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The Council of Europe Commissioner for Human Rights and the European Court of Human Rights: An ever-closer relationship

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Résumé de l'article

La relation entre le/la Commissaire aux droits de l'homme et la Cour européenne des droits de l'homme a considérablement évolué au fil du temps, allant d'une séparation claire des fonctions à des interactions croissantes. La *Résolution (99) 50 sur le Commissaire aux droits de l'homme du Conseil de l'Europe*, adoptée le 7 mai 1999, reflète une volonté claire de séparer les deux institutions. Cette séparation ne s'est cependant pas traduite par un isolement l'un de l'autre dans la pratique et n'a pas empêché les références croisées entre le/la Commissaire et la Cour de se multiplier au cours des années. Dans le cadre de son travail par pays ou thématique, le/la Commissaire s'appuie sur les conventions internationales et européennes, et en premier lieu sur la *Convention* et la jurisprudence de la Cour, lorsqu'il/elle formule des recommandations aux États membres. Réciproquement, la Cour a d'emblée fait référence aux travaux du/de la Commissaire dans ses arrêts. Si les rôles différents des deux institutions peuvent expliquer des approches parfois divergentes, les références croisées entre le/la Commissaire et la Cour ont sans aucun doute enrichi leur travail respectif. Avec l'entrée en vigueur du *Protocole nº14 à la Convention* en 2010, les fonctions du/de la Commissaire ont été formellement étendues, donnant une reconnaissance formelle à l'institution, qui est expressément introduite dans le texte de la *Convention* et dans le mécanisme de contrôle établi par la *Convention*. Le/la Commissaire peut à présent, de sa propre initiative, intervenir en tant que tierce partie devant la Cour en soumettant des observations écrites et en prenant part aux audiences. Cette possibilité représente un outil supplémentaire à la disposition du/de la Commissaire afin de promouvoir et protéger les droits de l'homme. Le rôle du/de la Commissaire dans le processus d'exécution des arrêts de la Cour s'est également accru au fil des ans. Avec l'amendement introduit en 2017 aux *Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts* (*Règle 9*), qui permet au/à la Commissaire de soumettre des commentaires écrits sur l'exécution des arrêts directement au Comité des Ministres, la contribution du/de la Commissaire à l'exécution des arrêts devrait avoir un impact plus important.

THE COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS: AN EVER-CLOSER RELATIONSHIP

Dunja Mijatović and Anne Weber[*]

The relationship between the Commissioner for Human Rights and the European Court of Human Rights has varied considerably over time, from a clear separation of functions to increasing interactions. *Resolution (99)50 on the Council of Europe Commissioner for Human Rights*, adopted on 7 May 1999, reflects a clear willingness to separate the two institutions. This separation, however, did not mean isolation from each other in practice and did not prevent cross-references between the Commissioner and the Court from increasing over the years. In the course of his/her country or thematic work, the Commissioner relies on international and European conventions, and in the first place the *Convention* and the case law of the Court, when making recommendations to member states. Conversely, the Court has from the outset made references to the work of the Commissioner in its judgments. While the different roles of the two institutions might explain the sometimes diverging approaches, cross-references between the Commissioner and the Court have undoubtedly enriched each other's work. With the entry into force of *Protocol n°14 to the Convention* in 2010, the Commissioner's functions have been formally extended, providing formal recognition to the institution of the Commissioner, which is expressly introduced in the text of the *Convention* and into the control mechanism established by the *Convention.* The Commissioner may now on his/her own initiative exercise the right to intervene as a third-party before the Court, by submitting written comments and taking part in hearings. This possibility represents an additional tool at the Commissioner's disposal to help promote and protect human rights. The Commissioner's role in the process of execution of the Court's judgments has also increased over the years. With the amendment introduced in 2017 to the *Rules of the Committee of Ministers for the supervision of the execution of judgments* (*Rule 9*), which allows the Commissioner to submit written comments on the execution of judgments directly to the Committee of Ministers, the contribution by the Commissioner to the execution of judgments is expected to have a greater impact.

La relation entre le/la Commissaire aux droits de l'homme et la Cour européenne des droits de l'homme a considérablement évolué au fil du temps, allant d'une séparation claire des fonctions à des interactions croissantes. La *Résolution (99) 50 sur le Commissaire aux droits de l'homme du Conseil de l'Europe*, adoptée le 7 mai 1999, reflète une volonté claire de séparer les deux institutions. Cette séparation ne s'est cependant pas traduite par un isolement l'un de l'autre dans la pratique et n'a pas empêché les références croisées entre le/la Commissaire et la Cour de se multiplier au cours des années. Dans le cadre de son travail par pays ou thématique, le/la Commissaire s'appuie sur les conventions internationales et européennes, et en premier lieu sur la *Convention* et la jurisprudence de la Cour, lorsqu'il/elle formule des recommandations aux États membres. Réciproquement, la Cour a d'emblée fait référence aux travaux du/de la Commissaire dans ses arrêts. Si les rôles différents des deux institutions peuvent expliquer des approches parfois divergentes, les références croisées entre le/la Commissaire et la Cour ont sans aucun doute enrichi leur travail respectif. Avec l'entrée en vigueur du *Protocole n°14 à la Convention* en 2010, les fonctions du/de la Commissaire ont été formellement étendues, donnant une reconnaissance formelle à l'institution, qui est expressément introduite dans le texte de la *Convention* et dans le mécanisme de contrôle établi par la *Convention*. Le/la Commissaire peut à présent, de sa propre initiative, intervenir en tant que tierce partie devant la Cour en soumettant des observations écrites et en prenant part aux audiences. Cette possibilité représente un outil supplémentaire à la disposition du/de la Commissaire afin de promouvoir et protéger les droits de l'homme. Le rôle du/de la Commissaire dans le processus d'exécution des arrêts de la Cour s'est également accru au fil des ans. Avec l'amendement introduit en 2017 aux *Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts* (*Règle 9*), qui permet au/à la Commissaire de soumettre des commentaires écrits sur l'exécution des arrêts directement au Comité des Ministres, la contribution du/de la Commissaire à l'exécution des arrêts devrait avoir un impact plus important.

