on cooperation between national human rights institutions of member states and between them and the Council of Europe,* 602nd meeting of the Ministers' Deputies, 30 September 1997.

[195] Ibid., para. c).

in addition to those among European ombudsmen.[196] Through the Resolution, the bond between NHRIs and the CoE system was strengthened, and biennial meetings of European NHRIs have been held since then under the auspices of the CoE.[197]

The establishment in 1997 of the European Coordinating Group of NHRIs – subsequently the European Network of NHRIs (ENNHRI) – also contributed to the reinforcement of the relationship between NHRIs and the CoE by providing the latter with an easily identifiable interlocutor. ENNHRI comprises European A- and B-status NHRIs as well as non-accredited institutions, whose rights within the organisation vary accordingly; as of December 2018, ENNHRI has forty-two members.[198] While the Network was initially established as a forum rather than a formal body, an increasing formalisation led to the adoption of rules of procedure in 2000, the creation of a Legal Working Group and of other working groups on various substantive themes over the years, and the establishment of a permanent secretariat in 2013 (previously, most of the tasks entrusted to the secretariat were carried out by the Chair NHRI and its staff).[199]

Even prior to setting up a formal central structure, ENNHRI managed to interact with CoE bodies in various ways, especially through its Chair and working groups. Its engagement with the ECtHR will be examined further below; here it is worth mentioning that ENNHRI has had observer status at the Steering Committee for Human Rights since 2001. This position has enabled ENNHRI to participate extensively in the reform process of the Convention and the Court by contributing to the drafting of Protocol no. 14[200] and forwarding submissions on the occasion of several High-level

[196] Pohjolainen, *supra* n 29, 78. Cf. also, on the evolution of the relationship between NHRIs and the CoE, de Beco, *supra* n 46, 152-159 (which, however, pre-dates and thus does not consider the formalisation of the European Coordinating Group of NHRIs into the European Network of NHRIs).
[197] In addition to roundtables on specific themes: cf., for a list of these meetings and roundtables and their outcomes up to 2004, Fellous, *supra* n 10, 181-186. The practice has subsequently continued.
[198] For the updated list of ENNHRI members, cf. the following webpage: http://ennhri.org/List-of-members (accessed 4 January 2019). The different "categories of members" according to their GANHRI status, and their related prerogatives, are listed in ENNHRI, *Constitution and Statutes*, 20 June 2013, Article 6.
[199] For a detailed account of the European Group/ENNHRI evolution (until 2012), cf. Bruce Adamson, "NHRI and Their European Counterparts: Scope for Strengthened Cooperation and Performance towards European Human Rights Institutions", in Wouters and Meuwissen, *supra* n 46, 125-153. For an updated list of ENNHRI working groups, cf. the following webpage: http://ennhri.org/Working-groups (accessed 4 January 2019).
[200] Linos-Alexander Sicilianos, "La «réforme de la réforme» du système de protection de la CEDH", *Annuaire français de droit international* 49 (2003): 613, footnote 11.

Conferences on the future of the Court and of the ECHR system, including the latest ones held in Brussels and Copenhagen.[201]

These contributions were not limited to outlining the functions of NHRIs and shaping their role in the CoE system, but they included a wide range of proposals regarding, *inter alia*, the relationship between national judges and the ECtHR, the independence of the Court, the right to individual application, the margin of appreciation and indications from the Court in relation to general measures, the role of the Department for the Execution of Judgments, and the use of pressure mechanisms by the Committee of Ministers.[202] With regard to the draft Copenhagen Declaration, ENNHRI highlighted several problematic aspects and was vocal in opposing any attempts to politically influence the Court.[203]

On its part, the Steering Committee for Human Rights has recently recognised that NHRIs "can significantly help meet the challenges relating to national implementation" and announced its plan to "conduct a study on the impact of current national legislation, policies and practices on the activities of NHRIs with a view to identifying the best examples thereof".[204] Such an analysis was conducted throughout 2016 and 2017 and highlighted both good practices and persisting challenges in the promotion and protection of the activities of NHRIs, as well as of NGOs and human rights defenders.[205] Subsequently, a compilation of States' good practices and of relevant international and regional instruments has been prepared with a view to "a draft non-binding instrument of the

[201] Cf. the webpage dedicated to ENNHRI Legal Working Group, which represents ENNHRI at the Steering Committee for Human Rights: http://ennhri.org/Legal-Working-Group (accessed 4 January 2019).
[202] Cf. especially ENNHRI, *Submission of the European Network of National Human Rights Institutions (ENNHRI) on Brussels Declaration 26-27 March 2015*, 26 March 2015, accessed 4 January 2019, http://www.ennhri.org/IMG/pdf/ennhri_submission._brussels_declaration.10.2.15.pdf. Cf. also, for a summary of the content of ENNHRI contributions to previous High-level Conferences, Adamson, *supra* n 199, 140-143.
[203] ENNHRI, *Submission of the European Network of National Human Rights Institutions on draft Declaration of Copenhagen*, February 2018, accessed 4 January 2019, http://ennhri.org/ENNHRI-warns-against-the-weakening-of-the-Convention-system-in-its-submission. Cf., similarly, the opinion by the *Commission nationale consultative des droits de l'homme*, *Note de la CNCDH sur le projet de Déclaration de Copenhague*, 16 February 2018, accessed 4 January 2019, https://www.cncdh.fr/fr/actualite/vives-inquietudes-concernant-levolution-du-systeme-europeen-des-droits-de-lhomme.
[204] Steering Committee for Human Rights, *CCDH report on the longer-term future of the system of the European Convention on Human Rights*, 11 December 2015, CDDH(2015)R84 Addendum I, 25-26.
[205] Committee of Ministers, "1293rd meeting, 13 September 2017. 4.7 Steering Committee for Human Rights (CDDH)", *Decisions*, 13 September 2017, CM/Del/Dec(2017)1293/4.7.

Committee of Ministers and a guide of good practices" to support States in the promotion and protection of the above-mentioned actors.[206]

A further upgrade in the collaboration between NHRIs and the CoE occurred when the office of the CoE Commissioner for Human Rights was created in 1999. Resolution (99) 50, which instituted the office of the Commissioner, mentions several times "national human rights structures"– that is, NHRIs and similar institutions, such as ombudsmen and equality bodies, in accordance with the broad notion adopted by the CoE.

First of all, in carrying out his/her advisory and information functions, the Commissioner "shall, wherever possible, make use of and co-operate with human rights structures in the member States".[207] It is also stated that, where such institutions do not exist, the Commissioner shall promote their creation; finally, the Commissioner is specifically mandated to "facilitate the activities of national ombudsmen or similar institutions in the field of human rights".[208]

To fulfil this mandate, the Commissioner has taken up the organisation of meetings and roundtables with NHRIs and consult with them on various topics; a constant exchange of information between NHRIs and between NHRIs and the Commissioner is ensured by a liaison office operating within the office of the Commissioner since 2003. The Commissioner has, on several occasions, referred to the role that NHRIs can play at the national level to advance human rights,[209] advocated for their establishment or strengthening and defended them from attacks from their respective

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[206] Steering Committee for Human Rights/Drafting Group on Civil Society and National Human Rights Institutions (CDDH-INST), *[Draft] Overview document on the protection and promotion of the civil-society space, based on the compilation of measures and practices in place in the Council of Europe member States and Compilation of measures and practices in place in the Council of Europe member States*, 24 September 2018, CDDH-INST(2018)R4add, 2. The progress of the work by the Drafting Group on Civil Society and National Human Rights Institutions can be followed at https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/human-rights-development-cddh/civil-society-and-human-rights-institutions (accessed 4 January 2019).

[207] Committee of Ministers, *Resolution (99) 50 on the Council of Europe Commissioner for Human Rights,* 104th session, 7 May 1999, Article 3(c).

[208] Ibid., Article 3(c) and (d).

[209] E.g., Commissioner for Human Rights, "National Human Rights Structures can help mitigate the effects of austerity measures", *Human Rights Comment*, 31 May 2012, accessed 4 January 2019, https://www.coe.int/en/web/commissioner/-/national-human-rights-structures-can-help-mitigate-the-effects-of-austerity-measur-1. Cf. also, among others, the seminar co-organised by the CoE and ENNHRI on *Freedom of Expression – Role and Powers of National Human Rights Institutions (NHRIs) and other National Mechanisms*, Strasbourg, 15 December 2016.

governments,[210] and offered technical cooperation for the establishment and strengthening of these institutions in Member States. Moreover, the Commissioner commonly meets with national human rights structures during his country visits.[211]

While the Commissioner for Human Rights and the Steering Committee for Human Rights undoubtedly are the CoE bodies that paid the greatest attention to the establishment and reinforcement of national human rights structures, and developed the closest ties with these structures, they are not the only ones. Several CoE mechanisms, such as the European Commission for Democracy through Law (so-called Venice Commission), the European Committee for Social Cohesion, Human Dignity and Equality, and the Advisory Committee on the Framework Convention for the Protection of National Minorities, have variously considered and encouraged the establishment and strengthening of national human rights structures, highlighted their role in furthering the objectives of CoE bodies' mandates, and exchanged views with them.[212] A further example of collaboration between the CoE

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[210] E.g., Commissioner for Human Rights, "Letter to the Prime Minister of Serbia", 18 May 2015, CommHR/NS/sf 054-2015, 4 January 2019, https://www.coe.int/en/web/commissioner/country-monitoring/serbia/-/asset_publisher/mLRlkOZweJs0/content/the-commissioner-urges-serbia-to-shield-the-national-ombudsman-from-undue-pressure?; Commissioner for Human Rights, "Andorra: sustain progress on children and women's rights and bolster human rights structures", 12 May 2016, accessed 4 January 2019, https://www.coe.int/bs/web/commissioner/-/andorra-sustain-progress-on-children-and-women-s-rights-and-bolster-human-rights-structures; and Commissioner for Human Rights, "Croatian government should reconsider the draft law on the Ombudsman for Children", *Statement*, 11 July 2017, accessed 4 January 2019, https://www.coe.int/bs/web/commissioner/-/croatian-government-should-reconsider-the-draft-law-on-the-ombudsman-for-children.

[211] Former Commissioner Nils Muižnieks met with representatives from NHRIs and ombudsmen in all of his latest country visits, such as to Sweden (October 2017), Kosovo (February 2017), Lithuania (December 2016), Ireland (November 2016), and Croatia (April 2016). The incumbent Commissioner, Dunja Mijatović, has continued this practice in her visits to Albania (September 2018) and Greece (June 2018).

[212] Cf., among others: Committee of Ministers, "1246 Meeting, 3 February 2016. 6.3 European Committee for Social Cohesion, Human Dignity and Equality (CDDECS) – Abridged report of the 4th meeting (Helsinki, 9-11 December 2015)", *CM Documents*, 17 December 2015, CM(2015)172, on the Conference organised by the CDDECS on "Council of Europe, National Human Rights Institutions, Equality Bodies and Ombudsman Offices Promoting Equality and Social Inclusion", held in Helsinki on 10 and 11 December 2015, in which several representatives from national human rights structures participated.

The Advisory Committee on the Framework Convention for the Protection of National Minorities, in its opinions on the status of minorities in States Parties, also examines the role played by NHRIs, ombudsmen, and equality bodies in the implementation of the Framework Convention: e.g., Advisory Committee on the Framework Convention for the Protection of National Minorities, *Fourth Opinion on Denmark adopted on 20 May 2014*, 20 January 2015, ACFC/OP/IV(2014)001, especially paras. 34 *et seqq*.

The Venice Commission routinely assesses the founding laws of ombudsman institutions in particular, against criteria which the Commission itself has developed and which aim to ensure the independence and effectiveness of these institutions: cf. the dedicated webpage on the website of the Commission, accessed 4 January 2019, https://www.venice.coe.int/WebForms/pages/?p=02_Ombudsmen&lang=EN. Cf. also, among others, Committee of Ministers, "881 Meeting, 14 April 2004. 10.1 European Commission for democracy through law (Venice Commission) – b. Annual report of activities for 2003", *CM Documents,* 17 March 2004, CM(2004)55, where the opinions of the Venice Commission on the establishment and strengthening of ombudsman institutions in Armenia, Bulgaria, and North Macedonia are referred to.

and NHRIs is the CoE-FRA-ENNHRI-EQUINET Platform on social and economic rights, which primarily promotes the national implementation of the European Social Charter and of other international instruments on economic and social rights.[213]

Additionally and significantly, the latest High-level Conferences on the future of the Court and of the Convention have underscored the role that NHRIs have played and can potentially play in the ECHR system. At the Interlaken Conference in 2010, the contribution by NHRIs to promoting the knowledge of the ECHR standards and their application by national authorities was noted.[214]

The 2012 Brighton Declaration referred to the importance of cooperation between State authorities and NHRIs (as well as civil society) to ensure the "viability of the Convention mechanism".[215] In the context of the implementation of the Convention at the national level, the Declaration asked States Parties to "consider the establishment" of independent NHRIs.[216]

The invitation was reiterated in the 2015 Brussels Declaration, which specifically focused on the national implementation of the Convention and on the execution of the Court's judgments.[217] Accordingly, the Declaration mentioned NHRIs on various occasions when referring to the "primary role" of national actors in ensuring respect for human rights and, in the context of the execution of ECtHR judgments, when encouraging enhanced dialogue and cooperation between governments and other stakeholders.[218]

The latest Copenhagen Declaration, adopted in 2018, also emphasised the importance of the national implementation of the Convention and of the execution of ECtHR judgments, even though

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[213] For more information about the Platform, cf. its website at https://www.coe.int/en/web/turin-european-social-charter/coe-fra-ennhri-equinet (accessed 4 January 2019).

[214] High-level Conference on the Future of the European Court of Human Rights, *Interlaken Declaration*, 19 February 2010, para. B.4.a. Cf. also Committee of Ministers, "1159 Meeting, 16 January 2013. 4.3 Steering Committee for Human Rights (CDDH): CDDH report on measures taken by the member States to implement relevant parts of the Interlaken and Izmir Declarations", *CM Documents*, 17 December 2012, CM(2012)167, especially paras. 18-42 and 129-141.

[215] High-level Conference on the Future of the European Court of Human Rights, *Brighton Declaration*, 20 April 2012, para. 4.

[216] Ibid., para. 9.c.i.

[217] High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", *Brussels Declaration*, 27 March 2015, para. B.1.g.

[218] Ibid., preamble and para. B.2.a. NHRIs are also mentioned at the end of the Declaration, where the Committee of Ministers and Member States are generally encouraged "to involve, where appropriate, civil society and National Human Rights Institutions in the implementation of the Action Plan" set out in the Declaration.

other aspects were also dealt with.[219] NHRIs were mentioned among those actors whose engagement is needed for the effective implementation of the Convention and their "significant role" in this respect was highlighted separately.[220] Moreover, Member States were again asked to "consider the establishment" of NHRIs.[221] It is noteworthy that, for the first time, it was explicitly recommended that States adhere to the Paris Principles for the creation of these institutions. Also in light of the fact that reference to the Paris Principles and to the accreditation by GANHRI has been made by various CoE bodies,[222] it appears that a more circumscribed concept of NHRIs is emerging in the CoE context as well.

While demonstrating an increasing attention towards the role that NHRIs can play in the Convention's system, the above-mentioned intergovernmental declarations are rather vague and do not set out the details of the involvement by NHRIs. On the other hand, more concrete proposals put forward by groups of experts were not followed up.[223]

The Group of Wise Persons, tasked with submitting new proposals for the effectiveness of the ECHR system after the adoption of Protocol no. 14, advocated for a stronger cooperation between the CoE Commissioner and "national ombudsmen and similar institutions" with a view to reducing the ECtHR caseload. More specifically, the Group envisioned that the Commissioner could identify a systemic problem in a State, likely to give rise to a considerable influx of applications to the ECtHR,

[219] High-level Conference on the reform of the European Convention on Human Rights system, *Copenhagen Declaration,* 13 April 2018.
[220] Ibid., paras. 14 and 18.
[221] Ibid., para. 18.
[222] Multiple references to the Paris Principles and accreditation by GANHRI can be found in Steering Committee for Human Rights/CDDH-INST, *supra* n 206. The Commissioner for Human Rights attaches great importance to the Paris Principles and GANHRI accreditation as well: Commissioner for Human Rights, "Paris Principles at 25: Strong National Human Rights Institutions Needed More Than Ever", *Human Rights Comment*, 18 December 2018, accessed 4 January 2019, https://www.coe.int/en/web/commissioner/-/paris-principles-at-25-strong-national-human-rights-institutions-needed-more-than-ever. To give another example, the European Commission against Racism and Intolerance recently revised its General Recommendation on the establishment of equality bodies by "building on other standards developed in this field, such as the Paris Principles": European Commission against Racism and Intolerance, *ECRI General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level, adopted on 7 December 2017*, 27 February 2018, CRI(2018)06, preamble.
[223] For a thorough analysis of the reports by the Group of Wise Persons and Lord Woolf insofar as the involvement of ombudsmen is concerned, cf. Hans Gammeltoft-Hansen, "The European Court of Human Rights and the ombudsmen", in JJørgensen and Slavensky, *supra* n 60, 43-52.

and collaborate with national human rights structures to find a solution at the national level.[224] There is no evidence that such a practice has been undertaken, even though the Commissioner routinely draws attention to structural human rights shortcomings in Member States and closely cooperates with NHRIs and other national bodies.

According to the Group, another task that could be entrusted to NHRIs and similar institutions is the dissemination of information to the public regarding the right to apply to the ECtHR and its conditions of admissibility.[225] This activity has been followed up more recently at the CoE level, in the context of the ongoing reform of the ECHR system, and it is currently performed by various NHRIs and ombudsmen, even though it has not been undertaken systematically by all relevant national institutions.[226] Also in light of the role foreseen for ombudsmen in its report, the Group suggested that the Committee of Ministers recommend entrusting ombudsmen with a human rights mandate, where this was still not the case.[227]

The proposals laid down in the report by Lord Woolf were even bolder. Lord Woolf was asked, shortly after the adoption of Protocol no. 14 and essentially in parallel with the work of the Group of Wise Persons, to review the working methods of the ECtHR and make recommendations to the Court for the efficient handling of its caseload. The Review put forward a significant role for ombudsmen and other domestic institutions with complaint-handling functions and included "increased recourse to national ombudsmen and other methods of alternative dispute resolution" among its guiding principles.[228]

According to the Review, the main task of ombudsmen and similar institutions would be to process cases that are inadmissible pursuant to the ECHR requirements as well as admissible cases

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[224] Committee of Ministers, *Report of the Group of Wise Persons to the Committee of Ministers*, 979bis meeting of the Ministers' Deputies, 15 November 2006, CM(2006)203, para. 113.
[225] Ibid.
[226] Cf. CoE Secretary General, "Post-Interlaken Report on providing objective and comprehensive information to applicants to the European Court of Human Rights. Report by the Secretary General of the Council of Europe", *Information Document,* 6 January 2012, SG/Inf(2010)23-Final, Section II.B (which refers to the outcome of a Roundtable held between CoE bodies and national human rights structures on 21 and 22 September 2011 in Madrid). For examples of NHRIs that perform this task, cf. Section 5.3 of this dissertation *infra*.
[227] Committee of Ministers, *supra* n 224, para. 111.
[228] Lord Woolf, *Review of the Working Methods of the European Court of Human Rights*, December 2005, 4.

under certain circumstances.[229] This development was conceived to go hand in hand with the establishment of "satellite offices" of the Court Registry in those States Parties with a high number of inadmissible applications. It would be for these offices to re-direct prospective applicants to national ombudsmen and other alternative methods of dispute resolution. However, these offices have never been created, so that the role envisaged in the Woolf Review for NHRIs dealing with individual complaints has never materialised. It is therefore nugatory to examine here the objections raised against the feasibility of the plan – *inter alia*, in terms of sustainability of the new workload for ombudsmen.[230]

In the literature too, proposals have been made to involve NHRIs at an early stage with a view to reducing the ECtHR caseload. Along the lines of the proposal by the Group of Wise Persons, according to which NHRIs should act as reference points for the dissemination of information on the Court, one author argues that prospective applicants could be obligated to seek advice from their respective NHRIs regarding the admissibility of their applications to the ECtHR.[231] This procedural requirement would not in any case prevent the prospective applicant from submitting his/her case to the Court, in the event of an adverse opinion from the NHRI.[232]

According to another proposal, which at least at a first glance does not appear to reduce the ECtHR caseload but instead to increase it, NHRIs would be allowed to submit cases to the ECtHR.[233] While the author of the proposal has convincingly illustrated how the ECtHR docket would benefit from this innovation in the long run, especially as long as applications by NHRIs are limited to cases

[229] Ibid., 31-34 and 47.
[230] Cf. the objections raised by Gammeltoft-Hansen, *supra* n 223, which also refers to the apparent contradiction between the Woolf Review's proposals and the ECtHR case-law, which has constantly refused to consider proceedings before ombudsmen either a "domestic remedy" under Article 35 or an "effective remedy" under Article 13.
[231] Antoine Buyse, "The Court's Ears and Arms: National Human Rights Institution and the European Court of Human Rights", in Wouters and Meuwissen, *supra* n 46, 176-177.
[232] Ibid., 177.
[233] Gauthier de Beco, "La contribution des institutions nationales des droits de l'homme au renforcement de l'efficacité de la Cour européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme* 77 (2009): 170 *et seqq*., which explains how this prerogative could help reduce the influx of repetitive cases raising the same issue as the application by the NHRI and have a deterrent effect on the State, which would be prompted to remedy the structural shortcoming before the NHRI submits its application to the ECtHR. This kind of "actio popularis" by NHRIs is allowed in the Inter-American human rights system.

highlighting structural deficiencies in Member States, it is doubtful that the States parties to the Convention would accept such an extension of potential applicants. The same author has acknowledged that the proposal by the Parliamentary Assembly to allow the Commissioner for Human Rights to submit applications to the ECtHR was never followed up by Member States,[234] and there is no reason to think that they would be more enthusiastic about vesting NHRIs with this power.

Notwithstanding the failure of these proposals, NHRIs and ombudsmen have found other avenues for making an impact in the Convention's system and, in particular, for interacting with the Court, at both the judgment phase and the post-judgment one. As illustrated in Chapter 2 of this dissertation, in the post-judgment phase national human rights structures have been empowered to submit information to the Committee of Ministers regarding the execution of ECtHR judgments. As the only provision that explicitly mentions NHRIs and assigns them a concrete and well-defined role in the Convention's system, this rule deserves close examination. Its use by NHRIs and the effects of this use to date form the subject of the in-depth empirical analysis carried out in Chapter 4 of this dissertation. Below, the opportunities for NHRIs in the judgment phase are briefly considered.

Article 36 ECHR, as introduced by Protocol no. 11 and amended by Protocol no. 14, and Rule 44 of the Rules of Court provide for various kinds of third-party interventions before the ECtHR, with different aims.[235] In the Convention's system, the concept of "third party" is used in a broad sense, encompassing individuals and entities that have a specific interest in the outcome of the proceedings as well as *amici curiae* ("friends of the court"), who provide assistance to the court by clarifying points of law and fact without necessarily taking the side of any party to the proceedings.

[234] Cf. further in the current section as well as Section 2.4. of this dissertation.

[235] For a thorough analysis of the system of third-party interventions before the ECtHR and its purposes, cf. Linos-Alexander Sicilianos, "La tierce intervention devant la Cour européenne des droits de l'homme", in *Les tiers à l'instance devant les jurisdictions internationales*, eds. Hélène Ruiz Fabri and Jean-Marc Sorel (Paris: Pedone, 2005), 123-150. According to Sicilianos, the right of intervention by the State of nationality of the applicant is based on the diplomatic protection model; interventions upon approval by the President of the Court, as laid down in Article 36(2), are aimed at ensuring the "proper administration of justice"; whereas the right of intervention by the Commissioner for Human Rights (Article 36(3)) protects the general interest. Cf. also, for an extensive account of the practice of third-party (non-State) interventions before the ECtHR: Dinah Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings", *American Journal of International Law* 88, no.4 (1994), 630 *et seqq*.

None of these actors, notwithstanding the reference to "third party" in the heading of Article 36, is considered to be party to the proceedings.[236]

As a matter of fact, the opportunity for third-party interventions had already been granted by the ECtHR in practice since the end of the 1970s;[237] the formalisation by means of a new Rule of Court in 1982[238] and of Protocol no. 11 subsequently gave greater certainty and legitimacy to the procedure and boosted requests for submission by interested parties.

Article 36 is articulated as follows: the first paragraph allows States Parties whose nationals are applicants in a case to intervene. This provision is couched in terms of a *right* of the States Parties concerned to submit comments or participate in the hearings. It has not been used extensively, as it is not so frequent that the applicant is a national of a State Party other than the respondent State; additionally, States are not always interested in intervening in favour of their nationals. The 2018 Copenhagen Declaration has sought to encourage the submission of third-party interventions by Member States, under paragraphs 1 and 2 of Article 36, as a way to strengthen their dialogue with the Court.[239]

While using a slightly different wording, paragraph 3 also enshrines a *right* to intervene, which is conferred upon the CoE Commissioner for Human Rights and extends to all cases before the Court (*rectius*, before a Chamber or the Grand Chamber). This provision was introduced by Protocol no. 14 and has been taken advantage of by the Commissioner; as mentioned in Chapter 2, whereas only three *amicus curiae* briefs were submitted by the Commissioner before the entry into force of Protocol no.

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[236] As explicitly provided for in CoE, *Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby*, 11 May 1994, European Treaty Series – No. 155, para. 91. In both national and international systems, the distinction between third-party interveners and *amici curiae* is not always apparent. For attempts of clarification in the literature, cf. the following entries in the Max Planck Encyclopedia of Public International Law (Oxford Public International Law, accessed 23 December 2018, http://opil.ouplaw.com): Philippe J. Sands and Ruth Mackenzie, "International Courts and Tribunals, Amicus Curiae" (last updated: January 2008); and Andreas Zimmermann, "International Courts and Tribunals, Intervention in Proceedings" (last updated: August 2006).

[237] William A. Schabas, *The European Convention on Human Rights. A Commentary* (Oxford: Oxford University Press, 2015), 788, refers to the *Winterwerp* case (ECtHR, *Winterwerp v. the Netherlands*, no. 6301/73, 24 October 1979) as the first occasion when the ECtHR allowed third-party interventions. Cf. also, on the evolution of the system, Shelton, *supra* n 235.

[238] Former Rule 37(2): cf. Schabas, *supra* n 237, 789-790.

[239] *Copenhagen Declaration*, *supra* n 219, paras. 34, 39 and 40.

14 (under paragraph 2 of Article 36, which is analysed below), twenty briefs have been submitted since then up to December 2018.[240]

It should be noted that, during the drafting process of Protocol no. 14, the proposal was also discussed to vest the Commissioner with the power to bring proceedings before the ECtHR on his/her own motion, particularly in cases of mass violations of human rights or structural problems. This more far-reaching proposal was rejected by States Parties, which in turn accepted the right of the Commissioner to intervene as a third party in proceedings before the Court.[241]

Paragraph 2 of Article 36 is arguably the most significant component of the third-party intervention mechanism before the ECtHR, as the most innovative and widely used. According to this provision, "the President of the Court may, in the interest of the proper administration of justice, *invite* any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant" to intervene in the proceedings (emphasis added). Thus, a wide population is potentially concerned by this provision; these individuals and entities, however, are not entitled to submit their views, but require a leave from the Court. Moreover, pursuant to Rule 44 of the Rules of Court, leave to intervene may be made by the Court conditional upon respect for certain time and content limits.[242] At any rate, within these limits, the ECtHR has almost always granted authorisations to intervene, which are most commonly requested by NGOs.[243] Other interveners include States Parties, individuals (in rare cases) as well as international organisations, bodies, and agencies.[244]

Although to a lesser extent compared to NGOs, NHRIs have also submitted their observations to the ECtHR in respect of pending cases. This has been the case for the UK human rights

[240] Cf. Section 2.4 of this dissertation.
[241] For the drafting history of Article 36(3) ECHR, cf. Sicilianos, *supra* n 235, 143 *et seqq*.
[242] Rule 44(5) reads: "Any invitation or grant of leave … shall be subject to any conditions, including time-limits, set by the President of the Chamber. Where such conditions are not complied with, the President may decide not to include the comments in the case file or to limit participation in the hearing to the extent that he or she considers appropriate".
[243] Schabas, *supra* n 237, 792-793.
[244] Interveners from the latter category have included, among others: the European Commission (in the *Bosphorus v. Ireland* case), the UN High Commissioner for Refugees (e.g., in the *Saadi v. the UK*, *M.S.S. v. Belgium and Greece*, *Kurić v. Slovenia*, and *Hirsi Jamaa and others v. Italy* cases), the Organisation for Security and Cooperation in Europe (in the *Blečić v. Croatia* case), and the Venice Commission (e.g., in the *Sejdić and Finci v. Bosnia and Herzegovina, Rywin v. Poland,* and *Berlusconi v. Italy* cases).

commissions in particular – a circumstance which is arguably connected to their extensive experience in litigating cases at the national level.[245] Indeed, the prerogatives of these institutions in the area, which have been either laid down in the institutions' founding laws or recognised by courts and regularly exercised, range from direct initiation of legal proceedings to interventions as third parties and legal assistance to prospective applicants.[246]

Before the ECtHR, the British Equality and Human Rights Commission intervened in twenty-four cases, of which five were struck out of the list, two were declared inadmissible, and one is still pending.[247] The Northern Ireland Human Rights Commission appears to have addressed the Court as a third party in seven cases, including the first case where an *amicus curiae* brief was submitted by an NHRI, in 1993.[248]

In the last years, other national human rights structures have started to file *amicus curiae* briefs with the ECtHR: the Irish Human Rights Commission submitted information in three cases between

[245] Cf., for similar considerations, de Beco, *supra* n 233, 184.

[246] Nonetheless, there are differences between the mandates of the various institutions. While the Equality and Human Rights Commission of Great Britain is explicitly entrusted with these powers by the Equality Act 2006, the right of the Northern Ireland Human Rights Commission to intervene as a third party was established by the House of Lords (House of Lords, *In Re Northern Ireland Human Rights Commission*, 20 June 2002, [2002] UKHL 25). The Scottish Human Rights Commission may also intervene in domestic civil proceedings, but it is explicitly forbidden from providing assistance to (prospective) parties in legal proceedings and cannot institute proceedings.

[247] ECtHR, *Al-Saadoon and Mufdhi v. the UK*, no. 61498/08, 2 March 2010; *Kay and others v. the UK*, no. 37341/06, 21 September 2010; *J.M. v. the UK*, no. 37060/06, 28 September 2010; *Greens and M.T. v. the UK*, nos. 60041/08 and 60054/08, 23 November 2010; *Seal v. the UK*, no. 50330/07, 7 December 2010; *O'Donoghue and others v. the UK,* no. 34848/07, 14 December 2010; *Knaggs and Khachik v. the UK* (dec.), nos. 46559/06 and 22921/06, 30 August 2011 (inadmissible); *Bah v. the UK*, no. 56328/07, 27 September 2011; *Fox v. the UK* (dec.), no. 61319/09, 20 March 2012 (inadmissible); *Asuquo v. the UK* (striking out), no. 61206/11, 10 July 2012; *R.P. and others v. the UK*, no. 38245/08, 9 October 2012; *Hode and Abdi v. the UK*, no. 22341/09, 6 November 2012; *Redfearn v. the UK*, no. 47335/06, 6 November 2012; *C.N. v. the UK*, no. 4239/08, 13 November 2012; *Van Colle v. the UK*, no. 7678/09, 13 November 2012; *Eweida and others v. the UK*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013; *McCaughey and others v. the UK*, no. 43098/09, 16 July 2013; *Kawogo v. the UK* (striking out), no. 56921/09, 3 September 2013; *O.G.O. v. the UK* (striking out), no. 13950/12, 18 February 2014; *Pritchard v. the UK* (striking out), no. 1573/11, 18 March 2014; *Armani da Silva v. the UK* [GC], no. 5878/08, 30 March 2016; *Sabure Malik v. the UK* (striking out), no. 32968/11, 30 June 2016; *Big Brother Watch and others v. the UK,* nos. 58170/13, 62322/14 and 24960/15, 13 September 2018; and *Catt v. the UK*, no. 43514/15 communicated on 19 May 2016 (pending).

[248] ECtHR, *Brannigan and McBride v. the UK*, nos. 14553/89 and 14554/89, 25 May 1993. At that time, the institution was named Northern Ireland Standing Advisory Commission on Human Rights, as was in another case: ECtHR, *John Murray v. the UK* [GC], no. 18731/91, 8 February 1996. The other five cases in relation to which the Northern Ireland Human Rights Commission submitted comments all concerned the actions of security forces in Northern Ireland between the 1980s and the early 1990s. Four of them were delivered on 4 May 2001: *Shanaghan v. the UK,* no. 37715/97; *Kelly v. the UK, no.* 30054/96; *Hugh Jordan v. the UK,* no. 24746/94; and *McKerr v. the UK*, no. 28883/95. The latest one is *McCaughey and others v. the UK*, no. 43098/09, 16 July 2013.

2011 and 2012,[249] whereas the *Défenseur des droits* (the French classical ombudsman) intervened in five cases between 2014 and 2017.[250] While the French NHRI, the *Commission nationale consultative des droits de l'homme*, also began to intervene before the ECtHR rather recently, in 2013, it has already submitted briefs in nine cases.[251] The Human Rights Defender of Armenia submitted its first brief in July 2018 in a case concerning medical assistance in detention[252] and the Danish Institute for Human Rights did the same in January 2019 in a case concerning family reunification.[253] It is also possible that other NHRIs were granted leave to intervene, as ECtHR judgments (and especially decisions) do not always mention third-party interventions, nor are interventions referred to in relation to communicated cases.

Moreover, reports and recommendations produced by NHRIs in the exercise of their functions are increasingly mentioned in ECtHR judgments under the heading "relevant law and practice"; reference to these documents is often introduced by applicants.[254] While at times this kind of

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[249] ECtHR, *Magee v. Ireland* (striking out), no. 53743/09, 20 November 2012; *Donohoe v. Ireland*, no. 19165/08, 12 December 2013; and *O'Keeffe v. Ireland* [GC], no. 35810/09, 28 January 2014. In all instances, comments were forwarded by the Irish Human Rights Commission; the merger of this Commission with the Equality Authority resulted, in 2014, in the establishment of the Irish Human Rights and Equality Commission. Third-party interventions by the Commission are published at https://www.ihrec.ie/publications/ (accessed 4 January 2019).

[250] ECtHR, *Okitaloshima Okonda Osungu and Selpa Lokongo v. France* (dec.), nos. 76860/11 and 51354/13, 8 September 2015 (inadmissible); *R.K. and others v. France*, no. 68264/14, 12 July 2016; *Charron and Merle-Montet v. France* (dec.), no 22612/15, 16 January 2018 (inadmissible); *A.S. and G.S. v. France*, no. 4409/16, 29 January 2019; and *Association confraternelle de la presse judiciaire v. France and eleven other applications*, no. 49526/15, communicated on 26 April 2017 (pending). For the texts of the briefs submitted by the *Défenseur,* cf. *Défenseur des droits*, "L'action du Défenseur des droits devant la Cour européenne des droits de l'homme (CEDH)", accessed 4 January 2019, https://juridique.defenseurdesdroits.fr/index.php?lvl=cmspage&pageid=6&id_rubrique=111.

[251] ECtHR, *Yengo v. France*, no. 50494/12, 21 May 2015; *A.A.A. v. France* (striking out), no. 26735/15, 4 July 2017; *I.O. v. France* (striking out), no. 40132/15, 31 May 2016; *Khan v. France*, no. 12267/16, 28 February 2019; *J.M.B. and nine other applications v. France*, no. 9671/15, communicated on 11 February 2016 (pending); *F.R. and three other applications v. France*, no. 12792/15, communicated on 11 February 2016; *Association confraternelle de la presse judiciaire v. France*, *supra* n 250; *Moustahi v. France*, no. 9347/14, communicated on 30 October 2017 (pending); and *Gjutaj and others v. France*, communicated. This list has been derived from *Commission nationale consultative des droits de l'homme*, *supra* n 203, 1; for more details on the single interventions, cf. the annual reports (*rapports d'activité*) of the CNCDH, starting from CNCDH, *Rapport d'Activité 2013. Une année au service de la protection et de la promotion des droits de l'homme en France et dans le monde*, 20 November 2014, which mentions the first third-party intervention ever submitted by the Commission, in the *Yengo* case.

[252] ECtHR, *Hakobyan v. Armenia*, no. 11222/12, communicated on 14 September 2015 (pending); the case was referred to by Mikayel Khachatryan, Head of the International Cooperation Department at the Human Rights Defender of the Republic of Armenia (interview conducted on 15 November 2018, on file with author).

[253] As confirmed by Christoffer Badse, Director of the Monitoring Department at the Danish Institute for Human Rights (interview conducted on 21 February 2019, on file with author). The case referred to is ECtHR, *M.A. v. Denmark*, no. 6697/18, communicated on 7 September 2018 (pending).

[254] The Greek NHRI keeps an updated list of all ECtHR judgments in which reference is made to its reports, by either the applicants or the Court: Greek National Commission for Human Rights, *The Greek National Commission for Human Rights in the Case-Law of the European Court of Human Rights*, last updated October 2018, accessed 4 January 2019, http://www.nchr.gr/index.php/en (right side of the webpage). According to Anna Irene Baka, Legal Officer at the Greek

documents from NHRIs have been relied on by the Court in its reasoning and have had an impact on the outcome of the proceedings, the fact remains that, in these instances, the NHRI is only a "passive" participant; additionally, while certain NHRIs have considerable influence on the public debate, so that their documents are widely circulated, this is not always the case, and it might be unadvisable to rely on the parties to make reference to the positions of NHRIs.

In addition to the above-mentioned national institutions, ENNHRI has recently initiated a practice of submission of its own third-party interventions, relying on the expertise developed by its members.[255] Interventions are lodged by ENNHRI with respect to cases that raise issues which transcend national boundaries and affect several States Parties: this was the case in *Gauer v. France* (on the forced sterilisation of women with a mental disability; the application was declared inadmissible for breach of the six-month rule), *D.D. v. Lithuania* (on involuntary internment in psychiatric institutions and guardianship proceedings, Judgment of 14 February 2012), and *Big Brother Watch and others v. the UK* (on mass surveillance, Judgment of 13 September 2018).

The (potential) added value of submissions by ENNHRI is clear: the Network can collect and synthesise the knowledge and practical experience of its members and thus provide the Court with thorough and wide-ranging analyses covering several States Parties. Moreover, ENNHRI can replace NHRIs that do not have the resources or expertise to intervene on their own;[256] for instance, in relation to *D.D. v. Lithuania*, it is noteworthy that the Lithuanian Ombudsmen's Office was not even a member of ENNHRI at the time of submission of the intervention nor was it at the time of judgment.

Commission, the most significant references by the ECtHR to reports and resolutions by the Commission have covered matters such as the use of force, detention conditions, the rights of persons with mental disabilities, the rights of people living with HIV/AIDS, the right to a fair trial, and same-sex partnerships (interview conducted on 27 July 2018, on file with author). According to Baka, the Court appears to be interested not only in the assessments conducted by the Commission, but also in the recommendations addressed by the Commission to the Greek authorities.

[255] For an insider's perspective on the strategic monitoring exercised by ENNHRI in this area, cf. Adamson, *supra* n 199, 143-145.

[256] For a different opinion, although with reference to the hypothetical right to application of NHRIs, cf. de Beco, *supra* n 233, 173, footnote 25: "Il ne nous semble cependant pas recommandable d'ouvrir le droit de recours au Groupe européen [the precedessor of ENNHRI], car ce Group ne pourrait pas l'utiliser comme menace vis-à-vis des États, comme le pourraient les institutions nationales des droits de l'homme. De plus, ceci obligerait ce Group à acquérir des connaissances approfondies sur la situation des droits de l'homme dans l'État concerné, ce dont il n'a pas les moyens". It might be added that the European Group (now ENNHRI) has undergone significant changes over the years: its membership has considerably increased, a permanent secretariat has been created, and relationships and exchanges between member NHRIs have been strengthened.

Nonetheless, the human rights issues raised by involuntary admissions to psychiatric institutions are certainly of European interest.

As noted by some authors, an alternative way for NHRIs to bring their views to the ECtHR might be to provide information to the Commissioner for Human Rights, who has a right to intervene before the Court pursuant to Article 36(3) ECHR.[257] Nonetheless, it does not appear that this avenue has been systematically pursued, a circumstance that can be explained by the experience developed by NHRIs in submitting briefs to the Court as well as by the openness of the Court with respect to third-party interventions, which are rarely refused. The fact remains that the Commissioner closely collaborates with NHRIs and that s/he might draw on their reports or consult with them for his/her submissions.[258]

Submissions by NGOs are still much greater in number, but the growing experience of the above-mentioned NHRIs and of ENNHRI might encourage more institutions to intervene and guide them in the drafting of submissions. A recent meeting of ENNHRI Legal Working Group precisely focused on how member NHRIs could usefully lodge third-party submissions with the ECtHR.[259]

Third-party interventions before the ECtHR are not the focus of this dissertation; therefore, their contents and impact on the decisions of the Court are not analysed here. Nonetheless, a few observations are in order. *Amicus curiae* briefs can be of great assistance to the ECtHR in contextualising cases and grounding its decisions on firm bases. Typically, this happens when third parties provide the Court with statistical data, information on the laws or practices of individual States, or a comparative overview of the laws and practices of multiple States on certain aspects.[260]

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[257] Cf. de Beco, *supra* n 233, 174 *et seqq*.; and Buyse, *supra* n 231, 178.

[258] For instance, the Commissioner referred to reports and other information provided by national human rights structures in his third-party interventions relating to the *M.S.S. v. Belgium and Greece* case and the *N.D. and N.T. v. Spain* case.

[259] ENNHRI, "Legal Working Group discusses third party intervention before the ECtHR, plans future activities", *News*, 23 June 2017, accessed 4 January 2019, http://www.ennhri.org/Legal-Working-Group-discusses-third-party-intervention-before-the-European.

[260] Paul Harvey, "Third Party Interventions before the ECtHR: A Rough Guide", *Strasbourg Observers*, 24 February 2015, accessed 4 January 2019, https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/. Nonetheless, ideological positions as well have proved to be highly influential on the reasoning of the Court: Nicole Bürli, *Third-Party Interventions before the European Court of Human Rights* (Cambridge: Intersentia, 2017), 188 *et seqq*.

In this respect, NHRIs, in light of their independence and extensive knowledge of national and international law, jurisprudence, and practice, appear well-suited to act as "friends of the court".[261]

While third-party comments are not always mentioned directly by the Court in its reasoning, they seem to be relied on not infrequently by the ECtHR in support of its arguments.[262] Third-party interventions are believed to strengthen the Court's ability to deliver well-informed and well-reasoned judgments as well as its legitimacy more broadly.[263]

It should also be underlined that third-party interventions are not unrelated to the execution of ECtHR judgments; ideally, NHRIs (and NGOs) could follow the development of a case from its early stages before the ECtHR, by submitting an *amicus curiae* brief, to the full execution of the Court's judgment by the State concerned. In this respect, the French NHRI has resolved to mainly follow up at the execution stage those cases in relation to which it previously submitted a third-party intervention.[264] The involvement by NHRIs could start even earlier, as the case unfolds in national courts, before reaching the ECtHR; the NHRI would thus follow the whole "life cycle" of a case.

3.7. Preliminary conclusions

This chapter has illustrated the main characteristics of NHRIs, how these institutions were born and have spread worldwide, and how they have established themselves as key players in the promotion and protection of human rights at the national level and as close partners for international organisations which monitor States' human rights records. Indeed, it appears that, in light of their

[261] On the added value of NHRIs as third-party interveners, cf. Buyse, *supra* n 231, 177 *et seqq*. De Beco, *supra* n 233, 180-181, refers to NHRIs as the "*amicus curiae* idéal" of the Court, as they differ from both the government and NGOs and are expected not to take sides in the dispute, but to provide their expert opinion.
[262] Bürli, *supra* n 260.
[263] Nicole Bürli, "Amicus Curiae as a Means to Reinforce the Legitimacy of the European Court of Human Rights", in *The European Court of Human Rights and its Discontents. Turning Criticism into Strength*, eds. Spyridon Flogaitis, Tom Zwart, and Julie Fraser (Cheltenham; Northampton, MA: Edward Elgar, 2013), 135-146. Cf. more generally on the usefulness of third-party interventions (by NGOs) before international courts: Shelton, *supra* n 235, 611-642.
[264] Interview with Thomas Dumortier, Legal Adviser at the *Commission nationale consultative des droits de l'homme*, 8 March 2019, on file with author. Cf. also, as examples of third-party interventions by NHRIs in cases that they subsequently followed-up at the execution stage, the intervention by the Northern Ireland Human Rights Commission in *McKerr v. the UK, supra* n 248, and the intervention by the Irish Human Rights Commission in *O'Keeffe v. Ireland*, *supra* n 249.

composition and functions, NHRIs can play a potentially critical role in the efforts to embed international norms and decisions in domestic contexts.

On the one hand, the statutory nature of NHRIs allows for a dialogue with their respective governments as well as for easier access to governmental information; on the other, their independence and expertise enable them to cooperate with civil society and make them a reliable source of information for distant international bodies. In other words, their "bridging" role – within the national context and between the national and international levels – should represent their added value in the face of the implementation challenge. However, the main assets of NHRIs also give rise to certain ambiguities.

Being relatively recent institutions in the human rights scene, NHRIs have inevitably come to partially occupy areas which were once of other actors – be they international organisations, State organs or NGOs.[265] The links developed by NHRIs with multiple actors potentially endanger one of the most significant characteristics of these institutions – i.e., their independence.[266] While institutionally mandated to cooperate with both State organs and NGOs, NHRIs must not be influenced by their agendas or yield to their demands. To strike the right balance is not an easy task, but a crucial one if NHRIs are to maintain contacts with their main interlocutors. Losing the trust of the government would mean losing the ability to have a concrete impact on policy and legislation, whereas the trust of NGOs guarantees that NHRIs are not the umpteenth State organ defending governmental policies. Moreover, the credibility of NHRIs in the eyes of the public heavily relies on their independence from all other actors.