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[*] Dunja Mijatović was elected Commissioner for Human Rights in January 2018 by the Council of Europe Parliamentary Assembly and took up her position on April 1, 2018. She is the fourth Commissioner, succeeding Nils Muižnieks (2012-2018), Thomas Hammarberg (2006-2012) and Alvaro Gil-Robles (1999-2006). Anne Weber is an Adviser in the Office of the Commissioner for Human Rights (November 2009-present).

La relación entre el/la Comisario/Comisaria de derechos humanos y la Corte europea de derechos humanos ha cambiado bastante a lo largo del tiempo, yendo de una separación clara de las funciones a interacciones cada vez mayores. La *Resolución (99)50 sobre el Comisario de derechos humanos del Consejo de Europa*, adoptada el 7 de mayo 1999 demuestra una voluntad clara de separar las dos instituciones. Esa separación no tuvo como resultado el aislamiento del uno o del otro en la práctica y no impidió que las referencias cruzadas entre el/la Comisario/Comisaria y la Corte se multiplicaran a través de los años. En el marco de su trabajo por país o temáticas, el/la Comisario/Comisaria se apoya sobre las convenciones internacionales, y en primer lugar sobre la *Convención* y la jurisprudencia de la Corte, para formula recomendaciones a los Estados miembros. Mutualmente, la Corte hizo referencia, desde su comienzo, a los trabajos del/de la Comisario/Comisaria en sus sentencias. Si los papeles diferentes de las dos instituciones pueden explicar enfoques diferentes, las referencias cruzadas entre el/la Comisario/Comisaria enriquecieron sin duda sus trabajos respectivos. Con la entrada en vigor del *Protocolo n°14 de la Convención en 2010*, las funciones del/de la Comisario/Comisaria fueron formalmente extendidas, dándole un reconocimiento formal a la institución, que fue expresamente introducida en el texto de la Convención y en el mecanismo de control establecido por la Convención. El/la Comisario/Comisaria puede ahora, de su propra iniciativa, intervenir como tercero frente a la Corte, enviando observaciones escritas y tomando lugar en las audiencias. Esta posibilidad representa una herramienta suplementaria a la disposición del/de la Comisario/Comisaria para promover y proteger los derechos humanos. El papel del/de la Comisario/Comisaria en el proceso de ejecución de las sentencias de la Corte también creció a través de los años. Con la enmienda de las *Reglas del Comité de Ministro para la vigilancia de la ejecución de las sentencias (Regla 9)*, introducida en 2017, que permite al/a la Comisario/Comisaria de someter comentarios escritos sobre la ejecución de las sentencias directamente al Comité de Ministros, la contribución del/de la Comisario/Comisaria a la ejecución de las sentencias debería tener un impacto más importante.

> The mere existence of such an international court principled, impartial and fair in its procedures and rulings - is an encouragement for people working for human rights throughout the continent.[1]

The Commissioner for Human Rights (hereinafter: "the Commissioner") is an independent, non-judicial institution mandated to promote awareness of and respect for human rights across the 47 Council of Europe member states. In 2019, the Commissioner's Office celebrated its 20th anniversary. 70 years ago, on 4 November 1950, the *European Convention on Human Rights*[2] (hereinafter: "the *Convention*") was opened for signature. On this occasion, it is time to take stock of the special relationship maintained between the Commissioner and the judicial organ established by the *Convention*: the European Court of Human Rights (hereinafter: "the Court").

I. Two Distinct but Complementary Institutions

The relationship between the Commissioner and the Court has varied considerably over time, from a clear separation of functions to increasing interactions.

A. The Creation of a New, Separate Institution: The Commissioner for Human Rights

The Commissioner's mandate reflects a compromise resulting from lengthy debates about the specific role and functions such a new institution was to be entrusted with. The reasons behind the creation of a new institution have evolved, as have the links that such an institution should have with the Court. Paradoxically, it is when the Court became single and permanent with the entry into force of *Protocol n°11 to the Convention*,[3] and that the European Commission of Human Rights ceased to exist, that the idea of a commissioner finally materialized.

Back in 1972, a first proposal focused on the possible creation of a "Human Rights Ombudsman" or "European Commissioner" whose primary task would be to assist in receiving and, after preliminary investigation, bringing well-founded claims in appropriate form before the (then) Commission.[4]

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1 Council of Europe, European Court of Human Rights, *Dialogue Between Judges*, Proceedings of the Seminar "How Can We Ensure Greater Involvement of National Courts in the Convention System?", (2012) at 31.

2 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*Convention*].

3 *Protocol n°11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, 11 May 1994, CETS n°155 (entered into force 1 November 1998) [*Protocol n°11*].

4 Council of Europe, PA, 1971 23rd Sess (Third Part), *Need for a Commissioner of Human Rights or Equivalent Solution at European Level*, Motion for a recommendation, Doc 3092 (1972); on the origins

In 1996, the Finnish Government relaunched the idea of a "Commissioner" who would complement or assist the Court. The rationale behind the Finnish proposal was that, with the rapid enlargement of the Council of Europe at the time, the new permanent Court would have to face an enormous workload.[5] As a result, it was suggested that the Commissioner be entrusted with three main functions[6] to ease the future workload of the Court: giving information and advice to individuals "with human rights grievances", dealing with grievances by offering individuals a non-judicial procedure, and acting as *amicus curiae* on the basis of Article 36 of the *Convention*.[7] At the Council of Europe's second Summit, held on 10 and 11 October 1997 in Strasbourg, the Heads of State or Government of the organization's member states adopted an Action Plan in which they welcomed the proposal to create an office of Commissioner for Human Rights to promote respect for human rights in the member states and instruct the Committee of Ministers to study arrangements for its implementation, while respecting the competences of the single Court.[8]

This decision laid the ground for the future mandate of the Commissioner with a more preventive role. However, in contrast with the Finnish proposal, it was agreed that the Commissioner should be separate from the Court, to avoid the risk of interference with the operation of the system of the *Convention*.

On 7 May 1999, on the occasion of the 50th anniversary of the Council of Europe, the Committee of Ministers adopted *Resolution (99)50*[9] on the Council of Europe Commissioner for Human Rights. The agreed mandate covers a broad range of activities aimed at promoting education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe. At the same time, limitations were set, and an important feature of the mandate is that the Commissioner shall not take up individual complaints. In addition, Article 1 of *Resolution (99)50* stipulates that the Commissioner "shall respect the competence of, and perform functions other than those fulfilled by, the supervisory bodies set up under the *European Convention on Human Rights*".[10] The *Resolution 99(50)* thus reflects a clear willingness to separate the two institutions: the Commissioner on the one hand, a non-judicial institution which cannot take up individual complaints, and the Court on the other hand, a judicial body tasked to deal with individual applications. This separation, however, did not mean isolation from each other in practice and did not prevent cross-references between the Commissioner and the Court from increasing over the years.

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of the institution, see: Anne Weber, *Les mécanismes de contrôle non contentieux du respect des droits de l'homme*, coll. Fondation Marangopoulos pour les droits de l'homme (Paris: Pedone, 2008) at 191-96.

5 Stefan Trechsel, *"*A European Commissioner for Human Rights for the European Court of Human Rights*",* in B Haller, H C Krüger and H Petzold (eds), *Law in Greater Europe: Towards a Common Legal Area: Studies in Honor of Heinrich Klebes*, (The Hague: Kluwer Law International, 2000) at 179.

6 Jeroen Schokkenbroek et al, "The Preventive Role of the Commissioner for Human Rights of the Council of Europe"*, in* L.-A. Sicilianos (ed.), *The Prevention of Human Rights Violations*, (The Hague: Kluwer Law International, 2001) at 204.

7 *Convention*, *supra* note 2, art 36.

8 Council of Europe, Second Summit of Heads of State and Government of the Council of Europe, *Action Plan of the Council of Europe's Second Summit* (1997) at 2.

9 Council of Europe, Committee of Ministers, 104th Sess, *Resolution (99)50* (1999) [*Resolution (99)50*].

10 *Ibid,* art 1.

B. Cross-References and Mutual Enrichment

Article 1 of *Resolution (99)50* calls on the Commissioner "to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe".[11] Unsurprisingly, the *Convention* became the privileged source of reference for the Commissioner's work: since the very beginning of the mandate, almost all country reports (or letters addressed by the Commissioner to the national authorities) have mentioned the *Convention* and the relevant case law of the Court. In fact, the Commissioner takes the case law of the Court into account and a large part of his or her work consists of advising governments to effectively apply the existing standards.[12] One of the first reports by Alvaro Gil-Robles, following a visit to Romania, thus underlined that in the area of defamation

> […] the terms of Article 10 of the *European Convention*, and above all the construction placed on it by the Court, are the most suitable guides and absolutely must be central to any proposed reforms.[13]

Such references have developed over time, becoming more systematic and detailed under the second and third mandate holders. Most recently, there have been extended references to the well-established case law of the Court under, among others, Article 3 (life imprisonment),[14] Article 6 (independence of the judiciary),[15] or Article 11 (freedom of assembly).[16] The same goes for the thematic work: the Commissioner relies on international and European conventions, and in the first place the *Convention* and the case law of the Court, when making recommendations to member states. The Commissioner has for instance highlighted the general principles developed by the Court for the effective investigation of complaints against the police that engage Article 2 or 3 of the *Convention* in an Opinion[17] and reflected on the major case law of the Court on enforced disappearances in an Issue Paper.[18]

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11 *Ibid.*

12 Thomas Hammarberg & Isil Gachet, "Human Rights Diplomacy and the Council of Europe Commissioner for Human Rights", in Zdzislaw Kedzia et al (eds), *Human Rights Diplomacy: Contemporary Perspectives*, (Leiden, Netherlands: Martinus Nijhoff Publishers, 2011) at 101-28.

13 Council of Europe, Office of the Commissioner for Human Rights, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, On His Visit to Romania 5-9 October 2002*, CommDH 13 (2002) at para 59.

14 *Convention*, *supra* note 2, art 3; Letter from Dunja Mijatović, Commissioner for Human Rights, to the Minister of Justice of Serbia (15 May 2019).

15 *Convention*, *supra* note 2, art 6; Council of Europe, Commissioner for Human Rights, *Report by Dunja Mijatović, Commissioner for Human Rights, Following Her Visit to Hungary from 4 to 8 February 2019*, CommDH 13 (2019) at para 88.

16 *Convention*, *supra* note 2, art 11; Council of Europe, Commissioner for Human Rights, *Memorandum On Maintaining Public Order and Freedom of Assembly in the Context of the "yellow vest" Movement in France*, CommDH 8 (2019) at para 45-46.

17 Council of Europe, Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints Against the Police*, CommDH 4 (2009) at 3; the *Opinion* stresses that these principles "must be adhered to for the investigation of a death or serious injury in police custody or as a consequence of police practice. They also provide a useful framework for determining all complaints.".

18 Council of Europe, Commissioner for Human Rights, *Missing Persons and Victims of Enforced Disappearance in Europe*, Issue paper (2016).

A question has arisen as to whether the Commissioner should limit him or herself to the *Convention* standards and the case law of the Court. The answer has been negative, and in some instances, recommendations made by the Commissioner have gone further than some judgments issued by the Court. In the area of migration for instance, the Commissioner has differentiated him/herself from the Court regarding the detention of migrant children. While the Court has not considered this practice as *prima facie* incompatible with the *Convention* but sets stringent conditions on the detention of migrant children,[19] the Commissioner clearly set out the principle of non-detention in an Issue Paper,[20] a position reiterated since in a number of letters and speeches.[21] The Commissioner has also taken a diverging line from the Court regarding involuntary placements of persons with psychosocial disabilities. As for other questions affecting the rights of persons with disabilities, the Commissioner's recommendations are based on the more advanced principles set out in the 2006 United Nations *Convention on the Rights of Persons with Disabilities* (the *CRPD*),[22] which has been ratified by 46 of the 47 Council of Europe member states, as well as the European Union. The Commissioner is of the view that the *CRPD* is the international benchmark and legal reference point in all matters pertaining to disability.[23] As a consequence, having regard to Article 14 of the *CRPD* (Liberty and security of the person), which states that "the existence of a disability shall in no case justify a deprivation of liberty",[24] the Commissioner has urged member states to reform their legislation, "on involuntary placements in such a way that it applies objective and non-discriminatory criteria which are not specifically aimed at people with psychosocial disabilities, while ensuring adequate safeguards against abuse for the individuals concerned".[25] For its part, the Court continues to refer to the minimum conditions linked to the existence of a "true mental disorder", which have to be satisfied in order for the "detention of a person of unsound mind" to be "lawful" within the meaning of Article 5(1)(e) of the *Convention*.[26]

At times, the Commissioner has also had a forward-looking approach, as in the case of legal gender recognition. In an Issue Paper entitled *Human rights and gender identity* published in October 2009, the Commissioner adopted a stance against making

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19 *A.M. and Others v France*, n° 24587/12 (12 July 2016).