The difficulties in finding a conceptual space for NHRIs[267] and ensuring their actual independence have led to the uncertainties at the international level that have been outlined above – e.g., regarding the role that NHRIs should play within the reporting procedures before UN treaty

[265] Roberts, *supra* n 82, 228-229.
[266] Cf. the concerns expressed in Human Rights Watch, *supra* n 50. Cf. also Murray, *supra* n 51, 5-7, on the difficulty of defining "independence" in relation to NHRIs.
[267] Smith, *supra* n 10, 908 *et seqq*. Cf. also Dickson, *supra* n 11, 273, on the difficulty of carving out a conceptual space for NHRIs "in the traditional division of state functions".

bodies. While there is growing awareness of the importance of independent participation by NHRIs into international and regional monitoring processes, and of the distinctive contribution that they can make, there still exist varying rules and practices of engagement – a circumstance which hinders greater involvement on the part of NHRIs, deterred by conflicting approaches and procedures. In the CoE context, recourse to the wider notion of "national human rights structures" and the paucity of formalised rules of engagement with these structures arguably contribute to this lack of clarity.

Notwithstanding some outstanding issues and room for development, it is undeniable that NHRIs are increasingly regarded by all main stakeholders as essential actors for ensuring the implementation of international human rights standards and the realisation of human rights more generally. Even in the absence of a legal obligation for States to create NHRIs,[268] a steady trend of establishment of NHRIs is being witnessed; furthermore, NHRIs are strongly promoted by the UN and other international organisations and have met with prevalent support by NGOs. It is hard to find such a consensus on other instruments for the promotion and protection of human rights.

Moreover, remedies are being developed to overcome the above-mentioned weaknesses of NHRIs. Above all, GANHRI is amending the accreditation system in terms of a more comprehensive review, greater transparency, and wider participation, with a view to ensuring that only NHRIs which effectively promote and protect human rights are accredited.[269] Much remains to be done to actually implement these reforms and root them in the accreditation process, but the changes undertaken go in the direction of a more thorough and objective review of NHRIs, yet free from improper external interference.

The strengthening of the GANHRI accreditation process has arguably led to greater recognition of the role of NHRIs, and especially of A-status NHRIs, by international organisations – first and

[268] As mentioned, the CRPD and OPCAT do not prescribe the establishment of NHRIs as such, whereas most of the other UN treaty bodies (except for the Committee on the Rights of the Child) simply recommend that States institute NHRIs, in the absence of an express reference to these institutions in their respective treaties. At any rate, there is no general obligation upon States to create these institutions: de Beco and Murray, *supra* n 22, 22-23.

[269] See Section 3.4 *supra* on GANHRI accreditation system. In the literature, corrections to the accreditation procedure are proposed in de Beco and Murray, *supra* n 22, 143-147: e.g., the inclusion of independent experts in the Sub-Committee on Accreditation, broader consultations with NGOs, greater focus on the effectiveness of NHRIs, and greater publicity of the documentation on which the assessment is based.

foremost the UN. National institutions routinely cooperate with treaty bodies, are involved in recently-developed mechanisms such as the UPR, and increasingly participate in the drafting of treaties negotiated within the UN. Notwithstanding some persistent uncertainties as to the concrete means of interaction between NHRIs and UN bodies, especially as far as treaty bodies are concerned, a trend is clearly discernible on the ground towards a "special relationship" between the UN and NHRIs.

While somewhat lagging behind, the CoE has also increasingly involved NHRIs in its activities and, even though intermittently, is formalising this relationship and attributing greater importance to the Paris Principles and the accreditation process carried out by GANHRI. The fact that this trend is less clear-cut than the involvement of NHRIs in the UN context arguably explains why the literature on the subject is sorely lacking.[270] Chapters 4 and 5 of this dissertation aim to fill this gap by providing an empirical analysis of the extent to which NHRIs have contributed to the promotion of the execution of ECtHR judgments by acting at both the international and national levels.

[270] Exceptions include the works mentioned in Section 3.6 *supra*; and Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2008), 289 *et seqq*.

CHAPTER 4. PROMOTING THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS: THE EXPERIENCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS AT THE COUNCIL OF EUROPE LEVEL

This chapter focuses on the activities carried out at the CoE level by NHRIs to promote the execution of ECtHR judgments. As highlighted in Chapter 1, there is widespread recognition that delays and failures in the execution of ECtHR judgments have led to the overburdening of the Court and of the Committee of Ministers as well as, more generally, to the weakening of the ECHR system. On the other hand, in the last fifteen to twenty years, the process of supervision of the execution of ECtHR judgments has gradually become more transparent and objective by opening up to the participation of actors other than the Committee of Ministers and the respondent Member States (Chapter 2).

An analysis is thus opportune of the role that NHRIs are currently playing and can potentially play in this area as bodies that, due to their particular features, including their position at the crossroads between the national and international levels of human rights promotion and protection (Chapter 3), would appear to be ideally suited for aligning national systems with international standards and decisions.

In practice, at the CoE level, the execution of ECtHR judgments is mainly promoted by NHRIs through the submission of communications to the Committee of Ministers under Rule 9(2) of the *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*.[1] This chapter provides an in-depth analysis of the authors, content, and impact

[1] Another possible means would seem to be the participation in briefings with representatives from the Committee of Ministers, the Department for the Execution of Judgments, and NGOs. Since this kind of interaction is not given much publicity and could only be ascertained by this author in relation to a single NHRI in a single case (i.e., the Serbian Protector of Citizens in the *Zorica Jovanović* case), it is not considered in this chapter. It is also possible that further informal contacts have taken place between NHRIs and the Department for the Execution of Judgments in particular; these exchanges are, however, inherently inaccessible to the public and thus do not lend themselves to systematic research.

of the communications lodged with the Committee of Ministers by NHRIs, thus drawing for the first time a comprehensive portrayal of the interactions between NHRIs and the Committee of Ministers (and the Department for the Execution of Judgments, which supports the Committee) for the full execution of ECtHR judgments. By way of this analysis, the current level and means of engagement by NHRIs, at the CoE level, in the promotion of the execution of ECtHR judgments are mapped, thus providing answers to the following research question and sub-questions:

Q1: To what extent have NHRIs contributed to promoting the execution of ECtHR judgments?

a) *Which NHRIs have interacted with the Committee of Ministers and the Department for the Execution of Judgments to this end?*
b) *In relation to which cases have NHRIs interacted with these bodies?*
c) *How have NHRIs interacted with these bodies?*
d) *What have been the effects of these interactions?*

Chapter 5 will examine the activities that NHRIs have performed at the national level with a view to promoting the execution of ECtHR judgments.

4.1. Communications to the Committee of Ministers from National Human Rights Institutions (Rule 9(2) communications)

In a context of mostly informal relations between NHRIs and CoE bodies, the institutionalisation of a role for NHRIs in promoting the execution of ECtHR judgments is significant. As mentioned, the 2006 *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements* provide for the opportunity for NHRIs, as well as NGOs, to submit to the Committee of Ministers "any communication … with regard to the execution of judgments under Article 46, paragraph 2, of the Convention" (Rule 9(2)).

On the basis of this provision, read in the context of the CoE system for the supervision of the execution of ECtHR judgments (illustrated in Chapter 2) and in light of the characteristics of NHRIs (outlined in Chapter 3), a few elements emerge and some hypotheses can be posited. Firstly, the Rule in question is addressed to "national institutions for the promotion and protection of human rights"; in line with the comprehensive approach that has traditionally been adopted by the CoE in this regard,[2] it is expected that the expression would be interpreted by the Committee of Ministers as referring to a wide range of national public bodies *sensu lato* promoting and protecting human rights, including classical ombudsmen and equality bodies.

Secondly, while communications under Rule 9(1) from the injured party (i.e., the applicant before the ECtHR) can only refer to the "payment of the just satisfaction or the taking of individual measures", there is no limit as regards the content of communications from NHRIs and NGOs. Indeed, these entities are expected to chiefly submit information in respect of general measures. More specifically, communications from NHRIs, in view of these institutions' "official status" and thorough knowledge of the national legal system, can be expected to fulfil one or more of these aims: providing reliable and independent information to the Committee of Ministers, mainly about the state of legislation, administrative regulation and practice, and jurisprudence in the State concerned; putting forward proposals for reform with a view to aligning the conduct of States to the Court's judgments; and verifying that States are implementing their action plans and complying with their action reports, as well as respecting any interim resolutions or other indications by the Committee of Ministers.[3]

Thirdly and conversely, it is to be underlined that the Committee of Ministers is "entitled to consider" Rule 9(2) communications, but it is not compelled to do so; this is contrary to what happens with communications from the injured party under Rule 9(1), which the Committee "shall consider". In the absence of an obligation for the Committee of Ministers to consider and for States to reply to

[2] Cf. Section 3.6 of this dissertation.
[3] For more information regarding action plans and reports, as well as interim resolutions and other instruments at the disposal of the Committee of Ministers, cf. Section 2.2 of this dissertation.

submissions by NHRIs and NGOs, a relatively low response rate could be envisaged; nonetheless, the institutional relationship between NHRIs and State bodies and the fact that NHRIs would probably adopt a less "adversarial" approach towards governments could prompt the latter to interact with NHRIs more frequently and willingly than with NGOs.

The following sections map the current level of engagement by NHRIs with the Committee of Ministers with a view to promoting the execution of ECtHR judgments, by testing the above-mentioned hypotheses and others in relation to the authors, content, and impact of Rule 9(2) communications. To this end, Section 4.2 first of all identifies the institutions that have taken part so far in the procedure laid down in Rule 9(2), what kind of institutions they are (human rights ombudsmen, consultative commissions, commissions with a protection mandate, research institutes, or entities other than NHRIs),[4] and what their international status is (A-, B- or C-status institutions, or non-accredited institutions).[5] The rate of their communications is also measured.

The identification of the participants in the procedure is followed by an analysis of the types of judgments that attract the attention of NHRIs (with particular regard to the severity of the violation and the legal importance of the case;[6] Section 4.3) and an analysis of the content of communications from NHRIs in order to ascertain the kind of information and observations that these institutions tend to submit to the Committee of Ministers (Section 4.4).

Finally, the impact of Rule 9(2) communications on the monitoring activity of the Committee of Ministers is examined in Section 4.5. To this end, it is first of all ascertained whether communications from NHRIs have been replied to by States and/or referred to by the Committee of Ministers and/or the Department for the Execution of Judgments in their resolutions and documents

[4] A categorisation of models of NHRIs can be found in Section 3.2 of this dissertation.
[5] As shown in Chapter 3, A-status NHRIs are institutions that, on the basis of the assessment by the Global Alliance of NHRIs (GANHRI), fully comply with the Paris Principles – i.e., the international standards for NHRIs endorsed by the UN. Partially compliant institutions are accredited with B status, whereas institutions that ask for accreditation by GANHRI but are considered non-compliant with the Principles are given C status. Cf. Section 3.4 of this dissertation for more information on GANHRI and the accreditation of NHRIs; cf. Section 3.6 for the status of European NHRIs.
[6] These two criteria have been put forward and applied by Shai Dothan to identify the types of ECtHR judgments that attract the attention of NGOs: Shai Dothan, "A Virtual Wall of Shame: The New Way of Imposing Reputational Sanctions on Defiant States", *Duke Journal of Comparative & International Law 27*, no. 2 (2017): 169 *et seqq*. These criteria are tested and, where necessary, adapted to NHRIs in this dissertation – cf. Section 4.3 *infra*.

(what I term "formal recognition"). Thereafter, it is verified whether observations and proposals from NHRIs have actually been accepted by States and/or used by the Committee of Ministers and/or the Department for Execution as the basis for their recommendations ("substantial recognition"). Some preliminary conclusions are drawn in Section 4.6 regarding the activities of NHRIs in the CoE context with a view to promoting the execution of ECtHR judgments.

Where appropriate, throughout the chapter, a comparison is drawn with the communications lodged with the Committee of Ministers by NGOs, which are also allowed to intervene under Rule 9(2). While communications from NGOs are not the focus of this dissertation, some considerations are made as regards their number, content, and impact compared to the number, content, and impact of communications from NHRIs in order to ascertain whether the role in the procedure of these two groups of entities and their consideration by the relevant CoE bodies differ in any respect.

4.2. Who: which institutions have submitted communications and to what extent

As of December 2018, twelve "national institutions for the promotion and protection of human rights" submitted at least one communication to the Committee of Ministers regarding the execution of ECtHR judgments. These are the Human Rights Defender of Armenia, the Public Defender of Rights of the Czech Republic, the French *Commission nationale consultative des droits de l'homme* (also known as CNCDH), the French *Défenseur des droits* (and its predecessor, the *Médiateur de la République*),[7] the Public Defender of Georgia, the Greek National Commission for Human Rights, the Equality and Human Rights Commission (Great Britain), the Irish Human Rights and Equality Commission (and its predecessor, the Irish Human Rights Commission), the Northern Ireland Human Rights Commission, the Commissioner for Human Rights of Poland, the Protector of Citizens of Serbia, and the Human Rights Ombudsman of Slovenia.

[7] The functions of the *Médiateur* and of three other institutions were attributed to the *Défenseur* in 2011.

The number of participating institutions is significantly lower than that of all European national human rights structures, according to the broad definition adopted by CoE bodies; indeed, almost all forty-seven CoE Member States have a classical ombudsman and/or equality bodies in place, in lieu of or in addition to an NHRI.[8] The number of national structures that have so far participated in the Rule 9(2) procedure is also much lower than that of members of the European Network of National Human Rights Institutions (ENNHRI; forty-two)[9] and even of A- and B-status European NHRIs (thirty-five).

Nonetheless, the number of national human rights structures taking part in the Rule 9(2) procedure is on the rise as, over the thirteen years during which the procedure has been available, six NHRIs submitted their first communications in the last five years, and three of them in the last two years (namely, the Armenian Human Rights Defender, the Georgian Public Defender, and the Greek National Commission for Human Rights, between the end of 2016 and the end of 2018).[10]

According to the categorisation adopted in Chapter 3, two interveners are consultative commissions (the French and Greek commissions), three are commissions with a protection mandate (commissions from Great Britain, Northern Ireland, and Ireland), five are human rights ombudsmen (NHRIs from Armenia, Georgia, Poland, Serbia, and Slovenia), whereas the French *Défenseur des*

[8] It is difficult to calculate the exact number of European ombudsman institutions and equality bodies. According to a comprehensive survey of ombudsman institutions in Europe, carried out between September 2005 and October 2007, forty-five CoE Member States have national or regional ombudsmen, the exceptions being Monaco and San Marino (Gabriele Kucsko-Stadlmayer, ed., *European Ombudsman-Institutions. A comparative legal analysis regarding the multifaceted realisation of an idea* (Vienna: Springer, 2008)). Some of these institutions also qualify as A- or B-status NHRIs; additionally, many more sector-specific ombudsmen exist. Equinet is a network of forty-six European equality bodies, whose members come from EU Member States, Acceding States and Candidate States (thirty-four countries in total). Some Equinet members also qualify as NHRIs and/or ombudsmen.

[9] As mentioned in Section 3.6 of this dissertation, ENNHRI membership is not limited to A-status European institutions, but it also includes B- and C-status institutions as well as non-accredited institutions (whose prerogatives within the organisation, however, differ).

[10] The Northern Ireland Human Rights Commission informally forwarded its first communication in the early 2000s, before the Rule 9(2) procedure was introduced; it was followed by the CNCDH and the *Médiateur*, which started to submit joint communications in 2009. In 2011, the Equality and Human Rights Commission (Great Britain), the Irish Human Rights Commission and the Commissioner for Human Rights of Poland came along. The Public Defender of Rights of the Czech Republic and the Protector of Citizens of Serbia submitted their first communications in 2014, the Human Rights Ombudsman of Slovenia in 2015, the Public Defender of Georgia at the end of 2016, and the Human Rights Defender of Armenia and the Greek National Commission for Human Rights in 2018. If one considers the *Défenseur* separately from the *Médiateur*, the first communication lodged by the new institution dates back to 2016; at any rate, it is clear that the *Défenseur* built on the experience developed by its predecessor in the submission of communications to the Committee of Ministers.

droits and the Public Defender of the Czech Republic can be considered classical ombudsmen – and thus not NHRIs in the narrow sense. Nonetheless, the Czech Defender is arguably evolving from a classical ombudsman into a human rights ombudsman.[11]

It is unsurprising that almost all commissions with a protection mandate in Europe have so far participated in the procedure; their extensive experience in litigation at the national level has led to the submission of various *amicus curiae* briefs to the ECtHR on their part, and it is not rare for third-party interveners to also monitor the execution of the respective judgments once delivered (this pattern is discernible among NGOs as well).[12] Ombudsmen too, especially in Central and Eastern Europe, are frequently vested with the power to apply to or intervene before national courts, in addition to their complaint-handling functions. It might, however, be more striking that among the most active NHRIs to date is the CNCDH, a large consultative commission whose primary role at the domestic level is to advise the parliament and government on the compatibility of bills, laws, and policies with human rights standards.

At any rate, the examination of the categories of NHRIs that have intervened to date shows that all kinds of NHRIs can participate in the Rule 9(2) procedure; while research institutes have not made their contribution so far, it is not their inherent nature that prevents them from doing so. On the contrary, the research and reporting competences of these NHRIs could prove useful in terms of providing reliable information on the laws and practices of their States regarding a certain human rights matter.

With the exception of the French and Czech ombudsmen, participating entities have been accredited by GANHRI as either A-status institutions (NHRIs from Armenia, France, Georgia,

[11] While the primary competence of the institution remains to oversee the legitimacy and fairness of the conduct of State organs, its mandate has gradually been extended to discrimination cases (also between private individuals or entities); moreover, the Defender acts as the NPM and CRPD monitoring body for the Czech Republic. The human rights-oriented mandate of the Czech Public Defender has recently been recognised by ENNHRI, which admitted the Defender as a member at the end of 2017. For an overview of the Defender's functions, cf. the "Mandate" section of the institution's website, accessed 4 January 2019, https://www.ochrance.cz/en/mandate-of-the-public-defender-of-rights/. For more details, cf. the "Law on the Public Defender of Rights" section, accessed 4 January 2019, https://www.ochrance.cz/en/law-on-the-public-defender-of-rights/.

[12] Dothan, *supra* n 6, 169 *et seqq*.

Greece, Ireland, Poland, Serbia, Great Britain, and Northern Ireland) or B-status institutions (the Ombudsman of Slovenia).

The data above first of all confirm the inclusive approach adopted by the CoE, including its Committee of Ministers, towards national human rights structures; with regard to the execution of judgments as well, the Committee of Ministers appears ready to accept communications from both compliant and partially compliant NHRIs as well as from entities that do not qualify as NHRIs, such as classical ombudsmen. At least as far as the *admissibility* of communications is concerned (their *consideration* and *acceptance* will be analysed subsequently in Section 4.5), there is thus no difference between the above-mentioned institutions.

Nonetheless, the analysis also shows that A-status NHRIs are the most active participants in the Rule 9(2) procedure – a circumstance that could be explained by their greater expertise and financial and staff resources, which allow NHRIs to extend their activities to the international level. At the UN level too, A-status institutions have indeed taken the lead as far as reporting to treaty bodies and contributing to the Universal Periodic Review are concerned. However, at least in general terms, it does not appear that engagement at one level has an effect on engagement at the other, as Rule 9(2) interveners and participants in the UN procedures are not the same.[13] According to a

[13] During the UPR second cycle (2012-2016), nineteen A-status European NHRIs submitted information, and yet this number (which is much greater than the nine A-status institutions that submitted communications to the Committee of Ministers) does not include NHRIs from Poland and Serbia, which instead intervened at the CoE level. Similar considerations apply to B-status institutions: the Slovenian Human Rights Ombudsman, which submitted a communication to the Committee of Ministers, did not participate in the UPR second cycle (although it did participate in the first cycle), whereas five other B-status NHRIs contributed to the UPR second cycle (cf. Section 3.5. of this dissertation). The same goes for non-accredited institutions: the *Défenseur* has never participated in the UPR, the Czech Defender submitted information during the first cycle only, whereas other non-accredited institutions made their contribution (between the first and second cycles, various specialised ombudsmen from Croatia, the Netherlands, and Norway, the children ombudsmen from Ireland and Sweden, the Finnish Ombudsman for Equality, the Moldovan Council on the Prevention and Elimination of Discrimination and Ensuring Equality, and the Swiss Federal Commission against Racism intervened).
It is also noteworthy that among the most active authors of alternative reports to UN treaty bodies, having submitted information to five or more different committees, are a number of A-status institutions that have never intervened before the Committee of Ministers: these are NHRIs from Bosnia and Herzegovina, Denmark, Germany, and the Netherlands. The same applies to the B-status Human Rights Commissioner of Azerbaijan, which has long retained A status before being downgraded in May 2018. While some of these countries may receive few adverse judgments from the ECtHR, others have been condemned by the Court for serious and/or systemic violations, thus making communications from NHRIs amply justified and expected.
Conversely, not all national human rights structures that submitted information to the Committee of Ministers regularly interact with UN treaty bodies: the Slovenian Human Rights Ombudsman forwarded a single submission to the CRPD Committee, while the Czech Public Defender only engaged with the Committee on the Elimination of Racial

representative from the Netherlands Institute for Human Rights, participation in the two contexts entails different preparatory activities on the part of NHRIs, as the periodic reviews at the UN level revolve around more general issues, whereas third-party interventions before the ECtHR and communications to the Committee of Ministers are more prominently influenced by the concrete circumstances of the case.[14] At any rate, there does not appear to be a relationship between participation in the UN procedures and submission of communications to the Committee of Ministers under Rule 9(2), or vice versa.

On the other hand, the increasing efforts by ENNHRI to strengthen participation by NHRIs in the promotion of the execution of ECtHR judgments are significant, but too recent to explain the communications of most institutions to date. In 2016, ENNHRI Legal Working Group published the *Guidance for National Human Rights Institutions to Support Implementation of Judgments from the European Court of Human Rights*, which details the actions that can be undertaken by NHRIs at both the national and international levels to promote the execution of ECtHR judgments, including the submission of communications to the Committee of Ministers under Rule 9(2).[15] While ENNHRI might not have prompted recourse to the Rule 9(2) procedure by NHRIs from the beginning, its recent focus on the issue is likely to be conducive to greater involvement on the part of NHRIs, especially of newer ones and of those that are less familiar with CoE procedures.

Mention should also be made of a 2008 pilot project promoted by the CoE Commissioner for Human Rights to boost the engagement of NHRIs with the execution of ECtHR judgments by enhancing the collaboration of these institutions with both national authorities and CoE bodies. The project involved five national human rights structures: the Austrian Ombudsman Board, the Belgian Office of the Federal Ombudsmen, the French *Médiateur de la République*, the CNCDH, and the

Discrimination. The *Défenseur des droits* submitted two reports – one to the Committee on the Elimination of Discrimination against Women and another to the Committee on the Rights of the Child.

[14] Interview with Anne van Eijndhoven, Policy Adviser at the Netherlands Institute for Human Rights, 4 May 2017, on file with author.

[15] ENNHRI/Legal Working Group, *Guidance for National Human Rights Institutions to Support Implementation of Judgments from the European Court of Human Rights* (Brussels: ENNHRI, 2016).

Northern Ireland Human Rights Commission; six other institutions (mainly human rights and classical ombudsmen) were invited as observers.[16] While three of the participants are among the most active contributors to the Rule 9(2) procedure, the Austrian and Belgian ombudsmen have never submitted information to the Committee of Ministers, nor have any of the observers. There are no indications that further similar initiatives have been organised by the Commissioner.

To sum up, it can preliminarily be claimed that while it appears that commissions with a protection mandate on the one hand and A-status NHRIs on the other are the main participants in the Rule 9(2) procedure, there is no straightforward explanation for why institutions other than commissions with a protection mandate and A-status institutions also intervened and why many other A-status NHRIs did not.

A few factors might play a role. First of all, as before the recent document by ENNHRI no serious effort had been undertaken to collectively inform NHRIs about Rule 9(2), nor have CoE bodies systematically promoted the use of this instrument, an information issue appears to exist.[17]

While by now most NHRIs and a good number of ombudsmen should be aware of the existence of the procedure (but not necessarily of its concrete functioning),[18] the replies from some participating

[16] These are the *Defensor del Pueblo* from Spain (an A-status human rights ombudsman), the Office of the Commissioner for Administration from Cyprus (B-status human rights ombudsman), the Dutch Office of the National Ombudsman (classical ombudsman), the Office of the Public Defender of Rights from Slovakia (classical ombudsman), and the Consultative Commission for Human Rights from Luxembourg (A-status consultative commission). Cf. Commissioner for Human Rights, *Enhancing the role of National Human Rights Structures in the execution of the European Court of Human Rights' judgments. Pilot project, 31 January – 1 February 2008, Palais de l'Europe, Room 14. Debriefing and Follow-up to the Pilot Project Meeting*, 7 February 2008, CommDH/NHRS(2008)7.

[17] This was confirmed by Levan Meskhoradze, Team Leader of the EU Project at the Office of the Public Defender of Georgia, and by Petr Polák, Head of the Department of Equal Treatment at the Public Defender of Rights of the Czech Republic, according to whom it would be appropriate to publicise more widely the procedure among NHRIs and ombudsmen (the interviews were conducted on 17 April 2018 and 1 June 2018 respectively and are on file with author). Cf. also the more general findings of Office of the High Commissioner for Human Rights (OHCHR), *Survey on National Human Rights Institutions: Report on the findings and recommendations of a questionnaire addressed to NHRIs worldwide* (Geneva: OHCHR, July 2009), 42-47 and 57-58, according to which insufficient knowledge of the international and regional human rights systems mainly explained the unsatisfactory level of engagement by NHRIs with supranational procedures, and training on these aspects should be further pursued.

[18] It was not deemed useful to insist on the point in the interviews with representatives from NHRIs that have not participated in the procedure thus far. Besides, also among participating NHRIs, there is not always a clear recollection of how the institution became aware of the existence and functioning of the procedure. This is partly due to the fact that some interviewees (e.g., representatives from the Equality and Human Rights Commission of Great Britain and from the Public Defender of Georgia) joined the institution at a moment when communications to the Committee of Ministers had already been submitted and were thus common knowledge within the organisation. However, it arguably also points to the fact that NHRIs were not informed of the procedure in a single official way.

NHRIs as well as the elements provided above lead to the conclusion that different institutions have become aware of the opportunity to get involved in the procedure through different channels, such as the pilot project by the Commissioner for Human Rights, guidelines and exchanges within ENNHRI, but also contacts with NGOs and the Department for the Execution of Judgments. For instance, the Czech Public Defender was made aware of the existence of the procedure by NGOs that had already used it (the Open Society Foundations in particular) and was also approached by the Department for Execution with specific regard to the case in which the Defender then determined to intervene.[19] In other instances, it might be the previous involvement of the NHRI in a matter which went all the way to Strasbourg that explains the engagement by the NHRI and its awareness of the procedure.

Furthermore, an issue of resources may be present.[20] The lack of resources can consist in financial constraints as well as refer to the number and expertise of members of the staff and to the priorities set by the institution; as suggested by a representative from the Equality and Human Rights Commission (Great Britain), NHRIs with a legal focus and large legal teams would probably prioritise interventions before national and international courts and follow-up actions with respect to judgments, contrary to NHRIs whose main focus is research or policy.[21] Even though most NHRIs (at least A-status ones) undertake all of these activities, priorities must be established and the budget allocated accordingly.

Additionally, the institution's remit can limit its ability to intervene: e.g., the Czech Public Defender of Rights has a clear mandate to cooperate with European and international organisations only as far as equality matters and the protection of the rights of people with disabilities are concerned.[22] In other areas, the Defender could draw the attention of the international monitoring

[19] Interview with Polák, Public Defender of Rights of the Czech Republic, *supra* n 17.
[20] As has been the case to date for the Croatian Ombudsman: interview with Tatjana Vlašić, Human Rights Promotion, Cooperation and Public Relations Advisor to the Croatian Ombudswoman, 31 October 2018, on file with author. In OHCHR, *supra* n 17, 47, several respondent NHRIs from all over the world maintained that the limited resources at their disposal were the main obstacle to their further engagement with international and regional procedures.
[21] Interview with Clare Collier, Senior Principal at the Equality and Human Rights Commission (Great Britain), 26 September 2018, on file with author.
[22] Interview with Polák, Public Defender of Rights of the Czech Republic, *supra* n 17.

bodies to the reports that it publishes in the exercise of its national mandate, but it would probably refrain from more intensive cooperation.[23]

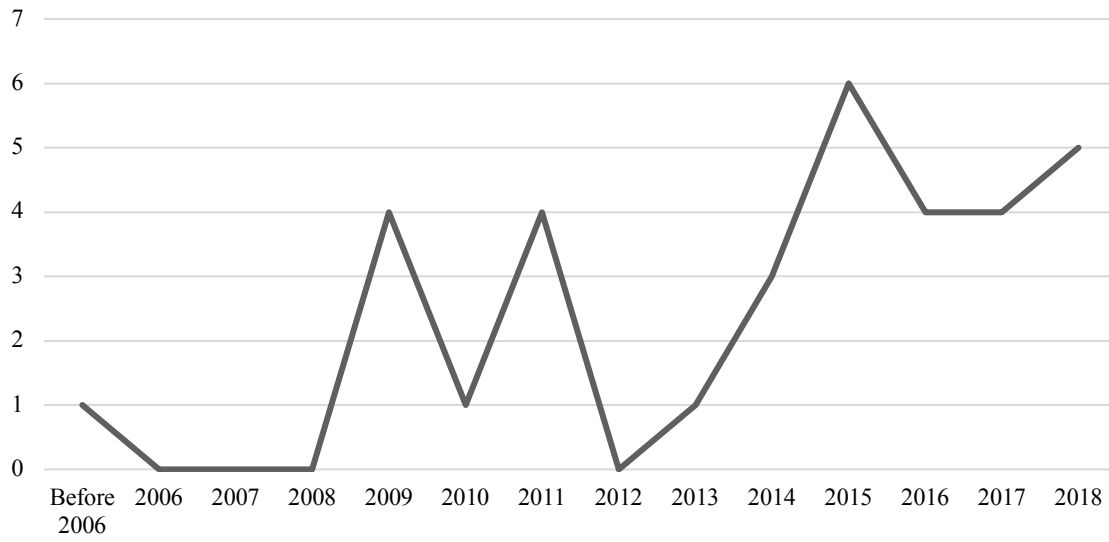
Finally, it should be noted that the participation by at least some NHRIs might not have been needed to date. For instance, as pointed out by a representative from the Danish Institute for Human Rights, Denmark has seldom been found to violate the Convention;[24] as of December 2018, Denmark has no cases pending before the Committee of Ministers and awaiting full execution. In the case of the Netherlands, a representative from the Dutch NHRI acknowledged that as the Government takes ECtHR judgments seriously and is usually willing to implement them, submissions to the Committee of Ministers have been unnecessary until now.[25]

More generally, as noted by virtually all interviewees from both participating and non-participating institutions, NHRIs would try to preliminarily engage with the competent national authorities at the domestic level, before resorting to submissions to international monitoring bodies.[26] While this course of action does not necessarily apply to all NHRIs, it is in line with the cooperative relationship that normally exists between NHRIs and other State bodies, so that only when no agreement can be found or the relevant authorities appear to take too much time to fulfil their commitments would NHRIs step up their action and address the international level.

[23] Ibid.
[24] Interview with Christoffer Badse, Director of the Monitoring Department at the Danish Institute for Human Rights, 26 October 2017, on file with author.
[25] Interview with van Eijndhoven, Netherlands Institute for Human Rights, *supra* n 14.
[26] Interviews with van Eijndhoven, Netherlands Institute for Human Rights, *supra* n 14; Meskhoradze, Office of the Public Defender of Georgia, *supra* n 17; Polák, Public Defender of Rights of the Czech Republic, *supra* n 17; Vlašić, Croatian Ombudswoman, *supra* n 20; Collier, Equality and Human Rights Commission (Great Britain), *supra* n 21; and Badse, Danish Institute for Human Rights, *supra* n 24.

As of December 2018, as far as I was able to determine,[27] the twelve above-mentioned NHRIs submitted a total of thirty-three communications.[28] Due to the limited number of communications and participating institutions, it is hardly possible to discern meaningful trends. At most, one could note that, since 2013, the number of communications from NHRIs has rather steadily grown and, when decreasing or remaining stable, has not fallen below the threshold of four communications per year.

Figure 4.1: Number of communications from NHRIs per year



[27] The documents published under the "Submissions" section of the website of the Department for the Execution of Judgments, accessed 4 January 2019, https://www.coe.int/en/web/execution/submissions, were first of all consulted, together with those published on HUDOC-EXEC, a database that is also run by the Department and collects documents on closed cases as well (contrary to the "Submissions" webpage). Additionally, since the Department only started to circulate materials in 2011, while NHRIs have been allowed to submit communications since 2006, the websites and activity reports of NHRIs have been scrutinised. However, as websites and reports of NHRIs do not always account for all of the institutions' activities in detail, it cannot be excluded that some submissions may have been missed.

[28] In the period between the submission of this dissertation to external examiners (January 2019) and its defence, a further Human Rights meeting of the Committee of Ministers was held, in March 2019, where two more communications from NHRIs were received: Committee of Ministers/Secretariat General, *1340th meeting (March 2019) (DH). Communication from the Human Rights Defender of Armenia (21/01/2019) and reply from the authorities (01/02/2019) in the case of Ashot Harutyunyan v. Armenia (Ashot Harutyunyan group) (Application No. 34334/04)*, 4 February 2019, DH-DD(2019)120; and Committee of Ministers/Secretariat General, *1340th meeting (March 2019) (DH). Communication from a NHRI (Commissioner for Human Rights) (06/03/2019) in the case of P. and S. v. Poland (Application No. 57375/08)*, 15 March 2019, DH-DD(2019)283. These communications have not been analysed in the dissertation. The same applies to other documents which were received at the same meeting from both governments and NGOs regarding cases that are considered in the dissertation as cases in relation to which NHRIs have intervened – namely the *McKerr v. the UK* group of cases, the *P. and S. v. Poland* case, and the *Zorica Jovanović v. Serbia* case.
Moreover, Thomas Dumortier, Legal Adviser at the *Commission nationale consultative des droits de l'homme*, referred to the imminent submission of a joint communication by the CNCDH and the French National Preventive Mechanism in the *Yengo* case (interview of 8 March 2019, on file with author); the communication, which will be considered at the Human Rights meeting of the Committee of Ministers in June 2019, can be found as Committee of Ministers/Secretariat General, *1348th meeting (June 2019) (DH). Communication from a NHRI (Commission nationale consultative des droits de l'homme (CNCDH) et Contrôleur général des lieux de privation de liberté) (02/04/2019) in the case of Yengo v. France (Application No. 50494/12)*, 12 April 2019, DH-DD(2019)416.

These figures are due to both the continued participation by long-standing interveners, such as the CNCDH (which submitted six communications over a nine-year period), and the active contribution by relative newcomers to the procedure, such as the Georgian Public Defender (which submitted six communications between 2016 and 2018). A detailed overview of the number of communications submitted by each institution per year is presented in Table 4.1 below.

Table 4.1: Number of communications from each NHRI per year[29]

Year \ NHRI	Human Rights Defender of Armenia	Public Defender of Rights of the Czech Republic	*Commission nationale consultative des droits de l'homme*	*Défenseur des droits*	Public Defender of Georgia	Greek National Commission for Human Rights	Equality and Human Rights Commission (GB)	Northern Ireland Human Rights Commission	Irish Human Rights and Equality Commission	Human Rights Defender of Poland	Protector of Citizens of Serbia	Human Rights Ombudsman of Slovenia	**Total**
Before 2006							1						1
2009			2				2						4
2010			1										1
2011						1	1	1	1				4
2012													
2013			1										1
2014		1				1				1			3
2015		1	1			1	1	1			1		6
2016				1	1			1		1			4
2017			1		3								4
2018	1				2	1			1				5
Total	1	2	6	1	6	1	3	5	3	2	2	1	33

The above-mentioned thirty-three communications have been submitted in respect of twenty-five cases or groups of cases pending before the Committee of Ministers (some ECtHR cases are considered jointly for the purposes of the supervision of execution by the Committee). The difference between the number of communications and the number of (groups of) cases is due to the fact that NHRIs may submit multiple communications in relation to a certain case. Vice versa, it is also possible (albeit rarer) that a single submission refers to various cases; the Public Defender of Georgia

[29] The first four communications attributed to the CNCDH in the table were actually submitted jointly with the *Médiateur*/*Défenseur* (see Table 4.2 below).

recently sent a communication in relation to three groups of cases, all revolving around the lack of adequate investigations into the wrongdoing of law-enforcement officials.[30]

In most instances, NHRIs submitted a single communication for each case in which they intervened; nonetheless, two to three communications were filed by NHRIs in relation to a number of cases. Table 4.2 below shows the number of communications lodged by NHRIs with respect to each case.

Table 4.2: Number of communications per case[31]

NHRI / Ombudsman	Case / Group of cases	Number of communications
Human Rights Defender of Armenia	*Muradyan v. Armenia*	1
Public Defender of Rights of the Czech Republic	*D.H. v. the Czech Republic*	2
Commission nationale consultative des droits de l'homme	*Winterstein and others v. France*	1
	Mennesson v. France (group of cases)	1
	Taïs v. France	1 (jointly with the *Médiateur*)
	Gebremedhin v. France	1 (jointly with the *Médiateur*)
	Frérot v. France (group of cases)	1 (jointly with the *Médiateur*)
	Popov v. France (group of cases)	1 (jointly with the *Défenseur*)
Défenseur des droits	*De Souza Ribeiro v. France*	1
Public Defender of Georgia	*Gharibashvili v. Georgia* (group of cases)	3
	Identoba and others v. Georgia (group of cases)	3[32]
	Makharadze and Sikhariulidze v. Georgia (group of cases)	1[33]
	Merabishvili v. Georgia	1

[30] Committee of Ministers/Secretariat General, *1310th meeting (March 2018) (DH). Communication from another organisation (07/12/2017) and reply from the authorities (14/12/2017) in the cases of Makharadze and Sikharulidze, Tsintsabadze, Identoba and Others v. Georgia (Applications No. 35254/07, 35403/06, 73235/12)*, 20 December 2017, DH-DD(2017)1416, 2. The submission consists in a report by the Public Defender, titled "Disciplinary Proceedings Against the Employees of the Prosecutor's Office of Georgia, Ministry of Internal Affairs, Penitentiary and State Security Service of Georgia on the Basis of Individual Complaints. Outcomes of the Study of the Public Defender of Georgia".

[31] In the interests of readability, the details of the cases have not been included in the table. They are reported below in this chapter as the single cases are considered more closely. Additionally, a complete list can be found in the "List of legal documents and official reports" at the end of the dissertation.

[32] As mentioned, the second communication in the *Identoba and others* group of cases is the same as the third submission in the *Gharibashvili* group of cases and the first one in the *Makharadze and Sikhariulidze* group of cases: cf. *supra* n 30.

[33] Cf. *supra* note 32.

Greek National Commission for Human Rights	*Chowdury and others v. Greece*	1
Equality and Human Rights Commission (GB)	*Al-Skeini and others v. the UK*	1
	Gillan and Quinton v. the UK	1
	Vinter and others v. the UK	1
Northern Ireland Human Rights Commission	*S. and Marper v. the UK*	3
	McKerr v. the UK (group of cases)	2
Irish Human Rights and Equality Commission	*O'Keeffe v. Ireland*	2
	McFarlane v. Ireland (group of cases)	1
Commissioner for Human Rights of Poland	*Orchowski and others v. Poland* (group of cases)	1
	P. and S. v. Poland	1
Protector of Citizens of Serbia	*Zorica Jovanović v. Serbia*	2
Human Rights Ombudsman of Slovenia	*Kurić and others v. Slovenia*	1

The number of communications required by each case is dependent upon various factors, including its complexity. Furthermore, if the respondent State accepts the observations by the NHRI, or if the Committee of Ministers uses them as the basis for its own recommendations, the NHRI might consider its task to be completed and a single submission sufficient. Conversely, if both the State concerned and the Committee ignore the submission by the NHRI, the institution might consider it pointless to intervene further. These dynamics are analysed in greater detail in Section 4.5 below.

A final consideration relates to the apparently striking difference between the number of communications from NHRIs and that of communications from NGOs: between January 2011 and the end of 2017 only, approximately five-hundred communications were submitted by NGOs.[34] This comparison might, however, be misleading if it is not taken into account that the number of European NHRIs is much smaller than that of NGOs active in CoE Member States; partly for inherent reasons, as one NHRI only can be established in a State, and partly for practical reasons, as not all Member States have established such an institution yet. Even if we include ombudsmen and equality bodies as well (which, however, should not be expected to interact with international bodies to the same extent as NHRIs), their number is still more limited than that of NGOs. Moreover, national human

[34] Cf. Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights. 11th Annual Report of the Committee of Ministers 2017* (Strasbourg: CoE, March 2018), 73. Communications from NGOs and NHRIs have been made public since January 2011.

rights structures are expected to intervene with regard to judgments delivered against their respective countries only, in accordance with the focus of their mandates and expertise.

If one considers the wealth of NGOs operating in CoE Member States, the fact that a handful of organisations have submitted the majority of communications (even though various smaller and local ones have also participated), and the fact that the yearly number of submissions has remained essentially stable after 2012,[35] it would appear that while NGOs have made wider use of the Rule 9(2) procedure compared to NHRIs, room to grow in this respect exists for them as well.[36]

4.3. When: the selection of cases

Before examining the content of Rule 9(2) communications from NHRIs, it is appropriate to assess the criteria on the basis of which NHRIs appear to select cases to follow up before the Committee of Ministers. The driver behind each decision by an NHRI to intervene might not always be clearly discernible, in the absence of direct confirmation by the NHRI concerned, and a mix of factors might be at work, some of which are nonetheless easier to verify.

Various potential selection criteria have been identified by Shai Dothan in relation to the promotion of the execution of ECtHR judgments by NGOs, and they will be tested here with respect to NHRIs to the extent that they are relevant.[37] In analysing the types of judgments that are most

[35] Ibid.

[36] Remezaite, Legal Consultant at the European Human Rights Advocacy Centre (which is among the NGOs that are most active in litigating cases before the ECtHR and intervening in the execution phase), maintains that NGOs, NHRIs, and legal professionals still have little knowledge of the ways in which they can contribute to the execution of ECtHR judgments, and that "civil society engagement with the [Committee of Ministers] remains very low": Ramute Remezaite, "The implementation crisis: PACE's efforts to enhance compliance with European Court judgments", *European Human Rights Advocacy Centre Bulletin* 24 (winter 2015): 10.
It is worth mentioning here the activities of the European Implementation Network, which aims to strengthen the involvement of NGOs in the promotion of the execution of ECtHR judgments including by intensifying their interactions with the Committee of Ministers. To this end, it carries out training activities in favour of NGOs and organises meetings between NGOs and representatives from the Committee of Ministers to discuss the execution of judgments due to be examined by the Committee at its Human Rights meetings. It has also published a manual for NGOs on how to monitor the execution of ECtHR judgments: Başak Çalı and Nicola Bruch, *Monitoring the Implementation of Judgments of the European Court of Human Rights. A Handbook for Non-Governmental Organisations* (London: University College London, 2011). The website of the Network can be found at http://www.einnetwork.org/ (accessed 4 January 2019).

[37] Dothan, *supra* n 6, 141-189. If the literature analysing in depth the promotion of the execution of ECtHR judgments by NHRIs is lacking, the literature on the activities by NGOs in the same area is also limited. The above-mentioned article by Dothan appears to be the only thorough study of the submissions by NGOs to the Committee of Ministers. There remain important differences between the approach of this dissertation and that of Dothan's article, which uses

frequently followed up at the execution stage by NGOs, Dothan distinguishes two main criteria: the "severity of the violation" found by the Court and the "legal importance of the case". Both can be identified on the basis of a number of "proxies" or indicators; the main indicator for the severity of the violation is the ECHR right infringed upon by the State concerned.[38] Table 4.3 below classifies the judgments in respect of which NHRIs submitted information on the basis of the provisions the infringement of which was ascertained by the Court.[39]

Table 4.3: Cases and articles infringed

Article infringed	Cases / Groups of cases
Article 2	*Al-Skeini and others v. the UK, Gharibashvili v. Georgia*, *Makharadze and Sikhariulidze v. Georgia*, *McKerr v. the UK, Muradyan v. Armenia, Taïs v. France*
Article 3	*Frérot v. France, Gharibashvili v. Georgia*, *Identoba and others v. Georgia* (alone and in conjunction with Article 14), *O'Keeffe v. Ireland*, *Orchowski and others v. Poland*, *P. and S. v. Poland, Popov v. France, Vinter and others v. the UK*
Article 4	*Chowdury and others v. Greece*
Article 5	*Merabishvili v. Georgia* (para. 3), *P. and S. v. Poland* (para. 1), *Popov v. France* (paras. 1 and 4)
Article 6	*McFarlane v. Ireland*
Article 8	*Frérot v. France, Gillan and Quinton v. the UK*, *Kurić and others v. Slovenia*, *Mennesson v. France*, *P. and S. v. Poland, Popov v. France*, *S. and Marper v. the UK*, *Winterstein and others v. France*, *Zorica Jovanović v. Serbia*
Article 11	*Identoba and others v. Georgia* (in conjunction with Article 14)
Article 13	*De Souza Ribeiro v. France* (in conjunction with Article 8), *Frérot v. France, Gebremedhin v. France* (in conjunction with Article 3), *Kurić and others v. Slovenia* (in conjunction with Article 8), *McFarlane v. Ireland*, *O'Keeffe v. Ireland* (in conjunction with Article 3)

quantitative methods to determine the efficacy of reputational sanctions for States' compliance with their international obligations.

[38] Dothan, *supra* n 6, 151 *et seqq*. Dothan further considers the granting of just satisfaction to the applicant (and its amount) an indicator for the severity of the violation. The author himself however recognises the limits of this indicator, as just satisfaction should be awarded by the Court "if the internal law of the High Contracting Party concerned allows only partial reparation to be made"; just satisfaction is not therefore in itself tied to the severity of the violation. At any rate, while NHRIs have often intervened with respect to judgments awarding relatively high sums as just satisfaction (10,000 euros or above), they also submitted information in relation to various cases where smaller amounts were awarded and even five cases where no just satisfaction at all was awarded.

[39] The table shows the main violations established by the ECtHR in each case (for groups of cases, in each leading case). Exceptionally, the *Identoba and others* group of cases can also be found under Article 14, because of the significance of the recognition by the Court of violations of Article 14 and even though the main Articles violated are 3 and 11 (in conjunction with Article 14). In the *Frérot* group of cases, a violation of Article 6 was also found, but was not dealt with by the CNCDH and the *Médiateur* in their communication.