20 "No migrant child should ever be subject to detention." Council of Europe, Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications*, Issue Paper (2010) at 43.

21 See for ex Council of Europe, Commissioner for Human Rights, *Immigration Detention of Children: Coming to a Close?*, Keynote speech by Nils Muižnieks at the Conference hosted by the Czech Chairmanship of the Committee of Ministers of the Council of Europe, CommDH/Speech 5 (2017); see also: Letter from Dunja Mijatović, Commissioner for Human Rights, to the Secretary of State for Migration and Asylum of Belgium (5 June 2018).

22 *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) [*CRPD*].

23 Council of Europe, Commissioner for Human Rights, *Comments by Dunja Mijatović, Council of Europe Commissioner for Human Rights, on the Draft Additional Protocol to the Convention on Human Rights and Biomedicine Concerning the Protection of Human Rights and Dignity of Persons with Mental Disorder with Regard to Involuntary Placement and Involuntary Treatment* (2018).

24 *CRPD, supra* note 22, art 14.

25 Council of Europe, Commissioner for Human Rights, *Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, Following his visit to Norway from 19 to 23 January 2015*, CommDH 9 (2015) at para 41.

26 *D.D. v Lithuania*, n° 13469/06 (14 February 2012) at para 156.

legal recognition of the gender identity of transgender persons subject to irreversible sterilization surgery.[27] Eight years later, in the judgment *A.P., Garçon and Nicot v. France*, the Court found that the condition of compulsory sterilization surgery or treatment for legal gender recognition violated Article 8 of the *Convention* (right to respect for private life),[28] referring to the Commissioner's Issue Paper.

Conversely, the Court has from the outset made references to the work of the Commissioner. Firstly, it has done so in its judgments under the section relating to the facts of the case, as an additional source of information, supplementing to a certain extent the absence of *in situ* visits by the Court, i.e. the limited capacity of the Court to make factual findings.[29] The Court for example referred to the Commissioner's visit in Transnistria, during a visit to Moldova in October 2000, when looking at international reactions to the applicants' conviction and detention,[30] and to the Commissioner's reports on Cyprus, to assess the situation of "artistes" in Cyprus in the first case dealing with trafficking in human beings.[31] While these mentions are now a relatively stable practice in the Court's case law, there have also been notable exceptions, in cases where the Court could have referred to or relied on the Commissioner's reports and information, but did not.[32]

Secondly, such references have been introduced in the operative part of the judgment, in support of the Court's line of reasoning. Major judgments in which the Court has given some weight to the Commissioner's findings include *Horváth and Kiss v. Hungary* on the placement of Roma children in special schools,[33] *M. v. Germany* on preventive detention,[34] and *Biao v. Denmark* regarding the difference of treatment between those who have held citizenship as of birth and those who have obtained it later.[35] In these cases, the work of the Commissioner has generally been taken into

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27 Council of Europe, Commissioner for Human Rights, *Human Rights and Gender Identity*, Issue Paper, CommDH/IssuePaper (2009) 2 (2009) at 18; *Recommendation n°4*: "Abolish sterilization and other compulsory medical treatment as a necessary legal requirement to recognize a person's gender identity in laws regulating the process for name and sex change".

28 *A.P., Garçon and Nicot v France*, n° 79885/12 (6 April 2017) at para 131.

29 Laurence Burgorgue-Larsen et al, *La conscience des droits, Mélanges en l'honneur de Jean-Paul Costa* (Paris: Dalloz, 2011) at 78.

30 *Ilaşcu and Others v Moldova and Russia* [GC], n° 48787/99, [2004] VII ECHR 179 at para 288.

31 *Rantsev v Cyprus and Russia*, n° 25965/04, [2010] I ECHR 65 at paras 91-104; the Court notes in particular that "the reports of the Council of Europe's Commissioner for Human Rights and the report of the Cypriot Ombudsman highlight the acute nature of the problem in Cyprus, where it is widely acknowledged that trafficking and sexual exploitation of cabaret artistes is of particular concern" (para 199).

32 See for instance *Sakir v Greece*, n° 48475/09 (24 March 2016), dealing with racist violence; although the Court cites reports by Amnesty International, Human Rights Watch and the Greek Ombudsman dating from 2012-2014, no mention is made of the Commissioner's report on Greece from April 2013 on the increase in racist and other hate crimes in Greece.

33 *Horváth and Kiss v Hungary*, n° 11146/11 (29 January 2013) at para 114.

34 *M. v Germany*, n° 19359/04, [2009] VI ECHR 169 at para 76, 102, 132, 129; "The Court agrees with the findings of both the Council of Europe's Commissioner for Human Rights (…) and the CPT (…) that persons subject to preventive detention, in view of its potentially indefinite duration, are in particular need of psychological care and support." (para 129).

35 *Biao v Denmark* [GC], n° 38590/10 (24 May 2016) at para 137; in a joint dissenting opinion, three judges underlined however that "the Court should be careful not to convert non-binding, policy-based recommendations into legally binding obligations." (page 78).

account to substantiate the legal argumentation, leading to a conclusion of a violation of the *Convention*.

However, there have also been situations in which the Court departed from the Commissioner's findings, such as in the recent case *Hudorovič and Others v. Slovenia* regarding the authorities' failure to ensure access to clean water and sanitation to members of two Roma communities over an extended period of time. The Court found no violation of Article 8 of the *Convention*[36] despite the fact that the Commissioner, in his report on his visit to Slovenia mentioned in the judgment, had insisted on the dire consequences that the absence of access to clean water has had on the Roma community.[37]

The different roles of the two institutions might explain the sometimes diverging approaches: the Commissioner includes a clear rapid response dimension and his/her field experience in member states allows him/her to put into a wider perspective the Court's judgments. The Commissioner addresses human rights issues as they arise, whereas the Court's procedures take longer and deal by definition with an individual case. The Commissioner is thus often confronted with situations where there is a distinct lack of case law from the Court, and he/she might give guidance to member states nonetheless to ensure they move forward. In addition, the Commissioner's mandate is broad and does not only cover the *Convention*'s standards. Beyond other Council of Europe instruments, it also draws on UN instruments and soft law. As a consequence, the Commissioner may sometimes look at which instruments provide the most appropriate framework for addressing human rights issues, which is often – but not always – the *Convention*.