Article 14	*D.H. v. the Czech Republic* (in conjunction with Article 2 Prot. no. 1), *Identoba and others v. Georgia*, *Kurić and others v. Slovenia* (in conjunction with Article 8)
Article 18	*Merabishvili v. Georgia* (in conjunction with Article 5(1))

As can be seen, most communications from NHRIs were submitted in respect of judgments establishing a violation of Article 2 (six cases or groups of cases), Article 3 (eight cases), Article 8 (nine cases), and Article 13 (six cases). Violations of Articles 2 and 3 are commonly considered serious *per se*, as these norms protect rights – the right to life and freedom from torture and ill-treatment respectively – which are non-derogable even in times of emergency. Applications alleging their violation are thus prioritised by the Court, as are applications alleging the violation of the rights protected by Articles 4 and 5(1), namely freedom from slavery and forced labour and the right to liberty and security, which, while derogable in times of emergency, are also considered "core rights".[40]

As for cases involving a violation of Article 13 (right to an effective remedy), they can also be considered as signalling severe breaches of the Convention; the observation that violations of this norm are often alleged by the applicants but rarely recognised by the ECtHR supports the claim that infringements of this right are established by the Court in the most serious cases only.[41] Analogous considerations apply to violations of Article 14 (prohibition of discrimination), which were found in three cases in relation to which NHRIs intervened; and, even more strongly, to violations of Article 18 (which regulates the restrictions on ECHR rights), as there have been only twelve cases in total where the ECtHR found a breach of this Article as of December 2018.

[40] Cf. ECtHR, *The Court's Priority Policy*, June 2009 as amended with effect from 22 May 2017, accessed 4 January 2019, http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

[41] Dothan, *supra* n 6, 153, explains: "Applicants often accuse states of violating their rights under Articles 13 or 14 in addition to the main violation covered by another article of the Convention. Usually, the ECHR decides that finding an additional violation besides the main violated article is unnecessary. But in rare cases when the discrimination of the applicants is severe or when the state doesn't provide any good remedy, the ECHR finds a violation of these articles as well. Accordingly, the existence of Article 13 and Article 14 violations can serve as a good proxy for the existence of severe and pervasive human rights violations".

Article 8, for its part, protects a wide range of rights connected to the respect for private and family life – from parental rights to the protection of personal data, from health rights to the protection of the secrecy of correspondence. Cases involving a violation of Article 8 and in respect of which NHRIs intervened are all sensitive cases or cases where a serious interference is at stake, as they concern the retention of DNA profiles and fingerprints in police databases (*S. and Marper v. the UK*),[42] "stop and search" powers of the police (*Gillan and Quinton v. the UK*),[43] the detention of aliens (*Popov v. France*)[44] and their expulsion from the territory (*De Souza Ribeiro v. France*),[45] the automatic and unannounced deprivation of resident status (*Kurić and others v. Slovenia*),[46] the lack of information concerning the fate of newborn babies (*Zorica Jovanović v. Serbia*),[47] the right to housing of Travellers (*Winterstein and others v. France*),[48] and access to lawful abortion (*P. and S. v. Poland*).[49] It can thus be said that NHRIs, similarly to NGOs, have tended to follow up the execution of judgments highlighting violations of core rights or severe violations of other rights (notably, the right to respect for private and family life in its various facets).

As to the legal importance of a case, Dothan identifies several indicators, including the HUDOC categorisation, the judge's formation (i.e., the size of the panel), and the presence of concurring or dissenting opinions.[50] These indicators are used here with respect to communications from NHRIs, while noting their limitations and adding other possible indicators.

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[42] ECtHR, *S. and Marper v. the UK* [GC], nos. 30562/04 and 30566/04, 4 December 2008.
[43] ECtHR, *Gillan and Quinton v. the UK,* no. 4158/05, 12 January 2010.
[44] ECtHR, *Popov v. France*, nos. 39472/07 and 39474/07, 19 January 2012. For the purposes of the supervision by the Committee of Ministers, this judgment has recently been joined with others – all delivered by the Fifth Section on 12 July 2016: *A.B. and others v. France*, no. 11593/12; *A.M. and others v. France*, no. 24587/12; *A.M v. France*, no. 56324/13; *R.C. and V.C. v. France*, no. 76491/14; *R.K. and others v. France*, no. 68264/14; and *R.M. and others v. France*, no. 33201/11.
[45] ECtHR, *De Souza Ribeiro v. France*, no. 22689/07, 30 June 2011; and ECtHR, *De Souza Ribeiro v. France* [GC], no. 22689/07, 13 December 2012.
[46] Three judgments were delivered in ECtHR, *Kurić and others v. Slovenia,* no. 26828/06: on 13 July 2010 (merits), 26 June 2012 (GC, merits and just satisfaction) and 12 March 2014 (GC, just satisfaction).
[47] ECtHR, *Zorica Jovanović v. Serbia*, no. 21794/08, 26 March 2013.
[48] ECtHR, *Winterstein and others v. France* (merits), no. 27013/07, 17 October 2013; and ECtHR, *Winterstein and others v. France* (just satisfaction), no. 27013/07, 28 April 2016.
[49] ECtHR, *P. and S. v. Poland*, no. 57375/08, 30 October 2012.
[50] Dothan, *supra* n 6, 158, considers the classification of a case as "leading" by the Committee of Ministers and the issuance of interim resolutions by the Committee as further proxies for the legal importance of a case. However, risks of

HUDOC is a database that includes all judgments and decisions by the ECtHR, except for those delivered by single judges. Judgments and decisions published in HUDOC are assigned an importance level ranging from 1 (high importance) to 3 (low importance), where "importance" refers to the significance of the ruling's "contribution to the development, clarification or modification of the Court's case-law".[51] Of even greater importance than level 1 rulings are so-called case reports or key cases – i.e., judgments and decisions selected for publication in the Court's official *Reports of Judgments and Decisions* and, since 2016, in the online collection of *Key Cases*.[52]

Fourteen out of twenty-five cases or groups of cases in which NHRIs intervened have been published as key cases,[53] while five have been classified as level 1 cases (*Orchowski and others v. Poland*, *McFarlane v. Ireland*, *Winterstein and others v. France*, *Frérot v. France*, and *Taïs v. France*). Five other cases or groups of cases have been assigned level 2 (*Identoba and others v. Georgia*, *Makharadze and Sikhariulidze v. Georgia*, *Popov v. France, P. and S. v. Poland,* and *Muradyan v. Armenia*), while a single group of cases has been assigned level 3 (the *Gharibashvili v. Georgia* group of cases).

These data show that a substantial majority of the cases that attracted the attention of NHRIs were considered by the Court of major legal significance. Nonetheless, NHRIs (which, as has been shown, do not frequently intervene) also forwarded communications in relation to cases that were attributed a lower level of importance under the HUDOC categorisation. It is submitted here that these cases appear legally important from a different perspective – namely, from a domestic one.

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reversed causality problems have been highlighted by Dothan himself as regards both indicators, as the classification of a case as "leading" and the issuance of interim resolutions could be the consequence of the participation by NGOs (or NHRIs), rather than the cause. These remarks are shared here, to the point that neither indicators will be used in this dissertation. Moreover, the usefulness of the classification of a case as "leading" can be questioned on additional grounds, as shown *infra*.

[51] Cf. ECtHR, *HUDOC User Manual,* updated 26 September 2016, 8, accessed 4 January 2019, https://www.echr.coe.int/Documents/HUDOC_Manual_2016_ENG.PDF.

[52] The *Reports of Judgments and Decisions* and *Key Cases* can be found at https://www.echr.coe.int/Pages/home.aspx?p=caselaw/reports&c= (accessed 4 January 2019).

[53] These cases are *Chowdury and others v. Greece, McKerr v. the UK*, *D.H. v. the Czech Republic*, *S. and Marper v. the UK*, *Gillan and Quinton v. the UK*, *Al-Skeini and others v. the UK*, *Kurić and others v. Slovenia*, *De Souza Ribeiro v. France*, *Zorica Jovanović v. Serbia*, *Vinter and others v. the UK*, *O'Keeffe v. Ireland*, *Mennesson v. France*, and *Gebremedhin v. France*. With respect to groups of cases, the leading case giving the name to the group has been considered.

Accordingly, NHRIs followed up judgments dealing with the lack of effective investigations into deaths and ill-treatment allegedly caused by law-enforcement officials and military personnel (*Muradyan v. Armenia, Gharibashvili v. Georgia,* and *Makharadze and Sikhariulidze v. Georgia*)[54] – judgments which do not significantly innovate the Court's case-law but highlight serious pitfalls in the national legislation or practice. Another example is the detention of asylum seekers; as there is by now a fairly consolidated ECtHR jurisprudence on the issue, the *Popov* group of cases would not be considered "important" under the HUDOC categorisation.[55] Nonetheless, the existence of a group of cases in itself points to a wider domestic shortcoming that the CNCDH and the *Défenseur des droits* sought to contextualise and solve.

Indeed, it appears that there is a difference between what is significant for the Court's decision and what is significant at the execution stage, and this is particularly evident in the case of NHRIs, the focus of whose submissions is usually on the state of the domestic legal orders and on the changes required to bring them into line with the ECtHR judgments. This hypothesis was confirmed by some representatives from participating NHRIs, who pointed to the need for the adoption of general measures at the domestic level as the main criterion determining their interventions before the Committee of Ministers.[56]

As to the judge's formation (or size of the panel), all twenty-five cases or groups of cases were decided by either a Chamber or the Grand Chamber. That is, no judgment in relation to which NHRIs submitted communications was issued by a Committee of three judges, which can deliver rulings on

[54] Cf. ECtHR, *Muradyan v. Armenia*, no. 11275/07, 24 November 2016. Cf. also ECtHR, *Gharibashvili v. Georgia*, no. 11830/03, 29 July 2008. As the Committee of Ministers closed, in September 2017, its examination of the *Gharibashvili* case, but not of all the related repetitive cases, the group of remaining cases has been renamed after *Tsintsabadze v. Georgia*, no. 35403/06, 15 February 2011. This dissertation, nonetheless, refers to the "Gharibashvili group of cases", as the name by which these cases – currently thirteen – have long been known. Cf., finally, the *Makharadze and Sikhariulidze v. Georgia* group of cases, which includes two cases: ECtHR, *Makharadze and Sikhariulidze v. Georgia,* no. 35254/07, 22 November 2011; and ECtHR, *Dzebniauri v. Georgia* (striking out), no. 67813/11, 9 September 2014.
[55] ECtHR, *Popov v. France, supra* n 44.
[56] Interviews with Collier, Equality and Human Rights Commission, *supra* n 21; and with Meskhoradze, Public Defender of Georgia, *supra* n 17.

issues that are the subject of a consolidated ECtHR jurisprudence and should hence require a more straightforward supervision of execution.[57]

As far as the presence of separate opinions is concerned (either dissenting or concurring), out of twenty-eight judgments on the merits delivered in the leading cases at issue, fourteen include separate opinions.[58] This number highlights a propensity by NHRIs to submit observations in relation to cases to which separate opinions are attached, as the delivery of separate opinions is rather uncommon in the ECtHR practice.[59] Nonetheless, it should be considered that, while this indicator usually points to legally *controversial* cases, it does not necessarily characterise legally *important* cases, on which the panel's judges might all agree. Moreover, separate opinions are more common in Grand Chamber's judgments, also in light of the larger number of judges sitting in the panel, so that the relatively high number of Grand Chamber's judgments in relation to which NHRIs intervened might affect the number of judgments with separate opinions that NHRIs followed up. Finally, it would be appropriate to distinguish between all kinds of separate opinions (concurring, dissenting, partly concurring and partly dissenting) and analyse the number of judges joining a separate opinion.[60]

Dothan considers the classification of a case as "leading" by the Committee of Ministers a further potentially relevant indicator of the legal importance of a case. "Leading cases" are cases that have "been identified as revealing new structural and/or systemic problems, either by the Court directly in its judgment, or by the Committee of Ministers in the course of its supervision of

[57] Even though, as mentioned, the legal significance of a case for the ECtHR might differ from the legal significance of a case from the point of view of its domestic implementation. Since single judges may only declare cases inadmissible, NHRIs could not follow up their decisions at the execution stage.

[58] Separate opinions can be found in *Merabishvili v. Georgia*, *P. and S. v. Poland*, *D.H. v. the Czech Republic* (in both the Chamber's and Grand Chamber's judgments), *Identoba and others v. Georgia*, *McFarlane v. Ireland*, *Al-Skeini and others v. the UK*, *Kurić and others v. Slovenia* (only in the Grand Chamber's judgment on the merits), *De Souza Ribeiro v. France* (in both the Chamber's and Grand Chamber's judgments), *Vinter and others v. the UK*, *Winterstein and others v. France*, *O'Keeffe v. Ireland*, and *Taïs v. France*.

[59] In the absence of more recent data, those provided by Dothan, *supra* n 6, 157, can be referred to: according to them, in the period from January 2008 to October 2013, 10.89% of ECtHR judgments included at least one separate opinion. Dothan defines the difference between the number of judgments with separate opinions in the general population and the number of judgments with separate opinions that were followed up by NGOs as "statistically significant" (ibid.).

[60] For a thorough study of ECtHR separate opinions, cf. Robin C. A. White and Iris Boussiakou, "Separate Opinions in the European Court of Human Rights", *Human Rights Law Review* 9, no. 1 (2009): 37-60, which also mentions previous studies on the issue.

execution", as opposed to "repetitive cases", which "relat[e] to a structural and/or general problem already raised before the Committee in the context of one or several leading cases".[61] A third category, that of "isolated cases", which should apply to cases only requiring individual measures to remedy the ECHR violations found, seems to exist only in theory and has apparently not been used for any judgment supervised by the Committee of Ministers, at least in recent years.[62]

The usefulness of this indicator is doubtful. First of all, both leading and repetitive cases highlight national structural shortcomings requiring general measures to be remedied (leading cases raise new issues, while repetitive cases show that the issues raised by previous leading cases have not been solved yet and have led to fresh violations of the Convention), so that NHRIs can be expected to intervene in relation to both leading and repetitive cases. On the other hand, since for the purposes of the supervision of execution repetitive cases are grouped with the related leading case, NHRIs would intervene in relation to either individual leading cases or groups comprising a leading *and* one or more repetitive cases.[63] While submissions by NHRIs would not be expected in relation to "isolated cases", it is currently impossible to verify this assumption for the lack of use of this category in practice. NHRIs have not intervened with respect to friendly settlements to date.

It is clear that the Committee of Ministers increasingly considers some kind of general measures necessary to fully implement a judgment. As general measures might be as simple as the dissemination of the ECtHR judgment in question among the relevant actors (e.g., judges or law-enforcement agencies), the *kind* of general measures required could be a more relevant indicator of the legal importance of a case. While the content of communications from NHRIs are analysed in greater detail below, participating NHRIs have often recommended the adoption of one or more of

[61] Cf. the "Glossary" section on the website of the Department for the Execution of Judgments of the Court, at https://www.coe.int/hy/web/execution/glossary?desktop=false#{"15005454":[]} (accessed 4 January 2019).
[62] The category of "isolated cases" can be found in the above-mentioned Glossary (ibid.), but not in the HUDOC-EXEC database. The only other category existing in this database, in addition to those of leading and repetitive cases, is that of friendly settlements.
[63] Considering that NHRIs submit information almost exclusively in relation to general measures, which affect all judgments of a group. It should be noted that the termination of the supervision by the Committee of Ministers of the leading *Gharibashvili* case did not prevent the Georgian Public Defender from submitting a further communication in relation to the remaining repetitive cases of the group which are still pending (cf. *supra* n 30); at any rate, the *Tsintsabadze v. Georgia* case has now become the leading case for the group (cf. *supra* n 54).

the following measures: amendments to laws or regulations, changes in the administrative practice, and adjustments to the judicial interpretation and application of norms. Therefore, NHRIs, as could be expected, intervened when they considered that more complex measures were needed than the mere dissemination of the ECtHR judgment in question among competent public bodies.

Another classification adopted by the Committee of Ministers at the execution stage appears more telling, namely the distinction between "enhanced" and "standard" supervision. Following the Interlaken Declaration, a "twin track supervision system" has been devised and put into use since 2011. On the basis of this new working method, certain types of judgments – those requiring urgent individual measures, pilot judgments, judgments disclosing major structural and/or complex problems (as identified by the Court or the Committee of Ministers), and judgments in inter-State cases – are prioritised and subject to closer ("enhanced") supervision by the Committee of Ministers.[64] This more thorough process of examination is not limited to the opportunity to debate the case at the meetings of the Committee, but it would normally imply stronger cooperation between the Member State concerned and the Department for the Execution of Judgments with a view to fully implementing the judgment, as well as the adoption of a larger number of interim resolutions and decisions by the Committee.[65]

The two categories are not, at any rate, strictly separated: a case under enhanced supervision may be transferred to standard supervision if sufficient progress in the execution is shown on the part of the State concerned; conversely, a case under standard supervision may be moved to enhanced supervision, for instance when delays in the implementation of the appropriate measures occur or

[64] Cf. Committee of Ministers, *Supervision of the execution of judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – Modalities for a twin-track supervision system*, 6 September 2010, CM/Inf/DH(2010)37; and Committee of Ministers, *Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – Outstanding issues concerning the practical modalities of implementation of the new twin track supervision system*, 7 December 2010, CM/lnf/DH(2010)45 final. These documents were preceded by Committee of Ministers, *Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – elements for a roadmap*, 24 June 2010, CM/Inf(2010)28-rev.

[65] Cf. the documents referred to in the footnote above.

when the measures proposed by the State concerned do not meet the expectations of the Committee of Ministers or the Department for Execution.

The distinction between enhanced and standard supervision appears to be more suitable for our purposes than that between leading and repetitive cases, as the examination of a case under enhanced supervision should be the exception and apply to judgments the execution of which is particularly complex or problematic. Of the twenty-four cases or groups of cases in which NHRIs intervened,[66] eighteen have been placed under enhanced supervision at some point during their consideration by the Committee of Ministers. Four of these cases were transferred from enhanced to standard supervision, while one underwent the opposite process (the possible impact of submissions by NHRIs on these transfers are examined in the following sections of this chapter).[67] If one considers that, at the end of 2017, leading cases under enhanced supervision were less than a third of leading cases under standard supervision,[68] the tendency of NHRIs to submit communications with respect to cases under enhanced supervision is clear.

At any rate, as the criteria for this classification leave a certain margin of discretion to the Committee of Ministers and the Department for Execution (particularly as far as judgments raising "major structural and/or complex problems" are concerned), it may happen that cases requiring even articulated general measures are placed under standard supervision; or that some cases prove to need more complex measures than anticipated; or that even minor progress prompts the transfer of a case from enhanced to standard supervision with a view to encouraging the State concerned. Therefore, the distinction itself between enhanced and standard supervision should be taken with a grain of salt.[69]

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[66] As the supervision of *Taïs v. France* was closed before the entry into force of the new working methods, this case has not been included.

[67] The former are *O'Keeffe v. Ireland*, *Kurić and others v. Slovenia*, *Al-Skeini v. the UK*, and *S. and Marper v. the UK*; the latter is *McFarlane v. Ireland*.

[68] Cf. Department for the Execution of Judgments, *Pending Cases. Detailed statistics from 2011 to 2017*, accessed 4 January 2019, https://www.coe.int/en/web/execution/statistics#{%2234782408%22:[]}.

[69] Notwithstanding the fact that the placement of a case under standard or enhanced supervision is not always based on straightforward criteria, it appears that the States concerned and the Committee of Ministers give increasing importance to this classification as regards the implementation efforts and the degree of supervision respectively: Başak Çali, "Reflections on the 2016 Annual Report of the Committee of Ministers on the Execution of ECtHR Judgments", *EIN News*, 9 July 2017, accessed 4 January 2019, http://www.einnetwork.org/ein-news-past-editions/2017/7/9/reflections-on-the-cm-2016-annual-report-on-the-execution-of-ecthr-judgments.

It can thus be preliminarily concluded that NHRIs tend to intervene with respect to cases highlighting serious violations and/or cases of major legal importance, similarly to what was found by Dothan with respect to NGOs. As mentioned, however, the "legal importance" of a case should be interpreted as covering cases that are legally significant from the perspective of the national legal order as well.

Additionally, it seems that at least another criterion should be taken into consideration when analysing the kinds of judgments that attract the attention of NHRIs: namely, the expertise that NHRIs have developed on a certain topic before intervening, on the basis of the activities that they have undertaken at the national level – e.g., inquiries, recommendations to national authorities, or *amicus curiae* briefs before domestic courts.

While this aspect was not always underlined by interviewees from participating NHRIs,[70] the previous examination of a matter at the domestic level and thus the ability to provide first-hand data and reasoned analysis appear to be a relevant factor in the decisions by NHRIs to intervene. For instance, as noted, various NHRIs followed up judgments related to the conditions of detention and ill-treatment by law-enforcement officials: the Commissioner for Human Rights of Poland highlighted a systemic problem of degrading prison conditions in the country in the *Orchowski and others* group of cases;[71] the CNCDH and the *Défenseur* dealt with the excessive use of force by the police and the lack of medical care in detention (*Taïs* case),[72] full body searches of detainees and the violation of the privacy of their correspondence (*Frérot* group of cases),[73] and the detention of migrant families with minors (*Popov* group of cases);[74] the Public Defender of Georgia reported on

[70] Nonentheless, a representative from the CNCDH indicated that the previous development of a "doctrine" by the Commission at the national level regarding a certain matter constitutes the main criterion determining third-party interventions and Rule 9(2) submissions by the CNCDH (interview with Dumortier, CNCDH, *supra* n 28). According to Dumortier, this previous involvement of the Commission at the domestic level would commonly consist either in the examination of bills and laws or in more general warnings and views expressed by the CNCDH.
[71] ECtHR, *Orchowski and others v. Poland*, no. 17885/04, 22 October 2009. The *Orchowski* judgment has been a leading case for eleven repetitive cases, two of which are still pending before the Committee of Ministers.
[72] ECtHR, *Taïs v. France*, no. 39922/03, 1 June 2006.
[73] This group of cases includes ECtHR, *Frérot v. France*, no. 70204/01, 12 June 2007; and ECtHR, *Khider v. France*, no. 39364/05, 9 July 2009.
[74] For the references of the *Popov* group of cases, cf. *supra* n 44.

deaths in custody as a result of inadequate medical assistance (*Makharadze and Sikhariulidze* group of cases),[75] on the use of video-surveillance in penitentiaries and the storage of recordings (*Merabishvili* case),[76] and on the lack of effective investigations into the ill-treatment allegedly perpetrated by law-enforcement officials during arrest or in custody (*Gharibashvili* group of cases).[77]

As mentioned, communications from NHRIs in these instances might be determined by the seriousness of the violation; additionally or alternatively, they might be prompted by the domestic responsibilities of NHRIs in monitoring detention conditions. Indeed, the Georgian and Polish ombudsmen act as the National Preventive Mechanisms (NPMs)[78] for their countries and therefore routinely visit places of detention and issue reports on prison conditions. The French NPM is the *Contrôleur général des lieux de privation de liberté*, created in 2008; nonetheless, its functions were previously exercised by the *Médiateur* (predecessor of the *Défenseur*) and both the *Défenseur* and the CNCDH collaborate with the *Contrôleur* and complementarily deal with prison conditions by advising the Parliament and Government on criminal and prison reforms (the CNCDH especially)[79] and by carrying out investigative and complaint-handling activities in related fields (the *Défenseur*, which is now competent on children rights, anti-discrimination, and the ethics of law enforcement).

The communications submitted by the Northern Ireland Human Rights Commission in the *McKerr* group of cases,[80] relating to the delays and shortcomings affecting the investigations into the killings carried out or covered up by the UK security forces in Northern Ireland between the 1980s and the 1990s, are another example of a solid understanding by an NHRI of the issues raised by

[75] For the references of the *Makharadze and Sikhariulidze* group of cases, cf. *supra* n 54.
[76] ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017.
[77] For the references of the *Gharibashvili* group of cases, cf. *supra* n 54.
[78] NPMs are national bodies entrusted by the UN Optional Protocol to the Convention against Torture with the prevention of torture and inhuman or degrading treatment or punishment at the domestic level. This preventive function is chiefly discharged by NPMs by way of visits to penitentiaries and other places where people are deprived of their liberty. On the role of NHRIs as NPMs, cf. Section 3.5 of this dissertation.
[79] Examples of recommendations (*avis*) by the CNCDH can be found at http://www.cncdh.fr/fr/avis, accessed 4 January 2019. The CNCDH also issued reports such as CNCDH, *Sanctionner dans le respect des droits de l'homme. Les droits de l'homme dans la prison – Volume 1* (Paris: La Documentation Française, 2007).
[80] This group of cases includes the following ECtHR judgments: *McKerr v. the UK*, no. 28883/95, 4 May 2001; *Kelly and others v. the UK,* no. 30054/96, 4 May 2001; *Finucane v. the UK*, no. 29178/95, 1 July 2003; *McCaughey and others v. the UK,* no. 43098/09, 16 July 2013; and *Collette and Michael Hemsworth v. the UK,* no. 58559/09, 16 July 2013.

ECtHR judgments. Indeed, the Northern Irish and Irish commissions were both born as post-conflict NHRIs and enshrined in the so-called Good Friday agreement; therefore, while the Northern Ireland Human Rights Commission has a wide-ranging mandate, the investigation (or monitoring of the investigations) into the human rights violations occurred during the lengthy conflict is an important component of the institution's mission of re-building a peaceful society on the basis of justice and human rights.[81]

The expertise of the CNCDH on the rights of Roma and Travellers has been recognised by the ECtHR itself which, in the *Winterstein and others* judgment, mentioned, under the section "relevant domestic law and practice", a thorough CNCDH report compiled in 2008 on the conditions of Roma and Travellers in France and a 2012 recommendation by the same body concerning these minorities, including their housing situation.[82] Reference to the 2008 report was also made by one of the NGOs submitting information to the Committee of Ministers on the same case.[83]

Similarly, in the *Zorica Jovanović* case, the ECtHR mentioned a report by the Serbian Protector of Citizens on the "missing babies cases" – i.e., cases of newborns who allegedly died right after birth but whose fate remains uncertain in the absence of convincing and complete information from the competent authorities.[84] The authoritativeness of the report by the Protector is evident in several respects, as it contributed to the flexible approach adopted by the Court as regards the six-month

[81] Cf. the "About us" section on the Commission's website, accessed 4 January 2019, http://www.nihrc.org/about-us. Cf. also, for various references to the particular mandate and powers of the Northern Ireland NHRI, Anne Smith, "The Unique Position of National Human Rights Institutions: A Mixed Blessing?", *Human Rights Quarterly* 28 (2006): 904-946; and Stephen Livingstone and Rachel Murray, *Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission with Comparisons from South Africa* (Nuffield Foundation, 2005).

[82] ECtHR, *Winterstein and others v. France* (merits), *supra* n 48, paras. 65-67. The two CNCDH documents referred to are *Étude et propositions sur la situation des Roms et des gens du voyage en France*, 7 February 2008; and *Avis sur le respect des droits des « gens du voyage » et des Roms migrants*, 22 March 2012. Cf. also the annual reports by the CNCDH on the fight against racism, as well as the two following recommendations: *Avis portant sur le projet de loi relatif à l'accueil des gens du voyage*, 17 June 1999, and *Avis sur le droit à l'eau potable et à l'assainissement,* 23 June 2011 (on the right to water and sanitation, including for Travellers).

[83] Committee of Ministers/Secretariat General, *1222 meeting (10-12 March 2015) (DH). Communication from a NGO (ATD Quart Monde) (20/01/2015) in the case of Winterstein and others against France (Application No. 27013/07) and reply from the authorities (28/01/2015)*, 11 February 2015, DH-DD(2015)167, 3.

[84] The parents suspect that their children were put up for adoption; hundreds of children born between the late 1960s and the 1990s are believed to be involved. For the references of the case, cf. *supra* n 47.

rule[85] and to the delivery of a pilot judgment. The ECtHR also suggested the adoption of measures that appear to be based on those recommended by the Protector.[86]

As explained in the report, the Protector was directly involved in the matter as a result of three complaints filed by the parents of missing babies; the impossibility for the Protector to formally follow up those complaints, since the facts in question preceded the establishment of the institution, did not prevent it from writing the report and issuing recommendations to the public authorities concerned. Following the ECtHR judgment, the Protector has been highly involved in the domestic consultations about the investigations into wrongdoing and about redress for families, and it has reported to the Committee of Ministers on national developments.[87]

A comparable previous domestic involvement is that of the Slovenian Human Rights Ombudsman in the matter of the "erasure" of the resident status of Yugoslavian citizens living in Slovenia when the country's independence was declared in 1991. Since then, the legal status of and material consequences for former residents who did not apply for Slovenian citizenship or whose applications were rejected have been at the centre of the public debate, leading *inter alia* to various interventions by the legislature, declarations of partial unconstitutionality by the Constitutional court, and public apologies by members of the executive.

The Human Rights Ombudsman was predictably involved in the solution of a problem affecting thousands of residents and ex-residents of Slovenia; indeed, since its inception, the institution has received complaints on the matter and issued reports and recommendations for the attention of the Parliament and Government.[88] The Ombudsman was also asked, by some of the applicants in the *Kurić and others* case, to apply for a constitutional review of the most recent acts regulating the status

[85] ECtHR, *Zorica Jovanović v. Serbia*, *supra* n 47, paras. 56-57.
[86] Ibid., para. 92.
[87] Cf., in particular, Committee of Ministers/Secretariat General, *1250 meeting (8-10 March 2016) (DH). Communication from the Mediator (Ombudsman) (29/02/2016) and reply from the authorities (04/03/2016) in the case of Zorica Jovanović against Serbia (Application No. 21794/08),* 4 March 2016, DH-DD(2016)254.
[88] Committee of Ministers/Secretariat General, *1250 meeting (8-10 March 2016) (DH). Communication from a national institution of human rights (Ombudsman) (10/12/2015) in the case of Kurić and others against Slovenia (Application No. 26828/06),* 17 December 2015, DH-DD(2015)1380, 5-6.

of and compensation for the "erased";[89] the communication from the Ombudsman to the Committee of Ministers illustrates the grounds for its refusal to do so as well as its opinion on the acts at issue. It should be noted, incidentally, that this submission is a testament to the fact that communications from NHRIs are not necessarily in favour of the applicants (the issue is dealt with in greater detail in the next section).

From the communication of the *Défenseur des droits* in the *De Souza Ribeiro* case, it clearly emerges that the *Défenseur* has long dealt with expulsion procedures against aliens, with particular regard to French overseas territories, where a derogatory regime is in place. The *Défenseur* refers to various third-party submissions that it lodged with domestic courts as well as to the general recommendations that it addressed to the competent public authorities.[90]

The Armenian Human Rights Defender, within which a dedicated Department for Protection of Criminal Procedure Rights and Rights of Military Servicemen has operated since 2016 and which routinely receives individual complaints from servicemen, intervened in a case concerning the death of a member of the armed forces;[91] whereas the Greek National Human Rights Commission listed the numerous recommendations that it had addressed to the Government in relation to the phenomena of human trafficking and forced labour in Greece before the *Chowdury and others* judgment.[92]

Countries whose governments launch wide public consultations on topical issues certainly promote the involvement of NHRIs; the United Kingdom is a case in point. The *Gillan and Quinton* case put under scrutiny the power of police officers, under section 44 of the Terrorism Act 2000, to

[89] The power of the Slovenian Ombudsman to initiate a constitutional review is provided for in the Slovenian Law on the Constitutional Court. The relevant Articles, translated in English, can be found at http://www.varuh-rs.si/legal-framework/constitution-laws/law-on-the-constitutional-court/?L=6 (accessed 4 January 2019).
[90] Committee of Ministers/Secretariat General, *1265 meeting (20-22 September 2016) (DH). Communication from the Rights Defender (07/06/2016) and reply from the authorities (15/06/2016) in the case of De Souza Ribeiro against France (Application No. 22689/07),* 23 June 2016, DH-DD(2016)769, 4-5 and 9-14 (including an *amicus curiae* brief submitted by the *Défenseur* to the French Council of State). For the references of the *De Souza Ribeiro* case, cf. *supra* n 45.
[91] ECtHR, *Muradyan v. Armenia*, *supra* n 54.
[92] Cf. ECtHR, *Chowdury and others v. Greece*, no. 21884/15, 30 March 2017; and Committee of Ministers/Secretariat General, *1331 meeting (December 2018) (DH). Communication from the Greek National Commission for Human Rights (12/10/2018) in the case of Chowdury and others v. Greece (Application No. 21884/15)*, 6 November 2018, DH-DD(2018)1074, 8 (footnote 1).

"stop and search" people even in the absence of a reasonable suspicion that they are terrorists.[93] Following the ECtHR judgment, the UK Government initiated a review of some counter-terrorism measures and the Equality and Human Rights Commission put forward its views;[94] the Commission also submitted information within the process of parliamentary scrutiny that followed.[95] Being unsatisfied with the new bill debated in Parliament as well as with the provisional measures adopted meanwhile, the Commission addressed the Committee of Ministers and asked to transfer the case from standard to enhanced supervision.[96]

Similarly, a public consultation was opened by the UK Home Office on the retention of DNA and fingerprint data as a consequence of the ECtHR judgment in *S. and Marper v. the UK*.[97] As highlighted by the Northern Ireland Human Rights Commission in its first communication to the Committee of Ministers, the Northern Ireland Office itself (i.e., the UK Government department responsible for Northern Ireland) asked the Commission to participate in the consultation.[98] The Commission did so and also shared its position with the Committee of Ministers, thus keeping the Committee updated on national developments.

These cases also make clear that it might be the ECtHR judgment that puts a human rights breach under the spotlight, thus prompting NHRIs to further investigate at the national level failures highlighted at the international one. By way of example, the interest of the Equality and Human Rights Commission towards so-called whole-life orders and the possibility of release seems to follow the ECtHR judgment in *Vinter and others v. the UK*;[99] in a similar way, the responsibilities of the UK

[93] ECtHR, *Gillan and Quinton v. the UK, supra* n 43.
[94] For the documentation relating to the review process, cf. the following webpage of the UK Government: https://www.gov.uk/government/publications/review-of-counter-terrorism-and-security-powers (4 January 2019).
[95] The national initiatives of the Equality and Human Rights Commission are described in Committee of Ministers/Secretariat General, *1115 DH meeting (June 2011). Communication from National Human Rights Institution (NHRI) in the case of Gillan and Quinton against the United Kingdom (Application No. 4158/05) and reply of the government,* 31 May 2011*,* DH-DD(2011)419. The *Parliamentary submission to the Joint Committee on Human Rights* is also attached as Annex 1.
[96] Ibid., paras. 1-2 and 15.
[97] ECtHR, *S. and Marper v. the UK, supra* n 42.
[98] Northern Ireland Human Rights Commission, *Response to Home Office Consultation on 'Keeping the Right People on the DNA Database'*, July 2009, para. 2.
[99] Cf. ECtHR, *Vinter and others v. the UK* [GC], nos. 66069/09, 130/10 and 3896/10, 9 July 2013 (relinquishment); and Committee of Ministers/Secretariat General, *1214 meeting (2-4 December 2014) (DH). Communication from a national institution for the promotion and protection of human rights (Equality and Human Rights Commission) (16/09/2014) in*

Government for the deaths caused by its armed forces during the Iraqi war drew renewed attention after the *Al-Skeini and others* judgment.[100]

In December 2017, the Public Defender of Georgia submitted, in relation to three groups of ECtHR cases, a study on the disciplinary proceedings against law-enforcement officials which highlighted the widespread failures of the Georgian public authorities to investigate and punish the wrongdoing of their officials.[101] As mentioned at the beginning of the report, the Public Defender has been focusing on this matter at least since 2013, on the basis of the numerous complaints received, and issuing recommendations to the bodies concerned as well as a more general one to create "an independent investigatory mechanism".[102] By then, various cases raising the same issues had already been decided by the ECtHR, including the leading *Gharibashvili* and *Tsintsabadze* cases.

Similarly, the activities of the Polish Commissioner for Human Rights in the area of access to abortion procedures, in terms of both investigations and recommendations to public authorities, appear to have intensified after some landmark ECtHR judgments against Poland, including the *Tysiąc* and *R.R.* judgments, which preceded the *P. and S.* case.[103]

Causal relationships are blurred here, but it is not the aim of this dissertation to dissect them; the general proposition is that NHRIs tend to intervene at the CoE level in relation to issues of which they have already gained a sufficiently solid experience and understanding at the national level, which can also come as a result of ECtHR judgments.

Nonetheless, there can be instances where an NHRI has not developed a long-term and consistent experience at the domestic level in a certain matter but considers that it has the ability and

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the case of Vinter and others against United Kingdom (Application No. 66069/09) and reply from the authorities (24/09/2014), 3 October 2014, DH-DD(2014)1150, 4.

[100] ECtHR, *Al-Skeini and others v. the UK* [GC], no. 55721/07, 7 July 2011 (relinquishment).

[101] Cf. *supra* n 30.

[102] Ibid., 5.

[103] Cf. ECtHR, *P. and S. v. Poland, supra* n 49; and Committee of Ministers/Secretariat General, *1324 meeting (September 2018) (DH). Communication from the Commissioner for Human Rights (Ombudsman) (31/08/2018) in the case of P. and S. v. Poland (Application No. 57375/08)*, 31 August 2018, DH-DD(2018)802, 6 *et seqq*. especially, where the domestic activities carried out in the area by the Commissioner are outlined.
Cf. also ECtHR, *Tysiąc v. Poland*, no. 5410/03, 20 March 2007; and ECtHR, *R.R. v. Poland,* no. 27617/04, 26 May 2011.

interest to intervene anyway. In the *Mennesson* group of cases,[104] regarding the status of children born from surrogacy abroad, the CNCDH submitted a communication to argue that the status of these children was still uncertain in France,[105] even though it appears that the CNCDH only touched upon the topic of surrogacy in 2011 in relation to the bill on bioethics with a view to supporting the existing ban on surrogacy in the country.[106] The significance of the legal changes perceived by the NHRI as necessary, the existence of other cases decided by or pending before the ECtHR raising the same issues, as well as the centrality of the topic in the public debate, arguably prompted the decision of the CNCDH to intervene.

To conclude, it appears that NHRIs are most likely to intervene at the international level in matters that they have already dealt with at the domestic one in the exercise of their national mandates. This would be the case especially for NHRIs that do not have the resources to initiate studies or investigations following each ECtHR judgment which is delivered against their countries. Nonetheless, it may be that an ECtHR judgment prompts the NHRI to tackle a certain issue; this circumstance arguably increases the likelihood that the NHRI, in addition to undertaking the usual domestic activities in relation to human rights violations, would follow up the issue at the international level, provided that the institution is aware of the opportunity to submit its views to the Committee of Ministers under Rule 9(2).

It might be objected that these conclusions are obvious, and that it is not a prerogative of NHRIs to intervene in cases in relation to which they have developed expertise. While it is accepted here that

[104] ECtHR, *Mennesson v. France*, no. 65192/11, 26 June 2014. Three more judgments considered repetitive were joined to the *Mennesson* judgment for the purposes of supervision: these are *Labassee v. France*, no. 65941/11, 26 June 2014; *Foulon and Bouvet v. France*, nos. 9063/14 and 10410/14, 21 July 2016; and *Laborie v. France*, no. 44024/13, 19 January 2017.

[105] Committee of Ministers/Secretariat General, *1294 meeting (September 2017) (DH). Communication from the "Commission nationale consultative des droits de l'homme" (11/09/2017) and reply from the authorities (13/09/2017) in the case of Mennesson v. France (Application No. 65192/11)*, 13 September 2017, DH-DD(2017)1001.

[106] CNCDH, *Avis sur le projet de loi relatif à la bioéthique,* 3 February 2011, which, however, highlighted that some members of the CNCDH "s'interrogent sur la possibilité de faire évoluer la législation permettant aux parents de reconnaître l'enfant né à l'étranger de gestation pour autrui" (para. 4). In the end, the existing surrogacy regime was not amended, even though the issue was debated and was the subject of a comparative study: Sénat/Service des études juridiques, *Les documents de travail du Sénat. Série Législation compare. La gestation pour autrui,* January 2008, accessed 4 January 2019, https://www.senat.fr/lc/lc182/lc182_mono.html.

this must generally be the case for NGOs too,[107] what I would like to emphasise is the relevance of the domestic activities of NHRIs for their international ones, as well as the proximity of NHRIs to national debates on human rights – a proximity that is at least less pronounced in the case of transnational NGOs.

Moreover, while decisions by NGOs to follow up cases are – naturally and legitimately – guided by advocacy aims, or by the interests of their members in the case of membership-based NGOs, the selection of cases by NHRIs appears, to a certain degree, more externally-driven. Indeed, in addition to the priorities set by and for themselves, NHRIs are to some extent "constrained" by the kind of complaints that are lodged with them or by the bills currently under discussion in parliament and on which their opinion is requested (again, this is especially the case for institutions with rather limited resources).

Finally, another aspect that is considered by Dothan is the type of States – low-reputation or high-reputation ones – which attract submissions by NGOs the most. While the distinction is relevant for NGOs, which are often transnational and, in any case, rarely tied to a specific State, NHRIs have always intervened, and are expected to continue to do so, with respect to the States that established them and in which they operate. National human rights structures, be they NHRIs *sensu stricto* or ombudsmen, are domestic public bodies whose expertise consists in the thorough knowledge of the national legal system and human rights situation, and it is this particular knowledge that is valued at the international level. NHRIs do not therefore choose cases on the basis of the State involved and of its reputation; the fact that the NHRIs from some European States only have participated, as has been shown, mainly depends on NHRIs themselves – particularly on their knowledge of the procedure and on their resources.

Nonetheless, States can be a relevant factor as far as their willingness and promptness in the execution of judgments is concerned: as highlighted in the previous section, States that swiftly

[107] But this aspect is not analysed in Dothan, *supra* n 6.

implement ECtHR judgments make submissions by NHRIs needless. Moreover, as mentioned, the relationship between State authorities and NHRIs plays a role: i.e., if there is an ongoing and productive dialogue between the government and the NHRI at the national level, the NHRI will not need to have recourse to an instrument of international pressure.

4.4. What: the content of communications

As to the content of communications submitted by NHRIs, I posited a six-pronged categorisation on the basis of the characteristics of NHRIs and their expected contribution to the procedure, refined it after a preliminary cursory reading of the communications, and finally tested it through an exhaustive examination of the communications. Firstly, communications from NHRIs may contain different or complementary information compared to that provided by governments – e.g., concerning the legislation and its interpretation, or the administrative or judicial practice, as well as information in the form of statistical data.

Secondly, communications may include the views of NHRIs on the suitability of the actions proposed or undertaken by governments to give execution to the ECtHR judgments. After the 2010 reform of the Committee of Minister's working methods, this kind of submissions should especially follow the filing of action plans on the part of governments. In these instances, the submissions by NHRIs might also enshrine alternative proposals to remedy the violations ascertained and prevent future ones.

Thirdly, communications from NHRIs can challenge governmental assertions that the measures proposed and agreed upon with the Committee of Ministers have been enacted. After the reform, these communications should typically respond to the governments' action reports and object to their accuracy.

Fourthly, while it is expected that most communications from NHRIs would refer to the adoption and enactment of general measures, nothing prevents NHRIs from expressing their views on the adequacy and actual implementation of individual measures.

Fifthly, in view of their pluralistic composition as well as institutional cooperation with a variety of national and international actors, NHRIs could use their submissions to convey the views of these other actors – be they NGOs with which NHRIs cooperate at the national level or international monitoring bodies with which NHRIs interact.

Sixthly, NHRIs might make (what can be defined as) procedural requests by asking the Committee of Ministers to transfer a case from standard to enhanced supervision or vice versa, keep it under standard or enhanced supervision, keep it under examination in general (i.e., not close it), or refer a case back to the ECtHR in the context of interpretation or infringement proceedings.

An analysis of all of the communications forwarded by NHRIs to the Committee of Ministers shows that these documents frequently consist of a combination of the first three above-mentioned elements: namely, NHRIs supply the Committee with new information, or information that contrasts with that provided by governments, and on these bases dispute the appropriateness, exhaustiveness and/or actual implementation of the measures proposed or taken by the governments. The other elements, when present, normally add to the former ones and strengthen or widen the content of the submissions.

As to the provision of information, the kind of alternative or additional information brought by NHRIs has greatly varied. To start with, it is common for NHRIs – based on their in-depth knowledge of the national legislation, administrative practice, and case-law – to contextualise, for the benefit of an international audience, internal provisions, administrative measures or judgments by illustrating their legal value and practical effects at the domestic level.

In the *McFarlane* group of cases, which addresses the issue of delays in criminal proceedings and the lack of effective remedies against these delays, the Irish Human Rights Commission gave a broad overview of the relationship between the Irish Constitution and the ECHR as interpreted by domestic judges, as well as of the unaccountability of Irish judges (and of the Irish State) for the

damages caused in the exercise of their functions.[108] On the basis of this complementary information, the Irish NHRI claimed the unsuitability of the Government's response, which, by focusing on organisational aspects only, did not allow, in the opinion of the NHRI, for the full execution of the judgment.

In the *O'Keeffe* case,[109] the Irish Human Rights Commission objected to the characterisation of the action for damages under the European Convention on Human Rights Act 2003 as a suitable remedy for victims of sexual abuses at school. By underlining a number of hurdles that complainants would face in putting forward their claims, the Commission disagreed with the Government's assertion that the violation of Article 13 ECHR as established by the Grand Chamber had been remedied.[110] The difficulties encountered by individuals seeking justice at the domestic level were also dealt with in the submission filed by the CNCDH in the *Mennesson* group of cases, where the French NHRI contested the effectiveness of the procedure for the reopening of domestic proceedings following an ECtHR judgment.[111]

In the *Popov* group of cases, concerning the detention of migrant families with children, the CNCDH and the *Défenseur des droits* pointed to contradictions in the domestic jurisprudence as regards the right of minors to challenge their detention before a judge.[112] In the same communication, the two institutions also criticised the use of a ministerial *circulaire* to introduce changes in the detention regime of migrant families with minors; while it appeared that the governmental directive had mostly been applied, and alternatives to detention had generally been preferred with regard to

[108] Committee of Ministers/Secretariat General, *1120th DH meeting (13-14 September 2011). Communication from a National Human Rights Institution in the case of Mc Farlane against Ireland (Application No. 31333/2006)*, 4 August 2011, DH-DD(2011)573E, 5-10. Cf. also ECtHR, *McFarlane v. Ireland* [GC], no. 31333/06, 10 September 2010 (relinquishment). The *McFarlane* case has been a leading case for five repetitive cases, the supervision of which was closed in September 2018.
[109] ECtHR, *O'Keeffe v. Ireland* [GC], no. 35810/09, 28 January 2014.
[110] Committee of Ministers/Secretariat General, *1243 meeting (8-10 December 2015) (DH). Communication from a National Human Rights Institution (Irish Human Rights and Equality Commission) (19/10/2015) in the case of O'Keeffe against Ireland (Application No. 35810/09),* 29 October 2015, DH-DD(2015)1136, 7-10.
[111] Committee of Ministers/Secretariat General, *supra* n 105, 3-4.
[112] Committee of Ministers/Secretariat General, *1172 meeting (4-6 June 2013) (DH). Communication from national institutions for the promotion and protection of Human Rights (Commission nationale Consultative des Droits de l'Homme (CNCDH) et le Défenseur des Droits) (06/05/13) in the case of Popov against France (Application No. 39472/07)*, 27 May 2013, DH-DD(2013)588, 9-10.

this category of migrants, that instrument did not give rise to an enforceable right of the individuals concerned not to be placed in detention.[113]

The *Vinter and others* judgment, on its part, established a violation of Article 3 ECHR by the UK in light of the uncertainties surrounding the review of whole-life orders, which was exercised, in accordance with the Crime (Sentences) Act 1997, at the discretion of the Secretary of State on compassionate grounds. Following the Grand Chamber's judgment, the Court of Appeal (England and Wales) interpreted the above-mentioned Act as compatible with the ECHR by excluding that humanitarian reasons only could justify the review of life-imprisonment sentences.

The UK Government referred to the judgment by the Court of Appeal to affirm that it had executed the ECtHR ruling.[114] However, the Equality and Human Rights Commission highlighted that a Prison Service Order (a directive of the Secretary of State for Justice) still in force, to be read in conjunction with the Crime (Sentences) Act, clearly detailed the medical reasons that could lead to the review of an indeterminate sentence on compassionate grounds and did not provide for other reasons (such as the legitimate penological grounds referred to by the ECtHR).[115] According to the Commission, in the absence of an amendment to the Prison Service Order, it would be difficult to firmly establish a right of review of life sentences.[116]

The data supplied, interpreted or contested by NHRIs might also consist in numerical or statistical data. The *D.H.* case revolves around the discrimination, in the primary schools of the Czech Republic, of Roma children, whose social or health disadvantages have been routinely classified as "mild mental disabilities", so that a disproportionate number of Roma children have been placed in special schools or classes.[117] Presented by the Government with the figures of children from special schools or classes who had been re-diagnosed on the basis of new tools, the Public Defender of Rights

[113] Ibid., 11-12.
[114] Committee of Ministers/Secretariat General, *1208 meeting (23-25 September 2014) (DH). Communication from the United Kingdom concerning the case of Vinter and others against the United Kingdom (Application No. 66069/09)*, 1 July 2014, DH-DD(2014)857, para. 4.
[115] Committee of Ministers/Secretariat General, *supra* n 99, 4-5.
[116] Ibid., 5-6.
[117] ECtHR, *D.H. and others v. the Czech Republic*, no. 57325/00, 7 February 2006. The case was subsequently referred to the Grand Chamber, which issued its judgment on 13 November 2007.

of the Czech Republic maintained that the statistics were not "very revelatory", as they did not account for whether the transfer of children to standard classes actually took place nor for the ethnicity of the children who had been re-diagnosed.[118]

In a subsequent submission to the Committee of Ministers, the Public Defender again objected to the statistical data provided by the Government. Firstly, the Defender criticised the reference to the absolute number of Roma children educated in special classes, in place of the share of Roma children assigned to these classes.[119] By referring to the latter indicator instead, the Public Defender showed how, while the overall number of children educated in special classes had indeed decreased (and so had the absolute number of Roma children), the share of Roma children still placed in these classes had increased.[120] Secondly, the Czech Defender pointed to several pitfalls or uncertainties regarding the methodology used to collect the data in question.[121]

The Commissioner for Human Rights of Poland also provided the Committee of Ministers with elements to interpret official statistics differently. In its action plan addressing the *Orchowski and others* judgment, the Polish Government made reference to the data compiled by the Central Prison Service Board, according to which Polish prisons were used at around 96% of their capacity.[122] However, the Commissioner argued that, that percentage being an average, it did not reflect the fact that various detention facilities were overpopulated.[123] Moreover, on the basis of its experience as NPM, the Commissioner noted how, in order to avoid (nominal) overcrowding, prison administrators

[118] Committee of Ministers/Secretariat General, *1201 meeting (3-5 June 2014) (DH). Communications from the Public Defender of Rights (14/04/2014) in the case of D.H. against Czech Republic (Application No. 57325/00),* 30 April 2014, DH-DD(2014)569, 5-6.
[119] Committee of Ministers/Secretariat General, *1222 meeting (10-12 March 2015) (DH). Communication from the Public Defender of Rights (Ombudsman) (23/02/2015) in the case of D.H. and Others against Czech Republic (Application No. 57325/00)*, 3 March 2015, DH-DD(2015)248, 7-10.
[120] Ibid.
[121] Ibid., 10-11.
[122] Committee of Ministers/Secretariat General, *Action plan / action report – Communication from Poland concerning the cases of Orchowski and Sikorski against Poland (Applications No. 17885/04 and 17599/05)*, 12 September 2011, DH-DD(2011)709E, para. 10.
[123] Committee of Ministers/Secretariat General, *1136th DH meeting (March 2012). Communication from Office of the Human Rights Defender in the cases of Orchowski and Sikorski against Poland (Applications No. 17885/04 and 17599/05) and reply of the government*, 9 December 2011, DH-DD(2011)1108, 2.

not infrequently had recourse to spaces that should not be used as ordinary cells, such as infirmaries, recreational areas, and isolation and transit cells.[124]

It is not infrequent that the complementary information supplied by NHRIs consists in the outcomes of investigations and studies carried out by NHRIs themselves. This is most common for classical and human rights ombudsmen, whose investigative and complaint-handling functions are central to their mandates, but studies are undertaken and reports drafted by a variety of national human rights structures. As shown, the Polish Commissioner based some of its observations regarding the *Orchowski and others* group of cases on its experience as NPM. The Armenian Human Rights Defender, on its part, referred to various instances where it had ascertained, following individual complaints, the provision of sub-standard medical care to members of the military.[125]

In the *Gharibashvili* group of cases, concerning the inaction of public authorities faced with allegations of ill-treatment and violation of the right to life, the Public Defender of Georgia brought to the attention of the Committee of Ministers the findings of its inquiries, both prompted by individual complaints and undertaken by the Defender *ex officio*, which pointed to persistent shortcomings in the investigations into the wrongdoing of law-enforcement officials.[126] Tellingly, out of sixty cases submitted by the Public Defender to the Office of the Chief Prosecutor over three years, fifty-nine prompted a new investigation, but no case was referred to court.[127] The situation was similar for the twenty-three cases struck out of the list by the ECtHR following friendly settlements or unilateral declarations, on the basis *inter alia* of the Georgian Government's commitment to initiate new investigations: only one re-opening led to a conviction.[128] The Public Defender also highlighted

[124] Ibid., 2-3.
[125] Committee of Ministers/Secretariat General, *1331 meeting (December 2018) (DH). Reply from the authorities (03/10/2018) to a communication from a NGO (25/09/2018) in the case of Muradyan v. Armenia (Application No. 11275/07)*, 5 October 2018, DH-DD(2018)961, 6.
[126] Committee of Ministers/Secretariat General, *1294 meeting (September 2017) (DH). Communication from a NGO (05/09/2017) and reply from the authorities (12/09/2017) in the case of Gharibashvili v. Georgia (Application No. 11830/03)*, 13 September 2017, DH-DD(2017)1000, 4-8.
[127] Ibid., 8.
[128] Ibid., 6-7.

the lack of transparency in the conduct of investigations, towards both the victims and the Public Defender's Office itself.[129]

In a subsequent communication to the Committee of Ministers, in relation not only to the *Gharibashvili* group of cases, but also to the *Identoba and others* and the *Makharadze and Sikhariulidze* groups of cases, the Public Defender of Georgia enclosed a study that it had conducted on the outcomes of disciplinary proceedings initiated against law-enforcement officials following individual complaints.[130] As a result, the Public Defender had addressed a number of recommendations to the general inspectorates of various public authorities in order to remedy the shortcomings identified.[131]

Similarly, the Serbian Protector of Citizens forwarded to the Committee of Ministers its 2010 special report on the "missing babies", which was produced following the complaints from the parents of three babies and significantly influenced (together with a parliamentary report) the decision of the ECtHR to adopt a pilot-judgment.[132] The Protector's report pointed to several failures in the past and current practices of a variety of public authorities involved and it addressed recommendations to them.

As mentioned, it is not only ombudsman offices that conduct inquiries and research and share their findings with the Committee of Ministers. The CNCDH evidently relied, for the detailed analysis and recommendations in the *Winterstein and others* case, on its 2008 in-depth study on the conditions of Roma and Travellers in France, as well as on subsequent recommendations to public authorities, all of which highlighted the widespread discrimination against these minorities and the neglect of their needs, including in relation to housing.[133] Having constantly followed the national developments

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[129] Ibid., 7-8.
[130] Committee of Ministers/Secretariat General, *supra* n 30. For the references of the *Gharibashvili* and *Makharadze and Sikhariulidze* groups of cases, cf. *supra* n 54. As to the *Identoba and others* group of cases, it includes three cases: *Identoba and others v. Georgia*, no. 73235/12, 12 May 2015; *Begheluri and others v. Georgia*, no. 28490/02, 7 October 2014; and *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 others v. Georgia*, no. 71156/01, 3 May 2007.
[131] Committee of Ministers/Secretariat General, *supra* n 30.
[132] Committee of Ministers/Secretariat General, *1201 meeting (3-5 June 2014) (DH). Communication from Serbia concerning the case of Zorica Jovanović against Serbia (Application No. 21794/08)*, 20 March 2014, DH-DD(2014)369.
[133] Cf. the documents mentioned *supra* n 82.

in the area, the CNCDH was able to provide a thorough overview of the applicable laws and regulations, the administrative practice as well as the judicial interpretation of Travellers' right to housing.[134] It is also clear that commissions with a protection mandate, whose powers often include the conduct of individual and general inquiries, as well as research institutes could significantly contribute with original data and analyses.

At times, the different data or alternative analyses included in NHRIs' submissions have been derived from the work of NGOs, independent national actors (such as the NPM when distinct from the NHRI), or international monitoring bodies. In these communications from NHRIs, according to the categorisation outlined above in the interests of simplification, the first element (i.e., the provision of new or different data) is intertwined with the fifth one (namely, bringing to the Committee of Ministers' attention the findings and observations of other actors).

This practice by NHRIs is in line with their duty to cooperate – in the exercise of their functions at the national and international levels – with a variety of actors, and it is a testament to the fact that submissions by NHRIs might be useful not only as they convey the views of an independent national body, but also because they can aggregate information from various sources and give voice to multiple bodies and organisations that might not have the competence or resources to address the Committee of Ministers. Indeed, while NGOs have been allowed to submit communications to the Committee of Ministers under Rule 9(2) together with NHRIs, not all NGOs are familiar with this opportunity or have the resources or expertise to do so. On the other hand, communications from "international intergovernmental organisations" have been admitted under Rule 9(3) since January 2017 only. Communications from NHRIs can thus act and have acted as a vehicle for additional

[134] Committee of Ministers/Secretariat General, *1230 meeting (9-11 June 2015) (DH). Communication from a national independent body (Commission Nationale Consultative des Droits de l'homme (CNCDH)) (01/04/2015) and reply from the authorities (15/04/2015) in the case of Winterstein and others against France (Application No. 27013/07),* 15 April 2015, DH-DD(2015)427.

expert or first-hand information to reach the Committee of Ministers and contribute to a well-informed decision process by the Committee.

In the above-mentioned *Winterstein and others* case, the CNCDH relied not only on its previous report and recommendations, but also on the statistics elaborated by ATD Quart Monde, an NGO specialised in the fight against poverty which has long dealt with the conditions of Travellers and is a member of the CNCDH.[135] ATD Quart Monde was an applicant in the ECtHR proceedings[136] and also submitted its own Rule 9(2) communication in the case, in which it referred to the 2008 report by the CNCDH and the recommendations therein.[137] In this particular instance, a "division of labour" took place by which the NGO mainly focused its attention on the individual measures of execution (having assisted the applicants from the beginning, the NGO had a thorough knowledge of the specific situation of most of them), and the NHRI on the general measures. The potential complementarity of the roles of NGOs and NHRIs is especially clear in this instance, where another NGO (the European Roma Rights Centre) explicitly sought to integrate the submission by the CNCDH by providing statistical data on the evictions of Roma.[138]

Similarly, in the *Popov* group of cases, the joint communication from the CNCDH and the *Défenseur des droits* coupled the findings of the *Défenseur* following on-site visits in Mayotte (a French overseas territory) with those of Cimade, an NGO which assists migrants and asylum seekers and visits centres of detention. Both sources reported the deplorable living conditions of migrants and asylum seekers constrained in the island's detention centre.[139] The annual reports issued by Cimade jointly with other NGOs about the centres of administrative detention for migrants were also

[135] The CNCDH has sixty-four members, more than twenty of which are representatives from NGOs. Other members include experts and representatives from the trade unions, in addition to the *Défenseur des droits* and two members of the Parliament who are *ex officio* members of the Commission.
[136] The application by the Association was declared inadmissible by the ECtHR, in line with its well-established jurisprudence according to which an NGO can only be considered a "victim" under Article 34 ECHR if its own Convention's rights are violated: cf. ECtHR, *Winterstein and others v. France* (merits), *supra* n 48, paras. 108-109.
[137] Committee of Ministers/Secretariat General, *supra* n 83, 3.
[138] Committee of Ministers/Secretariat General, *1259 meeting (7-9 June 2016) (DH). Communication from a NGO (European Roma Rights Centre) (10/03/2016) in the case of Winterstein and Others against France (Application No. 27013/07) and reply from the authorities (18/03/2016)*, 31 March 2016, DH-DD(2016)370, paras. 4 and 5 in particular.
[139] Committee of Ministers/Secretariat General, *supra* n 112, 5-6.

mentioned in the *Défenseur*'s communication in the *De Souza Ribeiro* case; reference was made in particular to the number and modalities of the expulsions carried out in overseas detention centres, signalling the lack of effective remedies against removal decisions.[140]

Cimade is also a member of the CNCDH, a circumstance which certainly makes the exchanges of information easier. Similarly, the submission in the *Chowdury and others* case by the Greek National Commission for Human Rights, another large consultative commission whose members mainly come from civil society organisations, is explicitly based on the "data arising from two large scale participation hearings of relevant national stakeholders" in the fields of forced labour and human trafficking.[141]

At any rate, NHRIs other than consultative commissions have referred to the data and analyses of NGOs: for instance, in the *P. and S.* case, the Polish Commissioner for Human Rights relied on an investigation carried out by the NGO Federation for Women and Family Planning on the actual accessibility of abortion procedures in Polish hospitals.[142] Indeed, membership is not the only means to ensure cooperation and exchange of views between NHRIs and civil society; there exist multifarious ways to establish and maintain this relationship, including the involvement of NGOs in the appointment of the members of the NHRI and regular meetings and consultations between NGOs and the NHRI.[143] At any rate, all A-status institutions, as well as many other NHRIs, institutionally collaborate with NGOs, while remaining distinct from the latter in terms of nature, functions, aims, and powers.[144]

Additionally, NGOs are not the only entities with which NHRIs interact and whose data and observations are referred to by NHRIs in their submissions to the Committee of Ministers. The CNCDH and the *Médiateur/Défenseur* mentioned on multiple occasions remarks by the *Contrôleur général des lieux de privation de liberté* (the French NPM) and the *Commission nationale de*

[140] Committee of Ministers/Secretariat General, *supra* n 90, 7.
[141] Committee of Ministers/Secretariat General, *supra* n 92, 2.
[142] Committee of Ministers/Secretariat General, *supra* n 103, 2-3.
[143] Cf. Section 3.1 of this dissertation.
[144] Ibid., and Chapter 3 of this dissertation more generally.

déontologie et de la sécurité (an independent administrative authority supervising the ethics of law-enforcement personnel, whose functions have been transferred to the *Défenseur* since 2011). Specifically, the reports by these bodies on resort to full body searches in penitentiaries were referred to in the communication submitted by the CNCDH and the *Médiateur* in the *Frérot* group of cases,[145] whereas a report by the *Contrôleur général* following its visit to a detention centre for migrants was taken into account in the communication regarding the *Popov* group of cases.[146]

The Polish Commissioner for Human Rights referred to the information provided by the National Health Fund and the Patient Rights' Ombudsman on different aspects of access to lawful termination of pregnancy in Poland, including the outcome of the Ombudsman's investigation into access to abortion services in a particular region, where it appeared that no hospital was performing abortions.[147]

NHRIs might also bring to the Committee of Ministers' attention the opinion of external experts: in the *Gillan and Quinton* case, the Equality and Human Rights Commission presented the views of a counsel and a professor who had already been consulted by the NHRI within the domestic process of legislative review of the measures adopted by the UK Government.[148]

Furthermore, NHRIs have inserted into their communications the observations from a variety of international human rights monitoring bodies, with which NHRIs often maintain a close collaboration. This is the case, for instance, for UN treaty bodies, to which numerous NHRIs submit their alternative reports to be considered alongside those by governments and NGOs during periodic reporting procedures. In the *Al-Skeini and others* case, where the killings by the British armed forces in Iraq were considered and a violation of the procedural limb of Article 2 ECHR was found, the

[145] CNCDH and *Médiateur de la Republique*, *Communication de la Commission nationale consultative des droits de l'homme et du Médiateur de la République au titre de la Règle 9 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des terms des règlements amiables. Arrêt Frérot c/. France, CEDH, 12 juin 2007,* 25 September 2009, 4, 6 and 8. The submission is available on the website of the *Défenseur des droits*, at https://juridique.defenseurdesdroits.fr/index.php?lvl=cmspage&pageid=6&id_rubrique=111 (accessed 4 January 2019).
[146] Committee of Ministers/Secretariat General, *supra* n 112, 7.
[147] Committee of Ministers/Secretariat General, *supra* n 103, 7-8 in particular.
[148] The scrutiny undertaken by the parliamentary Joint Committee on Human Rights specifically concerned the remedial order issued by the Government pending the adoption of the Protection of Freedoms Bill: cf. Committee of Ministers/Secretariat General, *supra* n 95, para. 9 and Annex 2.

Equality and Human Rights Commission noted how it had communicated its concerns regarding the promptness, transparency, independence, and effectiveness of the investigations opened as a result of the ECtHR judgment to two UN treaty bodies – the Committee against Torture and the Human Rights Committee – and how those bodies had shared its concerns.[149]

The lists of issues and concluding observations by the same two UN treaty bodies were also mentioned in the communication from the Northern Ireland Human Rights Commission in the *McKerr* group of cases, as both bodies addressed questions and recommendations to the UK Government regarding the independence, transparency, and comprehensiveness of the investigations into conflict-related deaths in Northern Ireland.[150]

The Northern Ireland Commission referred again to the views of a UN treaty body in the *S. and Marper* case. In debating the suitability of the Government's action plan regarding the retention of DNA profiles and fingerprints in police databases, which differentiated *inter alia* between individuals aged under ten and individuals aged ten or over (ten being the age of minimum criminal responsibility in the UK), the Northern Ireland Commission took the opportunity to highlight that a General Comment of the UN Committee on the Rights of the Child states that "a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable".[151]

In the *Frérot* group of cases, in addition to the observations by national independent bodies supervising detention conditions and the conduct of law-enforcement officials, the CNCDH and the *Médiateur* also reported the conclusions by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which had condemned the excessive resort to

[149] Committee of Ministers/Secretariat General, *1250 meeting (8-10 March 2016) (DH). Communication from a national institution for the promotion and protection of human rights (Equality and Human Rights Commission (EHRC)) (04/12/2015) in the case of Al-Skeini and others against the United Kingdom (Application No. 55721/07) and reply from the authorities (14/12/2015)*, 17 December 2015, DH-DD(2015)1374, 6-7.
[150] Committee of Ministers/Secretariat General, *1222 meeting (10-12 March 2015) (DH). Communication from a national institution for the promotion and protection of human rights (Northern Ireland Human Rights Commission (NIHRC)) (15/01/2015) in the McKerr group of cases against the United Kingdom (Application No. 28883/95) and reply from the authorities*, 26 January 2015, DH-DD(2015)119, 3-4.
[151] Northern Ireland Human Rights Commission, *supra* n 98, para. 7. Cf. also UN Committee on the Rights of the Child, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, para. 32.

full body searches in French penitentiaries following its on-site visit.[152] The criticisms from another CoE body, the Commissioner for Human Rights, in relation to the detention and expulsion regimes and practices in French overseas territories were referred to in the national institutions' communications in the *De Souza Ribeiro* case and the *Popov* group of cases.[153]

As a final example, the Greek National Commission for Human Rights referred to the reports and surveys on forced labour and human trafficking in Greece by various international bodies, including the EU Fundamental Rights Agency, the European Commission against Racism and Intolerance, the International Labour Organization, and especially GRETA (the CoE Group of Experts on Action against Trafficking in Human Beings).[154]

The considerations by other independent national entities and by international monitoring bodies strengthen the findings of NHRIs, whose positions appear to be shared by additional independent and expert actors. More generally, the injection of data from sources other than NHRIs themselves further extends the information at the disposal of the Committee of Ministers, which is thus in a better position to assess the governments' claims.

As mentioned, the provision of data in the communications from NHRIs is frequently accompanied by an assessment of the suitability of the measures proposed or adopted by the governments concerned. Alternatively or in addition, NHRIs might dispute their governments' assertions that certain measures have been (fully) executed. As far as the communications submitted to date are concerned, the former scenario appears more frequent, as NHRIs tend to *integrate* governmental communications by highlighting the need for different or additional measures rather than *disproving* governmental statements as to the implementation of measures.

[152] Committee of Ministers/Secretariat General, *supra* n 145, 6-7.
[153] Committee of Ministers/Secretariat General, *supra* n 90, 8; and Committee of Ministers/Secretariat General, *supra* n 112, 6.
[154] Committee of Ministers/Secretariat General, *supra* n 92, 26 *et seqq*. in particular.

Nonetheless, it is not always easy to clearly discern the two elements in practice; so that it can generally be said that, most of the time, in addition to providing new or different information, communications from NHRIs point to the inadequacies and deficiencies of the measures proposed or enacted by governments, both *per se* or in light of their unsatisfactory implementation.

In the same way as State measures can widely range from legislative amendments to changes in the administrative regulations and practices and judicial overturning, so do considerations by NHRIs. By way of example, NHRIs might object to aspects of legislative reforms (e.g., in the *Gillan and Quinton* case, the Equality and Human Rights Commission detected shortcomings in the provisional remedial order as well as in the bill under consideration in the Parliament),[155] of administrative regulations (e.g., in the *Merabishvili* case, the Georgian Public Defender asked the Minister of Corrections to extend the storage period for video recordings of penitentiaries' communal areas),[156] of administrative practices (e.g., in its December 2017 submission regarding three groups of cases, the Georgian Public Defender pointed to numerous deficiencies in the investigations into disciplinary offences committed by law-enforcement officials),[157] of courts' decisions, or – frequently – of a combination of them.

In the *D.H.* case, the Czech Public Defender undertook an overall assessment of the measures put in place by the Government and found shortcomings in the legislative measures adopted to remedy the discrimination suffered by Roma children in schools, as well as in the practical implementation of diagnostic tools, in the monitoring of re-diagnosis, and in the collection of statistical data.[158]

In the *Zorica Jovanović* case, the Serbian Protector of Citizens highlighted present and past failures by a number of public authorities in record-keeping, inspections, and investigation of

[155] Committee of Ministers/Secretariat General, *supra* n 95.
[156] Committee of Ministers/Secretariat General, *1331st meeting (December 2018) (DH). Reply from the authorities (30/11/2018) following a communication from "Public Defender of Georgia" in the case of Merabishvili v. Georgia (Application No. 72508/13),* 30 November 2018, DH-DD(2018)1195.
[157] Committee of Ministers/Secretariat General, *supra* n 30.
[158] Committee of Ministers/Secretariat General, *supra* n 118; and Committee of Ministers/Secretariat General, *supra* n 119.

complaints, and it also asked the Government to intervene by way of legislative amendments to ensure that effective investigations are carried out into the fate of "missing children" and satisfactory answers are given to their parents.[159]

The Greek National Human Rights Commission maintained that while the State's legislative framework for combating human trafficking and forced labour could be considered adequate overall, significant shortcomings affected its administrative and judicial implementation – e.g., insufficient inspections, problems in identifying the victims and granting them protection, ineffective investigations, and extremely low prosecution and conviction rates.[160]

The Armenian Human Rights Defender recommended that the Government re-organise the hotlines for reporting human rights violations in the military and conduct more thorough medical examinations of servicemen; additionally, it asked for the revision of various legislative provisions regulating disciplinary proceedings against servicemen.[161]

As a final example, the Polish Commissioner for Human Rights challenged the Government's assertion that the existing legislation regulating the termination of pregnancy and the rights of patients guarantees the right of access to lawful abortion for women in Poland, and it recommended both amendments to those Acts and the adoption of appropriate and effective hospital internal regulations with a view to informing women, *inter alia*, about the grounds for a lawful abortion, the opportunity to challenge a physician's refusal to terminate the pregnancy before the Patient Rights Ombudsman, and where else access to the service is provided in the case of conscientious objection by the physician consulted.[162]

In some instances, NHRIs questioned the adequacy of the *type* of measures undertaken by governments: for example, the CNCDH and the *Défenseur* maintained that the adoption of a

[159] Committee of Ministers/Secretariat General, *supra* n 87; and Committee of Ministers/Secretariat General, *supra* n 132.
[160] Committee of Ministers/Secretariat General, *supra* n 92, 25 *et seqq*.
[161] Committee of Ministers/Secretariat General, *supra* n 125.
[162] Committee of Ministers/Secretariat General, *supra* n 103. A combination of legislative and administrative changes was also deemed necessary by NHRIs, *inter alia,* in the *De Souza Ribeiro* and *Gebremedhin* cases and in the *Frérot* and *Gharibashvili* groups of cases.

ministerial circular – in lieu of a law – to regulate the detention of migrant families with children did not afford enough guarantees.[163] Similarly, the Northern Ireland Human Rights Commission criticised the use of a regulation instead of a piece of legislation (the former allowing for a more limited parliamentary scrutiny) for the regime of retention of DNA profiles and fingerprints.[164]

In other instances, where governments argued that the ECtHR judgments at issue had been executed following an overturning of the domestic jurisprudence (or, in any case, in light of subsequent domestic judgments in compliance with the ECtHR rulings), NHRIs considered the case-law to be insufficient to ensure the full and lasting implementation of the Court's judgments.

In the *Popov* group of cases, the case-law concerning the judicial review of the detention of migrant minors accompanying their parents was defined by the CNCDH and the *Défenseur* as "nuanced and unsettled".[165] Similar arguments have also been raised with respect to common-law countries: in the *Vinter and others* case, the Equality and Human Rights Commission challenged the Government's assertion that the reconciliation, by the Court of Appeal, of the Crime (Sentences) Act 1997 with the ECHR was sufficient to consider the ECtHR judgment to be executed, failing the amendment of the Act itself or of the Prison Service Order, the wording of which clearly confines the review of whole-life orders to medical grounds.[166]

Other criticisms levelled at governments by NHRIs have referred, *inter alia,* to budget cuts resulting from governmental reforms (e.g., those affecting the investigatory mechanisms for conflict-related deaths in Northern Ireland)[167] and to the lack of interim measures pending a lengthy parliamentary debate (on the reform of the system for the retention of DNA profiles and fingerprints in police databases).[168]

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[163] Committee of Ministers/Secretariat General, *supra* n 112, 11-12.
[164] Northern Ireland Human Rights Commission, *supra* n 98, para. 11.
[165] Committee of Ministers/Secretariat General, *supra* n 112, 10.
[166] Committee of Ministers/Secretariat General, *supra* n 114, 4-5.
[167] Committee of Ministers/Secretariat General, *supra* n 150, 4-5.
[168] Committee of Ministers/Secretariat General, *1115th DH meeting (June 2011). Communication from a National Human Rights Institution (NHRI) in the case of S. and Marper against the United Kingdom (Application No. 30562/04) and reply of the government*, 6 June 2011, DH-DD(2011)437, para. 8.

A characteristic of a not insignificant number of submissions by NHRIs is that of contextualising the issues raised by ECtHR judgments within a broader context, thus highlighting more fundamental problems of the national legal order or practice failing the resolution of which violations of the ECHR would recur. This aim is particularly explicit in some communications from NHRIs. In the *Chowdury and others* case, the Greek National Commission for Human Rights openly disputed the Government's claim that the facts of the case constituted an "isolated incident", and it showed that wider patterns of abuse against migrant workers are detectable in Greece and comprehensive remedial measures are needed.[169]

In the *McFarlane* group of cases, while welcoming the intention expressed by the Government to re-organise the court system in order to prevent further judicial delays of the kind established by the ECtHR judgments, the Irish Human Rights Commission maintained that "the manner in which Convention rights can be invoked and remedied in domestic law is … a broad structural issue that goes beyond the specific judicial delay found in *McFarlane*".[170] The NHRI thus provided the Committee of Ministers with information regarding the position of the ECHR in the Irish legal system as well as the immunity of Irish judges from legal proceedings for any damages caused by their delays.[171]

In the *Gharibashvili* group of cases, concerning procedural violations of Articles 2 and 3 ECHR, the general measures adopted by the Georgian Government mainly focused on the fight against ill-treatment on the one hand and on the reform of the public prosecutor's office on the other.[172] The Public Defender drew the attention of the Government and of the Committee of Ministers on complementary aspects, such as guarantees of institutional independence for the

[169] Committee of Ministers/Secretariat General, *supra* n 92, 13-14.
[170] Committee of Ministers/Secretariat General, *supra* n 108, 5.
[171] Ibid., 5 *et seqq*.
[172] E.g., Committee of Ministers/Secretariat General, *1259 meeting (7-9 June 2016) (DH). Updated action plan (01/06/2016). Communication from Georgia in the Gharibashvili group of cases against Georgia (Application No. 11830/03)*, 2 June 2016, DH-DD(2016)701, 9 *et seqq*.

authorities (including ministerial ones) investigating the criminal and disciplinary wrongdoing of law-enforcement officials and the effectiveness of these investigations.[173]

In the *Mennesson* group of cases, the CNCDH pointed to persistent gaps in the protection of surrogacy children, as French courts have agreed to date to legally recognise only the (biological) father-child relationships established abroad and not the (intended) mother-child ones. In the opinion of the NHRI, this approach could trigger future violations of the ECHR.[174]

After detailing the problems affecting the governmental plans or reports, various NHRIs issued specific recommendations to governments as to how the law and the administrative or judicial practice could be amended with a view to ensuring compliance with ECtHR judgments. This has been the case for the CNCDH and the *Défenseur*,[175] the Greek National Commission for Human Rights,[176] the Armenian Human Rights Defender,[177] the Public Defender of Georgia,[178] the Polish Commissioner for Human Rights,[179] and the Serbian Protector of Citizens.[180] At any rate, the considerations expressed by NHRIs on the measures proposed or adopted by governments are often revelatory of the alternative proposals by NHRIs themselves, so that the absence of a clear list of recommendations does not appear conclusive.

It should be underlined at this point that not all submissions by NHRIs claim that the governmental action plans or reports are unsuitable or insufficient. While admittedly this has been the case in most instances, two communications have been forwarded to date which endorse the

[173] Cf. all three communications from the Georgian Public Defender in the *Gharibashvili* group of cases: Committee of Ministers/Secretariat General, *supra* n 30; Committee of Ministers/Secretariat General, *supra* n 126; and Committee of Ministers/Secretariat General, *Communication from the Public Defender of Georgia (28/11/2016) in the Gharibashvili group of cases against Georgia (Application No. 11830/03)*, 7 December 2016, DH-DD(2016)1368.
[174] Committee of Ministers/Secretariat General, *supra* n 105, para. 21.
[175] Cf., in particular, CNCDH and *Médiateur de la République*, *supra* n 145, 1; CNCDH and *Médiateur de la République*, *Communication de la Commission nationale consultative des droits de l'homme et du Médiateur de la République au titre de l'article 9 du Règlement intérieur du Comité des Ministres. Affaire Gebremedhin, c/France*, 2010, 1; and Committee of Ministers/Secretariat General, *supra* n 134, 12.
[176] Committee of Ministers/Secretariat General, *supra* n 92, 47 *et seqq*.
[177] Committee of Ministers/Secretariat General, *supra* n 125, throughout the text.
[178] Committee of Ministers/Secretariat General, *supra* n 173, 7 *et seqq.*; Committee of Ministers/Secretariat General, *supra* n 126, 8; Committee of Ministers/Secretariat General, *supra* n 30, 14; and Committee of Ministers/Secretariat General, *supra* n 156, 7-8.
[179] Committee of Ministers/Secretariat General, *supra* n 103, 8-9.
[180] Committee of Ministers/Secretariat General, *supra* n 132, 25-26; and Committee of Ministers/Secretariat General, *supra* n 87.

measures adopted by the government concerned and conclude that the ECtHR judgments in question have been executed.

In the *Taïs* case, the CNCDH and the *Médiateur* maintained that the provisions of the French code of criminal procedure governing the reopening of cases where a decision not to prosecute was adopted are in compliance with the ECHR and the ECtHR jurisprudence.[181] Thus, the fact that the request from the applicants to reopen the domestic investigations following the ECtHR judgment in *Taïs* had been refused by the prosecutor, who considered that no new elements had emerged, did not mean that the French legal order was not in line with the Convention.

In the *Kurić and others* case, the Human Rights Ombudsman of Slovenia rejected the applicants' request that the Ombudsman urge a constitutionality review of two acts adopted by the Slovenian Parliament to regulate the legal status of so-called erased residents and compensate them.[182] The Ombudsman justified its refusal by asserting the legality and fairness of the two acts and, implicitly, their compliance with the ECtHR judgments in the case.[183]

It has already been noted that the opportunity for NHRIs and NGOs to submit communications under Rule 9(2) was clearly introduced to allow for additional observations on the general measures adopted or proposed by governments to reach the Committee of Ministers. Over the years, both the Committee and the Court have shown increasing awareness of the need for broader changes to the national legal systems in order to prevent future violations of the Convention. The content of the contribution by NHRIs in this respect has been analysed in this section and its impact will be assessed in the next one.

There are nonetheless a few cases where NHRIs also gave their views on the individual measures adopted or proposed by governments – i.e., on the measures that a government must enact

[181] CNCDH and *Médiateur de la République*, *Communication du Médiateur de la République et de la Commission Nationale Consultative des Droits de l'Homme au titre de l'article 9 du Règlement intérieur du Comité des Ministres. Affaire TAÏS C/ France*, 2009.
[182] Committee of Ministers/Secretariat General, *supra* n 88.
[183] Ibid., 6-7 in particular.

to put the violation(s) right with specific regard to the applicant(s) in the ECtHR case. In the *Gharibashvili* group of cases, the Public Defender of Georgia underlined the lack of concrete progress in the investigations into law-enforcement officials' wrongdoing that were opened as a result of the ECtHR judgments in the group of cases and were among the individual measures agreed upon by the Georgian Government (in addition to the payment of just satisfaction).[184]

In this instance, the attention paid by the Public Defender to the individual measures can be explained, on the one hand, by the close link between the individual measures and the general ones, which include reforms to guarantee the independence and effectiveness of the investigations into the crimes and misconduct of public officials; and, on the other, by the monitoring and complaint-handling activities carried out at the national level by the Defender, which had long started to receive and investigate complaints about the impunity of law-enforcement officials.

In the *Winterstein and others* case, the CNCDH briefly referred to the actions that it had undertaken at the national level to ascertain the proper implementation of the individual measures to which the French Government had committed – essentially, the provision of alternative lodging solutions to the applicants.[185] The CNCDH conceded that, in accordance with its mandate, its activities at both the national and international levels would commonly focus on the general measures needed to execute the ECtHR judgments, but it also highlighted the peculiarities of the case and the significance of the information received by one of its members, the NGO ATD Quart Monde. As mentioned, this NGO followed the individual situation of applicants closely and submitted a detailed communication in this respect to the Committee of Ministers.[186]

The CNCDH also gave some details on the implementation of the individual measures in the *Mennesson* group of cases by underlining that the applicants were still being denied the transposition of their parent-child relationship established abroad into the appropriate French registry.[187] Reference

[184] Committee of Ministers/Secretariat General, *supra* n 126, 4.
[185] Committee of Ministers/Secretariat General, *supra* n 134, para. 4.
[186] Cf. above in this section and n 83.
[187] Committee of Ministers/Secretariat General, *supra* n 105, paras. 7-11 in particular.

to the non-implementation of the individual measures thus served to illustrate the persistent shortcomings of the French legal order as regards not only the certification of parent-child relationships for surrogacy children born abroad but also the procedure for the re-opening of national proceedings following an ECtHR judgment.

Ultimately, it appears that observations by NHRIs with regard to individual measures are relatively rare, limited in extent, and often used as evidence of continuous problems in the implementation of the general measures required.

Lastly, while communications from NHRIs often entail *per se* a request to the Committee of Ministers to keep a case under scrutiny, there have been instances where NHRIs explicitly asked the Committee to handle cases in a certain way (what I would term "procedural requests"). The British Equality and Human Rights Commission called for the Committee of Ministers to keep a case under enhanced supervision (*Al-Skeini and others*)[188] and transfer two cases from standard to enhanced supervision (*Gillan and Quinton* and *Vinter and others*)[189]. These requests met with mixed results.[190]

On the other hand, an NHRI could also ask the Committee of Ministers to close its examination of a case on the ground that the government has adopted all the measures required to fully execute the judgment. While the CNCDH and the *Médiateur* did not submit such an explicit request in the *Taïs* case, their argument that no change to the French code of criminal procedure was needed to execute the judgment would point in that direction.[191]

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[188] Committee of Ministers/Secretariat General, *supra* n 149, 7.
[189] Committee of Ministers/Secretariat General, *supra* n 95, paras. 1 and 15; and Committee of Ministers/Secretariat General, *supra* n 99, 7.
[190] In the *Al-Skeini and others* case, the communication from the Commission was essentially late. It was received by the Department for Execution on the 4th December 2015 and due to be examined by the Committee of Ministers in its March 2016 session; the Committee, however, adopted a (pre-drafted) decision to move the case from enhanced to standard supervision during its December 2015 session (8-9 December). An early request by the Commission to transfer the *Gillan and Quinton* case under enhanced supervision was never followed up. Finally, in the *Vinter and others* case, while the primary request from the Commission to transfer the case to enhanced supervision was ignored, the case was kept under examination by the Committee of Ministers, contrary to the request from the UK Government to close the case and in accordance with the alternative request from the Commission, which had asked to wait at least until the ruling by the ECtHR in a similar pending case.
[191] However, the documentation relating to this case (including governmental communications and decisions by the Committee of Ministers) is not available in HUDOC-EXEC, so that a definitive assessment is not possible.

In a couple of cases, NHRIs encouraged the Committee of Ministers to make use of the interpretation proceedings under Article 46(3) ECHR. The CNCDH did so in the *Mennesson* group of cases by highlighting a fundamental disagreement with the French Government as regards the effects of the ECtHR judgment in question on the recognition in France of the (intended) mother-child relationships established abroad.[192]

Similarly, in its second communication in the *O'Keeffe* case concerning children sexually abused in schools, the Irish Human Rights and Equality Commission suggested to obtain interpretive clarifications from the ECtHR in the face of the allegedly restrictive notion of "victim" adopted by the Irish Government.[193] Specifically, the NHRI was critical of the requirement of a prior complaint of abuse filed with the school management in order for an individual to be considered a victim and receive compensation.[194] Neither requests from these NHRIs could overcome the reluctance of the Committee of Ministers to put into use the new Article 46(3) instrument.[195]

In closing, a few words about the content of the communications submitted by NGOs in the same cases and groups of cases in relation to which NHRIs intervened. It can be said that the content of these communications does not appear to be essentially different: NGOs have also submitted new or different information regarding the norms and, frequently, the practice relating to a certain matter, and on these bases challenged the appropriateness and effectiveness of the measures that were adopted or planned by governments.

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[192] Committee of Ministers/Secretariat General, *supra* n 105, para. 22.

[193] Committee of Ministers/Secretariat General, *1273 meeting (6-8 December 2016) (DH). Communication from a National Human Rights Institution (Irish Human Rights and Equality Commission) (19/10/2015) in the case of O'Keeffe against Ireland (Application No. 35810/09)*, 21 October 2016, DH-DD(2016)1167. The entire communication is dedicated to setting out the interpretive issues that should, in the opinion of the Irish Commission, be submitted to the ECtHR.

[194] Ibid., paras. 20 *et seqq*. in particular. This position was shared by an NGO intervening in the case, namely the Child Law Clinic at University College Cork, which also urged the Committee of Ministers to address the Court under Article 46(3) ECHR at the same meeting: Committee of Ministers/Secretariat General, *1273 meeting (6-8 December 2016) (DH). Communication from a NGO (The Child Law Clinic - School of Law - University College Cork) (04/11/2016) in the case of O'Keeffe against Ireland (Application No. 35810/09)*, 18 November 2016, DH-DD(2016)1274, para. 18.

[195] Cf. section 2.3 of this dissertation. Since the entry into force of Protocol no. 14 in 2010, the Committee of Ministers has never activated interpretation proceedings under Article 46(3) and has only recently initiated its first infringement proceedings against Azerbaijan, in October 2017.

The information provided by NGOs has often been based on their close contacts with the victims of violations and thus on their knowledge of the situation "on the ground", as well as, in the case of membership-based NGOs, on their authority to represent the interests of their members (e.g., the European Association of Jehovah's Christian Witnesses in the *Identoba and others* group of cases, or the Association of the Erased Residents of Slovenia in the *Kurić and others* case). This also makes clear why submissions by NGOs have more frequently addressed individual measures in addition to general ones, especially in the case of membership-based NGOs or NGOs which provided legal assistance to the applicants before the ECtHR or to other complainants in a similar situation.[196]

Nonetheless, in many instances, NGOs forwarded observations on the legislative, administrative, and judicial framework of the State concerned very much like NHRIs. Indeed, while various intervening NGOs (especially transnational ones) could have provided comparative analyses of the matters dealt with in the judgments, their communications under Rule 9(2) focused on the national situation, in witness of the distinct nature of the supervision of execution process. For instance, the European Roma Rights Centre, which has conducted in-depth research on the situation of Roma in many European countries, only referred to France in its Rule 9(2) submissions in the *Winterstein and others* case (contrary to its more general considerations as a third-party intervener in the ECtHR proceedings).[197]

In the same way as NHRIs, NGOs referred to the findings of other bodies in order to strengthen their positions. These include international monitoring bodies,[198] but also independent national

[196] A case in point are the communications from the European Human Rights Advocacy Centre and Middlesex University, which assisted Mr. Merabishvili before the ECtHR: the first two communications from these organisations were filed under Rule 9(1), as communications from the injured party, whereas the third one was made under Rules 9(1) and 9(2) (and classified by the Department for Execution as a communication under Rules 9(2) and 9(6)). Cf. also the communications from most NGOs in the *Identoba and others* group of cases and in the *Kurić and others* case, as well as the communication from ATD Quart Monde in the *Winterstein and others* case, *supra* n 83.

[197] Committee of Ministers/Secretariat General, *supra* n 138; and Committee of Ministers/Secretariat General, *1324 meeting (September 2018) (DH). Communication from a NGO (European Roma Rights Centre) (09/08/2018) in the case of Winterstein and Others v. France (27013/07),* 24 August 2018, DH-DD(2018)794.

[198] Cf. the ample reference to reports by international monitoring bodies, mainly on the matter of non-discrimination, by Atheist Ireland in the *O'Keeffe* case: Committee of Ministers/Secretariat General, *1236 meeting (22-24 September 2015) (DH). Communication from a NGO (Atheist Ireland) (30/06/2015) in the case of O'Keeffe against Ireland (Application No. 35810/09)*, 11 August 2015, DH-DD(2015)795, 12 *et seqq*. in particular. Cf. also, among others, Committee of Ministers/Secretariat General, *1288th meeting (June 2017) (DH). Communication from a NGO (Coalition for an*

bodies, first and foremost NHRIs. In addition to the examples of collaboration between NGOs and NHRIs given above in this section, it is worth mentioning that the Coalition for an Independent and Transparent Judiciary, a group of Georgian NGOs that intervened in the *Gharibashvili* group of cases, repeatedly referred to the observations by the Public Defender and underlined the agreement between the Coalition and the Defender on many of the changes proposed.[199]

Finally, NGOs have also submitted "procedural requests": among others, ASTRA, a Serbian NGO fighting human trafficking and dealing with missing children, in its first submission urged the Committee of Ministers to keep the *Zorica Jovanović* case under review and adopt an interim resolution to avoid further delays in the execution of the judgment.[200] After several submissions on the part of ASTRA and other NGOs and in the face of the persistent non-execution of the judgment, ASTRA and YUCOM – The Lawyers' Committee for Human Rights requested that infringement proceedings be initiated against Serbia.[201]

To conclude, the content of communications submitted by NGOs under Rule 9(2) does not substantially differ from that of communications from NHRIs; what should distinguish the two is the source of the information, namely the fact that the information provided by NHRIs should be impartial or impartially verified. Whether this feature is actually perceived by the recipients of the communications (States, the Committee of Ministers, and the Department for the Execution of Judgments) and has a bearing on their determinations is the subject of the next section.

Independent and Transparent Judiciary) (07/03/2017) and reply from Georgia (22/03/2017) in the Gharibashvili group of cases against Georgia (Application No. 11830/03), 24 March 2017, DH-DD(2017)359, 5 *et seqq*. in particular.

[199] Committee of Ministers/Secretariat General, *1288th meeting (June 2017) (DH), supra* n 198, 4 and 7; and Committee of Ministers/Secretariat General, *1294 meeting (September 2017) (DH). Communication from a NGO (07/08/2017) and reply from the authorities (21/08/2017) in the case of Gharibashvili v. Georgia (Application No. 11830/03)*, 23 August 2017, DH-DD(2017)873, 2-4.

[200] Committee of Ministers/Secretariat General, *1214 meeting (2-4 December 2014) (DH). Communication from a NGO (Astra-Anti Trafficking) (05/11/2014) in the case of Zorica Jovanović against Serbia (Application No. 21794/08) and reply from the authorities (12/11/2014),* 14 November 2014, DH-DD(2014)1359, para. 12.

[201] Committee of Ministers/Secretariat General, *1331st meeting (December 2018) (DH). Communication from NGOs (YUCOM and ASTRA) (05/11/2018) in the case of ZORICA JOVANOVIC v. Serbia (Application No. 21794/08)*, 14 November 2018, DH-DD(2018)1111, para. 13(c).