Cross-references between the Commissioner and the Court have undoubtedly enriched each other's work, contributing to a sort of quasi-judicial dialogue, also reinforcing the findings of the Commissioner in a judicial decision, and in so doing helping the Court to make the *Convention* a "living instrument".

II. The Consecration of the Institution of the Commissioner as Part of the *Convention* System

Without interfering with the independence of the Commissioner's Office, the Committee of Ministers and the Parliamentary Assembly have both recommended to the Commissioner to take on additional responsibilities. In February 2008, the Committee of Ministers adopted a declaration on the protection of human rights defenders, inviting the Commissioner "to strengthen the role and capacity of his Office

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36 *Convention, supra* note 2, art 8.

37 *Hudorovič and Others v Slovenia*, n° 24816/14 (10 March 2020); as noted in the partly dissenting opinion to that judgment, by finding that the water tank deliveries were adequate enough, the majority of the Court went against the practically unanimous conclusions of several expert bodies, including the Commissioner (page 53).

in order to provide strong and effective protection for human rights defenders".[38] Furthermore, with the entry into force of *Protocol n°14 to the Convention*[39] in 2010, the Commissioner's functions have been formally extended: the Commissioner may now on his/her own initiative exercise the right to intervene as a third-party before the Court, by submitting written comments and taking part in hearings.[40] The *Protocol n°14* provides formal recognition to the institution of the Commissioner, which is expressly introduced in the text of the *Convention* and into the control mechanism established by the *Convention*, thus putting an end to the tendency to keep the Commissioner on the fringes of the system.[41] The recent amendment to *Rule 9* of the *Rules of the Committee of Ministers for the supervision of the execution of judgments*,[42] allowing the Commissioner to submit communications relating to the execution of judgments to the Committee of Ministers, puts the finishing touches to its integration in the *Convention* system.

A. The Possibility of Third-Party Interventions in Cases Pending Before the Court

The work undertaken by the Commissioner's Office in relation to third-party interventions is often linked to the entry into force of *Protocol n°14*. While the *Protocol n°14* has certainly given a crucial impetus in this area, third-party interventions by the Commissioner predates the entry into force of that *Protocol n°14*. The possibility for the Commissioner to intervene in a case pending before the Court was for the first time activated in a group of cases concerning the transfer of asylum seekers to Greece under the *Dublin Regulation*.[43] On 9 November 2009, the Court

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38 Council of Europe, Committee of Ministers, 1017th meeting of the Ministers' Deputies, *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities*, (2008) at no 4 [*2008 Declaration*].

39 *Protocol n°14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, 13 May 2004, CETS n° 194 (entered into force 1st June 2010) [*Protocol n°14*].

40 *Convention, supra* note 2, art 36(3); it should be noted that *Protocol n°16 to the Convention* which foresees the possibility for the Court to give advisory opinions, also stipulates that the Commissioner "shall have the right to submit written comments and take part in any hearing": *Protocol N°16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 2 October 2013, CETS n°.214 (entered into force 1 August 2018), art 3 [*Protocol n°16*].

41 Christos Giakoumopoulos et al, *La tierce intervention devant la Cour européenne des droits de l'homme et en droit comparé: actes du colloque* (Bruxelles: Bruylant, 2009) at 158; on the genesis of *Protocol n°14* and the rationale behind it, see also Council of Europe, Steering Committee for Human Rights (CDDH), *Reforming the European Convention on Human Rights, A Work in Progress*, Council of Europe Publishing (2009) at 157-61.

42 Council of Europe, Committee of Ministers, 964th meeting of the Ministers' Deputies, *Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements* (2006), Rule 9 [*Rule 9*].

43 *Regulation (EU) n° 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person*, 15 June 1990, n°604/2013 (entered into force 19 July 2013) [*Dublin Regulation*]; this intervention was the first one of this kind made by the Commissioner under the Article 36, §2 of the *Convention*. In another case in 2007 (*Mamasakhlisi v Georgia and Russia*,

invited by letter the Commissioner to intervene as a third-party in the Court's proceedings in 14 cases against the Netherlands and Greece. Since a number of similar cases were pending before various Sections of the Court, with the risk of differing approaches by the Sections, a lead case was subsequently identified and relinquished to the Grand Chamber. The Commissioner was again invited to intervene as a third-party on 3 May 2010 and submitted written observations in the case of *M.S.S. v. Belgium and Greece*,[44] concerning an Afghan asylum seeker returned from Belgium to Greece. On 1 September 2010, the Commissioner also intervened orally for the first time during the hearing before the Grand Chamber of the Court in this case.

In the meantime, *Protocol n°14* entered into force on 1 June 2010, giving the Commissioner the right to intervene in proceedings before the Court *proprio motu*. But the *M.S.S.* case had already paved the way for the Commissioner's work in that area. In that case, the Court delivered a judgment[45] a few months after the hearing which had wide-ranging consequences for the protection of the human rights of asylum seekers in Europe: it recognized that the living conditions asylum seekers had to endure in Greece amounted to degrading treatment, in violation of Article 3 of the *Convention*.[46] In response several member states suspended returns of asylum seekers to Greece. In this case, the Court relied extensively on the information supplied by the Commissioner, as well as other third-party interveners, to assess the situation of asylum seekers in Greece.

The first third-party intervention submitted by the Commissioner under Article 36(3) of the *Convention*[47] (i.e. on the Commissioner's own initiative) was in October 2011, in the case of *The Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*,[48] the first case in which the Court had to examine an application concerning a person who died before its submission, in the absence of any heir or close relative and with no legal representative. The case had been lodged by the Centre for Legal Resources (CLR) on behalf of Valentin Câmpeanu, a young man of Roma ethnic origin, suffering from a severe learning disability and infected with the HIV virus, who died at the age of 18 at the Poiana Mare Psychiatric Hospital, after having spent all his life in institutions. The Commissioner argued that in exceptional circumstances, NGOs should be allowed to lodge applications with the Court on behalf of victims, even in the absence of specific authorization. As the Chamber decided to relinquish jurisdiction in favor of the Grand Chamber, a hearing

n° 29999/04 (16 August 2007)), the Commissioner replied to questions put forward by the Court relating to the situation of the applicant.