4.5. How: the impact of communications

The notion of impact (as well as that of effectiveness) is traditionally subject to different definitions and means of measurement in the literature. In the field of human rights, in recent years, several authors have been variously approaching the impact that international human rights instruments (such as treaties, judgments, and "soft law") and institutions have on domestic legal orders and policy choices;[202] more generally, studies indicating "impact" and "effectiveness" as their main focus have multiplied.

This section analyses the impact that communications from NHRIs have had on the action plans and reports by governments, on the analyses by the Department for Execution, and on the decisions by the Committee of Ministers regarding the execution of ECtHR judgments. While this investigation might raise less complex issues than most of the studies mentioned above, some clarifications are appropriate on what kind of impact is being assessed and how, in light of the uncertainties that surround this concept.

This section (and this dissertation more generally) does not primarily aim to measure the extent to which NHRIs promote, and succeed in promoting, the greatest possible compliance with the ECtHR judgments. Indeed, this element would be difficult to evaluate, as States, which bear the primary responsibility for the execution of ECtHR judgments, are left considerable freedom by the Court and the Committee of Ministers as to the means to employ with a view to executing judgments (although, as shown, this margin of manoeuvre is being reduced by both the Court and the Committee).[203] On the other hand, it appears more significant to assess the concrete ability of NHRIs

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[202] Cf., among others: Andrew P. Cortell and James W. Davis Jr, "How Do International Institutions Matter? The Domestic Impact of International Rules and Norms", *International Studies Quarterly* 40, no. 4 (1996): 451-478; Christof Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002); Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, *The Power of Human Rights. International Norms and Domestic Change* (Cambridge: Cambridge University Press, 2009); Sharanbir Grewal and Erik Voeten, "Are New Democracies Better Human Rights Compliers?", *International Organization* 69, no. 2 (2015): 497-518; Jasper Krommendijk, *The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland. Paper-pushing or policy prompting?* (Cambridge: Intersentia, 2014); and Başak Çalı and Nazila Ghanea, *The Domestic Effects of International Human Rights Treaty Ratification in the Member States of the Cooperation Council for the Arab States of the Gulf (GCC)* (Qatar National Research Fund, 2014).

[203] Cf. Sections 2.2 and 2.3 of this dissertation.

to influence – to any extent – the determinations of States regarding the measures planned or adopted and the assessment of these measures by the Department for Execution and the Committee of Ministers.

To this end, I introduce a distinction between "formal recognition" and "substantial recognition" of the communications submitted by NHRIs.[204] Under the former tier, I investigate whether *consideration* was given by the relevant actors – i.e., Member States, the Department for the Execution of Judgments, and the Committee of Ministers – to the communications from NHRIs. More specifically, I ascertain whether Member States replied to the communications filed by NHRIs, whether the Department for Execution mentioned these communications in its memoranda and other documents, and whether the Committee of Ministers referred to them explicitly in its interim resolutions and decisions.

Under the latter tier, I analyse the actual *acceptance* of the information and recommendations submitted by NHRIs: namely, whether the content of communications from NHRIs was approved by States and shaped their action plans and reports, whether it influenced the dialogue between the Department for Execution and the Member States concerned and the Department's observations to the Committee of Ministers, and whether it informed the recommendations by the Committee of Ministers and/or the decisions by this body to continue or close the supervision of a case or examine a case under a certain procedure.

Communications from NHRIs can have a further kind of impact – namely, they can mobilise other domestic actors and raise the awareness of the public in general, thus initiating or reviving national debates, provided that the NHRI is sufficiently influential at the domestic level. This type of

[204] To a certain extent, this distinction echoes the one between "impact" and "effectiveness" made in Krommendijk, *supra* n 202, 24-27 and 57 *et seqq*., in relation to the concluding observations by UN treaty bodies. According to this distinction, "impact" is "the way in which domestic actors have used and discussed the reporting process and the [concluding observations] at the domestic level" (58), whereas "effectiveness" is "the extent to which policy, legislative or any other measures are taken as a result of" the concluding observations (60).

impact is not considered here, as it requires very different instruments of analysis and deserves separate and in-depth consideration.[205]

The formal recognition of communications submitted by NHRIs can be an important indicator of their substantial recognition, insofar as it demonstrates that the communications from NHRIs have in fact been read and considered worthy of reply by States and of mention by the Committee of Ministers or the Department for Execution.

As far as States' responses are concerned, out of twenty-eight communications from NHRIs in relation to which sufficient information is available,[206] twenty-one received a reply in the context of eighteen cases. Considering that the Ombudsman's submission in the *Kurić and others* case would not require a reply from the Slovenian Government,[207] the communications from NHRIs which were not answered to by the governments concerned include one of the three communications submitted by the Georgian Public Defender in the *Gharibashvili* group of cases, the joint submission by the CNCDH and the *Défenseur* in the *Popov* group of cases, the submission by the Greek National Commission for Human Rights in the *Chowdury and others* case, and all three submissions lodged by the Irish NHRI in the *McFarlane* group of cases and *O'Keeffe* case.

The response rate is thus relatively high; moreover, the lack of reply from the Georgian and French Governments appears exceptional. On the other hand, the Irish Government would seem to systematically refrain from replying to the communications from its A-status NHRI.

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[205] That communications to the Committee of Ministers from NHRIs can have this effect was underlined by Collier, Equality and Human Rights Commission (Great Britain), *supra* n 21, who maintained that communications can be useful to turn the spotlight on issues at the domestic level and can be taken up by actors such as NGOs, lawyers, and the public at large.

[206] The documentation concerning the *Frérot* group of cases and the *Taïs* case, as well as part of the documentation concerning the *S. and Marper* case and the *McKerr* group of cases, cannot be found on the HUDOC-EXEC database, as it dates back to before 2011, when the new working methods were adopted. This means, *inter alia*, that the lodging of action plans and reports by governments was not required and that most of the documents relating to the supervision of cases were not to be made public. In the *Gebremedhin* case, the reply from the French Government is not available, but it is referred to in the memorandum by the Department for Execution.

[207] On the other hand, the Slovenian Government relied, *inter alia*, on the refusal by the Ombudsman to initiate a constitutionality review in order to support its position: Committee of Ministers/Secretariat General, *1236 meeting (22-24 September 2015) (DH). Communication from the authorities (17/06/2015) concerning the case of Kurić and Others against Slovenia (Application No. 26828/06),* 30 June 2015, DH-DD(2015)688, 3.

In accordance with new Rule 9(6), submissions by NHRIs are brought to the attention of the respondent State by the Department for Execution. The same Rule prescribes that "when the State responds within five working days, both the communication and the response shall be brought to the attention of the Committee of Ministers and made public. If there has been no response within this time limit, the communication shall be transmitted to the Committee of Ministers but shall not be made public. It shall be published ten working days after notification, together with any response received within this time limit". If the State concerned replies to the communication after the second deadline, its response is published separately. Almost all submissions by NHRIs received a reply within the second deadline and were thus published along with the respective governmental responses, the only exceptions being the two submissions by the Czech Public Defender in the *D.H.* case and the submission by the Polish Commissioner for Human Rights in the *P. and S.* case.[208]

It is considered appropriate to compare States' response rate in relation to communications from NHRIs with their response rate in relation to communications from NGOs. By limiting the comparison to the cases in which NHRIs intervened as well, NGOs followed up sixteen out of twenty-two cases on which sufficient information is available.[209] In the context of these sixteen cases or groups of cases, as of December 2018, NGOs lodged one-hundred and three communications, fifty-seven of which received a reply from governments.

States' response rate in relation to submissions by NGOs is thus lower than their response rate in relation to submissions by NHRIs. It should be noted, however, that this difference might be determined by the larger number of NGOs' communications received and the possible reiteration of similar criticisms and proposals (in the *D.H.* case, for instance, nineteen submissions by NGOs were

[208] Both replies by the Czech Government were published separately: Committee of Ministers/Secretariat General, *1201 meeting (3-5 June 2014) (DH). Communication from the authorities (13/05/2014) in reply to document DH-DD(2014)569. Communication from the Czech Republic concerning the case of D.H. and others against Czech Republic (Application No. 57325/00),* 14 May 2014, DH-DD(2014)631; and Committee of Ministers/Secretariat General, *1222 meeting (11-12 March 2015) (DH). Communication from the authorities (04/03/2015) (in reply to Public Defender of Rights – DH-DD(2015)248) concerning the case of D.H. and others against Czech Republic (Application No. 57325/00)*, 5 March 2015, DH-DD(2015)261. Cf. also Committee of Ministers/Secretariat General, *1340 meeting (March 2019) (DH). Reply from the authorities (02/01/2019) following a communication from the Commissioner for Human Rights of the Republic of Poland in the case of P. and S. v. Poland (Application No. 57375/08)*, 9 January 2019, DH-DD(2019)28.
[209] The *Taïs* and *S. and Marper* cases and the *Frérot* group of cases are excluded for lack of sufficient information.

forwarded to the Czech Government, mostly by the same four NGOs).[210] Other reasons that can explain the lower number of governmental replies include the timing (in the *McKerr* group of cases, three of the four communications from NGOs which did not receive a reply were lodged during the period when elections were held in Northern Ireland and a stalemate over the creation of the new devolved government occurred), the particular circumstances of the case or the characteristics of the communications (in the *Mennesson* group of cases, three of the five submissions that did not receive a response shared the position of the French Government).

Overall, States' response rate with respect to submissions by NGOs is satisfactory and there does not appear to be a dramatic difference in the approach by governments towards communications from NGOs compared to communications from NHRIs. This was confirmed, at least in the case of Georgia, by the former Government Agent of Georgia before the ECtHR, who stated that, as agent, he only had regard to the substance of the submissions rather than their authors.[211]

Nonetheless, in a number of replies, governments emphasised that the observations by NHRIs were taken into careful consideration and given special weight; in other words, at least some States, at least formally, have appeared to make a distinction between NHRIs and NGOs as regards their contribution to the execution of ECtHR judgments.[212] In its reply to the Armenian Human Rights Defender, the Armenian Government seemed to be particularly open to the suggestions by the Defender as regards the execution of the *Muradyan* judgment. After expressing its "gratitude" for the Defender's recommendations and the high consideration given to them, the Government committed

[210] These were Amnesty International, Open Society, COSIV, and the European Roma Rights Centre.
[211] Interview with Meskhoradze, Public Defender of Georgia, *supra* n 17. Mr. Meskhoradze was formerly Government Agent of Georgia before the European Court of Human Rights.
[212] This is the case for all replies by the Georgian Government to the Public Defender (even though, in most cases, no specific response to the issues raised by the NHRI is actually given, see *infra*). The Polish Government stated that "it should be emphasized that the Polish authorities analyze with proper caution all the information and recommendations received from the representatives of the National Preventive Mechanism, functioning within the Ombudsperson's Office" (Committee of Ministers/Secretariat General, *supra* n 123, 5). The Serbian Government stated that the report on "missing babies" drafted by the Protector of Citizens "will be taken into account most seriously when deciding on the measures to be implemented", in addition to inviting the Protector to give its views within the new Working group established at the national level (Committee of Ministers/Secretariat General, *supra* n 132, 2).

to cooperate with the Defender to find the most appropriate remedies to the shortcomings identified in the judgment.[213]

The formal recognition by the Committee of Ministers of communications from NHRIs is more difficult to assess. This is because the final resolutions by means of which the Committee closes its examination of cases are limited to the ritualistic acknowledgment that all the necessary individual and general measures have been adopted by the government concerned, without further details.[214] Moreover, whereas decisions and interim resolutions by the Committee (the latter being decisions dealing with more complex cases)[215] are increasingly frequent with respect to cases subject to enhanced supervision, these documents too are concise. As for the rest, the meetings of the Committee of Ministers are not open to the public or any external actors.

Among the cases examined, NHRIs have been explicitly referred to by three Committee of Ministers' decisions only and in rather vague terms. In the *D.H.* case and in the *Gharibashvili* group of cases, the Committee of Ministers invited the national authorities concerned to cooperate with NHRIs, as well as with NGOs;[216] in the *Identoba and others* case, the Committee asked the Georgian Government to "provide their assessment of the impact of the measures taken to date and to provide

[213] Committee of Ministers/Secretariat General, *supra* n 125, 9-10.
[214] Exceptionally, in the final resolution concerning the *De Souza Ribeiro* judgment, the submissions forwarded by non-state actors in the course of the supervision of the case were mentioned; however, the submissions were referred to *en passant*, and the practice has not been followed in subsequent final resolutions. Cf. Committee of Ministers, *Resolution CM/ResDH(2017)135. Execution of the judgment of the European Court of Human Rights: De Souza Ribeiro against France*, 1286th meeting of the Ministers' Deputies, 10 May 2017.
[215] The "Glossary" section on the website of the Department for Execution defines interim resolutions as a "form of decision adopted by the Committee of Ministers aimed at overcoming more complex situations requiring special attention" (https://www.coe.int/hy/web/execution/glossary?desktop=false#{%2215005454%22:[]}, accessed 4 January 2019). Cf. also Section 2.2 of this dissertation.
[216] More specifically, in the *D.H.* case, the Committee of Ministers "recalled the importance of the role of NGOs and national human rights institutions in providing the solution to this complex problem and advised the authorities to continue their close co-operation in this context" (Committee of Ministers, "1259 meeting (June 2016) – H46-11. D.H. and others v. Czech Republic (Application No. 57325/00)", *Decisions,* 9 June 2016, CM/Del/Dec(2016)1259/H46-11, para. 4). In the *Gharibashvili* group of cases, the Committee "in light of the concerns expressed about the effectiveness of investigations, including those recently reported to the Committee, invited the authorities to continue the dialogue with civil society, the Public Defender of Georgia and national and international expert bodies" (Committee of Ministers, "1294th meeting, 19-21 September 2017 (DH) – H46-10. Gharibashvili group v. Georgia (Application No. 11830/03)", *Decisions*, 22 September 2017, CM/Notes/1294/H46-10, para. 6).

information on what measures they still intend to undertake … in the light of … the repeated findings and concerns of the Public Defender, and the concerns voiced by civil society".[217]

References to NGOs have not been much more numerous, notwithstanding the larger number of their submissions. In addition to the above-mentioned references in conjunction with NHRIs, the Committee of Ministers had mentioned the concerns by NGOs as well as the recommendations by the European Commission against Racism and Intolerance (a CoE body) once before in the *Identoba and others* group of cases.[218] In the *Zorica Jovanović* case, the Committee referred to the "concerns" expressed by "civil society" (a term which might actually include the Serbian NHRI as well) and asked the Serbian Government to consult with civil society to address those concerns.[219]

As far as the Department for Execution is concerned, a development is to be highlighted after the entry into force of the new Rules of the Committee of Ministers in 2006.[220] While the Department for Execution had already strengthened its scrutiny of and cooperation with Member States regarding the execution of judgments in the previous years, the publicity of this role came with the new Rules. Indeed, not only are the memoranda by the Department increasingly made public, but so are the notes on the agenda of the Committee of Minister's meetings, which include summaries of the measures taken and proposed by Member States to execute certain judgments and the assessment of these measures by the Department for Execution.

The notes on the agenda refer, to an increasing extent, to the communications from NHRIs. There is, however, no uniform practice of reporting communications from NHRIs in these documents.

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[217] Committee of Ministers, "1318th meeting, 5-7 June 2018 (DH) – H-46.8. Identoba and Others group v. Georgia (Application No. 73235/12)", *Decisions*, 7 June 2018, CM/Del/Dec(2018)1318/H46-8.

[218] The Committee "bearing in mind the conclusions of the latest report of the European Commission against Racism and Intolerance (ECRI) on Georgia and the concerns expressed by NGOs, invited the authorities to provide further information on the practical impact of these measures and on possible additional measures envisaged, notably in the light of ECRI's recommendations" (Committee of Ministers, "1273rd meeting, 6-8 December 2016 – H46-11. Identoba and others v. Georgia (Application No. 73235/12)", *Decisions*, 9 December 2016, CM/Del/Dec(2016)1273/H46-11, para. 5).

[219] The Committee "noted with interest that the revised draft law prepared by the Serbian authorities to execute this judgment took into consideration… certain concerns raised by civil society…. noted however that the revised draft law still leaves various issues outstanding…. encouraged therefore the Serbian authorities to address the outstanding issues and concerns of parents of 'missing babies' in consultation with civil society" (Committee of Ministers, "1250th meeting, 8-10 March 2016 – H46-23. Zorica Jovanović v. Serbia (Application No. 21794/08)", *Decisions*, 11 March 2016, CM/Del/Dec(2016)1250/H46-23, paras. 1-2).

[220] Cf. Sections 2.2 and 2.4 of this dissertation.

At times, communications from NHRIs are entirely ignored;[221] at other times, the notes merely mention the fact that one or more communications have been received;[222] at yet other times, the content of the communications is summarised.[223] Finally, especially in those instances where the concerns or observations by NHRIs are shared by the Department and influence its final recommendations, the communications appear to have been analysed in greater detail.[224] Similar considerations apply to submissions by NGOs.[225]

In the more elaborate memoranda by the Department, references to the communications from NHRIs and NGOs are more frequent, as the memoranda aim to provide in-depth analyses of the cases under scrutiny. For instance, in the memorandum concerning the *Gebremedhin* case, the Department

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[221] E.g., the communication from the Polish Commissioner for Human Rights in the *Orchowski and others* group of cases, while reported among the "reference texts", is not mentioned in Committee of Ministers, "Poland. Orchowski Group v. Poland", *Annotated order of Business and decisions adopted. 1164th Meeting (DH), 5-7 March 2013,* 11 March 2013, CM/Del/Dec(2013)1164. The same goes for the first communication from the Serbian Protector of Citizens in the *Zorica Jovanović* case (Committee of Ministers, "Serbia. Zorica Jovanović", *Annotated order of Business and decisions adopted. 1208th meeting (DH), 23-25 September 2014*, 30 September 2014, CM/Del/Dec(2014)1208; and Committee of Ministers, "H46-18 Zorica Jovanović v. Serbia (Application No. 21794/08)", *Notes on the Agenda. 1243 Meeting, 8-9 December 2015,* 10 December 2015, CM/Notes/1243/H46-18), as well as for its second one (Committee of Ministers, "H46-25 Zorica Jovanović v. Serbia (Application No. 21794/08)", *Notes on the Agenda. 1265 Meeting, 20-22 September 2016*, 22 September 2016, CM/Notes/1265/H46-25; and Committee of Ministers, "H46-27 Zorica Jovanović v. Serbia (Application No. 21794/08)", *Notes on the Agenda. 1273 Meeting, 6-8 December 2016*, 9 December 2016, CM/Notes/1273/H46-27).

[222] Cf. Committee of Ministers, "10 cases against the United Kingdom. S. and Marper", *Annotated Agenda and Decisions, Section 4.2. 1078th meeting (DH), 2-4 March 2010*, 18 March 2010, CM/Del/OJ/DH(2010)1078; and Committee of Ministers, "United Kingdom. S. and Marper v. the United Kingdom", *Annotated order of Business and decisions adopted. 1150th Meeting (DH), 24-26 September 2012,* 28 September 2012, CM/Del/Dec(2012)1150.

[223] Cf. Committee of Ministers, "Czech Republic. D.H. and others", *Annotated order of Business and decisions adopted. 1201st meeting (DH), 3-5 June 2014*, 6 June 2014, CM/Del/Dec(2014)1201; and Committee of Ministers, "Czech Republic. D.H. and others", *Annotated order of Business and decisions adopted. 1222nd meeting (DH), 11-12 March 2015*, 13 March 2015, CM/Del/Dec(2015)1222. Cf. also Committee of Ministers, "O'Keeffe v. Ireland (Application No. 35810/09)", *Notes on the Agenda. 1259 Meeting, 7-9 June 2016*, 9 June 2016, CM/Notes/1259/H46-15; and Committee of Ministers, "Tsintsabadze group v. Georgia (Application No. 35403/06)", *Notes on the Agenda. 1324th meeting, 18-20 September 2018 (DH),* 20 September 2018, CM/Notes/1324/H46-6.

[224] Cf. Committee of Ministers, "Gharibashvili group v. Georgia (Application No. 11830/03)", *Notes on the Agenda. 1294th meeting, 19-21 September 2017 (DH)*, 22 September 2017, CM/Notes/1294/H46-10.

[225] For instance, in the *Kurić and others* case, some communications from NGOs are mentioned, but in the "reference texts" only: cf. Committee of Ministers, "Slovenia. Kurić and others v. Slovenia", *Annotated order of Business and decisions adopted. 1172nd Meeting (DH), 4-6 June 2013*, 7 June 2013, CM/Del/Dec(2013)1172; and Committee of Ministers, "Slovenia. Kurić and others v. Slovenia", *Annotated order of Business and decisions adopted. 1179th Meeting (DH), 24-26 September 2013,* 27 September 2013, CM/Del/Dec(2013)1179.

In the *Mennesson* group of cases, communications from NGOs are mentioned, but no reference is made to their content: cf. Committee of Ministers, "H46-9 Mennesson group v. France (Application No. 65192/11)", *Notes on the Agenda. 1294th meeting, 19-21 September 2017 (DH),* 22 September 2017, CM/Notes/1294/H46-9.

In the *McKerr* group of cases, the *Notes* of the meetings dedicated to it present an increasingly detailed analysis of submissions by NGOs: cf., *inter alia*, Committee of Ministers, "United Kingdom. McKerr Group", *Annotated order of Business and decisions adopted. 1201st meeting (DH), 3-5 June 2014*, 6 June 2014, CM/Del/Dec(2014)1201; Committee of Ministers, "McKerr group v. the United Kingdom (Application No. 28883/95)", *Notes on the Agenda. 1243 meeting, 8-9 December 2015*, 10 December 2015, CM/Notes/1243/H46-25; and Committee of Ministers, "McKerr group v. the United Kingdom (Application No. 28883/95)", *Notes on the Agenda. 1259 meeting, 7-9 June 2016*, 9 June 2016, CM/Notes/1259/H46-42.

for Execution referred extensively to the observations submitted by the *Médiateur* and the CNCDH with respect to the effectiveness of the new remedy introduced for asylum seekers on the border to challenge the refusal of authorities to admit them onto the French territory.[226] The concerns expressed by the two institutions – regarding the degree of detail required for the applicants' complaints, the tight deadline for lodging the complaints, the insufficient assistance from a legal and linguistic point of view – were illustrated in detail by the Department for Execution.[227]

Similarly, in the *McKerr* group of cases, the Department referred in a 2006 memorandum to the proposals put forward by the Northern Ireland Human Rights Commission for the better implementation of the ECtHR judgment in question.[228] Those proposals entailed, *inter alia*, the formalisation into law of a number of practices regarding investigations into the acts of the armed forces, changes in the legal aid scheme for the victims' families, and the expedition of inquest proceedings.[229]

Nonetheless, memoranda by the Department for Execution are overall rare, as are the exchanges of correspondence between the Department and States that are made public. From these exchanges, it appears that the Department has explicitly drawn on submissions by NHRIs and NGOs to put questions to governments. In the *Popov* group of cases, the Department referred to the joint communication from the CNCDH and the *Défenseur* to ask the French Government for more information about the exceptional regime in force in the overseas territory of Mayotte as far as the detention of migrant families with minors is concerned.[230] In the *De Souza Ribeiro* case, the

[226] Committee of Ministers, "Gebremedhin (Gaberamadhien) v. France. Assessment of the general measures presented in the action report by France. Memorandum prepared by the Department for the execution of judgments and decisions of the European Court of Human Rights", *Information documents*, 26 February 2013, CM/Inf/DH(2013)9-rev. Cf. also ECtHR, *Gebremedhin v. France*, no. 25389/05, 26 April 2007.
[227] Committee of Ministers, *supra* n 226, paras. 8, 11, 21, and 25 in particular.
[228] Committee of Ministers, "Cases concerning the action of security forces in Northern Ireland – Stocktaking of progress in implementing the Court's judgments. Memorandum prepared by the Secretariat incorporating information received up to 26 May 2006", *Information documents*, 1 June 2006, CM/Inf/DH(2006)4-rev.
[229] The Northern Irish Commission's views are reported at ibid., paras. 18-19, 75, 107, 116, 124, 149. The original submission by the Commission is not available.
[230] Committee of Ministers/Secretariat General, *1243 meeting (8-10 December 2015). Communication from the authorities concerning the case of Popov against France (Application No. 39472/07),* 30 September 2015, DH-DD(2015)1100, 6 (question c)).

information provided by NGOs – before the intervention by the *Défenseur* – was used by the Department for Execution to ask for clarifications on the expulsion of asylum seekers from Mayotte.[231] However, the available documents of this kind are so scarce that it is difficult to derive general conclusions on the point. In sum, there is no consistency as far as the reference by the Department for Execution to the submissions forwarded by NHRIs (and NGOs) is concerned.

The examination of the impact of communications from NHRIs on the positions of States, the Committee of Ministers, and the Department for Execution would however be incomplete if it was limited to the formal recognition of the communications – i.e., to the explicit reference to these documents. Indeed, it is apparent from the outcome of the supervision process of some cases that NHRIs were able to influence, to a certain extent, the measures planned by States to execute the judgments and/or the recommendations by the Department for Execution and/or the decisions by the Committee of Ministers also in the absence of express mention of the communications in question.

Therefore, while explicit reference to the Rule 9(2) communications can be an indicator of the impact that NHRIs have had, the substantial acceptance of communications by States and CoE bodies is not always marked by formal recognition; on the other hand, reference in passing to the submissions by NHRIs does not necessarily imply that they have had a concrete influence on the approach of States or CoE actors. An analysis that goes beyond formal mention of communications from NHRIs is thus necessary to detect the relationship between these communications and the results of the supervision of execution process.

As far as States' replies to communications from NHRIs are concerned, it is admittedly hard to find instances where States spontaneously accepted the comments and recommendations by NHRIs and modified their action plans and reports accordingly. As mentioned, the reaction by the Armenian

[231] Committee of Ministers/Secretariat General, *1243 meeting (8-10 December 2015) (DH). Communication from the authorities concerning the case of De Souza Ribeiro against France (Application No. 22689/07),* 30 September 2015, DH-DD(2015)1101, question no. 5.

Government might constitute an exception in this respect,[232] but as the communication from the Human Rights Defender is recent and the Government is yet to submit a new action plan following the Defender's intervention, it is too soon to tell whether the Armenian Government will actually follow up the proposals by the Defender.[233] Analogous considerations apply to the recent statement by the Georgian Government that the recommendation by the Public Defender concerning the extension of the storage period for video-surveillance recordings in penitentiaries was "welcomed" by the Government in the context of ongoing reforms.[234]

Much more often, governments contested the new or different information provided by NHRIs, they defended the adequacy and effectiveness of the measures proposed or implemented, and they objected to the often more extensive and demanding proposals made by NHRIs. At times, governments indicated that the views of their respective NHRIs were taken into serious consideration, only to reject them thereafter.[235]

However, it is significant that most replies by States duly answered the objections raised by NHRIs; while the level of detail varied,[236] few governmental replies summarily dismissed claims by NHRIs. The replies by the Georgian Government, which frequently referred to previous or forthcoming action plans or to the replies provided to NGOs in order to address the issues raised by the NHRI,[237] would *prima facie* appear as a way to avoid the specific concerns highlighted by the

[232] Cf. above in this section, n 213 in particular.
[233] At any rate, a representative from the Human Rights Defender of Armenia confirmed the cooperative relationship between the Defender and the Government as far as the execution of ECtHR judgments is concerned: interview with Mikayel Khachatryan, Head of the International Cooperation Department at the Human Rights Defender of the Republic of Armenia, 11 April 2019, on file with author.
[234] Cf. Committee of Ministers/Secretariat General, *supra* n 156, 9.
[235] Cf. the answer provided by the Polish Government in the *Orchowski and others* case: Committee of Ministers/Secretariat General, *supra* n 123, 5 *et seqq*.
[236] Among the most thorough replies, cf. those by the Czech Government to the two communications from the Public Defender, *supra* n 208. The responses by the UK Home Office in the *Gillan and Quinton* case, by the Polish Government in the *Orchowski and others* case, and by the French Government in the *Winterstein and others* case are also rather detailed.
[237] Committee of Ministers/Secretariat General, *supra* n 30, 18; Committee of Ministers/Secretariat General, *supra* n 126, 19; and Committee of Ministers/Secretariat General, *Communication from a NGO (Public Defender of Georgia) (18/04/2018) in the case of Identoba and others v. Georgia (Application No. 73235/12), Members of the Gldani Congregation of Jehovah's Witnesses and others v. Georgia (Application No. 71156/01), Begheluri and others v. Georgia (Application No. 28490/02) and response from the Georgian authorities (26/04/2018)*, 27 April 2018, DH-DD(2018)444, 9.

Defender. Nonetheless, at least with respect to the *Gharibashvili* group of cases, various issues raised by the Defender were indeed shared by the NGO Coalition for an Independent and Transparent Judiciary, to which the Georgian Government replied in detail on two occasions.[238]

Therefore, although States might not readily welcome and follow up recommendations by NHRIs, the dialogue that is established between States and NHRIs through these exchanges appears critical for well-founded analyses by the Department for Execution and more objective decisions by the Committee of Ministers. The very fact that information and views alternative to those provided by governments are allowed contributes to less one-sided assessments by the relevant CoE bodies. Indeed, it is argued here that NHRIs do not expect their governments to embrace their positions, but they mainly seek through their submissions to urge the Committee of Ministers and the Department for Execution to recommend that governments adopt new or different measures which, in the opinion of NHRIs, would ensure better compliance with the ECtHR judgments in question.

This argument has been confirmed by the representatives from various NHRIs, who declared that their institutions would initiate a dialogue with their respective governments at the national level first and submit communications to the Committee of Ministers only should that dialogue fail.[239] While not all NHRIs necessarily perceive Rule 9(2) communications as a means of last resort, it is clear that by submitting information to the Committee of Ministers NHRIs aim to involve other actors in their exchanges with governments – actors which could use different means of pressure to urge governments to fully execute ECtHR judgments.

At any rate, there are a few instances where it appears that governments, while not openly subscribing to the views of NHRIs, *de facto* implemented some of the adjustments proposed by these institutions. In the *Winterstein and others* case, the French Government had long maintained that the developments which occurred in the national case-law following the ECtHR judgment exhausted the general measures necessary to fully implement the judgment. In spite of that, the Government made

[238] Cf. Committee of Ministers/Secretariat General, *supra* n 198, 17 *et seqq*.; and Committee of Ministers/Secretariat General, *supra* n 199, 15 *et seqq*.
[239] Cf. *supra* n 26.

reference, in its second-to-last action plan, to legislative amendments that sought to encourage the development of *terrains familiaux locatifs* with a view to better taking into account the housing needs of Travellers.[240] Those legislative changes closely mirrored the proposals by the CNCDH,[241] even though the French Government emphasised that the measures were adopted "independently from the execution of the Winterstein judgment".[242]

In the *S. and Marper* case, the UK Government changed its initial resolution to amend the framework governing the retention of DNA profiles and fingerprints through secondary legislation and decided to reform it by way of primary legislation. The UK Government had been urged to do so by several domestic actors, including the Parliament and the Northern Ireland Human Rights Commission.[243]

The impact of submissions by NHRIs on the analyses by the Department for Execution and on the decisions by the Committee of Ministers deserves, at any rate, closer consideration. Several examples can be mentioned of the influence that the communications from NHRIs have had on the questions put to governments by the Department for Execution and on the observations that the Department addressed to the Committee of Ministers regarding the status of execution of ECtHR judgments.

It has been mentioned above that, in relation to the *Popov* group of cases (detention of migrant families with minors), the Department for Execution explicitly referred to the communication submitted by the CNCDH and the *Défenseur* to ask for further details regarding the derogatory regime of the overseas territory of Mayotte.[244] Moreover, at least two further questions put to the French Government by the Department in that group of cases touched upon issues dealt with in the

[240] Committee of Ministers/Secretariat, *1288 meeting (June 2017) (DH). Action plan. Communication from France concerning the case Winterstein and others v. France (Application No. 27013/07)*, 27 June 2017, DH-DD(2017)743, 11-12.
[241] Committee of Ministers/Secretariat, *supra* n 134, paras. 26 *et seqq*.
[242] Committee of Ministers/Secretariat, *supra* n 240, 11.
[243] Committee of Ministers/Secretariat General, *1072nd meeting DH (December 2009). Case S. and Marper against United Kingdom – Statement by the United Kingdom delegation,* 3 December 2009, DD(2009)619E, para. 3.
[244] Cf. *supra* n 230.

submission by the two institutions. A first issue is that of the legal value and stability of the 2012 ministerial circular limiting the grounds for detention of migrant families.[245] A second one concerns the violation of Article 5(4) ECHR by France and the actual possibility for minors to address courts with a view to challenging their detention. In this respect, the concerns raised by the two institutions regarding the uncertainties of the case-law of administrative tribunals and the impossibility for the *juges des libertés et de la detention,* who normally review the prolonged detention of migrant adults, to review the situation of minors detained, were referred to by the Department.[246]

The *Popov* group of cases being subject to standard supervision, no decision by the Committee of Ministers nor memorandum by the Department for Execution are available. However, the indirect impact of the submission by the CNCDH and the *Défenseur* on the measures adopted by the French Government is evident in the most recent action report filed by France. First of all, the provisions that make the detention of migrant families with minors exceptional and only possible where appropriate facilities are available have been put on a statutory basis, as recommended by the two national institutions.[247] Moreover, while minors are still not able to directly lodge an appeal against their detention, it appears that the judicial guarantees against decisions placing them in detention have been strengthened overall.[248] At any rate, this group of cases is still pending before the Committee of Ministers.[249]

The *D.H.* case, concerning the discrimination of Roma children in the schools of the Czech Republic, is also illustrative of the influence that NHRIs can exert on the considerations by the Department for Execution. In the notes on the agenda, as well as in a 2015 memorandum, the Department for Execution took up several concerns raised by the Czech Public Defender, including

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[245] Committee of Ministers/Secretariat General, *supra* n 112, 11-12; and Committee of Ministers/Secretariat General, *supra* n 230, 4 *et seqq*. (question b)).
[246] Committee of Ministers/Secretariat General, *supra* n 112, 9-10; and Committee of Ministers/Secretariat General, *supra* n 230, 8.
[247] Committee of Ministers/Secretariat General, *1288 meeting (June 2017) (DH). Action report. Communication from France concerning the case of Popov v. France (Application No. 39472/07)*, 20 March 2017, DH-DD(2017)327, 3 *et seqq*.
[248] Ibid., 5-6.
[249] A circumstance which, according to a representative from the CNCDH, is attributable to the intervention by the Commission (interview with Dumortier, CNCDH, *supra* n 28).

the circumstance that socially disadvantaged children could still be put in classes for children with mild mental disabilities, the high number of children who had not been re-diagnosed according to the new tools, the lack of monitoring over the actual transfer of children to standard classes, the lack of disaggregated data on Roma children, the conflict of interests related to the provision of information by schools, and the limitations on the powers of the forthcoming supervisory body.[250] With respect to most of these issues, which were highlighted by a number of NGOs as well, the submissions by the Public Defender were explicitly referred to in the memorandum.[251] The Defender's observations were also incorporated into various decisions by the Committee of Ministers, together with the recommendation that the cooperation of the Czech Government with the Defender and NGOs continue.[252]

Indeed, the *D.H.* case is exemplary of the twin-track strategy that NHRIs can undertake by engaging with the authorities at the national level and interacting with CoE bodies at the same time. Further information, particularly in the form of statistics, is being awaited by the Committee of Ministers to ascertain the effectiveness of the measures recently introduced by the Czech Parliament and Government to fully execute the judgment.

Analogously, the Serbian Protector has been highly involved in the promotion of the execution of the *Zorica Jovanović* judgment at both the international and national levels. While the first submission by the Protector, consisting in a 2010 special report on the phenomenon of "missing babies", was not mentioned explicitly by either the Department for Execution or the Committee of Ministers, it had been largely relied on by the ECtHR itself to adopt the pilot-judgment procedure and recommend that the Serbian Government establish, by means of a *lex specialis*, an appropriate

[250] Cf. Committee of Ministers/Secretariat General, *supra* n 118; and Committee of Ministers/Secretariat General, *supra* n 119.
[251] Department for the Execution of Judgments, *D.H. and others against Czech Republic (No. 57325/00) – General measures for the execution of judgment of the European Court. Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights*, 3 March 2015, H/Exec(2015)8, 6 *et seqq*.
[252] E.g., Committee of Ministers, "1259 meeting (June 2016) – H46-11. D.H. and others v. Czech Republic (Application No. 57325/00)", *supra* n 216.

mechanism, supervised by an independent body, to provide compensation and answers to the parents involved.[253]

The findings and recommendations by the Serbian NHRI, which were mostly shared by intervening NGOs and parents' associations, thus influenced the execution process at the national level – the Protector was *inter alia* included in the Working group entrusted with proposing general measures to implement the judgment – as well as the supranational supervision. The Committee of Ministers and particularly the Department for Execution, which has engaged in close bilateral consultations with the Serbian Government, followed up various proposals from the Protector, such as the adoption of the necessary measures by law (instead of bylaw) and the extension of the categories of potential applicants, and they shared the Protector's doubts concerning the powers of the police units and courts responsible for the "missing babies" cases.[254] The Committee of Ministers also invited the Serbian Government to more generally address the "concerns of parents of 'missing babies' and civil society" and cooperate with them.[255] The supervision of the case continues as the general elections held in Serbia in April 2016 have slowed down the execution process.

The persistent shortcomings affecting the investigations into possible violations of Articles 2 and 3 ECHR by law-enforcement officials, as highlighted by the Georgian Public Defender, were explicitly mentioned in the notes on the agenda of the December 2016 meeting and led the Committee of Ministers to keep the effectiveness of these investigations under review and require further information from the Georgian Government.[256]

In the notes on the agenda of the September 2017 meeting especially, the concerns expressed by the Public Defender (and reiterated by a coalition of NGOs) were referred to in detail, in particular

[253] ECtHR, *Zorica Jovanović v. Serbia, supra* n 47, para. 92.
[254] Cf. the submissions forwarded by the Protector of Citizens in the case, *supra* nn 87 and 132, as well as the *Notes on the Agenda* relating to the case, mentioned *supra* n 221.
[255] Cf. Committee of Ministers, *supra* n 219; and Committee of Ministers, "Zorica Jovanović v. Serbia (Application No. 21794/08)", *Decisions, 1265th meeting – 20-21 September 2016*, 22 September 2016, CM/Del/Dec(2016)1265/H46-25, para. 3.
[256] Committee of Ministers, "Gharibashvili group v. Georgia (Application No. 11830/03)", *Notes on the Agenda*, *1273 Meeting, 6-8 December 2016*, 9 December 2016, CM/Notes/1273/H46-10, as well as the Decision adopted at the same meeting, para. 7.

as regards the hierarchical ties between the law-enforcement officials accused of violations and those in charge of the investigations – i.e., the General Inspection Departments of the same bodies to which the accused belong.[257] The Department for Execution accordingly noted that "it is important that the authorities take into account the relevant recommendations of the Public Defender of Georgia and national and international expert bodies" as far as the independence and effectiveness of investigations is concerned,[258] whereas the Committee of Ministers – by means of a decision adopted during the same meeting – "in light of the concerns expressed about the effectiveness of investigations, including those recently reported to the Committee, invited the authorities to continue the dialogue with civil society, the Public Defender of Georgia and national and international expert bodies".[259]

While the supervision of the *Gharibashvili* judgment has recently been closed, the examination of most repetitive cases of the group is ongoing, due to the persistent need for general measures. In September 2018, the Committee of Ministers welcomed a number of reforms undertaken, the most significant of which – the creation of the State Inspector's Service as an independent mechanism investigating allegations of ill-treatment perpetrated by law-enforcement officials – met a long-standing request from the Public Defender and the Coalition for an Independent and Transparent Judiciary.[260] Other developments included the strengthening of victims' rights of participation in the proceedings, which had also been advocated by the Defender.

At times, the arguments by NHRIs were accepted by the Department for Execution and the Committee of Ministers only in part. In the *S. and Marper* case, criticisms by the Northern Ireland Human Rights Commission that the duration of the retention of DNA profiles and fingerprints in

[257] Committee of Ministers, *supra* n 224.
[258] Ibid.
[259] Committee of Ministers, "1294th meeting, 19-21 September 2017 (DH) – H46-10. Gharibashvili group v. Georgia (Application No. 11830/03)", *supra* n 216.
[260] Committee of Ministers, "1324th meeting, 18-20 September 2018 (DH) – H46-6. Tsintsabadze group v. Georgia (Application No. 35403/06)", *Decisions*, 20 September 2018, CM/Del/Dec(2018)1324/6, para. 8. Cf. also the action plan submitted by the Georgian Government: Committee of Ministers/Secretariat General, *1324th meeting (September 2018) (DH). Action plan (13/07/2018). Communication from Georgia concerning the case of Tsintsabadze v. Georgia (Application No. 35403/06)*, 8 August 2018, DH-DD(2018)767, 27-28. Finally, cf. all submissions forwarded by the Georgian Public Defender in this group of cases, *supra* nn 30, 126, and 173.

police databases was still excessive and that no distinction had been made on the basis of the age of the suspect/convict and of the gravity of the crime mostly reinforced already clear indications provided by the ECtHR as to the changes that the UK Government needed to enact.[261] The issues of application of the planned measures in Northern Ireland and lack of interim measures pending the entry into force of the new ECHR-compatible legislation appear to be more closely linked to the concerns raised by the Northern Irish NHRI, even though no explicit reference to its submission was made.[262] On the other hand, the risks connected to the "national security exception" anticipated by the Northern Ireland Commission were not taken up by the Department for Execution nor by the Committee of Ministers.[263] At any rate, the implementation of a number of important amendments to the original action plan appears to mostly depend on the installation of the new coalition government in May 2010, which proved to be more willing to give full execution to the ECtHR judgment.

At other times, the views of NHRIs seem to have essentially been rejected by the Department for Execution. For instance, in the *McKerr* group of cases, concerning the actions of the UK security forces in Northern Ireland, the Department analysed in great detail the arguments by the Northern Ireland Commission, but it mostly accepted the responses by the UK Government on the adequacy of various practices and policies relating to the inquests (which the Commission had asked to put on a statutory footing), as well as of the new rules compelling witness testimonies.[264]

The delays in the conduct of inquest proceedings, possibly due to the lack of sufficient resources, were the sole issue on which the Department requested further information from the UK Government.[265] The same issue formed the subject of a further submission by the Northern Ireland Commission to the Committee of Ministers;[266] the question remains open, as the Department for

[261] ECtHR, *S. and Marper v. the UK*, *supra* n 42, para. 119 in particular.
[262] Committee of Ministers/Secretariat General, *supra* n 168, paras. 4-8.
[263] Ibid., paras. 13-16.
[264] Committee of Ministers, *supra* n 228.
[265] Ibid., Section J, paras. 144 *et seqq*.
[266] Committee of Ministers/Secretariat General, *supra* n 150, 4 *et seqq*. This second submission also asked for clarifications on the competences of the various bodies entrusted with the investigations.

Execution and the Committee of Ministers are awaiting for a reform which they have already substantially approved but has yet to be implemented.

In the *O'Keeffe* case, which highlighted the failure by the Irish authorities to protect children from sexual abuses by teachers, the Irish Human Rights and Equality Commission objected to the allegedly restrictive notion of "victim" adopted by the Irish Government in its action plans, according to which compensation by the State would only be granted to victims of abusers who had previously been reported to the school management, without any action having been taken against them.[267] The Irish NHRI even asked, in its second communication, to refer the matter to the ECtHR through the interpretation proceedings under Article 46(3) ECHR.[268]

However, in light of the Irish Government's decision to (slightly) extend the categories of beneficiaries of *ex gratia* payments by the State and in light of the promise by the Government to adopt a "holistic and flexible approach" when ascertaining whether a prior complaint had been lodged against the abuser, the Department for Execution held that "the limits imposed on the settlement scheme appear acceptable".[269]

Incidentally, the observation that the requirement of a prior complaint could not be derived from the Grand Chamber's judgment was shared by the Child Law Clinic of the University College Cork, an NGO which also intervened in the case, and doubts were also expressed by the Independent Assessor, who has been tasked by the Irish State with reviewing applications for *ex gratia* payments rejected by the State Claims Agency.[270] Moreover, a new motion by the opposition to further broaden the range of beneficiaries has recently been passed by one of the Houses of the Irish Parliament.[271] In

[267] Committee of Ministers/Secretariat General, *supra* n 110, 4-7; and Committee of Ministers/Secretariat General, *supra* n 193, paras. 20 *et seqq*. in particular.
[268] Committee of Ministers/Secretariat General, *supra* n 193.
[269] Committee of Ministers, "O'Keeffe v. Ireland (Application No. 35810/09)", *supra* n 223.
[270] Committee of Ministers/Secretariat General, *1318th meeting (June 2018) (DH). Communication from the authorities (10/05/2018) concerning the case of O'Keeffe v. Ireland (Application No. 35810/09),* 23 May 2018, DH-DD(2018)503. Cf. also Committee of Ministers/Secretariat General, *1230 meeting (9-11 June 2015) (DH). Communication from a NGO (The Child Law Clinic of the University of Cork) (22/04/2015) in the case of O'Keeffe against Ireland (Application No. 35810/09),* 07 May 2015, DH-DD(2015)499, paras. 12 *et seqq*.
[271] Committee of Ministers/Secretariat General, *1324th meeting (September 2018) (DH). Action plan (27/07/2018). Communication from Ireland concerning the case of O'Keeffe v. Ireland (Application No. 35810/09)*, 2 August 2018, DH-DD(2018)755, para. 18. As reported by the Irish Government in the action plan, the motion "calls for access to the

general, it can be said that the debate at the national level on how best to compensate victims of sexual abuses in schools and implement the *O'Keeffe* judgment is still ongoing.

It is clear from the examples above that the assessment of States' action plans and reports by the Department for Execution plays a heavy role in the determinations by the Committee of Ministers. Thus, the impact that submissions by NHRIs have on the analyses by the Department is likely to reflect on the decisions by the Committee of Ministers. This is not, however, always the case, as the Committee of Ministers is not bound to the recommendations issued by the Department.

In the *Gebremedhin* case, the Department for Execution took into serious consideration the concerns raised by the CNCDH and the *Médiateur* regarding the new remedy established by France to allow for asylum seekers who make their applications at the border to challenge the denial of their requests to enter France. In the opinion of the national institutions, even though a legislative amendment had introduced an appeal with suspensive effects against this kind of decisions, the remedy in question did not appear to be effective in practice.[272] Having highlighted several issues that potentially threatened the effectiveness of the remedy (including short deadlines, insufficient legal and linguistic assistance, and high standards required for the reasoning of the applications), the Department for Execution concluded that "it … falls to the Committee of Ministers to decide whether, notwithstanding the effectiveness in theory of the measures taken, the aforementioned doubts about its effectiveness in practice do not call into question the adequacy of the general measures adopted by France".[273] Nevertheless, the Committee of Ministers closed its examination of the case at the same meeting.[274]

State's redress scheme for those citizens who were sexually abused in primary school, whose perpetrators have already been identified and convicted, on the same terms as has been afforded to those in residential institutions". The Government made it clear that it considered that the motion "goes beyond the Judgment of the ECtHR in the O'Keeffe case" (ibid.).