44 *M.S.S. v Belgium and Greece* [GC], n° 30696/09, [2011] I ECHR 255 [*M.S.S*].

45 *Ibid*; in the 14 other cases in which the Commissioner had intervened prior to the *M.S.S.* case, the Court decided to strike out the cases as the matter giving rise to the applicant's complaints was considered to be "resolved".

46 *Convention*, *supra* note 2, art 3.

47 *Ibid,* art 36(3).

48 *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC], n° 47848/08, [2014] V ECHR 1 [*Câmpeanu*].

took place on 4 September 2013, with the participation of the Commissioner.[49] In a judgment of 17 July 2014, the Court declared the case admissible, stressing, as the Commissioner did, that it was

> satisfied that in the exceptional circumstances of this case and bearing in mind the serious nature of the allegations, it should be open to the CLR to act as a representative of Mr. Câmpeanu, notwithstanding the fact that it had no power of attorney to act on his behalf and that he died before the application was lodged under the *Convention*. To find otherwise would amount to preventing such serious allegations of a violation of the *Convention* from being examined at an international level with the risk that the respondent State might escape accountability under the *Convention* as a result of its own failure to appoint a legal representative to act on his behalf as it was required to do under national law (…). Allowing the respondent State to escape accountability in this manner would not be consistent with the general spirit of the *Convention*.[50]

To date, the Commissioner has intervened in a total of 25 cases or groups of cases[51] concerning 12 member states (three times under Article 36(2), and 22 times under Article 36(3) of the *Convention*), in which 14 judgments and several decisions have been delivered by the Court. It was during the mandate of Nils Muižnieks that the potentialities of *Protocol n° 14* and of third-party interventions in general were developed, with 15 sets of written observations submitted to the Court, an exponential increase from the previous situation – and a practice which continues under the current mandate holder.[52]

The possibility of third-party interventions before the Court might have been until recently a lesser-known aspect of the mandate of the Commissioner, also raising some questions as to the criteria used for deciding whether to intervene in a case. One obvious criterion is that the intervention must bring added value. This means that the Commissioner should have first-hand information on the issues at stake, either through his/her country work or through thematic knowledge, to bring useful insights before the Court.[53]

The thematic priorities are also well reflected in the cases in which the Commissioner has intervened so far: the vast majority (11 cases) deals with human rights defenders, whom the Commissioner is specifically tasked to assist under his/her

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49 This was the first – and only – oral intervention by Nils Muižnieks before the Court, following on the written observations submitted by his predecessor in October 2011.

50 *Câmpeanu*, *supra* note 48 at para 112.

51 These cases can be found on the dedicated webpage of the Commissioner's website: "Third Party Interventions by the Commissioner for Human Rights", online: <www.coe.int/en/web/commissioner/third-party-interventions >.

52 As of July 2020, Commissioner Mijatović had intervened as a third party in eight cases and participated in three Grand Chamber hearings (in the cases of *N.D. and N.T. v Spain*, n° 8675/15 (26 September 2018) [*N.D. and N.T. v Spain*]; *Selahattin Demirtaş v Turkey (n°2)*, n° 14305/17 (18 September 2019); *M.A. v Denmark*, n° 6697/18 (10 June 2020)); at the time of writing, two further third-party interventions were about to be submitted to the Court under Article 36(3) of the *Convention*.

53 See Council of Europe, Commissioner for Human Rights, *1st Quarterly Activity Report 2016 by Nils Muižnieks, Council of Europe Commissioner for Human Rights (1 January to 31 March 2016)*, CommDH 22 (2016).

mandate.[54] This particular focus thus represented an especially important driving force for the development of third-party interventions in practice. Another group of cases (7) relates to migration issues, a topic on which all mandate holders have been very active. Finally, three cases deal with the rights of persons with disabilities, while three further cases relate to the right to freedom of expression, two important areas of work for the Commissioner.

In addition, for the Commissioner to intervene, it needs to be a case allowing him/her to illuminate a broader human rights issue, one where the general interest might be at stake and where 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."[55] For instance, the *Estemirova* case[56] allowed the Commissioner to highlight the long-standing problems facing human rights defenders in the North Caucasus, while the observations submitted on a group of cases challenging the so-called "Law on Foreign Agents"[57] provided an opportunity for the Commissioner to reiterate that this law was incompatible with international and European human rights standards and that its application "has had a major 'chilling effect' on the work of civil society organizations in the Russian Federation"[58]. In six cases against Azerbaijan, the Commissioner underscored that these cases were an illustration of a serious and systemic human rights problem in the country, with pre-trial detention being used as a tool of punishment to silence those expressing dissenting views. In several cases concerning Turkey, the Commissioner also sought to highlight that the detention and prosecution of numerous journalists, human rights defenders and opposition parliamentarians was part of a broader pattern of repression against those expressing dissent or criticism of the authorities, and particularly of official policy on issues related to the situation in southeastern Turkey.

Such criteria have been highlighted by the successive Commissioners during their oral presentations before the Court. During the hearing in *M.S.S.*, Thomas Hammarberg stressed that his approach had been to be "very selective" and to intervene "only in particularly important cases" where the ruling of the Court would have a broader repercussion and importance for the defense of human rights throughout the Council of Europe area. He added that he would limit himself to situations where he felt that he had something to contribute as a background to the Court's deliberations on a particular case. In the *Câmpeanu* case, Nils Muižnieks underlined the importance of the case at stake,

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54 See *2008 Declaration*, *supra* note 38.

55 Council of Europe, Treaty Office, *Explanatory Report to Protocol n°14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, CETS n°194 (2004) at para 87.

56 Council of Europe, Commissioner for Human Rights, *Third-Party Intervention by the Council of Europe Commissioner for Human Rights under Article 36 of the European Convention on Human Rights: Svetlana Khusainovna Estemirova v the Russian Federation*, Application n° 42705/11, CommDH 18 (2016).

57 Council of Europe, Commissioner for Human Rights, *Third-party Intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights: Ecodefence and others v the Russian Federation and 48 other applications*, Application n° 9988/13, CommDH 22 (2017).

58 *Ibid* at para 38.

which would set the position of the Court with regard to access to justice of people with disabilities, and in the *N.D. and N.T.* case,[59] Commissioner Mijatović indicated that she had decided to take part in the hearing "because of the special importance this case has for the protection of the human rights of migrants, asylum seekers and refugees."

However, intervening is subject to two conditions. Firstly, except in cases where the Commissioner is invited by the Court to submit written comments under Article 36(2) of the *Convention*, the Commissioner is bound by a twelve-week deadline after the communication of a case to the authorities concerned.[60] This means that the Commissioner's Office needs to be informed of the communication of a case in due time.[61] The Commissioner's Office regularly follows the communication process, but the vast number of cases communicated every week makes it almost impossible to keep track of all of these cases. Nevertheless, the Office may also be informed through press releases published by the Court's Registry for the most important cases, or through NGOs which have supported the submission of an application or by the applicants' representatives themselves. Secondly, intervening requires human resources. The number of third-party interventions, sometimes perceived as low, can in part be explained by the resources available in the Commissioner's Office and the fact that third-party interventions only represent an additional tool at the Commissioner's disposal to help promote and protect human rights. The core activities of the institution remain the country visits and continuous monitoring of the human rights situation in all 47 Council of Europe member states, which means that, in practice, the Office has to be selective and strategic in its choice of interventions, which can also usefully supplement the work in the country in question.

The Commissioner's interventions have had a mixed impact until now. Besides the two Grand Chamber judgments mentioned above, this type of intervention has especially translated into an actual greater consideration of the Commissioner's findings by the Court in cases where the Commissioner has highlighted structural or systemic human rights problems and where the Court found a violation of Article 18 of the *Convention* (limitation on use of restrictions on rights).[62] In the *Kavala* judgment,[63] which contains numerous references to the Commissioner, the Court underlined in particular that it was also aware

> of the concerns expressed by the Commissioner for Human Rights and the third-party interveners, who consider that the applicant's detention is part of a wider campaign of repression of human-rights defenders in Turkey.[64]

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59 *N.D. and N.T. v Spain*, *supra* note 52.

60 The *Rules of the Court* indicate that, if the Commissioner wishes to exercise the right under Article 36(3) of the *Convention*, "he or she shall so advise the Registrar in writing not later than twelve weeks after transmission of the application to the respondent Contracting Party". Council of Europe, European Court of Human Rights, *Rules of Court* (2020), rule 44(2) [*Rules of the Court*].

61 Giakoumopoulos, *supra* note 41 at 157.

62 *Convention*, *supra* note 2, art 18.

63 *Kavala v Turkey*, n° 28749/18 (10 December 2019).

64 *Ibid* at para 230; the impact of the Commissioner's submissions has been a bit more limited in two cases brought by two journalists detained in Turkey (*Mehmet Hasan Altan v Turkey*, n° 13237/17 (20 March 2018) at 48 and *Şahin Alpay v Turkey*, n° 16538/17 (20 March 2018) at 42); while the Court

The Commissioner's findings can also be reflected in the part of the judgment concerning Article 46 of the *Convention* (execution of judgments). In *Aliyev v. Azerbaijan*,[65] the Court noted with concern that the events under examination in a number of similar cases could not be considered as isolated incidents. It added:

> The reasons for the above violations found are similar and inter-connected. In fact, these judgments reflect a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law. This pattern of the use of arbitrary detention in retaliation for the exercise of the fundamental rights to freedom of expression and association has also been the subject of comment by the Council of Europe Commissioner for Human Rights (…) and other international human-rights organizations (…). The Court accordingly finds that the actions of the State stemming from this pattern may give rise to further repetitive applications.[66]

In general, third-party interventions by the Commissioner appear to draw additional attention to the case in question, signaling that he/she considers the case to be important in some way.[67] Yet, the consideration by the Court of the Commissioner's observations has at times been less visible, if not inexistent. This might be due to the existence of a now well-established case law,[68] or to a more cautious approach on certain issues. In 2019, the Court issued for instance a judgment in the case of *Stoian v. Romania*,[69] concerning access of a young student with a physical disability to mainstream education in Romania. The Court, ruling as a committee of three judges, rejected all claims. The Commissioner's submission insisted on the need to interpret the *Convention* in the light of the rights and principles enshrined in the *CRPD*, stressing in particular that "reasonable accommodation is an individual right, which must be directly implemented without undue delays".[70] The Court's assessment stands at odds with that of multiple interveners, including the Commissioner, as it frames the right to reasonable accommodation in education as a matter of state policy.

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found that there had been a violation of Article 5(1) and Article 10, it considered that there was no need to examine separately the complaint under Article 18 of the *Convention*.

65 *Aliyev v Azerbaijan*, n° 68762/14 (20 September 2018).

66 *Ibid* at para 223.

67 See *a contrario Tarakhel v Switzerland*, n°29217/12, [2014] VI ECHR 195 in which the Commissioner did not intervene. While various considerations explain this, the Government (para 71), as well as three judges in a joint partly dissenting opinion, noted that neither the UNHCR nor the Commissioner for Human Rights had sought leave to intervene in the present proceedings, whereas they felt it necessary to do so in the case of *M.S.S.*

68 In the case of *Yunusova and Yunusov v Azerbaijan (nº2)*, n° 68817/14 (16 July 2020) [*Yunusova*], the Court found a violation of Article 18 of the *Convention* for the ninth time with respect to Azerbaijan (*Yunusova* at para 47) and only mentioned the third party intervention by the Commissioner, without giving any details on its substance and instead referring to an earlier similar judgment (para 100).

69 *Stoian v Romania*, n° 289/14 (25 June 2019).

70 Council of Europe, Commissioner for Human Rights, *Third-party Intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights*: *Ştefan-Moshe Stoian and Luminiţa Stoian v Romania*, Application nº289/14, CommDH 36 (2017) at para 34.