[272] CNCDH and *Médiateur*, *supra* n 175, 1-9.

[273] Committee of Ministers, *supra* n 226, para. 28.

[274] Committee of Ministers, *Resolution CM/ResDH(2013)56. Gebremedhin (Gaberamadhien) against France: Execution of the judgment of the European Court of Human Rights*, 1166 meeting of the Ministers' Deputies, 27 March 2013.

The cases mentioned until now include cases where the Department for Execution or the Committee of Ministers explicitly referred to the submissions by NHRIs (to either endorse or discard them) as well as cases where the recommendations by these CoE bodies otherwise appeared to draw on these submissions, as the only or main sources at the disposal of CoE bodies which mentioned certain information or views. In other instances, it is more difficult to discern whether NHRIs played a role in the determinations by the CoE bodies; this is especially the case for judgments that are subject to standard supervision, which normally implies that no document by the Department for Execution is available nor any interim decision by the Committee of Ministers is adopted.

In its communication to the Committee of Ministers in relation to the *Winterstein and others* case, the CNCDH detailed several general measures that, in its opinion, the French Government ought to adopt in order to fully comply with the judgment. As mentioned, the Court itself had recognised the expertise of the CNCDH on the challenges faced by Roma and Travellers in France in relation to housing.[275] The case having been placed under standard supervision, the opinions by the Department for Execution and the Committee of Ministers regarding the need for general measures in this case cannot be derived from publicly available documents. In a more recent judgment on the same case, the Court ruled separately on just satisfaction; but while the Court gave some indications as to the individual measures to be adopted by the French Government, it did not deal with general measures (and it was not expected to).

The question remains whether the ongoing supervision of the case by the Committee of Ministers is due to the fact that not all individual measures have been adopted yet by the French Government or whether it is also motivated by the expectation that general measures would be enacted too. Meanwhile, it appears that the French Government has met at least one of the demands by the CNCDH.[276]

[275] Cf. *supra*, n 82.
[276] Cf. above in this section and n 240.

In the *Vinter and others* case, where a violation of Article 3 ECHR was found by the Court insofar as the UK legal order did not allow for an adequate review of whole-life orders, the Equality and Human Rights Commission argued that the amendment of the relevant prison regulations was necessary to bring the national legal order into line with the ECtHR judgment. Failing this amendment, the Commission asked the Committee of Ministers to move the case from standard to enhanced supervision or, in the alternative, to wait for a forthcoming ECtHR ruling on a similar case.[277] Notwithstanding the request from the UK Government to close the supervision of the case, the case remained under scrutiny by the Committee of Ministers until the Court issued its judgment in *Hutchinson*.[278] It is not clear, however, in the absence of public documents by the Department for Execution or determinations by the Committee of Ministers, whether the decision to keep the case under supervision was in fact influenced by the communication from the NHRI or whether the Committee and the Department were already aware of the pending status of the *Hutchinson* case and would have taken the same decision anyway.

It is doubtful whether the submission by the Public Defender of Georgia in the *Merabishvili* case, concerning the pre-trial detention and questioning of a former Prime Minister of Georgia, was taken into consideration by the Department for Execution when it maintained that the general measures to be adopted by the Georgian Government to fully execute the judgment should include the extension of the period of retention of video footage from penitentiary institutions, so as to allow for the corroboration of complaints submitted by inmates.[279] The Public Defender had submitted a communication focusing on this particular aspect and making relevant recommendations to the Georgian Government,[280] but the communication was not referred to by the Department for Execution

[277] Committee of Ministers/Secretariat General, *supra* n 99, 7.
[278] ECtHR, *Hutchinson v. the United Kingdom* [GC], no. 57592/08, 17 January 2017. The Court ruled in favour of the UK Government, insofar as it considered the decision by the Court of Appeals mentioned in the Government's action report a sufficient guarantee for the review of whole-life orders.
[279] Committee of Ministers, "H46-10 Merabishvili v. Georgia (Application No. 72508/13)", *Notes on the Agenda. 1331st meeting, 4-6 December 2018 (DH)*, 6 December 2018, CM/Notes/1331/H46-10.
[280] Committee of Ministers/Secretariat General, *supra* n 156.

and, having been lodged by the Defender just before the Committee of Ministers' meeting, it might not have been examined by the Department for the purposes of that meeting.

Neither is clear whether the issues raised by the Irish Human Rights Commission in the *McFarlane* group of cases, with respect to the relationship between the ECHR and the Irish Constitution as well as the immunity of judges from claims for damages, have had or will have an impact on the execution of the judgments. The recent transfer of the group of cases from standard to enhanced supervision might give the Department for Execution and the Committee of Ministers the opportunity to examine the arguments by the NHRI more closely and take an explicit position on them.[281]

The *McFarlane* group of cases is also illustrative of a possible reason why the views expressed by NHRIs might not be (entirely) endorsed by the CoE bodies responsible for the oversight of the execution of ECtHR judgments. Insofar as NHRIs tend to raise broader issues, which they believe to be connected with the ECtHR rulings even though not directly dealt with by the Court, they might take advantage of cases to call for more extensive reforms or anyway advance the protection of human rights within their national legal systems. It is not yet clear whether the arguments by the Irish NHRI in the *McFarlane* group of cases will be considered as such by the Committee of Ministers and the Department for Execution; after all, the ECtHR appears to have pointed to similar fundamental issues in its ruling. At any rate, the Irish Government has until now sought to remedy the violations ascertained by the Court essentially by means of a re-organisation of the court system, without engaging in a deeper reflection on the kind of issues raised by the NHRI.

An even clearer example is arguably that of the submission by the Armenian Human Rights Defender in the *Muradyan* case, a case highlighting the lack of effective investigations into the deaths and ill-treatment of servicemen and inadequate medical care in the military. The observations by the Defender, nonetheless, also addressed the (un)fairness of disciplinary investigations and proceedings

[281] Committee of Ministers, "1288th meeting, 6-7 June 2017 (DH) – H46-40. McFarlane group v. Ireland (Application No. 31333/06)", *Decisions,* 8 June 2017, CM/Del/Dec(2017)1288/H46-40, para. 7.

against servicemen – a subject which is arguably well-known to the Defender and perceived as urgent, but which does not appear to be immediately related to the violations ascertained by the Court. The Armenian Government did not, however, object to the scope of the observations by the Defender and declared itself willing to cooperate with the Defender on the wide-ranging reforms proposed, even though in general terms.[282]

Apparently, the position expressed by the CNCDH in its submission regarding the *Mennesson* group of cases also pushed the implications of the relevant ECtHR judgments to the limits. The rulings dealt with the complex issue of the recognition in France of parent-child relationships legally established abroad following surrogacy agreements (which are illegal in France). The Court held, by means of important and innovative judgments, that France had violated the applicant children's right to respect for their private life by refusing to recognise the relationships of the children with their biological fathers.[283]

According to the Court, "this analysis [the analysis of the children's best interests] takes on a special dimension where, as in the present case, one of the intended parents is also the child's biological parent".[284] The CNCDH maintained in its submission that the judgments should not be interpreted as limiting the obligation of the French Government to recognise child-parent relationships to the intended/biological fathers, lest an unacceptable discrimination between men and women (namely, between intended fathers and intended mothers) would take place. The French Government, on its part, highlighted the specific reference by the Court to the biological relationship between the parent and the children, and the Committee of Ministers accepted this argument, which has also been shared by some academics and commentators.[285] It is indeed understandable that, on such sensitive issues, nor the Committee of Ministers nor the Department for Execution are willing

[282] Committee of Ministers/Secretariat General, *supra* n 125, 9-10.
[283] ECtHR, *Mennesson v. France, supra* n 104, paras. 100-101.
[284] Ibid., para. 100. The Court continues, in the same paragraph: "Having regard to the importance of biological parentage as a component of identity … it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof".
[285] Cf. those mentioned in the reply from the French Government to the CNCDH: Committee of Ministers/Secretariat General, *supra* n 105, 9.

to ask from States to go beyond what is explicitly required by the Court, which itself appears to have exercised considerable (and deliberate) self-restraint on the matter.

In sum, notwithstanding the closer scrutiny exercised by the Committee of Ministers in the supervision of execution and its growing propensity to impose the adoption of wide-ranging general measures, this intergovernmental body would not go as far as asking for more than what appears to have been ordered by the Court. Moreover, as reiterated throughout this dissertation, the margin of appreciation enjoyed by governments in the choice of the means for the execution of judgments is a cardinal principle of the system of supervision. Nonetheless, in October 2018, the *Cour de Cassation* submitted to the ECtHR the same issue raised by the CNCDH, in the first case of recourse to Protocol no. 16 by a national court;[286] so that the doubts expressed by the CNCDH do not appear ill-founded.

At any rate, there are instances where the reasons for the Department for Execution and the Committee of Ministers to ignore the views of NHRIs appear less clear. In the *Gillan and Quinton* case, where the Court established that the powers of the police to stop and search individuals under the Terrorism Act violated Article 8 ECHR, the Equality and Human Rights Commission argued that the legislative amendments tabled by the UK Government and then under discussion did not offer adequate guarantees for the right to respect for private life. This conclusion would later appear to be shared not only by various NGOs, but also by the Parliamentary Joint Committee on Human Rights and the Independent Reviewer of Terrorism Legislation. Nonetheless, the Committee of Ministers swiftly closed the examination of the case, which had always remained under standard supervision.[287]

In the *Orchowski and others* group of cases, the Polish Commissioner for Human Rights provided the Committee of Ministers and the Department for Execution with data that showed the persistence of the problem of overcrowding in Polish penitentiaries.[288] Most of the information was

[286] European Court of Human Rights, "The French Court of Cassation has submitted to the European Court of Human Rights the first request under Protocol No. 16, seeking an advisory opinion on the question of surrogacy", *Press releases*, 23 October 2018, accessed 4 January 2019, https://www.echr.coe.int/Pages/home.aspx?p=press&c=#n1347882722901_pointer.
[287] Committee of Ministers, *Resolution CM/ResDH(2013)52, Gillan and Quinton against the United Kingdom. Execution of the judgment of the European Court of Human Rights*, 1164th meeting of the Ministers' Deputies, 7 March 2013.
[288] Committee of Ministers/Secretariat General, *supra* n 123.

directly derived from the activity of the Polish Commissioner as NPM; nevertheless, it does not appear that this information has been considered by the Committee of Ministers or the Department for Execution.[289]

The delays in the investigations into the mistreatment and killings allegedly perpetrated by the British forces in Iraq were at the core of the communication from the Equality and Human Rights Commission in the *Al-Skeini and others* case.[290] The communication also included the concluding observations by two UN human rights treaty bodies which had endorsed the arguments by the NHRI and made recommendations to the UK Government accordingly.[291] In this specific case, the submission by the NHRI might have come too late; the decision by the Committee of Ministers to move the case from enhanced to standard supervision had already been taken in the previous meeting,[292] and the examination of the case was closed shortly afterwards. One is left wondering if the outcome could have been different had the Commission communicated its concerns before, and why it addressed two UN organs before submitting its views to the body specifically responsible for the supervision of the execution of ECtHR judgments.

4.6. Preliminary conclusions

This chapter has mapped the experience gained to date by NHRIs in promoting, at the CoE level, the execution of ECtHR judgments. Whereas a growing number of national human rights structures are submitting communications to the Committee of Ministers, many others have not until now sought to take part in the Rule 9(2) procedure. There are various possible explanations for this lack of engagement, including financial constraints and insufficient technical expertise, the fact that submissions to the Committee of Ministers might not be considered a priority by the institution, the fact that some States spontaneously and promptly comply with the ECtHR judgments, and the fact

[289] No memorandum was drafted in the case, even though the judgment was placed under enhanced supervision. The only decision that was issued after the communication from the Ombudsman did not mention its intervention.
[290] Committee of Ministers/Secretariat General, *supra* n 149.
[291] Ibid., 6-7.
[292] Cf., for more details, *supra* n 190.

that NHRIs might be able to convince the relevant authorities without the need to address international monitoring bodies.

However, the absence of any coordinated effort on the part of the CoE bodies involved in the supervision of execution to inform NHRIs of this opportunity, let alone to train them on the use of this instrument, would point to information problems as to the functioning, if not the very existence, of the procedure. The recent focus by ENNHRI on the role that NHRIs can play, at both the national and international levels, in encouraging the full execution of ECtHR judgments might pave the way for a greater involvement of these institutions.

By making use of their in-depth knowledge of the legal system and human rights situation of their respective countries, NHRIs have submitted information especially on the state of legislation, administrative practice, and jurisprudence with a view to integrating, disproving or confirming the data provided and views expressed by their governments. On the basis of the additional or different information provided, NHRIs have either endorsed the general measures proposed or enacted by governments or, more often, claimed their inadequacy to solve all of the issues raised by the ECtHR judgments. NHRIs have also used their communications to bring to the attention of the Committee of Ministers data and views from other entities with which they regularly interact, including NGOs and international monitoring bodies.

It can thus be said, in general terms, that NHRIs which have participated in the Rule 9(2) procedure to date have met the expectations that accompanied the reform of the Rules of the Committee of Ministers: namely, extending the sources of information on which the Committee can rely in its supervision of the execution of ECtHR judgments, especially as far as the conception and implementation of general measures are concerned.

In the case of NHRIs, the submission of new or different information compared to the information provided by governments should, theoretically, be given special consideration, in light of the independence of NHRIs not only from national authorities but also from any particular agenda or advocacy aims (cf. Chapter 3). However, it does not appear that the Committee of Ministers or the

Department for Execution treat information provided by NHRIs any differently from information provided by NGOs. At times, NHRIs are even mistakenly referred to as "NGOs" or "civil society",[293] and no difference is made between submissions by NHRIs and submissions by NGOs in the Committee of Ministers' annual reports on the status of the execution of judgments.[294]

Therefore, the "unique position" of NHRIs as a bridge between the State and civil society and between the national and international levels of human rights protection, which has been emphasised in the literature and recognised to a certain extent by several UN bodies, does not appear to be reflected in the practice of the supervision of the execution of ECtHR judgments. *A fortiori*, no distinction is made between A-status, B-status and non-accredited institutions.

States, on the other hand, have replied to communications from NHRIs more frequently and have at times explicitly acknowledged the peculiar role played by NHRIs and the consequent special importance of their views. Nonetheless, as expected, States have seldom acted upon the proposals by NHRIs on their own initiative. Indeed, NHRIs tend to address the international level of supervision precisely when the dialogue at the national level has not yielded significant results. At that point, it is the role of the Department for Execution to collect information and opinions from various sources with a view to assessing the measures proposed or enacted by governments, and the role of the Committee of Ministers to oversee the execution of judgments also on the basis of the assessments provided by the Department.

Section 4.5 has shown that there are instances where NHRIs succeeded in influencing the supervision of execution process by informing the analyses by the Department for Execution and the decisions by the Committee of Ministers. However, both these bodies often do not refer to the contents of the communications from NHRIs, nor do they acknowledge the very existence of these communications. Failing express reference to the communications from NHRIs and – more

[293] For instance, two communications from the Public Defender of Georgia were titled "Communication from a NGO", namely the September 2017 communication in the *Gharibashvili* group of cases (*supra* n 126) and the April 2018 communication in the *Identoba and others* group of cases (*supra* n 237). As mentioned, in the *Zorica Jovanović* case, the Committee of Ministers appears to include the Serbian Protector of Citizens within "civil society" (*supra* n 219).
[294] Committee of Ministers, *supra* n 34.

significantly – an analysis of the information and observations enshrined therein, it remains difficult to assess the impact of these communications.

CHAPTER 5. PROMOTING THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS: THE EXPERIENCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS AT THE DOMESTIC LEVEL

The submission of communications to the Committee of Ministers (Chapter 4) is not the only way in which NHRIs promote the execution of judgments delivered by the ECtHR. Indeed, in the exercise of their domestic mandates, NHRIs routinely refer to international human rights norms and rulings, one of the main functions of NHRIs being precisely to align national legal orders with the international one. This also applies to the ECHR and the judgments of the ECtHR. In fact, while from the perspective of international cooperation a "special relationship" would appear to exist between NHRIs and the UN system, the prominence of the ECHR and the binding force of ECtHR judgments in the legal orders of CoE Member States have meant that extensive consideration has been given to the European system of human rights protection by NHRIs in the exercise of their domestic mandates.

The first section of this chapter clarifies what is meant by "domestic mandate" of NHRIs, identifies six core functions that make up this mandate, and provides some clarification on the scope of this chapter's investigation. The following sections are each devoted to one of the functions thus identified and provide examples of how these functions have been performed to promote the execution of ECtHR judgments as well as, more generally, the implementation of the ECHR and of the well-established ECtHR case-law. Some preliminary conclusions are drawn in the last section.

5.1. Scope of the investigation

The "domestic mandate" of NHRIs is defined, for the purposes of this chapter, as all those activities which do not imply the direct cooperation of NHRIs with international organisations, but which can nonetheless be carried out in light of international standards and decisions. These activities vary widely and are directed at both the promotion and the protection of human rights. By relying on

a common – albeit not always meaningful and by no means rigid – distinction in human rights theory and practice, the Global Alliance of NHRIs (GANHRI) has defined the promotion activities of NHRIs as "those functions which seek to create a society where human rights are more broadly understood and respected", whereas protection activities "address and seek to prevent actual human rights violations".[1]

This chapter examines six core domestic functions of NHRIs – three of which can be considered to fall in the promotion mandate of NHRIs, while the other three can be characterised as protection-oriented. The former functions include advising the competent national authorities (government and parliament in the first place) on human rights matters, giving information to and raising the awareness of the public, and providing education and training to stakeholders. The latter functions comprise monitoring and reporting, handling individual complaints of human rights violations, and petitioning or intervening before national courts. While NHRIs can perform other functions, these have been chosen as recurrent in the mandates of almost all NHRIs and thus key,[2] as well as illustrative of the role that NHRIs can play to facilitate the execution of ECtHR judgments.

The sections of this chapter each introduce a domestic function of NHRIs and give concrete examples of how NHRIs have performed that function with a view to promoting the execution of ECtHR judgments. Unlike Chapter 4, which is structured as a comprehensive analysis of all the thirty-three communications submitted to date by European national human rights structures to the Committee of Ministers, this chapter systematically presents the ways in which NHRIs can and do contribute to the execution of ECtHR judgments through their core domestic activities and provides illustrations of these ways, but it does not purport to examine all national activities carried out by all European NHRIs to promote the execution of the Court's judgments.

[1] GANHRI, *General Observations of the Sub-Committee on Accreditation*, 21 February 2018, G.O. 1.2 ("Human rights mandate").
[2] With the possible exception of the complaint-handling function, which is considered optional by the Paris Principles. Nonetheless, the number of NHRIs entrusted with this task is considerable and the handling of individual complaints is increasingly recognised as a significant feature of NHRIs; cf., on this point, Section 3.1 of this dissertation.

This choice is essentially based on accessibility reasons: first of all, the websites of NHRIs and the documents stored therein do not always account for all the activities that the institutions have ever undertaken, and to collect information otherwise would by far exceed the resources and time available for this research. Moreover, not all documents by European NHRIs (not even all annual reports) have been translated in either English or French, a circumstance which limits the understanding of these materials by the author of this dissertation. Therefore, the investigation has been confined to documents and webpages in English, French, and – to a more limited extent – Spanish.

A further limitation concerns the "pool" of NHRIs whose practice has been scrutinised to select the examples outlined in this chapter. Only A-status institutions have been considered, as these institutions are expected to have carried out, and to carry out in the future, the most significant and systematic work of promotion of the execution of ECtHR judgments, in view of their wide-ranging human rights mandate and greater resources. This does not detract from the fact that B-status and non-compliant NHRIs as well as classical ombudsmen can also contribute, and have in fact contributed, to make their national legal orders comply with the rulings of the Court through their domestic activities.[3] At any rate, as explained, this chapter does not aim to gather and analyse all instances in which national human rights structures intervened at the domestic level to facilitate the execution of ECtHR judgments, but to systematise their activities in the area and give examples of these. For the same reason, the investigation has been limited to the last ten years.[4]

[3] To give just one example, the Czech Public Defender, in addition to submitting information to the Committee of Ministers on the execution of the *D.H.* case and participating at the domestic level in the implementation of the same judgment (cf. Chapter 4), is represented on the national Committee of Experts on the Execution of Judgments of the European Court of Human Rights, which gathers stakeholders to discuss the best ways to execute ECtHR judgments in the Czech Republic (cf. Committee of Ministers/Secretariat General, *1302nd meeting (December 2017). Action plan (31/08/2017). Communication from the Czech Republic concerning the case of Cervenka v. Czech Republic (Application No. 62507/12),* 25 September 2017, DH-DD(2017)1039, 3). In the context of the execution of the *Kummer* case, concerning the ill-treatment of persons detained in police stations, the Public Defender carried out a training seminar for police officers: Committee of Ministers/Secretariat General, *1236 meeting (22-24 September 2015) (DH). Action report (13/07/2015). Communication from the Czech Republic concerning the case of Kummer against Czech Republic (Application No. 32133/11)*, 17 August 2015, DH-DD(2015)829, 4.

[4] Information relating to previous years is also harder to find on the websites of NHRIs and various A-status NHRIs considered in this chapter did not even exist prior to that time.

On the other hand, while the focus of this dissertation remains the promotion of the execution of ECtHR judgments issued against the home countries of NHRIs, examples from this chapter also include instances where NHRIs more broadly supported the implementation of ECHR provisions and of ECtHR judgments issued against other States. This has been done because, during the analysis of the practice of NHRIs, it rapidly became clear that these institutions have acted domestically less to promote the execution of specific ECtHR judgments against their countries than to ensure that their national legal systems are in compliance with the ECHR and the ECtHR case-law as developed also through judgments against other countries. As these activities have been frequently carried out by NHRIs, they have been considered worthy of mention here as evidence of the multifarious ways in which NHRIs can and do take into account the European human rights system, contribute to decongesting the ECtHR and the Committee of Ministers, and enhance respect for human rights at home.

Each of the following sections thus briefly portrays the main features of the function considered, gives examples of the domestic experiences of NHRIs in promoting the execution of ECtHR judgments through that function, and also includes examples of the domestic experiences of NHRIs in promoting the implementation of ECHR norms and the ECtHR case-law more generally.

5.2. Advising

A competence common to all NHRIs consists in advising the relevant national authorities on human rights matters. The Paris Principles require that NHRIs be able "to submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights".[5] As further specified in the Principles, this advisory function would typically concern

[5] UN General Assembly, *Resolution 48/134. National institutions for the promotion and protection of human rights*, 20 December 1993, A/RES/48/134, Section A(3)(a).

laws, administrative regulations, bills and other proposals, as well as – more generally – the human rights situation of the country, including possible violations and how to remedy them.[6]

While by definition the advice provided by NHRIs is not binding on their addressees, these institutions have developed ways to press the authorities to act, including by publicising their recommendations and mobilising other actors.[7] In practice, much depends on the relationship between the NHRI and the competent public bodies, on the ability of the NHRI to disseminate its recommendations, and on its legitimacy and credibility among the public.

It is clear that NHRIs can, through their advisory functions, promote the alignment of domestic legal orders with international norms and rulings by recommending that laws and practices be adopted or amended with a view to complying with international standards or by pointing out that a certain situation breaches the international obligations of the State.

Advice to the relevant public bodies is indeed one of the most direct ways through which NHRIs can inform the process of execution of ECtHR judgments. At the forefront in this area is the experience of the French *Commission nationale consultative des droits de l'homme* (CNCDH) which, since the 2015 Brussels Declaration,[8] has been asked by the French Government to comment on the action plans that the Government is required to submit to the Committee of Ministers with a view to outlining the measures that it intends to take to give effect to the ECtHR judgments concerning France.[9] In this way, the Commission is able to potentially influence the determinations of the Government at an early stage and on a regular basis, whenever ECtHR judgments are delivered against France, even though there is of course no guarantee that the Government will modify its action plans in accordance with the recommendations by the Commission. In 2017, for instance, the

[6] Ibid.
[7] Cf., for a reflection on the ways in which NHRIs could strengthen the compliance of the addressees of their recommendations: GANHRI, *supra* n 1, G.O. 1.6 ("Recommendations by NHRIs"); and Gauthier de Beco, *Non-Judicial Mechanisms for the Implementation of Human Rights in European States* (Bruxelles: Bruylant, 2010), 129-130.
[8] High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", *Brussels Declaration*, 27 March 2015. Cf., for more information about the Brussels Declaration and the ongoing process of reform of the ECHR system more generally, Chapters 1 and 2 and Section 3.6 of this dissertation.
[9] CNCDH, *Rapport d'Activité 2016. Promotion et protection des droits de l'homme*, 17 July 2017, 38-39, accessed 4 January 2019, http://www.cncdh.fr/sites/default/files/rapport_dactivites_2016_de_la_cncdh.pdf.

CNCDH made its views known to the French Government on the execution of the ECtHR judgments in *Laborie* (concerning surrogate motherhood) and *Aycaguer* (retention of DNA profiles in police databases).[10] When ignored at the domestic level, the CNCDH has been ready to address the Committee of Ministers directly, as shown in Chapter 4.[11]

The advisory function of NHRIs can be exercised by these institutions *proprio motu*, upon request by the competent authorities or, somewhere in-between, in reply to public consultations.[12] Moreover, this task can be directed at different public bodies. NHRIs might issue recommendations concerning existing or draft legislation and thus call primarily on parliaments to act. The Irish Human Rights Commission conducted a review of the regulatory framework and practical accessibility of lawful termination of pregnancy in the country following the shortcomings identified by the ECtHR judgment in *A, B and C v. Ireland*.[13] The Commission then submitted its views on the *Protection of Life During Pregnancy Bill 2013* under consideration in the Irish Parliament.[14]

The Albanian People's Advocate intervened on several occasions during the legislative process aimed at giving effect to the ECtHR judgment in *Manushaqe Puto and others v. Albania*, concerning the right to property and the enforcement of domestic judgments awarding compensation for expropriated lands.[15]

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[10] CNCDH, *Rapport d'Activité 2017. 70 ans d'expertise au service des droits de l'homme*, 7 September 2018, 74, accessed 4 January 2019, http://www.cncdh.fr/sites/default/files/cncdh_rapport_dactivites_2017_vdef.pdf.

[11] As confirmed by Thomas Dumortier, Legal Adviser at the *Commission nationale consultative des droits de l'homme*, the opportunity for the CNCDH to address the Committee of Ministers remains important, also in light of the fact that the French Government, while consulting with the CNCDH in the early stages of the drafting of action plans, rarely keeps the Commission informed about subsequent developments, including the preparation of action reports (interview of 8 March 2019, on file with author).

[12] The latter means is typical of NHRIs from the United Kingdom and Ireland, whose Governments often have recourse to open consultations. To give just one example, the Scottish Human Rights Commission drafted two responses in relation to the Scottish Government's consultation on the reform of the status of incapacitated adults: Scottish Human Rights Commission, *Consultation on the Scottish Law Commission Report on Adults with Incapacity*, 5 April 2016, and *Adults with Incapacity (Scotland) Act 2000 – Proposals for Reform. Response of Scottish Human Rights Commission*, 27 April 2018, both available at http://www.scottishhumanrights.com/policy-publications/ (accessed 4 January 2019). Both submissions refer to ECHR norms and the ECtHR jurisprudence.

[13] ECtHR, *A, B and C v. Ireland* [GC], no. 25579/05, 16 December 2010.

[14] Irish Human Rights Commission, *Observations on the Protection of Life During Pregnancy Bill 2013*, July 2013, accessed 4 January 2019, https://www.ihrec.ie/documents/ihrc-observations-protection-of-life-during-pregna/.

[15] People's Advocate of the Republic of Albania, *Annual Report on the Activity of the People's Advocate. 1st January – 31st December Year 2015*, February 2016, 111 *et seqq*.; and *Annual Report on the Activity of the People's Advocate. 1 January – 31 December 2014*, February 2015, 14-15 and 34-36. Both documents can be found at http://www.avokatipopullit.gov.al/en/reports (accessed 4 January 2019). Cf. also ECtHR, *Manushaqe Puto and others v. Albania*, nos. 604/07, 43628/07, 46684/07 and 34770/09, 31 July 2012.

Other ways that NHRIs have found to convey their views to parliamentarians include "information sessions", such as that carried out by the Human Rights Centre of Finland on the subject of the responsibility of news websites for comments posted by their readers following a landmark Grand Chamber's judgment against Estonia,[16] or that carried out by the Croatian Ombudsman on national minorities, where multiple references to the Convention and the ECtHR case-law were made.[17]

The advice by NHRIs is also frequently addressed to the government or some of its ministries. For instance, the Parliamentary (*Seimas*) Ombudsmen of Lithuania expressed their views on the execution of the *L. v. Lithuania* judgment, concerning the status of transsexuals in the country, during a meeting with the Ministers of Health and Justice.[18]

The Serbian Protector of Citizens submitted recommendations to the Government following the ECtHR judgment in *Grudić v. Serbia*, which established that the Serbian Pensions and Disability Insurance Fund unlawfully stopped paying the disability pensions of the applicants residing in Kosovo.[19] The Serbian Protector, which had itself received numerous complaints regarding the suspension of so-called Kosovo pensions, urged the Government to resume the payments in order to give effect to the judgment and restore the property rights of the complainants.[20] The Serbian Protector also intervened regarding the execution of the *Ališić and others* judgment, which found Serbia (and Slovenia) to have violated the rights of property and to an effective remedy of the

[16] Human Rights Centre (Finland), *Human Rights Centre Annual Report 2015. Summary*, 14, 4 January 2019, https://www.humanrightscentre.fi/publications/action-plans-and-annual-reports/. The judgment in question is ECtHR, *Delfi AS v. Estonia* [GC], no. 64569/09, 16 June 2015.
[17] Interview with Tatjana Vlašić, Human Rights Promotion, Cooperation and Public Relations Advisor to the Croatian Ombudswoman, 31 October 2018, on file with author.
[18] Seimas Ombudsmen's Office of the Republic of Lithuania, "The Seimas Ombudsmen discussed issues of implementation of the ECtHR judgment in the case *L. v. Lithuania* with the Ministers of Health and Justice", *News*, 2 July 2018, accessed 4 January 2019, http://www.lrski.lt/en/news/619-the-seimas-ombudsmen-discussed-issues-of-implementation-of-the-ecthr-judgment-in-the-case-l-v-lithuania-with-the-ministers-of-health-and-justice.html. Cf. also ECtHR, *L. v. Lithuania*, no. 27527/03, 11 September 2007.
[19] ECtHR, *Grudić v. Serbia*, no. 31925/08, 17 April 2012.
[20] Protector of Citizens of the Republic of Serbia, *Annual Report 2012*, 2013, 22 and 176-179, https://www.ombudsman.org.rs/index.php?option=com_content&view=category&layout=blog&id=11&Itemid=13 (accessed 4 January 2019).

applicants, who had been prevented from withdrawing their foreign-currency savings following the dissolution of the Republic of Yugoslavia.[21]

The Commissioner for Human Rights of Poland issued recommendations to both the Parliament and the Government with a view to implementing ECtHR judgments against Poland on a wide range of subjects – from termination of pregnancy[22] to compensation for expropriated lands[23] and pre-trial detention of juveniles.[24] The Russian Ombudsman submitted proposals to execute ECtHR judgments concerning, *inter alia*, the confinement of defendants in caged docks[25] and the organisation of religious events in public,[26] while the Greek National Commission for Human Rights intervened regarding the execution of the *Chowdury and others* judgment, which highlighted the issues of forced labour and trafficking in the agricultural sector.[27]

Furthermore, almost all A-status NHRIs examined can be said to have advised national authorities to amend laws and practices in order to comply, more broadly, with ECHR standards and the ECtHR jurisprudence. Changes recommended by NHRIs in this light have concerned the forced displacement of Roma,[28] the expulsion of aliens,[29] the collection of data by the security services,[30]

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[21] Protector of Citizens of the Republic of Serbia, *Annual Report 2014,* 2015, 168-169, https://www.ombudsman.org.rs/index.php?option=com_content&view=category&layout=blog&id=11&Itemid=13 (accessed 4 January 2019). Cf. also ECtHR, *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* [GC], no. 60642/08, 16 July 2014.

[22] Commissioner for Human Rights of Poland, *Summary of the Report on the Activity of the Ombudsman in Poland in 2014*, 2015, 71, accessed 4 January 2019, https://www.rpo.gov.pl/en/content/report. The judgments at issue are ECtHR, *Tysiąc v. Poland*, no. 5410/03, 20 March 2007; and ECtHR, *R.R. v. Poland*, no. 27617/04, 26 May 2011.

[23] Commissioner for Human Rights of Poland, *Summary of the Report on the Activity of the Ombudsman in Poland 2015*, 2016, 59, accessed 4 January 2019, https://www.rpo.gov.pl/en/content/report. Reference is made to the need to execute ECtHR, *Skibińscy v. Poland*, no. 52589/99, 14 November 2006.

[24] Ibid., 34. The judgment referred to is ECtHR, *Grabowski v. Poland*, no. 57722/12, 30 June 2015.

[25] High Commissioner for Human Rights in the Russian Federation, *Report 2015*, May 2016, 46-47, accessed 4 January 2019, http://eng.ombudsmanrf.org/ombudsman/content/annual_reports. The relevant ECtHR judgment is ECtHR, *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, 17 July 2014.

[26] High Commissioner for Human Rights in the Russian Federation, *Report 2014*, May 2015, 90-91, accessed 4 January 2019, http://eng.ombudsmanrf.org/ombudsman/content/annual_reports. Cf. also ECtHR, *Kimlya and others v. Russia*, nos. 76836/01 and 32782/03, 1 October 2009.

[27] Greek National Commission for Human Rights, "ECtHR, Chowdury and others v. Greece: Recommendations for the full compliance of the Greek State", *Press release*, 27 August 2018, accessed 4 January 2019, http://www.nchr.gr/images/English_Site/TRAFFICKING/GNCHR%20Press%20Release_Compliance%20with%20ECtHR%20Chowdury.pdf.

[28] People's Advocate of the Republic of Albania, *Annual Report on the activity of the People's Advocate. 1st January – 31st December Year 2016*, April 2017, 17-18, accessed 4 January 2019, http://www.avokatipopullit.gov.al/en/reports.

[29] Danish Institute for Human Rights, *Human Rights in Denmark. Status 2014-15: A Summary*, 2015, 58-59, accessed 4 January 2019, https://www.humanrights.dk/publications/status-report-2014-15-human-rights-denmark-summary.

[30] CNCDH, *Rapport d'Activité 2015. Les droits de l'homme, droits universels et indivisibles*, 28 June 2016, 233 *et seqq*., accessed 4 January 2019, http://www.cncdh.fr/fr/publications/rapport-dactivites-2015.

the rights of individuals with HIV/AIDS,[31] the full-face veil,[32] and surrogate motherhood and anonymous childbirth,[33] to name a few.

5.3. Informing and raising awareness

NHRIs are typically mandated to promote awareness and understanding of human rights by the public at large. They carry out this responsibility through a variety of means including in-person helpdesk, information webpages, newsletters, and awareness campaigns. By disseminating information about ECtHR judgments against their own countries, NHRIs promote the execution of these judgments, as they sensitise stakeholders and the public opinion more generally as to the violations ascertained by the Court and the need to remedy them.

On the homepage of the National Commission for Human Rights of Greece the link can be found to an updated table (in Greek) of ECtHR judgments delivered against Greece, which indicates the ECHR norms violated and provides brief summaries of the cases.[34] Similarly, the Ukrainian Parliament Commissioner for Human Rights publishes summaries (in Ukrainian) of ECtHR judgments against the country and refers to the website of the Department for the Execution of Judgments (of which a Russian version exists) for those interested in the functioning of the supervision of execution mechanism.[35] The French CNCDH also reports the facts of cases lodged with the ECtHR against France and the related reasoning and decisions of the Court both in individual

[31] Greek National Commission for Human Rights, *Protection of the rights of people living with HIV/AIDS*, 2014, 13-14, accessed 4 January 2019, http://www.nchr.gr/images/English_Site/YGEIA/NCHR%20Report%20on%20the%20rights%20of%20people%20living%20with%20HIV%20_2_.pdf.

[32] *Commission consultative des Droits de l'Homme du Grand-Duché de Luxembourg*, *Avis sur le projet de loi 7179 portant modification de l'article 563 du Code pénal en créant une infraction de dissimulation du visage dans certains lieux publics*, Avis 2/2018, 5 *et seqq*., accessed 4 January 2019, https://ccdh.public.lu/fr/avis.html.

[33] *Commission consultative des Droits de l'Homme du Grand-Duché de Luxembourg*, *Avis sur le projet de loi 6568 portant réforme du droit de la filiation, modifiant - le Code civil, - le Nouveau Code de procédure civile, - le Code pénal, - la loi du 11-21 germinal an XI relative aux prénoms et changement de noms, - et la loi communale du 13 décembre 1988 et la proposition de loi 5553 portant réforme du droit de la filiation et instituant l'exercice conjoint de l'autorité parentale*, Avis 3/2015, 3 *et seqq*., accessed 4 January 2019, https://ccdh.public.lu/fr/avis.html.

[34] Cf. the right side of the homepage of the institution, accessed 4 January 2019, http://www.nchr.gr/index.php.

[35] Cf. the "European Court of Human Rights" section of the Ukrainian Commissioner's website, accessed 4 January 2019, http://www.ombudsman.gov.ua/en/page/applicant/court/. The contents of the various sub-sections are only available in Ukrainian.

files and in a biennial publication on the observations and decisions by international bodies regarding the human rights situation in France.[36] The added value of these conduits of information is the use of the national language for materials otherwise available in English or French only as well as the simplification of the contents of documents that can be rather technical.

The same aim is pursued through the publication of information on ECtHR judgments as short news in the relevant sections of the websites of NHRIs, in their newsletters (e.g., that of the Finnish Human Rights Centre),[37] in other periodic information bulletins (e.g., the monthly bulletin of the Georgian Public Defender's Office),[38] or on social media.[39]

NHRIs also typically refer to the ECtHR rulings issued against their home States in their annual reports;[40] however, as these documents are primarily addressed to the respective parliaments and often consist of detailed accounts of the activities carried out by the NHRI during the year, the

[36] Among the most recent files are CNCDH, "Arrêt A.B. et autres c. France", *Les arrêts de la Cour europeenne des droits de l'homme. Clefs de lecture*, 16 September 2016, accessed 4 January 2019, http://www.cncdh.fr/fr/publications/arret-de-la-cour-europeenne-des-droits-de-lhomme-ab-et-al-contre-france; and "Arrêt A.M. c. France", *Les arrêts de la Cour europeenne des droits de l'homme. Clefs de lecture,* 12 July 2016, accessed 4 January 2019, http://www.cncdh.fr/fr/publications/arret-am-contre-france-de-la-cour-europeenne-des-droits-de-lhomme. Cf. also CNCDH, *Droits de l'homme en France. Regards portés par les instances internationales: Rapport 2009-2011* (Paris: La Documentation française, 2011), 202 *et seqq*. in particular; on the other hand, the subsequent CNCDH, *Droits de l'homme en France. Regards portés par les instances internationales: Rapport 2012-2014* (Paris: La Documentation française, 2014) refers to the content of ECtHR judgments against France throughout its thematic part, on the basis of the judgments' subject-matters.

[37] Human Rights Centre (Finland), *supra* n 16, 9.

[38] The bulletins of this NHRI, which were also published in English, contained a section devoted to "International Stories about Human Rights" where ECtHR judgments against Georgia were also referred to (http://www.ombudsman.ge/eng/biuletini, accessed 2 May 2019). The bulletins, however, appear to have been published in the course of 2015 only, with the exception of a further single issue published in May 2017.

[39] To give just one example, on 10 October 2017, the Spanish *Defensor del Pueblo* shared on its Facebook page the delivery of an ECtHR judgment regarding the expulsion of migrants who had entered the Melilla enclave. The case referred to is ECtHR, *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, 3 October 2017, which has since been referred to the Grand Chamber. Among other institutions, the CNCDH is very active on Twitter, which it also uses to disseminate information on ECtHR judgments.

[40] The Danish Institute for Human Rights, among others, regularly account for ECtHR judgments issued in respect of Denmark, both favourable and adverse, in its annual and status reports: e.g., Danish Institute for Human Rights, *Human Rights in Denmark. Status 2016-17*, 70-71, accessed 4 January 2019, https://www.humanrights.dk/publications/status-report-2016-17-human-rights-denmark. The Finnish Parliamentary Ombudsman also refers in its annual reports to the judgments delivered by the ECtHR against Finland and to those supervised by the Committee of Ministers: cf., for instance, *Summary of the Annual Report 2017*, 2018, 138-139; *Summary of the Annual Report 2016*, 2017, 146-147; and *Summary of the Annual Report 2014*, 2015, 108-111. All reports can be found at https://www.oikeusasiamies.fi/en_GB/web/guest/annual-reports (accessed 4 January 2019).

information contained in these reports is less accessible to the public. Cooperation with the media can thus be key to reach a wider audience.[41]

Beforehand, NHRIs can inform the public on the rights protected by the Convention as well as on the application procedure before the ECtHR.[42] First of all, various NHRIs host on their websites translations of the ECHR[43] and of the Court's factsheets[44] in the national language. Instructions on how to apply to the ECtHR and on the admissibility requirements are also provided, even though at times through mere reference to the ECtHR website, which is only available in English and French.[45] On the contrary, simplified guidelines for potential applicants have been made available by the Scottish Human Rights Commission,[46] the Azerbaijani Human Rights Commissioner,[47] and the Institute of Human Rights Ombudsmen of Bosnia and Herzegovina,[48] while the Ukrainian Parliament Commissioner for Human Rights translated the official instructions by the ECtHR.[49]

At times, NHRIs directly inform individuals seeking redress about the opportunity to petition the ECtHR, the conditions to fulfil, and the procedure to follow. Indeed, various NHRIs have reported that they are often asked for assistance by potential complainants before the ECtHR. The Latvian

[41] For instance, at times, the CNCDH comments on ECtHR judgments delivered against France in the press (interview with Dumortier, CNCDH, *supra* n 11).
[42] Cf., on the role that NHRIs can play in this area and the benefits for the workload of the ECtHR: Antoine Buyse, "The Court's Ears and Arms: National Human Rights Institution and the European Court of Human Rights", in *National Human Rights Institutions in Europe: Comparative, European and International Perspectives*, eds. Jan Wouters and Katrien Meuwissen (Cambridge: Intersentia, 2013), 176-177. Cf. also, for the initiatives undertaken at the CoE level, Section 3.6 of this dissertation, n 226 in particular.
[43] Among others, the Human Rights Commissioner of Azerbaijan, the German Institute for Human Rights, the Commissioner for Fundamental Rights of Hungary, and the Ukrainian Parliament Commissioner for Human Rights.
[44] These are the Ukrainian Commissioner (cf. the webpage mentioned *supra* n 35) and the Greek Commission (cf. *supra* n 34; the translations by the Greek Commission are also available on the ECtHR website).
[45] The website of the Commissioner for Human Rights of Poland (section "Who else can help you" on the Polish and English homepages) links to the homepage of the ECtHR. The homepage of the Greek Commission links to the "Apply to the Court" section of the ECtHR website (https://www.echr.coe.int/Pages/home.aspx?p=applicants&c=, accessed 4 January 2019).
[46] Scottish Human Rights Commission, *Basic Guide for Applicants Taking Their Case to the European Court of Human Rights*, accessed 4 January 2019, http://www.scottishhumanrights.com/rights-in-practice/human-rights-laws/ (bottom of the webpage).
[47] The Azerbaijani Commissioner produced a *Guide how to apply to the European Human rights Court* in 2003 and 2005 (cf. the "publications" list available at http://www.ombudsman.gov.az/en/view/pages/32, accessed 4 January 2019). The Azerbaijani NHRI was downgraded to B status in May 2018; nonetheless, it is mentioned here as it has been an A-status institution for the most part of the period considered.
[48] Institute of Human Rights Ombudsmen of Bosnia and Herzegovina, "Application before European Court of Human Rights – Instruction", under the section "Useful links", accessed 4 January 2019, http://ombudsmen.gov.ba/Default.aspx?id=0&lang=EN.
[49] Cf. Ukrainian Parliament Commissioner for Human Rights, *supra* n 35, sub-section "How to appeal to the ECtHR".

Ombudsman noted that "persons wishing to file an action to the European Court of Human Rights seek help of the Ombudsman's Office on a regular basis, and the number of such applications increased".[50] The Russian Commissioner is likewise asked by individuals to provide information on the Convention and the Court's jurisprudence as well as on the procedure to apply to the Court.[51]

However, most NHRIs cannot, under their mandates, provide full legal assistance to individuals wishing to pursue their cases before the ECtHR, so that preliminary information only is offered to prospective applicants. The Armenian Human Rights Defender, for instance, while clarifying that it cannot intervene in court proceedings nor can it review judicial decisions, makes complainants aware that they can appeal final domestic judgments before the ECtHR and explains the procedure to do so.[52] Other NHRIs, especially commissions with a protection mandate,[53] can play a greater role in supporting applicants before courts – i.e., by assisting or acting on behalf of the applicants at the national level (cf. *infra* Section 5.7) and intervening as third parties in the ECtHR proceedings in support of the applicants' claims (cf. *supra* Section 3.6).

Finally, NHRIs promote knowledge of the ECHR system by including in their online and physical libraries' collections relevant international and national legal documents and scholarly works.[54]

5.4. Educating and training

In addition to informing the general public, NHRIs are also often entrusted with the task of providing education and training on human rights to more specific groups of persons concerned,

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[50] Ombudsman of the Republic of Latvia, *Summary of Annual Report 2017*, 21, accessed 4 January 2019, http://www.tiesibsargs.lv/en/pages/research-and-publications/annual-reports.
[51] Commissioner for Human Rights in the Russian Federation, *supra* n 25, 191, and *supra* n 26, 30.
[52] Human Rights Defender of the Republic of Armenia, *Annual Report on the Activities of the Republic of Armenia Human Rights Defender And Violations of Human Rights and Fundamental Freedoms in the Country During 2009*, 2010, 15-16, accessed 4 January 2019, http://www.ombuds.am/en/publications/annual_reports.html.
[53] For a categorisation of NHRIs, cf. Section 3.2 of this dissertation.
[54] Human rights library collections are made available by the *Commission consultative des droits de l'Homme du Grand-Duché de Luxembourg* (accessed 4 January 2019, https://ccdh.public.lu/fr/bibliotheque.html), the German Institute for Human Rights (accessed 4 January 2019, https://www.institut-fuer-menschenrechte.de/en/library/), and the Spanish *Defensor del Pueblo* (accessed 4 January 2019, https://biblioteca.defensordelpueblo.es/opac/abnetcl.exe/O7055/ID2b3c59ed?ACC=101).

including students, lawyers, police officers, social workers, teachers, and the media. Not infrequently, in designing education and training programmes, NHRIs introduce references to international norms and rulings, as one of the many ways of "bridging the gap" between the international and national levels and promoting knowledge and observance of international instruments by stakeholders.

NHRIs could thus potentially develop training tools that promote the execution of ECtHR judgments by drawing the attention of duty-bearers on their obligations deriving from the judgments (e.g., the procedures that prison officers are required to follow when searching detainees) or by informing interested parties on the opportunities arising from the same judgments (e.g., new avenues for lawyers or NGOs involved in the protection of victims of human rights violations).

In the accessible materials, not many instances could be found of courses and training sessions organised by NHRIs and specifically devoted to the execution of ECtHR judgments delivered against their home States. The Czech Public Defender of Rights organised training activities for officials from the school inspectorates following the *D.H.* judgment on discrimination of Roma children in primary schools.[55] In 2015, the High Commissioner for Human Rights in the Russian Federation held an "expert meeting" (no further details are available in the English version of the report) on the persistent non-execution of the ECtHR judgment against Russia on the voting rights of detainees.[56]

On the other hand, numerous examples can be given of training courses, educational materials, and codes of conduct where reference to ECHR norms and the ECtHR jurisprudence is made. These include a debate with foreign university students promoted by the Lithuanian Ombudsmen's Office,[57] a visit to the ECtHR for students from secondary schools organised by the Luxembourg

[55] Interview with Petr Polák, Head of the Department of Equal Treatment at the Public Defender of Rights of the Czech Republic, 1 June 2018, on file with author. Exceptionally, this example from the experience of a classical ombudsman has been made in this section, insofar as it is related to a case which has been examined in-depth in this dissertation and in consideration of the fact that not many other examples could be found, in the documents of European A-status institutions accessible to this author, of training activities concerning the execution of specific ECtHR judgments.

[56] The title of the expert meeting, convened on 30 October 2015, is "Difficulties in Applying Decisions of the European Court of Human Rights: Dialogue on Voting Rights for Persons in Custody"; cf. High Commissioner for Human Rights in the Russian Federation, *supra* n 25, 189.

[57] The debate concerned human rights and the ECHR in particular: Seimas Ombudsmen's Office of the Republic of Lithuania, "Students from different European countries have discussed human rights at the Seimas Ombudsmen's Office", *News*, 23 March 2017, accessed 4 January 2019, http://www.lrski.lt/en/news/486-students-from-different-european-countries-have-discussed-human-rights-at-the-seimas-ombudsmen-s-office.html.

Commission,[58] the promotion of the teaching of ECHR standards and ECtHR jurisprudence in Ukrainian universities,[59] resources for human rights education developed by the Northern Ireland Human Rights Commission,[60] courses for police officers provided by the Danish Institute for Human Rights,[61] the training for Armenian judges on the international standards (including ECtHR rulings) to combat violence against women,[62] the Code of Good Administration drafted by the Serbian Protector of Citizens (which also relies on the ECtHR case-law),[63] and tools for a human rights impact assessment made available by the Scottish Human Rights Commission.[64]

While admittedly the execution of ECtHR judgments would often require some preliminary legislative, administrative or judicial changes, it might be the case that the widespread training of the relevant professionals can suffice to change non-compliant practices; more likely, the training can maximise the impact of legislative and regulatory innovations. At any rate, the provision of education and training on ECHR standards and ECtHR judgments is an important tool in the hands of NHRIs to promote a human rights culture in key areas and prevent further violations.

5.5. Monitoring, inquiring and reporting

This section examines various interrelated activities by NHRIs which are commonly identified as falling in the "protection" category. It is a core responsibility of NHRIs to ascertain whether State

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[58] *Commission consultative des Droits de l'Homme du Grand-Duché de Luxembourg*, *Rapport d'activités 2012*, 69, accessed 4 January 2019, https://ccdh.public.lu/fr/publications.html.

[59] Ukrainian Parliament Commissioner for Human Rights, "A four-day training on human rights has been completed", *News*, 15 December 2017, accessed 4 January 2019, http://www.ombudsman.gov.ua/en/all-news/pr/a-four-day-training-on-human-rights-has-been-completed/.

[60] Northern Ireland Human Rights Commission, *Inspiring practice: Resources, tools and activities for human rights education*, 20 October 2008, 84 *et seqq*. in particular, accessed 4 January 2019, http://www.nihrc.org/publication/detail/inspiring-practice-resources-tools-and-activities-for-human-rights-educatio.

[61] The Danish NHRI organised various courses for police officers on human rights and hate crimes, in which references to the ECtHR jurisprudence were included: Danish Institute for Human Rights, *Annual Report 2011*, 34-35, accessed 4 January 2019, https://www.humanrights.dk/publications/annual-report-2011.

[62] Human Rights Defender of the Republic of Armenia, *Annual Communique on the Activities of the Human Rights Defender of the Republic of Armenia, and the State of Protection of Human Rights and Freedoms During the Year 2017*, 2018, 19, accessed 4 January 2019, http://www.ombuds.am/en/publications/annual_reports.html?page=1.

[63] The Code is mentioned in Protector of Citizens of Serbia, *2010 Regular Annual Report of the Protector of Citizens,* 2011, 99, https://www.ombudsman.org.rs/index.php?option=com_content&view=category&id=11&Itemid=13 (accessed 4 January 2019).

[64] Scottish Human Rights Commission, *Equality and Human Rights Impact Assessment*, accessed 4 January 2019, http://eqhria.scottishhumanrights.com/. This tool is specifically designed for public bodies.

bodies are breaching their human rights obligations, including those of international origin. This monitoring activity is closely connected with the reporting of its findings – in annual reports, other official documents, and websites. Moreover, monitoring can at times give rise, when a more in-depth examination is deemed necessary, to comprehensive inquiries into specific issues.[65] Finally, this section also considers a particular kind of monitoring – namely, that carried out by NHRIs acting as National Preventive Mechanisms (NPMs) and visiting places of deprivation of liberty.[66] On the other hand, this section does not focus on instances where monitoring is at the root of formal recommendations to legislative and administrative bodies, which have been considered under Section 5.2 as examples of the advisory function of NHRIs.[67]

Once again, the traditional domestic functions of NHRIs considered in this section readily apply to the promotion of the execution of ECtHR judgments. Supervising the adjustment of the internal legal order as a result of ECtHR judgments and reporting on the related obstacles, delays, and inadequacies perfectly fit the monitoring mandate of NHRIs. The Latvian Ombudsman explicitly linked a study it undertook on the country's legal framework and practice concerning the transplantations of tissues and organs to a string of ECtHR judgments issued against Latvia for the lack of guarantees against the arbitrary removal and use of tissues and organs.[68]

The Institute of Human Rights Ombudsmen of Bosnia and Herzegovina committed to re-visit institutions for people with mental disabilities following the ECtHR judgment in *Hadžimejlić and others*.[69] The Institute also denounced the persistent non-execution of the well-known *Sejdić and*

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[65] On the importance of the inquiries carried out by NHRIs, cf. Meg Brodie, "Uncomfortable Truths: Protecting the Independence of National Human Rights Institutions to Inquire", *University of New South Wales Law Journal* 38, no. 3 (2015): 1215-1260 (which focuses on the inquiries carried out by the Australian Human Rights Commission).

[66] NPMs are national bodies entrusted by the UN Optional Protocol to the Convention against Torture with the prevention of torture and inhuman or degrading treatment or punishment at the domestic level. This preventive function is chiefly discharged by NPMs by way of visits to penitentiaries and other places where people are deprived of their liberty. On the role of NHRIs as NPMs, cf. Section 3.5 of this dissertation.

[67] Indeed, there is no rigid distinction between the mentioned activities. More generally, a human rights issue can be dealt with by an NHRI from different angles: for instance, an individual complaint could give rise to a wider inquiry, which in turn could result in the issuance of recommendations to the public bodies responsible.

[68] Ombudsman of the Republic of Latvia, *supra* n 50, 18-19.

[69] Institute of Human Rights Ombudsmen of Bosnia and Herzegovina, *2016 Annual Report on the Results of the Activities of the Institution of the Human Rights Ombudsman of Bosnia and Herzegovina,* 2017, 75-76, accessed 4 January 2019, http://ombudsmen.gov.ba/Dokumenti.aspx?id=27&tip=1&lang=EN. Cf. also ECtHR, *Hadžimejlić and others v. Bosnia and Herzegovina,* nos. 3427/13, 74569/13 and 7157/14, 3 November 2015.

Finci judgment, along with the following *Zornić* judgment, which have required Bosnia and Herzegovina to lift the ban on members of minorities wishing to participate in the parliamentary elections.[70]

The Polish Commissioner for Human Rights has explicitly stated that it "is constantly monitoring the jurisprudence"[71] of the ECtHR and it undertook several initiatives in the face of non-execution or incomplete execution of ECtHR judgments. As most of these initiatives resulted in recommendations to the legislature and the executive or were originated by individual complaints (even though suggestive of more widespread violations), examples from the experience of the Polish Commissioner have been mentioned under Section 5.2 and will be further mentioned below under Section 5.6.

As for inquiries, NHRIs from the United Kingdom are renowned for the in-depth investigations that they undertake, directed at "issues of public interest relevant to the groups protected by discrimination legislation and to human rights".[72] While inquiries specifically prompted by the issuance of an ECtHR judgment against the United Kingdom could not be found, NHRIs from this country routinely investigate human rights issues in light of ECHR standards and of the ECtHR jurisprudence.

Examples from the Equality and Human Rights Commission (which has jurisdiction over England, Wales and Scotland) include the deaths of detainees with mental health conditions[73] and

[70] Institute of Human Rights Ombudsmen of Bosnia and Herzegovina, *2015 Annual Report on the Results of the Activities of the Institution of the Human Rights Ombudsman of Bosnia and Herzegovina*, 2016, 93, accessed 4 January 2019, http://ombudsmen.gov.ba/Dokumenti.aspx?id=27&tip=1&lang=EN. Cf. also ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, 22 December 2009; and ECtHR, *Zornić v. Bosnia and Herzegovina*, no. 3681/06, 15 July 2014.

[71] Commissioner for Human Rights of Poland, *Summary of Report on the Activity of the Human Rights Defender in 2009*, 53, accessed 4 January 2019, https://www.rpo.gov.pl/en/content/report.

[72] Parliament of the United Kingdom, *Equality Act 2006*, 16 February 2006, Section 16. The Northern Ireland Act more broadly refers to the "investigations" that the Northern Ireland Human Rights Commission can undertake to "keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights" (cf. Parliament of the United Kingdom, *Northern Ireland Act 1998*, 19 November 1998, Section 69).

[73] Equality and Human Rights Commission, *Preventing Deaths in Detention of Adults with Mental Health Conditions*, 23 February 2015, accessed 4 January 2019, https://www.equalityhumanrights.com/en/publication-download/preventing-deaths-detention-adults-mental-health-conditions-report.

home care for older people,[74] while the Northern Ireland Human Rights Commission referred to the Convention and the Court's jurisprudence when investigating, *inter alia*, access to justice for unrepresented litigants,[75] Travellers and their right to housing,[76] alternative care for children,[77] hate crimes,[78] and detention at borders.[79]

The Serbian Protector of Citizens has also made multiple references to the ECHR and the ECtHR case-law in its special reports on the situation of LGBT people in Serbia[80] and on domestic violence.[81] On its part, the Armenian Human Rights Defender, in introducing its ad hoc report on the right to a fair trial, stated that the "the Report analyzes the relevant provisions of the European convention, the case law of the European Court of Human Rights … the national legislation of the Republic of Armenia and law enforcement practice in the country under the light of its conformity to the European standards".[82]

As has been shown in Chapter 3, NHRIs are not infrequently designated as the National Preventive Mechanisms (NPMs) for their countries under the Optional Protocol to the Convention against Torture. Moreover, even when they have not been officially designated as NPMs, NHRIs

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[74] Equality and Human Rights Commission, *Close to home: An inquiry into older people and human rights in home care*, 31 October 2011, accessed 4 January 2019, https://www.equalityhumanrights.com/en/publication-download/close-home-inquiry-older-people-and-human-rights-home-care.

[75] Gráinne McKeever et al., *Litigants in person in Northern Ireland: barriers to legal participation* (Ulster University: Belfast, 2018), accessed 4 January 2019, http://www.nihrc.org/publication/detail/full-report-litigants-in-person-in-northern-ireland-barriers-to-legal-parti.

[76] Northern Ireland Human Rights Commission, *Out of Sight, Out of Mind: Travellers' Accommodation in Northern Ireland. Full Report*, 6 March 2018, accessed 4 January 2019, http://www.nihrc.org/publication/detail/out-of-sight-out-of-mind-travellers-accommodation-in-ni-full-report.

[77] Northern Ireland Human Rights Commission, *Alternative Care and Children's Rights in Northern Ireland*, 21 August 2015, accessed 4 January 2019, http://www.nihrc.org/publications/alternative-care-and-children.

[78] Northern Ireland Human Rights Commission, *Racist Hate Crime: Human Rights and the Criminal Justice System in Northern Ireland,* 15 October 2013, accessed 4 January 2019, http://www.nihrc.org/publication/detail/racist-hate-crime-human-rights-and-the-criminal-justice-system-in-nort.

[79] Northern Ireland Human Rights Commission, *Our Hidden Borders: The UK Border Agency's Powers of Detention*, 18 April 2009, accessed 4 January 2019, http://www.nihrc.org/publication/detail/our-hidden-borders-uk-agency-powers-of-detention.

[80] Protector of Citizens of Serbia, *LGBT Population in Serbia – Situation of Human Rights and Social Status,* September 2011, accessed 4 January 2019, https://www.ombudsman.org.rs/index.php?option=com_content&view=article&id=75:lgbt-population-in-serbia-situation-of-human-rights-and-social-status&catid=12:special-reports&Itemid=14.

[81] Protector of Citizens of Serbia, *Special Report on the Situation of Domestic Violence against Women in Serbia*, June 2011, accessed 4 January 2019, https://www.ombudsman.org.rs/index.php?option=com_content&view=category&layout=blog&id=12&Itemid=14&limitstart=12.

[82] Human Rights Defender of the Republic of Armenia, *Public Ad-Hoc Report: Ensuring Right to a Fair Trial in the Republic of Armenia*, 2009, 6, accessed 4 January 2019, http://www.ombuds.am/en/publications/special_reports.html.

might still be vested with powers of inspection of detention facilities and other places of deprivation of liberty. In carrying out these duties, NHRIs do not only refer to the standards enshrined in the UN Convention against Torture, but also to the ECHR (primarily Articles 3 and 8) and the abundant ECtHR case-law on the conditions of detention.

At times NHRIs have made specific reference to the need to give effect to ECtHR judgments issued on the matter against their own countries: the Armenian Ombudsman recalled several judgments against Armenia on the overcrowding of cells,[83] while the Croatian and Polish Ombudsmen highlighted that on various occasions their respective countries had been censured by the ECtHR for the inability of the competent authorities to follow up complaints by prisoners that they had been mistreated in detention.[84]

More often, NHRIs have referred to the Convention and the Court's jurisprudence in general, on aspects such as the right to visits for prisoners on remand,[85] personal searches,[86] and the rights of persons deprived of liberty at borders.[87]

5.6. Handling individual complaints

As mentioned in Chapter 3, the Paris Principles define the handling of individual complaints of human rights violations as an optional function for NHRIs.[88] Typically, human rights ombudsmen as

[83] Human Rights Defender of the Republic of Armenia, *Annual Report. The Activity of Human Rights Defender of Republic of Armenia in 2016 as National Preventive Mechanism*, 2017, 11, accessed 4 January 2019, http://www.ombuds.am/en/publications/annual_reports.html.
[84] Ombudsman of Croatia, *Report on the Performance of Activities of the National Preventive Mechanism for 2015*, August 2016, 25-26, and *Report on the performance of activities of the National Preventive Mechanism for 2014*, September 2015, 12, both available at http://ombudsman.hr/en/reports (accessed 4 January 2019). Cf. also Commissioner for Human Rights of Poland, *Report of the Polish Commissioner for Human Rights on the Activities of the National Mechanism for the Prevention of Torture in 2016*, 2017, 53-54, accessed 4 January 2019, https://www.rpo.gov.pl/en/content/reports-national-preventive-mechanism.
[85] Public Defender of Georgia, *NPM Report 2017*, 15. As of May 2019, the Report is accessible at the temporary link https://sites.google.com/view/geoombudsman2/reports/national-preventive-mechanism?authuser=0 (accessed 21 May 2019).
[86] Commissioner for Human Rights of Poland, *Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2014*, 2015, 21, accessed 4 January 2019, https://www.rpo.gov.pl/en/content/reports-national-preventive-mechanism.
[87] Ukrainian Parliament Commissioner for Human Rights, *Annual Report of the Ukrainian Parliament Commissioner for Human Rights on the Observance of Human and Citizens' Rights and Freedoms. Summary 2014*, 2014, 38, accessed 4 January 2019, http://www.theioi.org/ioi-members/europe/ukraine/parliament-commissioner-for-human-rights.
[88] Cf. *supra* n 2.

well as commissions with a protection mandate are vested with this responsibility, which, nonetheless, displays notable variations as regards the bodies that are subject to the oversight of the NHRI (most commonly, as far as public bodies are concerned, the head of State, parliament, judiciary, and armed forces are excluded), the subject-areas on which the review by the NHRI can be exercised (e.g., the Netherlands Institute for Human Rights can only examine complaints concerning discrimination), the powers conferred on the NHRI to carry out its tasks (e.g., the powers to conduct searches or summon witnesses), and the consequences attached to a finding by the NHRI that a violation has taken place.

In the latter respect, NHRIs are often tasked with promoting a mediation between the parties and/or issuing recommendations that, as such, are not binding. Nonetheless, at least some NHRIs can, in case of non-compliance with their recommendations by the public bodies concerned, publicise the findings of their reviews (e.g., the Armenian Human Rights Defender), notify the parliament and/or government of the non-compliance (e.g., the Croatian, Portuguese, and Spanish Ombudsmen), or even ask the courts to enforce their recommendations, which thus become essentially binding, or to otherwise remedy the violations found (e.g., NHRIs from Azerbaijan, Hungary, the Netherlands, Poland and Great Britain). Various NHRIs (such as those from Hungary, Lithuania and Serbia) can petition courts or other competent bodies in order to dismiss public officials who have been found by NHRIs, during their investigations into individual complaints, to have committed disciplinary or criminal offences.

In dealing with the individual complaints submitted to them, NHRIs can apply the ECHR and ECtHR jurisprudence as well as ensure that ECtHR judgments against their countries are given effect to. The Polish Commissioner for Human Rights examined complaints and undertook investigations *ex officio* in light of various ECtHR judgments against Poland, including on the excessive length of

domestic proceedings[89] and on strip searches and the regime for dangerous detainees.[90] The Commissioner also followed up the interim measures prescribed by the ECtHR to withhold the expulsion of a Belarusian asylum seeker to his country of origin.[91]

The Albanian People's Advocate was involved in a case concerning the restitution of confiscated land after the complainants had secured an ECtHR judgment in their favour, which, however, had not been executed promptly by the Albanian authorities. The Advocate urged the competent authorities to give full effect to the ECtHR judgment in question as soon as possible.[92]

Further examples can be drawn from the practice of the Spanish *Defensor del Pueblo* and of the Hungarian Commissioner for Fundamental Rights. The former, *inter alia*, has routinely referred to the ECtHR judgment in *Moreno Gómez* in deciding on complaints about noises and the consequent potential breach of the right to respect for private life.[93] The latter, approached by an individual complaining about the lack of a maximum limit for the consideration of eligibility for parole, maintained that the situation in Hungary was not fully in line with a previous ECtHR judgment against the country and thus made recommendations to remedy the persistent violation and fully execute the judgment.[94] On another occasion, the Hungarian Commissioner made reference to an ECtHR

[89] Commissioner for Human Rights of Poland, *Summary of the Report on the Activity of the Commissioner for Human Rights in 2016 with Comments on the Observance of Human and Civil Rights and Freedoms*, 2017, 62, accessed 4 January 2019, https://www.rpo.gov.pl/en/content/report.

[90] Commissioner for Human Rights of Poland, *supra* n 23, 29, accessed 4 January 2019, https://www.rpo.gov.pl/en/content/report.

[91] Commissioner for Human Rights of Poland, "The Commissioner's inquiry to the Border Guard and the Ministry of Foreign Affairs regarding the foreigner who was refused entry to Poland", 13 June 2017, accessed 4 January 2019, https://www.rpo.gov.pl/en/content/commissioner%E2%80%99s-inquiry-border-guard-and-ministry-foreign-affairs-regarding-foreigner-who-was-refused.

[92] Committee of Ministers/Secretariat General, *1294 meeting (September 2017) (DH). Communication from the applicant (12/07/2017) in the case of Gjonbocari and Others v. Albania (Application No. 10508/02),* 13 July 2017, DH-DD(2017)810.

[93] Cf., among many others, *Defensor del Pueblo*, "Planificación de los eventos en la carpa municipal para minimizar las molestias por ruido", *Sugerencia*, 26 March 2018, accessed 4 January 2019, https://www.defensordelpueblo.es/resultados-busqueda-resoluciones/?tipo_documento=resoluciones&subtipo=sugerencia. The ECtHR judgment referred to is ECtHR, *Moreno Gómez v. Spain,* no. 4143/02, 16 November 2004.

[94] Commissioner for Fundamental Rights of Hungary, *Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2017*, 2018, 31-32, accessed 4 January 2019, https://www.ajbh.hu/zh/web/ajbh-en/annual-reports.

judgment delivered against Hungary to hold that a prison administration had violated the right of detainees to the secrecy of their correspondence.[95]

Many other NHRIs have used the ECHR and the ECtHR case-law as the bases to decide on the complaints submitted to them on a variety of subjects. The Armenian Human Rights Defender, for instance, determined that while the conduct of some police officers in confronting a journalist did not amount to criminal conduct, it was nonetheless contrary to the jurisprudence of the ECtHR in respect of freedom of speech; the Defender thus recommended that the police refrain from a similar behaviour in the future.[96] The Finnish Parliamentary Ombudsman has repeatedly relied upon the Convention and Court's case-law to handle cases regarding, *inter alia*, unconsented medical treatment, unlawful house searches, the return of seized property, and teachers' freedom of speech.[97] The Russian Commissioner for Human Rights applied the ECHR as interpreted by the Court to deal with a complaint about insufficient consideration of house arrest as an alternative to detention in the pre-trial phase and with a complaint about an injunction, imposed on a journalist convicted of "knowingly false denunciation" and "insult of the authorities", to refrain from his journalistic work for two years.[98]

On its part, the Institute of Human Rights Ombudsmen of Bosnia and Herzegovina referred to the Convention and the Court's case-law in handling complaints about, *inter alia*, religious discrimination at school,[99] unlawful limitations on the right of assembly of LGBT people,[100] and

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[95] Commissioner for Fundamental Rights of Hungary, "Privacy in Prison – The Ombudsman's View on Illegal Control of a Prisoner's Letter", *Press releases*, 2 September 2013, accessed 4 January 2019, http://www.ajbh.hu/en/web/ajbh-en/press-releases/-/content/ujPUErMfB9lw/privacy-in-prison-the-ombudsman-s-view-on-illegal-control-of-a-prisoner-s-letter.

[96] Human Rights Defender of the Republic of Armenia, *Annual Report on the Activities of the RA Human Rights Defender and on the Violations of Human Rights and Fundamental Freedoms in the Country during 2012*, 2013, 28-29, accessed 4 January 2019, http://www.ombuds.am/en/publications/annual_reports.html.

[97] Parliamentary Ombudsman of Finland, *Summary of the Annual Report 2016*, 2017, 125-128, accessed 4 January 2019, https://www.oikeusasiamies.fi/en_GB/web/guest/annual-reports. Cf. also Parliamentary Ombudsman of Finland, "A teacher's freedom of speech was violated by the municipality", *Press releases*, 7 July 2015, accessed 4 January 2019, https://www.oikeusasiamies.fi/en_GB/-/a-teacher-s-freedom-of-speech-was-violated-by-the-municipality.

[98] Cf., respectively, High Commissioner for Human Rights in the Russian Federation, *supra* n 26, 56, and *supra* n 25, 53-54.

[99] Institute of Human Rights Ombudsmen of Bosnia and Herzegovina, *2017 Annual Report on the Results of the Activities of the Institution of the Human Rights Ombudsman of Bosnia and Herzegovina*, March 2018, 89, accessed 4 January 2019, http://ombudsmen.gov.ba/Dokumenti.aspx?id=27&tip=1&lang=EN.

[100] Ibid., 110-111.

infringements on the peaceful enjoyment of property.[101] More generally, it appears that the Institute regularly applies ECHR standards when deciding on individual cases submitted to it; for instance, complaints concerning various aspects of the right to a fair trial are examined in light of Article 6 ECHR and the relevant ECtHR case-law.[102]

5.7. Approaching national courts

In addition to resorting to courts on completion of the examination of individual complaints (where applicable), a considerable number of NHRIs are vested with other prerogatives vis-à-vis the judicial consideration of instances of human rights violations.

Most human rights ombudsmen from Eastern Europe and the Balkans, for instance, can petition the respective constitutional courts for the review of legislative or regulatory acts. As the ECHR not infrequently has constitutional status or is otherwise used as a parameter to establish the constitutionality of laws and other acts, NHRIs have referred, in their submissions, to the Convention as interpreted by the ECtHR to challenge the constitutional legitimacy of the contested measures.

Among others, the Ukrainian Parliament Commissioner challenged the constitutionality and ECHR-compliance of a provision of the national code of criminal procedure according to which pre-trial restrictive measures were automatically prolonged by the judge at the preliminary hearing in the absence of a specific request to the contrary from the accused, even when a motivated request of

[101] Ibid., 32, concerning the hindrance of the complainant's access to his house because of the loading and unloading of cargo; the case was decided on the basis of Article 1 Protocol 1 to the ECHR. Cf. also Institute of Human Rights Ombudsmen of Bosnia and Herzegovina, *supra* n 70, 31, concerning the noise produced by the electric chainsaws of a business activity; the case was decided on the basis of Article 8 ECHR.

[102] Institute of Human Rights Ombudsmen of Bosnia and Herzegovina, *Annual Report on Results of the Activities by the Human Rights Ombudsman of Bosnia and Herzegovina for 2010*, 2011, Annex I, 147 *et seqq*., accessed 4 January 2019, http://ombudsmen.gov.ba/Dokumenti.aspx?id=27&tip=1&lang=EN. The table identifies violations of the right to a fair trial as violations of Article 6 ECHR.

extension from the public prosecutor was lacking.[103] The Constitutional Court, in striking the provision as unconstitutional, also highlighted that it violated Article 5 ECHR.[104]

The Hungarian Commissioner too asked for the Constitutional Court's intervention in relation to the regulation of pre-trial detention, which at that time in Hungary could be indefinite for the most serious crimes.[105] The right to liberty and security and the presumption of innocence, as enshrined in the Fundamental Law of Hungary and as interpreted by a well-established ECtHR jurisprudence, were at the heart of the Commissioner's submission.[106]

Pre-trial detention was also the subject of a constitutional petition by the Polish Commissioner which, in light of the country's constitution and of the ECtHR case-law, "challenged the possibility of using pre-trial detention on the sole grounds of severity of sanctions for the act committed by the suspect, in a situation when there is no risk that he/she will hinder the proceedings".[107] On another occasion, the Polish Commissioner petitioned the Constitutional Court with a view to banning detention for persons convicted of defamation as contrary to the freedom of expression protected by both the Polish Constitution and the ECHR;[108] and in yet another instance, the Commissioner asked the Constitutional Court to curb the extensive powers conferred on the security services by the new Anti-Terrorism Act again by referring, *inter alia*, to the ECHR.[109]

The Spanish and Portuguese Ombudsmen too are vested with the power to initiate constitutional complaints, and the latter challenged the possibility that judges be moved and proceedings be transferred according to discretionary decisions by the Superior Council of the Judiciary also in light

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[103] Ukrainian Parliament Commissioner for Human Rights, "On the constitutional petition of the Ombudsperson the Constitutional Court of Ukraine rendered a decision that is important for development of legal system", *News*, 24 November 2017, accessed 4 January 2019, http://www.ombudsman.gov.ua/en/all-news/pr/181217-dd-on-the-constitutional-petition-of-the-ombudsperson-the-constitutional/.
[104] Ibid.
[105] Commissioner for Fundamental Rights of Hungary, *Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2015*, 2016, 36, accessed 4 January 2019, https://www.ajbh.hu/zh/web/ajbh-en/annual-reports.
[106] Ibid.
[107] Commissioner for Human Rights of Poland, *supra* n 89, 28-29.
[108] Commissioner for Human Rights of Poland, *Summary of Report on the Activity of the Ombudsman in Poland in 2012 with Remarks on the Observance of Human and Civil Rights and Freedoms*, 2013, 16, accessed 4 January 2019, https://www.rpo.gov.pl/en/content/report.
[109] Commissioner for Human Rights of Poland, "The Commissioner for Human Rights challenges the Anti-Terrorism Act before the Constitutional Tribunal", 11 July 2016, accessed 4 January 2019, https://www.rpo.gov.pl/en/content/commissioner-human-rights-challenges-anti-terrorism-act-constitutional-tribunal.

of the right to a fair trial enshrined in the Convention.[110] As a final example, as a result of recent amendments to its founding law, the Armenian Human Rights Defender has developed a close relationship with the Constitutional Court, to which the Defender submits petitions and *amicus curiae* briefs on human rights issues, which can include references to the ECHR and the ECtHR jurisprudence.[111]

NHRIs can also initiate other types of proceedings before domestic courts: the Equality and Human Rights Commission of Great Britain, for instance, can institute proceedings "whether for judicial review or otherwise" to challenge the lawfulness of decisions or actions by public bodies.[112] The Commission can further request an injunction if it believes "that a person is likely to commit an unlawful act".[113] The Ukrainian Commissioner, on its part, is entitled to institute proceedings in the public interest or protect the rights and interests of individuals who cannot apply to court themselves.[114]

Additionally, NHRIs can offer legal assistance and/or representation to victims of human rights violations; this is the case, among others, for the Irish and British commissions, as well as for the Danish Institute for Human Rights as regards instances of discrimination. In this capacity, the Danish Institute recently assisted the complainants in a family reunification case as well as in a case concerning the stripping of the right to vote from disabled people subject to guardianship.[115] In both instances the Institute referred to the relevant ECtHR case-law and both cases are in the process of being referred to the ECtHR following adverse judgments by the Danish Supreme Court.[116]

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[110] Portuguese Ombudsman, *Portuguese Ombudsman – National Human Rights Institution. Report to the Parliament – 2016*, 2017, accessed 4 January 2019, http://www.provedor-jus.pt/?idc=16.
[111] Interview with Mikayel Khachatryan, Head of the International Cooperation Department at the Human Rights Defender of the Republic of Armenia, 15 November 2018, on file with author.
[112] Equality Act 2006, *supra* n 72, Section 30.
[113] Ibid., Section 24.
[114] Ukrainian Parliament Commissioner for Human Rights, "Procedural rights of the Commissioner", accessed 4 January 2019, http://www.ombudsman.gov.ua/en/page/secretariat/pravo-na-sudovij-zaxist/povnovazhennya-upovnovazhenogo-u-sudovomu-proczesi/.
[115] Danish Institute for Human Rights, *Human Rights on the Agenda. Report 2017-18*, 2018, 20 and 26, accessed 4 January 2019, https://www.humanrights.dk/publications/annual-report-danish-parliament-2017-18.
[116] Ibid. The case concerning family reunification has been lodged with the ECtHR as *M.A. v. Denmark*, no. 6697/18, communicated on 7 September 2018. The Danish Institute filed a third-party intervention in this case in January 2019 (interview with Christoffer Badse, Director of the Monitoring Department at the Danish Institute for Human Rights, 21 February 2019, on file with author).

Another power conferred on some NHRIs vis-à-vis national courts, which has often been used to introduce ECHR standards and the ECtHR case-law into domestic proceedings, is the submission of third-party interventions or *amicus curiae* briefs. In essence, in these instances, NHRIs are not parties to the proceedings nor do they represent other parties, but they assist the courts by providing their expert opinion on issues of fact or law raised by the case.[117]

Once again, commissions with a protection mandate are among the most active contributors in this area. The Equality and Human Rights Commission of Great Britain made reference to the Convention and the Court's jurisprudence when intervening as a third party in cases concerning, *inter alia*, cuts to the legal aid for prisoners as regards certain kinds of proceedings,[118] cuts to social housing benefits,[119] the right of patients to be consulted on decisions concerning their cardiopulmonary resuscitation,[120] the right to life of British soldiers deployed abroad and the right of their families to thorough investigations into their deaths,[121] and the detention of asylum seekers pending examination of their claims.[122]

The Irish Human Rights and Equality Commission similarly intervened before national courts by presenting arguments based on the Convention, as interpreted by the ECtHR, on a variety of subjects including the right to private and family life of non-nationals,[123] the potential conflict

[117] For more on *amicus curiae* briefs and third-party interventions, cf. Section 3.6 of this dissertation.
[118] Equality and Human Rights Commission, "Prisoners will be able to access legal aid for important hearings", *News*, accessed 4 January 2019, https://www.equalityhumanrights.com/en/our-work/news/prisoners-will-be-able-access-legal-aid-important-hearings. Cf. also Court of Appeal (Civil Division), *R (Howard League for Penal Reform and The Prisoners' Claimants Advice Service) v. The Lord Chancellor* [2017] EWCA Civ 244 (10 April 2017).
[119] Equality and Human Rights Commission, "Bedroom tax: success and failure for disabled people at the Supreme Court", *Blog*, 30 November 2016, accessed 4 January 2019, https://www.equalityhumanrights.com/en/our-work/blogs/bedroom-tax-success-and-failure-disabled-people-supreme-court. Cf. also UK Supreme Court, *R (Carmichael and Rourke) v Secretary of State for Work and Pensions and other appeals* [2016] UKSC 58 (9 November 2016).
[120] Court of Appeal (Civil Division), *Tracey v. Cambridge University Hospitals NHS Foundation Trust & Others* [2014] EWCA Civ 822 (17 June 2014).
[121] Equality and Human Rights Commission, "The Smith Case. Supreme Court decision in Jason Smith Human Rights Case", 30 June 2010, accessed 4 January 2019, https://www.equalityhumanrights.com/en/legal-casework/smith-case.
[122] Equality and Human Rights Commission, *Detention Action v Secretary of State for the Home Department. Skeleton Argument on Behalf of the Equality And Human Rights Commission,* 2 December 2013, accessed 4 January 2019, https://www.equalityhumanrights.com/en/legal-casework/human-rights-legal-cases.
[123] Irish Human Rights and Equality Commission, *Luximon v Minister for Justice and Equality / Balchand v Minister for Justice and Equality. Outline Legal Submissions on Behalf of the Irish Human Rights and Equality Commission*, 11 July 2017, accessed 4 January 2019, https://www.ihrec.ie/documents/luximon-v-minister-justice-equality-balchand-v-minister-justice-equality-november-2017/.

between a finding of contempt of court and freedom of expression,[124] the deprivation of liberty of people with a mental disability,[125] extradition to countries where the respect for fundamental rights is at risk,[126] and assisted suicide.[127]

The Georgian Ombudsman has also submitted *amicus curiae* briefs referring to European human rights standards in proceedings concerning, *inter alia*, temporary resident permits and extradition proceedings.[128]

While at times NHRIs have included references to ECtHR judgments delivered against their home countries in their submissions to national courts, most interventions refer to the well-established jurisprudence of the ECtHR with a view to influencing the interpretation of domestic acts or otherwise bringing them in line with the European standards, rather than promoting the execution of specific judgments.

5.8. Preliminary conclusions

NHRIs have demonstrably engaged, through the exercise of their core domestic functions, in the promotion of the execution of ECtHR judgments and of the implementation of the ECHR. Thanks to their expertise, links with multiple national actors, and wide-ranging tasks in the promotion and

[124] Irish Human Rights and Equality Commission, *Tracey v. District Judge Aeneas McCarthy. Legal Submissions of the Amicus Curiae*, 27 October 2017, accessed 4 January 2019, https://www.ihrec.ie/documents/traceyamicus/.
[125] Irish Human Rights and Equality Commission, *L v the Clinical Director of St Patrick's University Hospital. Outline Submissions of the Amicus Curiae*, 21 December 2017, accessed 4 January 2019, https://www.ihrec.ie/documents/l-v-clinical-director-st-patricks-university-hospital-december-2017/.
[126] Irish Human Rights and Equality Commission, *The Attorney General v. Damache. Outline Submissions of the Amicus Curiae*, 9 December 2014, accessed 4 January 2019, https://www.ihrec.ie/documents/the-attorney-general-v-damache/. Cf. also the case of *Marques v the Director of Public Prosecutions and Attorney General v Marques,* mentioned in Irish Human Rights and Equality Commission, *Annual Report 2016*, 2017, 14, accessed 4 January 2019, https://www.ihrec.ie/documents/annual-report-2016/.
[127] Irish Human Rights Commission, *Fleming v Attorney General. Outline Submissions on Behalf of the Human Rights Commission*, 28 November 2012, accessed 4 January 2019, https://www.ihrec.ie/documents/ihrc-submission-fleming-v-attorney-general/.
[128] Public Defender of Georgia, *Activity Report 2014 of Public Defender of Georgia,* 16 December 2014, 24. As of May 2019, the Report is accessible at the temporary link https://sites.google.com/view/geoombudsman2/reports/activity-reports?authuser=0 (accessed 21 May 2019). Other briefs by the Public Defender, which are not currently available on its website, have concerned freedom of expression, discrimination on religious grounds, and discrimination on the basis of trade union affiliation.

protection of human rights, NHRIs have helped the relevant European standards seep into different areas of domestic law and practice and be absorbed by different domestic institutions and actors.

Admittedly, the collection of empirical data carried out for this chapter has shown that, while most European A-status NHRIs appear well versed in the ECHR standards and ECtHR jurisprudence, room for growth exists as far as the direct support by NHRIs to the execution of ECtHR judgments delivered against their home countries is concerned. Nonetheless, with regard to the domestic mandate of NHRIs, the distinction between the execution of ECtHR judgments on the one hand and the implementation of the ECHR as interpreted by the Court on the other is arguably more nuanced. This chapter has shown that NHRIs have a solid knowledge of the Convention and of the Court's well-established case-law, pay increasing attention to the judgments delivered by the Court,[129] are aware of the effects of these judgments on the national plane, and use them as a tool to advance the promotion and protection of human rights in their home countries.

Some NHRIs have been even more forward-looking and have acted to ensure that their States comply with new ECtHR judgments delivered against other countries, thereby potentially preventing future interventions by the ECtHR against their States. Accordingly, the Finnish Human Rights Centre organised an information session for members of the Finnish Parliament about the *Delfi v. Estonia* judgment, regarding the responsibility of news websites for defamatory comments from users.[130] Similarly, the Danish Institute for Human Rights addressed recommendations to its Government following an ECtHR judgment against Belgium concerning the expulsion of seriously ill foreigners.[131] More generally, in carrying out its advisory functions towards the Parliament and Government, and particularly in commenting on bills, the Danish Institute often refers to ECtHR

[129] While examples for this chapter have been collected from the whole ten-year span considered, an increasing volume of examples could be found in the last years of this period.
[130] Cf. *supra* Section 5.2.
[131] Danish Institute for Human Rights, *supra* n 115, 21. The judgment referred to is presumably ECtHR, *Paposhvili v. Belgium* [GC], no. 41738/10, 13 December 2016.

judgments delivered against other countries insofar as applicable to Denmark,[132] as the judgments issued by the Court directly against Denmark are overall rare.

In sum, NHRIs have a strong record of promoting the alignment of their domestic legal orders with international standards, including the ones from Strasbourg. While to date NHRIs cannot be said to have systematically followed up the execution of all (or even most) ECtHR judgments directed at their countries, they appear to increasingly take the initiative in this respect as well as be involved by their governments. The example set by the French Government, which now formally submits its action plans to the CNCDH before forwarding them to the Committee of Ministers, might soon be followed by others.

Moreover, in many countries NHRIs constitute the natural point of reference for individuals who claim to be the victims of human rights violations. Increasing familiarity of the public with the Convention and the Court's action means that a growing number of people address NHRIs to learn about the Convention, how to apply to the ECtHR or how to seek redress following ECtHR judgments.

These domestic driving forces, coupled with the developments at the CoE level, namely the strengthened supervision of the execution of ECtHR judgments and the greater involvement of diverse supranational and national actors including NHRIs,[133] are likely to further encourage the engagement of NHRIs with the execution process of ECtHR judgments.

[132] Interview with Badse, Danish Institute for Human Rights, *supra* n 116, 26 October 2017.
[133] Cf. Chapter 2 of this dissertation.

CHAPTER 6. CONCLUDING

It has long been recognised that the ECtHR is overwhelmed by an excessive influx of applications, which it struggles to keep pace with. After a number of amendments have been introduced to add admissibility hurdles and to allow the Court to deal with admissible applications more expeditiously, the recent debate on the reform of the Convention's system has mainly focused on the need to strengthen the national implementation of the Convention and ensure the prompt and full execution of the Court's judgments. More sustained action by Member States on these aspects would also facilitate the work of the Committee of Ministers, which is responsible for supervising the execution of ECtHR judgments and whose overload has also been acknowledged more recently.

This conceptual shift from the international level to the national one, while proclaimed in the context of all the latest High-level Conferences on the future of the Court, does not appear to have led to major concrete changes yet. The drafting of Protocol no. 16, which allows the highest courts of States Parties to seek the advisory opinion of the ECtHR on the interpretation and application of the Convention, is a first step in this direction, but it is too soon to assess its impact.[1] As to the reference to "subsidiarity" introduced by Protocol no. 15, it has arguably proved more controversial than helpful.[2]

Nonetheless, it would appear that an existing opportunity to reinforce this shift and contribute to the realisation of subsidiarity without giving governments carte blanche has not been fully pursued in practice and has been given limited consideration in the literature; reference is here made to the potential role of NHRIs. Since 2006, these institutions have been explicitly entitled to provide information to the Committee of Ministers regarding the execution of ECtHR judgments. Moreover,

[1] The Protocol only entered into force in August 2018 for the ten States which are parties to it.
[2] Cf. Section 1.1 of this dissertation for the notion of "subsidiarity" in the context of the ECHR system and for the debate concerning its scope and consequences.

in the exercise of their core national functions, NHRIs routinely promote the harmonisation of domestic legal orders with international norms and judgments, including ECtHR judgments.

This dissertation has investigated the extent to which NHRIs have engaged in the above-mentioned activities and contributed to the promotion of the execution of ECtHR judgments. More specifically, a comprehensive analysis of all communications submitted by NHRIs to the Committee of Ministers was undertaken, whereas the domestic activities of NHRIs in the area were systematised and illustrated through examples. On the basis of the findings of this empirical analysis, this chapter further reflects on whether and how the contribution by NHRIs to the promotion of the execution of ECtHR judgments can be strengthened, and what obstacles may need to be removed in order to allow for greater engagement on the part of NHRIs and greater impact of their interventions.

6.1. Research findings

Chapter 2 showed that, over time, a number of adjustments were made to the supranational procedure for the supervision of the execution of ECtHR judgments with a view to rendering it more objective, transparent, and open to the participation of actors other than government representatives. In this context, a space was carved out for NHRIs specifically by way of Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments, which constitutes the first formal recognition of a concrete role for NHRIs in the Convention's system.

Through this provision, NHRIs (better, "national institutions for the promotion and protection of human rights" as broadly interpreted at the CoE level) are expected to provide comprehensive and accurate information on the status of execution of judgments, by virtue of their privileged position as domestic institutions (thus closer to the situation on the ground than CoE bodies) which are independent from other State organs but also distinct from NGOs.

The "unique position" of NHRIs was analysed in detail in Chapter 3. As State bodies, NHRIs may have access to information that is precluded to NGOs and have at their disposal different means of putting pressure on the public bodies whose actions they are mandated to oversee. Unlike NGOs,

NHRIs should not be guided in the exercise of this monitoring function by advocacy aims or by the interests of their members, but only by the general interest in seeing that State bodies comply with their human rights obligations.

In addition, NHRIs that adhere to the Paris Principles[3] are institutionally tasked with cooperating with international organisations to ensure that international standards and decisions are duly implemented by States. The UN has been particularly active in this respect; indeed, the establishment itself of NHRIs and their characterisation as "bridges" between the national and international levels have long been encouraged by the UN, which has developed a particularly close relationship with NHRIs over time. Chapter 3 illustrated how pervasive this relationship has become, how it has extended to all main UN bodies and mechanisms that deal with the promotion and protection of human rights, how a role for NHRIs has been laid down in human rights treaties negotiated at the UN level, and how the UN General Assembly is advocating for a relationship to be established between NHRIs and additional UN bodies and programmes.

It was also shown that a comparable relationship does not currently exist between NHRIs and the CoE; before 2006, NHRIs were not given any formal role within the CoE monitoring system and were regularly involved almost exclusively by the CoE Commissioner for Human Rights. However, arguably in light of the increasing focus on the effective execution of the Court's judgments and implementation of the Convention by States Parties, this state of affairs appears to be changing: references to a role for NHRIs have multiplied in the official documents by CoE bodies and found their way in the declarations concluding the latest Conferences on the future of the Convention's system.[4] It remains the case that a broad notion of "national institutions" is adopted at the CoE level, which includes bodies that do not comply with the Paris Principles.

At any rate, there appears to be a growing interest in the potential of NHRIs and other domestic entities such as ombudsmen and equality bodies to provide independent and reliable information to

[3] The so-called Paris Principles are the international non-binding standards which regulate the composition and mandate of NHRIs; cf. Chapter 3 of this dissertation for more information.
[4] Cf. Section 3.6 of this dissertation.

the CoE as well as to act at the national level to further the execution of the Court's judgments. As a matter of fact, the added value of the involvement of these institutions in promoting the execution of ECtHR judgments would not only lie in their role as an additional source of information for the relevant CoE bodies, but also in their closer relationship with the domestic authorities. This relationship allows NHRIs (and, in the view of the CoE, comparable bodies) to cooperate with willing State authorities when these are hindered by the complexity of the measures required to fully execute ECtHR judgments, and to exert pressure on unwilling authorities.

The dissertation has thus built on the following established facts. First, a supranational role for NHRIs in promoting the execution of ECtHR judgments has been accepted by CoE Member States, resulting in the adoption of new Rule 9(2) of the Rules of the Committee of Ministers, and has been relied on by the Department for the Execution of Judgments of the ECtHR. Second, most of the core domestic activities carried out by NHRIs can be directed at the promotion of the execution of ECtHR judgments.

Accordingly, Chapter 4 investigated the use that has been made of the Rule 9(2) procedure by the actors concerned and it assessed whether such use meets the objectives underlying the procedure – namely, essentially, the provision of additional or different information to the Committee of Ministers and the development of something akin to "adversarial proceedings" between the government concerned and other actors when necessary. Complementarily, Chapter 5 investigated the extent to which traditional domestic activities of European NHRIs can be and have actually been aimed at furthering the execution of ECtHR judgments.

On the basis of the empirical findings of these investigations, recommendations are made in this section in order for these existing mechanisms to effectively achieve the goals set for them as well as for the potentialities of the well-established mandates of NHRIs to be fully exploited as regards the promotion of the execution of ECtHR judgments.

Chapter 4 analysed the use that NHRIs have made of the opportunity to submit communications to the Committee of Ministers regarding the execution of ECtHR judgments, which is the main avenue for NHRIs to contribute at the CoE level to the execution of ECtHR judgments. The chapter also examined how this use has been received by the main interlocutors of NHRIs in the context of the supervision of the execution of ECtHR judgments – namely States, the Committee of Ministers, and the Department for the Execution of Judgments. More specifically, Chapter 4 sought to answer the following research questions:

Q1: To what extent have NHRIs contributed to promoting the execution of ECtHR judgments?

a) Which NHRIs have interacted with the Committee of Ministers and the Department for the Execution of Judgments to this end?

b) In relation to which cases have NHRIs interacted with these bodies?

c) How have NHRIs interacted with these bodies?

d) What have been the effects of these interactions?

The analysis carried out in Chapter 4 showed that twelve national human rights structures have filed communications with the Committee of Ministers to date – a small number compared to the number of NHRIs, classical ombudsmen, and equality bodies that have been established in CoE Member States and are entitled to intervene in the procedure.

Participants include NHRIs in full compliance with the Paris Principles, partially compliant institutions as well as non-accredited bodies such as classical ombudsmen. Participants also differ as to their composition and functions, ranging from consultative commissions to commissions with a protection mandate, and from classical to human rights ombudsmen. Submissions to the Committee of Ministers at the execution stage are thus not a prerogative of A-status NHRIs nor of a particular category of national institutions, in line with the traditionally inclusive notion of national human rights structures in the CoE context.

The number of communications submitted by national human rights structures is also rather limited – thirty-three communications in relation to twenty-five cases or groups of cases, in contrast with the hundreds of communications forwarded by NGOs.

NHRIs[5] appear to have intervened in relation to cases that entail violations of core ECHR rights or severe violations of other ECHR rights as well as cases that can be qualified as legally important, from the point of view of either the Court's jurisprudence or the national legal order. Indeed, NHRIs were especially concerned with judgments requiring, in their opinion, the adoption of general measures at the domestic level in order to be fully implemented. The expertise already developed by NHRIs on the subject in the exercise of their domestic mandates would appear as another relevant factor in the decision of the institutions to submit Rule 9(2) communications.

As to the content of communications, NHRIs have tended to submit communications providing the Committee of Ministers with additional information compared to the information provided by governments, as well as different information or different interpretations of governmental information – even though, in two instances, NHRIs supported the positions of governments. The information submitted by NHRIs has commonly referred to the legislation, administrative practice, jurisprudence, and institutional arrangements regulating a certain matter at the national level; but it has also consisted of numerical and statistical data and their analysis (e.g., data on the prison population, the evictions of Travellers, the placement of Roma children in special classes).

NHRIs have then built on these data to comment on the suitability and exhaustiveness of the general measures adopted by governments and on their actual implementation, and to put forward additional or alternative measures.

Not infrequently, NHRIs have incorporated in their communications the data collected or the opinions expressed by other actors with which they regularly cooperate – from NGOs to independent

[5] From now on, when referring to the "national institutions for the promotion and protection of human rights" that have taken part in the Rule 9(2) procedure, unless specified otherwise, the term "NHRIs" will be used to avoid too a cumbersome terminology (also considering that ten out of twelve intervening institutions are in fact NHRIs *sensu stricto*). It is understood that the concept adopted at the CoE level is broader than that of NHRIs as defined by the UN and the majority of scholars, as well as by the author of this dissertation. Cf., for further details, Chapter 3 of the dissertation.

domestic bodies and international monitoring mechanisms. Other elements that can be found in communications from NHRIs include (rather limited) observations on the individual measures proposed or taken by governments, as well as "procedural requests" to the Committee of Ministers to examine a case under standard or enhanced supervision or to refer a case back to the ECtHR.

Chapter 4 further investigated whether the communications submitted to date by NHRIs have made a difference – i.e., whether they have succeeded in influencing the positions of the governments concerned, the assessments by the Department for the Execution of Judgments or the decisions by the Committee of Ministers. It was found that, in a few cases, NHRIs convinced their respective States to change their stances; more often, communications from NHRIs had an impact on the assessments conducted by the Department for Execution and on the determinations made by the Committee of Ministers (even though not all recommendations by the Department for Execution are followed by the Committee). However, in several instances, it was hardly possible to establish whether the submissions by NHRIs had had an impact at all, as the submissions were not analysed in their contents by the Department for Execution and the Committee nor, at times, mentioned at all.

The situation is similar for NGOs, whose interventions appear to have also influenced the supervision of execution process at times, but whose actual contribution is difficult to evaluate in the absence of express reference to their communications. At any rate, it does not appear that the relevant CoE bodies make a distinction between submissions by NHRIs on the one hand and submissions by NGOs on the other as such. As for States, the explicit recognition by some of them of the special importance attached to the views of NHRIs has rarely translated in the prompt and spontaneous acceptance of the recommendations made by these institutions.

An examination of the role played by NHRIs in promoting the execution of ECtHR judgments would have been incomplete if the national activities of NHRIs were not considered. It has emerged from Chapter 3 that A-status NHRIs in particular are given a broad mandate to promote and protect human rights and that, in accordance with their founding laws, they undertake wide-ranging activities

to this end – from advising national authorities to conducting visits in places of detention, from providing training and education on human rights to handling individual complaints of human rights violations. These activities are likely to intersect the furtherance of the execution of ECtHR judgments, as the national and international planes of human rights promotion and protection are strictly intertwined, as are the national and international dimensions of the mandates of NHRIs.

Chapter 5 thus set out to answer the following questions:

Q1: To what extent have NHRIs contributed to promoting the execution of ECtHR judgments?

...

e) What activities have NHRIs carried out at the domestic level to promote the execution of ECtHR judgments?

Once identified the main activities carried out by NHRIs at the national level for the promotion and protection of human rights, Chapter 5 gave examples of instances where A-status NHRIs, which, in light of their broad competences and more substantial resources, are especially expected to contribute to the execution of ECtHR judgments in a variety of ways, have exercised their domestic functions with a view to facilitating the execution of these judgments. While not all activities ever undertaken by NHRIs in this respect were considered, essentially because of accessibility reasons and resource constraints, the chapter offered a systematic portrayal of the ways in which NHRIs can contribute to the execution of ECtHR judgments and illustrated them by means of examples derived from the concrete experiences of NHRIs.

Notwithstanding the limitations of this approach, the extensive analysis of the practice of the selected NHRIs allowed to conclude that, while many A-status NHRIs have promoted the execution of one or more ECtHR judgments against their countries in the exercise of one or more of their domestic functions, these institutions have more often referred to ECHR standards and the ECtHR well-established jurisprudence in general rather than systematically following up judgments directed

at their countries. On the other hand, NHRIs have at times promoted the execution of new ECtHR judgments issued against other States, where they found that similar violations were occurring in their jurisdictions, in order to avoid future adverse judgments against their countries.

In sum, the work of most European A-status NHRIs is guided by a thorough understanding of the Convention and of the ECtHR case-law and increasing attention is being paid by these institutions to the judgments delivered by the ECtHR against their countries and others. This expertise is recognised by both national authorities, which interact with NHRIs on this level, and members of the public, who turn to NHRIs to know their rights under the Convention and how to protect them through national and international means.

The findings, illustrated above, regarding the ways in which NHRIs have to date contributed to promoting the execution of ECtHR judgments lead to the following further research questions:

Q2: Can the current contribution by NHRIs to promoting the execution of ECtHR judgments be strengthened?

i) Are there obstacles that prevent greater engagement by NHRIs and, if so, how can they be removed?

ii) Are there obstacles that prevent greater impact by NHRIs and, if so, how can they be removed?

As far as the participation by NHRIs in the Rule 9(2) procedure is concerned, Chapter 4 outlined, also on the basis of interviews with representatives from NHRIs, various possible reasons for the relatively low number of NHRIs submitting communications to the Committee of Ministers. A first obstacle to the engagement by NHRIs with the procedure can be the limitations on the institutions' mandates as far as their thematic areas of competence or their cooperation with international organisations are concerned; this is mostly the case for classical ombudsmen, equality

bodies, and other national human rights structures that have sector-specific responsibilities and do not fully comply with the Paris Principles. Indeed, A-status NHRIs should be vested with broad human rights mandates and with the ability to routinely interact with international organisations.

In this respect, at least from the 1980s, the CoE has recommended that its Member States establish effective institutions with a mandate to promote and protect human rights or, alternatively, attribute this mandate to existing institutions including classical ombudsmen. The most recent Declaration on the reform of the ECHR system, the so-called Copenhagen Declaration, specifically called upon States to institute NHRIs in compliance with the Paris Principles.[6]

A rather straightforward solution to this first obstacle would thus be for States to ensure that their independent human rights structures have as broad a human rights mandate as possible and the explicit power to interact with international organisations to carry out this mandate. CoE bodies could join UN bodies in urging States to create strong independent NHRIs, preferably in compliance with the Paris Principles. This "external pressure" on the part of CoE bodies could strategically be directed at States that bear primary responsibility for the overloading of the ECtHR.

Even A-status NHRIs with a broad mandate and the express prerogative to engage with international bodies might, however, be inhibited by scarce resources or insufficient expertise on the specific functioning of the ECHR system. It goes without saying that endowing NHRIs with additional financial resources would widen and strengthen their ability to promote and protect human rights, including by facilitating the execution of ECtHR judgments. If the execution of ECtHR judgments is considered a priority, NHRIs should be given additional funding that is appropriate to carry out the task on a regular basis. The issue of financial resources, in turn, is closely linked to that of staff resources – namely, increased funding would first of all guarantee the recruitment of a sufficient number of officers who are expert on the Convention's standards and the Court's case-law and are familiar with the opportunities for NHRIs to intervene in the life cycle of ECtHR cases.

[6] High-level Conference, *Copenhagen Declaration*, 13 April 2018, para. 18.

The primary responsibility thus rests once again on governments, which should ensure that enough funding is allocated to NHRIs in order for them to effectively engage in the promotion of the execution of ECtHR judgments. Moreover, if NHRIs are valued as partners by the Court and the CoE bodies involved in the supervision of the execution of judgments, it can also be expected that the CoE undertakes capacity-building initiatives in this respect, particularly by supporting NHRIs that have limited resources and/or are established in States that have bad records before the Court. The CoE has indeed already devised and financed projects which are aimed, *inter alia*, at strengthening the capacities of NHRIs; specific training on how these institutions can contribute to the execution of ECtHR judgments could be included.[7]

Nonetheless, the decision to allocate an adequate part of financial and staff resources to the execution of ECtHR judgments ultimately lies with NHRIs, which should be able to define their priorities, structure their departments, and recruit staff in complete independence. It may well be that NHRIs legitimately determine that following up the rulings delivered by the ECtHR should not be a priority of their mandates. As has been mentioned, smaller NHRIs or NHRIs which do not primarily focus on legal aspects might consider it more useful to engage in other activities.

On the other hand, it has also been shown that all kinds of NHRIs (consultative commissions, commissions with a protection mandate, ombudsmen, and research institutes) can submit communications to the Committee of Ministers and that these communications need not entail complex legal analyses, but they can provide all sorts of data and information. Moreover, in the context of the supervision of the execution of ECtHR judgments, the focus shifts from the specifics of the case before the Court to the wide range of general measures that might be needed to prevent future instances of violations. Thus, if the NHRI concerned is familiar with a certain subject-matter following its work at the national level, it could submit communications to the Committee of Ministers without devoting much additional financial and staff resources.

[7] For an overview of these projects, cf. the dedicated CoE webpage, accessed 4 January 2019, https://www.coe.int/en/web/national-implementation/thematic-work/ombudsperson-anti-discrimination.

For instance, the Greek National Commission for Human Rights forwarded to the Committee of Ministers a report that it had drafted following consultations with civil society in the context of its domestic work on the issues of human trafficking and forced labour; similarly, the Serbian Protector of Citizens submitted its report on "missing children", as did the Georgian Public Defender with its report on the disciplinary proceedings against law-enforcement officials; the French Commission followed up before the Committee of Ministers on its previous studies on the conditions of Roma and Travellers in France, and so on.[8]

Consequently, the observation that the participation by NHRIs in the ECHR system is essentially different from their participation in the periodic reporting procedures before UN bodies appears true up to a point;[9] because when it comes to the execution stage, and especially to the general measures of execution, the particularities of the cases before the ECtHR matter much less and NHRIs can contribute to the execution process with information that can be very similar to that submitted to UN bodies. The activities that NHRIs have already undertaken within their domestic competences, or with a view to contributing to the periodic reporting procedures before UN bodies, could be useful for the monitoring by the Committee of Ministers as well.

In consideration of the above, it should also be examined whether an information issue exists, namely whether NHRIs might not be aware of the existence of the mechanism or, at least, of the concrete arrangements for participation. It was shown that no comprehensive effort has been undertaken to date on the part of CoE bodies to inform NHRIs and ombudsmen of the existence and functioning of the procedure, the main initiative being a 2008 pilot workshop promoted by the CoE Commissioner for Human Rights that involved a relatively small number of national human rights structures and does not appear to have been followed up.

More recently, the European Network of National Human Rights Institutions (ENNHRI) issued rather detailed guidelines for NHRIs to "support the implementation of judgments" of the ECtHR, at

[8] All of these submissions have been analysed in Chapter 4; cf. especially Section 4.3.
[9] The observation was made by Anne van Eijndhoven, Policy Adviser at the Netherlands Institute for Human Rights (interview of 4 May 2017, on file with author).

both the national and CoE levels.[10] While members of ENNHRI should therefore by now be aware of the existence of the Rule 9(2) mechanism, further training on its concrete functioning and on the most effective ways for NHRIs to contribute to the execution process seems appropriate. The importance of specific training for the effective engagement by NHRIs with international procedures has been demonstrated in the UN context, where the institutions that had received the most training proved to be the most active participants in the relevant procedures.[11]

At any rate, it appears that a certain exchange of information between NHRIs that have taken part in the procedure and NHRIs that have not done so yet is already taking place within ENNHRI Legal Working Group.[12] Due to the large membership of ENNHRI, which includes all A-status European NHRIs but also partially compliant and non-accredited institutions, its awareness-raising and training action has considerable potential.

The Department for Execution, on its part, has already facilitated the involvement by NHRIs by publishing the information relating to the execution of ECtHR judgments on a much more user-friendly website, but it too could step up its engagement in the area of awareness raising by providing training to NHRIs or at least informing individual NHRIs of the opportunity to submit information when the Department considers that such information would benefit the supervision of the execution of specific judgments.[13]

It remains the case that NHRIs might find it sufficient to convey their views to the competent national authorities at the domestic level, especially if the latter appear open to the recommendations

[10] ENNHRI/Legal Working Group, *Guidance for National Human Rights Institutions to Support Implementation of Judgments from the European Court of Human Rights* (Brussels: ENNHRI, 2016).
[11] Cf. Chris Sidoti, "National Human Rights Institutions and the International Human Rights System", in *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, eds. Ryan Goodman and Thomas Pegram (Cambridge: Cambridge University Press, November 2011), 102-103.
[12] Interview with Clare Collier, Senior Principal at the Equality and Human Rights Commission (Great Britain), 26 September 2018, on file with author.
[13] That the Department for Execution or the Committee of Ministers could proactively ask NHRIs to submit information was also suggested by Christoffer Badse, Director of the Monitoring Department at the Danish Institute for Human Rights, according to whom the Danish Institute and other NHRIs are contacted and invited to provide their views by several international monitoring bodies; the latter include various (but not all) UN human rights treaty bodies as well as, among others, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (interviews conducted on 26 October 2017 and 21 February 2019, on file with author).

by NHRIs and generally willing to abide by ECtHR judgments. Nonetheless, knowledge of the Rule 9(2) mechanism on the part of NHRIs and their ability to use it would provide them with an additional tool to deal with instances of non-compliance or delays in the execution of judgments by States. At any rate, as pointed out by the ENNHRI Guidance as well, action at the national level does not exclude action at the international one and "the [Rule 9(2)] submission may be equally or more relevant after engagement with the national authorities".[14] Indeed, in most instances of Rule 9(2) submissions, NHRIs engaged concurrently at the two levels: frequently, they had already raised the relevant issues at the national level, then determined to intervene before the Committee of Ministers, and continued to work at the national level to solve the issues in cooperation with the domestic stakeholders.[15]

While each NHRI has developed its own particular relationship with its government and other national authorities, Rule 9(2) submissions should be conceived less as a means of shaming governments internationally than a way to share independent data and views with international monitoring bodies for a more comprehensive assessment of the issues at stake. This role is no different from the provision of information by NHRIs to UN bodies, a practice that – to my knowledge – has not been contested by any States. The difference rather appears to lie in the long-standing and close relationship between the UN and NHRIs, which entails that NHRIs, especially A-status ones, are used to regularly interact with a variety of UN bodies, are familiar with the procedures to do so (also thanks to the training and assistance provided by the Global Alliance of National Human Rights Institutions and by the OHCHR),[16] and arguably perceive that their contributions are valued by the bodies that receive them.

As regards the engagement by NHRIs with the execution of ECtHR judgments in the exercise of their domestic mandates, room for development exists in this respect as well. While most A-status NHRIs demonstrate a thorough knowledge of the ECHR norms as interpreted by the Court, many of

[14] ENNHRI/Legal Working Group, *supra* n 10, 3.
[15] Cf. the examples mentioned above in this section of NHRIs submitting to the Committee of Ministers the reports that they had drafted in the context of previous domestic activities on the issues at stake, as well as several other examples referred to in Chapter 4.
[16] For the role of the Global Alliance (GANHRI), cf. Chapter 3 of this dissertation.

them do not systematically act to promote the execution of specific ECtHR judgments delivered against their countries. Again, financial constraints and staff shortages can prevent greater involvement on the part of NHRIs, which might not have the resources to regularly follow up the judgments issued by the Court. Additionally, it might be that the early engagement of NHRIs with the national authorities concerned and the agreement reached between them on the most appropriate measures to adopt make a formal stance by NHRIs unnecessary.

At a minimum, NHRIs should undertake the regular monitoring of the judgments delivered by the Court, especially against their countries but also, usefully, against other countries which might have been censured by the Court for violations similar to those occurring in the home countries of NHRIs.[17] NHRIs could then select cases to follow up more closely in light of the resources available and the institutions' previous experiences in dealing with the issues raised by the cases.

The execution of ECtHR judgments can be an integral part of the fundamental domestic functions of NHRIs, as these judgments originate from violations at the national level and must be given effect to by States, often through the adoption of general measures that can considerably amend the national legislation, administrative practice, and case-law. In other words, contributing to the execution of ECtHR judgments is not a prerogative of the international relations departments of NHRIs, but it can potentially be mainstreamed in all major domestic activities undertaken by these institutions.

[17] As an example of best practice, the Greek National Commission for Human Rights systematically monitors judgments and communicated cases against Greece and keeps a database with summaries of the rulings, which is accessible from the homepage of the Commission's website; the Commission also monitors and refers to judgments delivered against other States to the extent that they are relevant to the Greek legal order (interview with Anna Irene Baka, Legal Officer at the Greek National Commission for Human Rights, 27 July 2018, on file with author). The Office of the Public Defender of Georgia also regularly monitors the judgments issued by the ECtHR against its home country and requests information from its Government on the measures taken or planned with a view to implementing the judgments (interview with Levan Meskhoradze, Team Leader of the EU Project at the Office of the Public Defender of Georgia, 17 April 2018, on file with author). For its part, the Equality and Human Rights Commission (Great Britain) each week checks for ECtHR judgments and communicated cases against the United Kingdom as well as Grand Chamber's judgments against other countries (interview with Collier, Equality and Human Rights Commission, *supra* n 12). Similarly, the French CNCDH constantly monitors the ECtHR judgments and communicated cases against France; judgments against other countries are also considered insofar as relevant for France, and the CNCDH becomes aware of the latter especially through Twitter and the work of university professors (interview with Thomas Dumortier, Legal Adviser at the *Commission nationale consultative des droits de l'homme*, 8 March 2019, on file with author).

To this end, the staff members of NHRIs should be familiar with the ECHR standards and ECtHR case-law in their own areas and monitor the issuance of relevant new judgments, so as to be able to intervene when necessary and possible within their remits.[18] The translation of ECtHR judgments by NHRIs themselves (if they have the ability to do so) or by competent national authorities (e.g., the government agent before the ECtHR, or the Ministry of Justice) can help disseminate judgments among all staff members of NHRIs, in addition to other stakeholders and the public at large.

Chapter 4 showed that, in certain instances, communications from NHRIs had a demonstrable influence on the measures put forward by States, frequently following the mediation of the Department for Execution and the Committee of Ministers, which endorsed the observations or proposals made by NHRIs. In other instances, communications from NHRIs were essentially dismissed, not only by the States concerned (which would hardly embrace more demanding measures if not somehow compelled to do so), but also by the CoE bodies.

These rejections stem from a variety of reasons: it might be that the proposals by NHRIs go beyond what is strictly required by the ECtHR judgments, as interpreted by the Committee of Ministers; that political considerations prevail (the Committee of Ministers is, after all, a political body); or that the Committee of Ministers and the Department for Execution simply find the arguments by governments convincing, or anyway satisfactory. It is not argued here that the positions expressed by NHRIs, however independent and authoritative, should always be endorsed by States or by the competent CoE bodies; and it is to be reiterated that respondent States enjoy a margin of appreciation in the choice of means to execute ECtHR judgments.

[18] Within the Croatian Ombudsman, for instance, each "advisor" monitors the ECtHR judgments issued in his/her area; this task is facilitated by the fact that the government agent before the ECtHR translates the judgments issued against Croatia as well as key judgments against other States and by the fact that a representative from the Ombudsman sits as observer on an expert committee created by the government agent before the ECtHR to provide input to and monitor the execution of ECtHR judgments against Croatia (interview with Tatjana Vlašić, Human Rights Promotion, Cooperation and Public Relations Advisor to the Croatian Ombudswoman, 31 October 2018, on file with author).

What is more problematic is that submissions by NHRIs are often not even mentioned in the documents produced by the Committee of Ministers and the Department for Execution, and they are rarely analysed in detail and accepted or rejected in a reasoned way. This practice can be detrimental to the well-functioning of the procedure in many respects: States could be discouraged from engaging with NHRIs and civil society, if the views of these actors appear to be ignored by CoE bodies; NHRIs might consider it useless to intervene, for the same reasons; and the efforts to make the supervision of execution process more transparent and objective would be compromised. Notwithstanding the above, it is a fact that most States have replied to the communications from NHRIs and rather in detail, and that the Department for Execution and the Committee of Ministers have relied on the exchanges of views between NHRIs and governments for their assessments. Moreover, most of the representatives from intervening NHRIs interviewed for this dissertation expressed their satisfaction with the consideration given to their submissions by the Department for Execution.

Nonetheless, if the participation by NHRIs (and NGOs) in the procedure is considered useful for more well-founded and less partial assessments by the Department for Execution and the Committee of Ministers, it would appear appropriate for these bodies to make explicit reference to the communications received by NHRIs (and NGOs) and to elaborate on why their views and proposals have been accepted or not. This approach could elicit stronger participation by NHRIs (and NGOs), which would consider that the data and views that they provide are actually taken into account; it could stimulate States to consistently interact with these other actors; and it would make the dynamics of the supervision of execution more transparent to researchers, NHRIs and NGOs that have not participated in the procedure, international organisations, and the public at large.

In accordance with the same principle, namely that the flow of information from different sources benefits the soundness and objectivity of the determinations by the Department for Execution and the Committee of Ministers, States should aim to respond to communications from NHRIs and NGOs whenever possible and in a meaningful way. At present, governments are only required to reply to communications from the injured parties; nonetheless, to date, governments have responded

to almost all submissions by NHRIs and to a satisfactory number of submissions by NGOs, even though they were not compelled to do so.

This situation might change as an increasing number of NHRIs and NGOs become aware of the procedure and have recourse to it: governments might find it too time-consuming to reply to all communications; at the same time, it would be more complicated to impose on them the obligation to reply to any communications from NHRIs and NGOs. Furthermore, since January 2017, international intergovernmental organisations, the CoE Commissioner for Human Rights, and entities that intervened as third parties in the ECtHR proceedings have also been given the opportunity to submit information to the Committee of Ministers under new Rules 9(3) and 9(4).

A possible solution would be to impose on governments the obligation to respond to the communications from A-status NHRIs only, while encouraging governments to also provide replies to the other communications under Rules 9(2), 9(3) and 9(4) to the extent possible. In this way, the additional burden on States would be limited and a distinct role would be attributed to those institutions that should ensure the highest standards of independence and effectiveness. Such an approach would be in line with that adopted in the UN context, where fully compliant NHRIs have been given growing privileges and responsibilities, as well as with the developments in the CoE context, where a role for NHRIs is being increasingly recognised and greater attention is being paid to the Paris Principles and the international accreditation process.[19]

It should also be reminded that NHRIs can convey the positions of other actors, including NGOs: following broad consultations with civil society, an NHRI can – through its submission – forward to the Committee of Ministers information and views from multiple entities, while at the same time avoiding overburdening the State concerned and the Department for Execution with an excessive number of communications. Even when it does not result in a single submission, this

[19] Cf. Section 3.5 of this dissertation for the developments at the UN level and Section 3.6. for the developments at the CoE level.

coordination activity can lead to complementary submissions which do not reiterate the same information and are thus more strategic and effective.[20]

At any rate, the amendment of the Rules of the Committee of Ministers in the above-mentioned direction is arguably premature, as governments have to date addressed most of the communications submitted by NHRIs; nonetheless, it should be considered in the event that communications from entities other than governments grow and governments' response rate decreases.

Can NHRIs themselves do more to enhance the impact of their communications under Rule 9(2)? First of all, NHRIs should strive to submit well-balanced and detailed communications.[21] The breadth and depth of NHRIs' knowledge of the domestic legal order and of the human rights situation of their countries should make this task feasible.

More specifically, NHRIs that are considering intervening should monitor the progress of the cases of interest which are under supervision and be up to date on all documents submitted by the government or NGOs as well as on any decisions by the Committee of Ministers and assessments by the Department for Execution, so that communications from NHRIs can be on point and possibly address the doubts and concerns expressed by the CoE bodies.[22] NHRIs can also get in touch with the Department for Execution with a view to drafting communications that are relevant and useful for the supervision process.

NHRIs should also consider that, as the Committee of Ministers' meetings are prepared in advance, they need to allow for sufficient time between the date of submission of the communication

[20] An example of how the submissions by NHRIs and NGOs can realise an efficient "division of labour" was mentioned in Chapter 4 in relation to the execution of the judgment in *Winterstein and others v. France*; many other instances where communications from NHRIs referred to the data and views of different actors, including NGOs, national independent bodies and international organisations, were described in the same chapter.
Badse, Danish Institute for Human Rights, *supra* n 13, underlined how NHRIs can facilitate the work of the Committee of Ministers and of the Department for Execution by notifying the judgments to the most relevant NGOs and then initiating broad debates with national stakeholders on the most appropriate ways to give effect to the judgments (interview of 26 October 2017).

[21] Lucja Miara and Victoria Prais, "The Role of Civil Society in the Execution of Judgments of the European Court of Human Rights", *European Human Rights Law Review*, no. 5 (2012): 535.

[22] E.g., Petr Polák, Head of the Department of Equal Treatment at the Public Defender of Rights of the Czech Republic, stated that the Public Defender was aware of the issues that the Department for Execution and the Committee of Ministers were focusing on (interview conducted on 1 June 2018, on file with author).

and the date of the meeting, so that the communication can be considered by the Department for Execution and forwarded to the government concerned, which is entitled to a period of time to respond. Otherwise, the communication will be considered at the following meeting and might become late.[23]

A last recommendation for NHRIs would be to continuously monitor the cases in which they intervened and consider submitting further communications as the cases progress, in order to keep the Department for Execution and the Committee of Ministers informed of the position of the NHRI on the subsequent action plans and reports submitted by the government. This is not an invitation to reiterate considerations already expressed; but if a case remains under the supervision of the Committee and subsequent documents are submitted by the government, it would be appropriate for the NHRI to make its views known to the Committee regarding the new measures proposed or enacted by the government or even merely the delays that the execution process is encountering.[24]

As to the enhancement of the impact of the activities undertaken by NHRIs at the national level, reference can be made to other studies that have analysed the effectiveness of NHRIs and identified ways in which these institutions can maximise their impact on the human rights situation of their countries. Factors such as institutional and procedural guarantees to ensure the independence of members, sufficiently strong powers, enforceability of decisions, cooperative relations with public authorities, and inclusiveness towards civil society groups have been considered, to a different extent by different authors, as contributing to the legitimacy and effectiveness of NHRIs.[25]

Similar considerations would apply to NHRIs that are promoting the execution of ECtHR judgments in the exercise of their domestic mandates; their success or failure will arguably depend, to a large extent, on their powers, their public legitimacy, and the relationship that they have built with domestic stakeholders, from the government and parliament to civil society movements.

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[23] As happened to the submission by the Equality and Human Rights Commission (Great Britain) in the *Al-Skeini and others* case: cf. Section 4.4 of this dissertation.
[24] Cf., in support, Miara and Prais, *supra* n 21, 536.
[25] On the effectiveness of NHRIs and the relevant literature, cf. Section 3.4 of this dissertation.

6.2. Limitations of the research

Accessibility issues have variously affected this dissertation. The fact that it is only since 2011 that the publication of documents relating to the supervision of the execution of ECtHR judgments is the rule and not the exception means that some communications from NHRIs might have been overlooked, even though the websites of NHRIs were also searched complementarily for completeness; it also entails that the possible impact of some of the pre-2011 communications from NHRIs on the positions of States and CoE bodies could not be established.

As regards Chapter 5 and the national activities that NHRIs have undertaken to date to promote the execution of ECtHR judgments, language has been the main issue, as only webpages in English, French, and Spanish could be consulted for the dissertation. Nonetheless, most A-status NHRIs translate into English at least their annual reports and, in various instances, a wealth of other documents and webpages; moreover, Chapter 5 did not aim to provide a comprehensive analysis of all instances where NHRIs facilitated the execution of ECtHR judgments in the exercise of their domestic mandates. Even with more time and resources and stronger language skills, such an analysis would arguably prove impossible, also because of the difficulty to retrieve all documents, especially older ones.

With more time and resources, a larger number of interviews with representatives from NHRIs would have been sought; while, as mentioned, interviews were not conceived as the primary source of data for this dissertation, they add value to empirical analyses which focus on the concrete use of procedures and on the approaches by the actors involved, as this dissertation does. A wider pool of interviewees would have ensured greater representativeness, even though, in carrying out the research, care was taken to select NHRIs with different mandates, statuses of accreditation, and geographical origins, as well as to include both NHRIs that have submitted communications under Rule 9(2) and NHRIs that have not.

Additionally, having more time and resources available, the scope of the research would have been broadened in terms of a comparative analysis of all main regional human rights systems (i.e., in

addition to the ECHR system, the African and Inter-American ones), and a more in-depth examination of the contribution by NGOs would have been carried out. More on these aspects will be said in the last section of this chapter, which includes some recommendations for further research.

A last limitation that I would like to underline is linked to the difficulties in measuring the impact of contributions by NHRIs, at the national and international levels, to the execution of ECtHR judgments. While an increasing body of literature is studying the effectiveness of NHRIs and the Global Alliance of National Human Rights Institutions is seeking to take into greater account the actual ability of NHRIs to deliver results, it is not easy to agree on the criteria to assess the impact of NHRIs.

For this dissertation, a workable notion of impact has been adopted by which the ability of NHRIs to influence the determinations of States and CoE bodies is evaluated, rather than their more abstract ability to promote the best possible execution of the ECtHR judgments. Also, considerable caution has been exerted when assessing the former kind of impact and conclusions have been drawn only when a clear link was found between the observations by NHRIs and the considerations and decisions by States and CoE bodies; to the extent possible, potential concurring factors were noted.

That said, it remains difficult to "isolate" the contribution by NHRIs to changes in decisions and practices, as it is for the contribution by other actors as well (such as NGOs or international organisations) to any human rights developments.[26] As put it by Bürli, who analysed the impact of third-party interventions on the reasoning and decisions of the ECtHR, "it is difficult to measure the influence of an intervention on the outcome of a case. At best one can find correlations that do not necessarily indicate causality".[27]

[26] On the difficulties of "attribut[ing] improvements in respect for human rights to any particular institutional actor or other factor", cf., among others, Richard Carver, *Measuring the Impact and Development Effectiveness of National Human Rights Institutions. A Proposed Framework for Evaluation* (Bratislava: United Nations Development Programme, 2014), 11 *et seqq*.

[27] Nicole Bürli, *Third-Party Interventions before the European Court of Human Rights* (Cambridge: Intersentia, 2017), 189. In commenting upon the impact of the communications from the Czech Public Defender in the *D.H. and others* case, Polák, Public Defender of Rights of the Czech Republic, *supra* n 22, highlighted the difficulties of evaluating the specific impact of the Defender's intervention in light of the several actors involved in the execution of the judgment (the Committee of Ministers, associations of parents, and various NGOs), so that a "synergy effect" arguably took place (even though Polák maintained that the Defender was in a privileged position because of its ability to submit accurate evidence).

6.3. Contributions to the literature and practice

The findings of this dissertation contribute to both the literature on NHRIs and the literature on the ECHR system by examining aspects that appear to be under-studied in the two fields. Indeed, on the one hand, academics interested in the relations of NHRIs with international organisations and in the contribution by NHRIs to the development and implementation of international human rights law tend to focus on the UN context; and while increasing attention is paid to regional human rights systems as well, scholarly works on the engagement by NHRIs with the ECHR system specifically are sparing.

On the other hand, the literature on the Convention and the Court is still predominantly concerned with the analysis of the ECHR substantive norms as interpreted by the Court and with the proceedings before the ECtHR rather than with the execution stage. Moreover, authors dealing with the execution process have rarely assessed the contribution that actors different from governments and CoE bodies have made, and separate consideration of the role of NHRIs is simply lacking.

These gaps in the literature appear serious if one considers that NHRIs should be institutionally mandated to promote the implementation of international standards and rulings and to regularly cooperate to this end with their governments and international organisations; that the provision conferring on NHRIs the most significant role in the CoE context is arguably Rule 9(2) of the Rules of the Committee of Ministers, which allows for the submission of information by NHRIs in respect of the execution of ECtHR judgments; and that NHRIs are referred to specifically by an increasing number of CoE bodies and in the context of the ongoing reform of the Court and of the ECHR system.

This dissertation has sought to fill these gaps by means of a comprehensive examination of the communications submitted to date by NHRIs to the Committee of Ministers in relation to the execution of ECtHR judgments and by means of a systematic mapping of the ways in which NHRIs have contributed and can contribute to the execution process in the exercise of their domestic mandates. The findings of this empirical analysis of the authors, contents, and impact of Rule 9(2)

communications from NHRIs, as well as of the national activities by NHRIs in the area, have been summarised above, together with their limitations.

Scholarship on NHRIs can build on these findings when examining a wide range of issues – from the role of NHRIs in the implementation of international standards and decisions to their interactions with international organisations, from their role in European or otherwise regional settings to their effectiveness in general. The dissertation has also shed light on the respective statuses of NHRIs and NGOs in international fora by showing the differences that currently exist between the UN context, where special prerogatives are often conferred on NHRIs, and the CoE one, where no comparable difference in treatment exists, especially as far as the execution of ECtHR judgments is concerned.

The dissertation also provides a stimulus for scholars researching on the ECHR system to give greater consideration to the execution of ECtHR judgments in general, to the machinery connected to it, and to the role that actors other than governments and the Committee of Ministers can play with respect to the outcome of the execution of judgments and its supervision. Separate consideration of the role of NHRIs is also sensible, as these institutions are largely considered to be "unique" bodies and are increasingly referred to in CoE settings, even though formal declarations have not always been reflected in practice.

More broadly, the dissertation also contributes to the literature on the compliance by States with their international obligations and on the role that specific domestic bodies can play in facilitating the alignment of national legal orders with international norms and rulings, on the basis of a conception of States as multi-layered entities whose different organs variously act to promote the implementation of international standards and decisions.

As to the contribution of the dissertation to practice, the empirical data collected for the research could be used by stakeholders to possibly adapt their rules and actions. The research findings show that, overall, the Rule 9(2) mechanism is not being used to its full potential, as a relatively low number of national human rights structures have submitted communications to date and, while at times the

communications had an influence on the execution process and its supervision, in most instances it is hard to assess whether this was the case. As to the domestic level, growth margins exist as regards the mainstreaming of the promotion of the execution of ECtHR judgments into the core domestic activities undertaken by NHRIs.

Section 6.1 above thus put forward some suggestions, addressed to NHRIs, governments, the Committee of Ministers, and the Department for the Execution of Judgments, with a view to taking full advantage of the opportunities offered by existing international and domestic procedures, without the need for major reforms to the system.

6.4. Future lines of inquiry

The extension of the scope of the research to the role of NHRIs in promoting the execution of rulings and decisions delivered in the context of the African and Inter-American human rights systems would appear as a natural line of further research.[28] These two systems share significant legal and institutional similarities with the ECHR one, being based on the adjudication of human rights complaints with binding effects (even though with some limitations)[29] and the implementation of decisions by States under the supervision of the supranational organisation.[30] Additionally, all three

[28] The study of the relationship between NHRIs and other European organisations such as the European Union and OSCE should also be pursued; it is, at any rate, a considerably different relationship, as both these organisations are not centred around courts and their areas of intervention are not confined to human rights.
As for the Asian context, notwithstanding the inexistence of a comprehensive human rights system comparable to that of other regions, the Asia-Pacific Forum of National Human Rights Institutions undertakes several activities of human rights promotion and protection in cooperation with a plurality of national, regional, and international partners.
[29] In the Inter-American context, individual petitioners do not have direct recourse to the Court, but only indirect through the Commission, similarly to what happened in the ECHR system before the entry into force of Protocol no.11. In the African context, to date, only eight States Parties to the Protocol on the establishment of the Court have accepted the competence of the Court to receive cases from individual petitioners. Both the African and the Inter-American Commissions receive individual complaints and issue findings and recommendations, which are widely considered to be non-binding *per se* but whose non-implementation can lead the Commissions to refer the cases to their respective Courts.
[30] Within the Inter-American system, there is no political body tasked with supervising the execution of the Court's judgments and of the Commission's decisions; absent specific provisions, the Inter-American Court is increasingly taking up this function with respect to its rulings. On the other hand, the Council of Ministers of the African Union is entrusted with monitoring the execution of judgments by States Parties, on behalf of the Assembly of Heads of State and Government (Article 29 of the Protocol on the Establishment of the African Court on Human and Peoples' Rights); to support the Council in this function, the African Court is required to refer to instances of non-compliance in its annual reports to the Assembly (Article 31 of the Protocol).

systems have encouraged their Member States to establish NHRIs[31] and have in place some form of cooperation with these institutions.

In the African context, significantly, NHRIs are mentioned in the African Charter on Human and Peoples' Rights, whose Article 26 compels States to "allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms" set forth in the Charter.

Within the African Union framework, the body that mainly interacts with NHRIs is the African Commission on Human and Peoples' Rights, which grants NHRIs "special observer status" provided that they fulfil certain requirements, including compliance with the Paris Principles.[32] The award of this status allow NHRIs to attend the public sessions of the Commission and "participate, without voting rights, in deliberations on issues which are of interest to them and … submit proposals which may be put to the vote".[33] Additionally and more generally, NHRIs are meant to collaborate with the Commission in the promotion and protection of human rights at the national level, for instance by conducting awareness-raising campaigns or providing human rights education.[34]

At present, African NHRIs do not have direct ties with the African Court on Human and Peoples' Rights, nor are they specifically tasked with ensuring the implementation of the Court's judgments at the domestic level; nonetheless, in the latest years, they have been strengthening their

[31] Cf., for the first recommendations to this end: African Commission on Human and People's Rights, *Resolution on the Establishment of Committees on Human Rights or Other Similar Organs at National, Regional or Sub-Regional Levels,* 5th ordinary session, 3-14 April 1989, Benghazi (Libya); and Organization of American States/General Assembly, *Support for international exchanges of experience among ombudsmen*, 7th plenary session, 5 June 1997, AG/RES. 1505 (XXVII-O/97).

[32] African Commission on Human and Peoples' Rights, *Resolution on Granting Observer Status to National Human Rights Institutions in Africa with the African Commission on Human and People's Rights*, 24th ordinary session, 22-31 October 1998, Banjul (Gambia). However, there is no exact correspondence between the accreditation conducted by GANHRI and the granting of special observer status by the African Commission: compare Global Alliance of National Human Rights Institutions, *Chart of the Status of National Institutions,* 8 August 2018, accessed 4 January 2019, https://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart%20%288%20August%202018.pdf; and African Commission on Human and Peoples' Rights, "National Human Rights Institutions", accessed 4 January 2019, http://www.achpr.org/network/nhri/.

[33] Resolution on Granting Observer Status*, supra* n 32, para. 4.

[34] Ibid. See also "National Human Rights Institutions", *supra* n 32.

reporting activity to the Commission and their involvement in the process of execution of the Commission's and Court's decisions.[35]

The situation is somewhat symmetrical within the Organization of American States. NHRIs from the Americas have less formal relationships with the Organization's bodies, but they have actively engaged with these – arguably more actively than African NHRIs have done with their counterparts. *Inter alia*, NHRIs have promoted the implementation of the American Convention on Human Rights and of the judgments of the Inter-American Court of Human Rights at the national level, informed the general public and trained professionals on the functioning of the Inter-American human rights system, submitted cases to the Inter-American Commission on Human Rights on behalf of victims, acted as *amici curiae* and expert witnesses for both the Commission and the Court, and helped establish the facts of a case.[36] More recently, NHRIs from the Americas have started to intervene during compliance proceedings before the Court[37] and signed a *Declaration of Commitment for Technical Cooperation* with a view to strengthening their collaboration with the Commission.[38]

Notwithstanding the significance of the regional dimension of NHRIs' activities, in terms both of collaboration with fellow NHRIs within regional networks and of interaction with regional organisations, few scholars are focusing on these aspects[39] and little attention is being paid to the role that NHRIs can play in promoting the execution of rulings. Both theory and practice would thus

[35] Cf. Network of African National Human Rights Institutions, "Cooperation with Regional Human Rights Mechanisms", accessed 4 January 2019, http://www.nanhri.org/our-work/thematic-areas/cooperation-with-regional-human-rights-mechanism/.
[36] Tom Pegram and Nataly Herrera Rodriguez, "Bridging the Gap: National Human Rights Institutions and the Inter-American Human Rights System", in *The Inter-American Human Rights System. Impact Beyond Compliance,* eds. Par Engstrom et al. (New York: Palgrave Macmillan, 2018), 171 *et seqq*.
[37] Ibid., 179.
[38] Organization of American States, "IACHR and National Human Rights Institutions (NHRIs) sign Declaration of Commitment for Technical Cooperation", *Press Release*, 19 November 2018, accessed 4 January 2019, http://www.oas.org/en/iachr/media_center/PReleases/2018/246.asp.
[39] For the Inter-American context, see Juan Méndez and Irene Aguilar, "La Relación entre el Ombudsman y el Derecho Internacional de los Derechos Humanos", in *II Congreso Anual de la Federación Iberoamericana del Ombudsman: Memoria. Toledo, 14 a 16 de abril de 1997,* ed. Federación Iberoamericana del Ombudsman (Federación Iberoamericana del Ombudsman, 1998), 257-276; and Pegram and Herrera Rodriguez, *supra* n 36, 167-198. As far as the African system is concerned, cf. Rachel Murray, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa* (Oxford: Hart Publishing, 2007); and Bonolo R. Dinokopila, "Beyond Paper-Based Affiliate Status: National Human Rights Institutions and the African Commission on Human and Peoples' Rights", *African Human Rights Law Journal* 10, no. 1 (2010): 26-52.

benefit from a closer examination of these dynamics, also considering that the issues of non-implementation of human rights treaties and non-execution of judgments and decisions also affect the African and Inter-American contexts.[40]

The relationship between NHRIs and NGOs could also be examined more thoroughly; as the literature on NHRIs typically stresses the "uniqueness" of these institutions and the clear differences between them and NGOs, it would be interesting to further investigate why, apparently, no distinctive role is recognised for NHRIs in the promotion of the execution of ECtHR judgments by CoE bodies and States. The investigation could be extended to other areas of the ECHR system where both NGOs and NHRIs are active, such as the submission of third-party interventions to the Court.

Finally, a further line of inquiry could be the in-depth examination of how single NHRIs have promoted the execution of ECtHR judgments or, alternatively, how single ECtHR judgments have been implemented and how NHRIs and/or other actors contributed to the implementation. In other words, case studies of institutions or judgments could be undertaken with a view to shedding more light on the complex dynamics underlying the execution of international judgments.

[40] Cf. Fernando Basch et al., "The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with Its Decisions", *SUR - International Journal on Human Rights* 7, no. 12 (2010): 9-35. In the African context, cf. Rachel Murray and Elizabeth Mottershaw, "Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights", *Human Rights Quarterly* 36, no. 2 (2014): 349-372.

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Collier, Clare, Senior Principal at the Equality and Human Rights Commission (Great Britain), 26 September 2018, by phone.

Dumortier, Thomas, Legal Adviser at the *Commission nationale consultative des droits de l'homme*, 8 March 2019, by phone.

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Polák, Petr, Head of the Department of Equal Treatment at the Public Defender of Rights of the Czech Republic, 1 June 2018, by phone.

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