Equally in 2019, the Court rendered inadmissibility decisions regarding cases related to events which occurred in 2015 in the context of counter-terrorism operations and curfews in southeastern Turkey,[71] in sharp contrast with the concerns expressed by the Commissioner in the submission regarding the grave allegations of human rights violations committed in southeast Turkey during the curfews and the erosion of judicial independence and the increasing interference by the executive in the judiciary in Turkey.[72]

Lastly, in the case of *N.D. and N.T. v. Spain*, in relation to two complaints concerning alleged summary returns of migrants from the Spanish city of Melilla to Morocco, the Grand Chamber also took a different view from the Commissioner, who had argued along the lines of the Chamber judgment and pointed to the existence of a practice whereby migrants who attempt to enter Melilla in groups by climbing the fence surrounding the city are summarily returned by Spain's border guards to Morocco.[73] According to the Commissioner, these returns take place outside of any formal procedure and without identification of the persons concerned or assessment of their individual situation, a circumstance which prevents them from effectively exercising their right to seek international protection in Spain. The Court, however, expanded the circumstances in which member states may return a person apprehended whilst trying to cross a border without an individual examination of his or her situation and found no violation of Article 4 of *Protocol n°4 to the Convention* (prohibition of collective expulsion of aliens).[74]

But even in cases where the Court adopted a different position from the Commissioner or decided to strike out the applications, the Commissioner's submissions have appeared to carry some weight in circles beyond the Court. For instance, the written observations submitted in two cases against Austria challenging Dublin's returns to Hungary[75] have been used by domestic courts in some countries to decide on concrete cases involving such returns.[76]

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71 *Elçi v Turkey*, n° 63129/15 (29 January 2019); *Ahmet Tunç and Others v Turkey*, n° 4133/16 (29 January 2019); *Tunç and Yerbasan v Turkey*, n° 31542/16 (29 January 2019); the Court, having regard to its findings regarding the effectiveness of the remedy of an individual application to the Constitutional Court, rejected the complaints under Article 35(1) of the *Convention* for non-exhaustion of domestic remedies.

72 Council of Europe, Commissioner for Human Rights, *Third-party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights in 34 applications v Turkey*, CommDH 13 (2017).

73 Council of Europe, Commissioner for Human Rights, *Third-party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights:N.D. v Spain* and *N.T. v Spain*, Applications Nº8675/15 and Nº8697/15 CommDH 11 (2018).

74 *N.D. and N.T. v Spain*, *supra* note 52. *Protocol Nº4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than those Already Included in the Convention and in the First Protocol Thereto*, 16 September 1963, CETS n° 046, art 4 (entered into force 2 May 1968).

75 Council of Europe, Commissioner for Human Rights, *Third-party Intervention by the Council of Europe Commissioner for Human Rights under Article 36 of the European Convention on Human Rights: S.O. v. Austria and A.A. v. Austria*, Applications nº44825/15 and nº44944/15, CommDH 3 (2015). These cases were finally struck out of the list of cases by the Court.

76 See for ex the decision by the Supreme Administrative Court of Finland, Helsinki, 20 April 2016, *Finland, X. v Finnish Immigration Service*, Finlex Data Bank 1503 KHO:2016:53 (Finland).

B. The Role of the Commissioner in the Process of Execution of the Court's Judgments

The prevention of human rights violations is one of the cornerstones of the Commissioner's mandate.[77] As many judgments delivered by the Court bring to light certain systemic problems in the member states concerned, it is the Commissioner's role to encourage the rapid and effective execution of these judgments and to assist the governments in their efforts to remedy these shortcomings (in law or practice) with a view to preventing further similar violations.[78] The successive Commissioners have therefore tried to play their part when it comes to the execution of the Court's judgments.

Of course, the Commissioner's role can only be complementary to the main dialogue, which takes place between member states within the Committee of Ministers. However, when travelling to the member states, the Commissioner has in many instances insisted on the importance of executing the Court's judgments and of implementing reforms aimed at addressing the root causes of repeat applications. This might happen in the framework of bilateral meetings with government representatives or publicly in country reports and letters. In some cases, Nils Muižnieks specifically selected problems that were at the origin of repetitive applications before the Court as themes for certain country reports, e.g. length of proceedings in Italy, the administration of justice in Ukraine, Russia, Georgia and the Republic of Moldova, counterterrorism measures and freedom of expression in Turkey.[79]

In other cases, the Commissioner may address the execution of a judgment as part of a more general examination of a specific human rights issue. The Commissioner has done so in reports on the Czech Republic,[80] which focused inter alia on the human rights of Roma, and in which the Commissioner discussed the execution of the *D.H.* judgment[81] which condemned the Czech Republic for the segregation of Roma children in schools. Similarly, in various reports on Azerbaijan, dealing notably with the issue of freedom of expression, the Commissioner insisted on the need to decriminalize defamation and amend the law on defamation, a measure which is also required in order to execute two judgments issued by the Court against Azerbaijan in 2008 and 2010.[82]

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77 Council of Europe, Committee of Ministers, 104th Sess, *Resolution (99)50* (1999) at art 3.

78 See Council of Europe, Commissioner for Human Rights, *Non-implementation of the Court's Judgments: Our Shared Responsibility*, Human Rights Comment (2016).

79 "Commissioner Muižnieks stated at the beginning of his mandate that one of his priorities was to deal with issues related to the dysfunctions of the justice system in some Council of Europe member states, especially those with the highest number of cases before the Court, and to assist them in addressing the structural causes of these dysfunctions in order to reduce the Court's caseload". Anne Weber, "Commissioner for Human Rights (CoE)" in Elisabeth Lambert Abdelgawad and Hélène Michel (eds), *Dictionary of European Actors*, 1st ed (Brussels, Belgium: Larcier, 2015) 61 at 63.

80 Council of Europe, Commissioner for Human Rights, *Report by Thomas Hammarberg, Commissioner for Human Rights, Following his Visit to the Czech Republic from 17 to 19 November 2010*, CommDH (2011) 3 (2011) at para 57-71; Council of Europe, Commissioner for Human Rights, *Report by Nils Muižnieks, Commissioner for Human Rights, Following his Visit to the Czech Republic, from 12 to 15 November 2012*, CommDH (2013) 1 (2013) at para 43-66.

81 *D.H. and Others v the Czech Republic* [GC], n° 57325/00, [2007] IV ECHR 241.

82 *Mahmudov and Agazade v Azerbaijan*, n° 35877/04 (18 December 2008); *Fatullayev v Azerbaijan*, n°40984/07 (22 April 2010); these cases have notably revealed the inadequacy of the legislation on

On occasion, the Commissioner has sought to raise awareness regarding pilot judgments, which are particularly important. In its *Resolution (2004)3*,[83] the Committee of Ministers of the Council of Europe invited the Court "to identify, in its judgments finding a violation of the *Convention*, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications" and "to specially notify" these judgments not only to the state concerned and to the Committee of Ministers, but also to the Parliamentary Assembly, to the Secretary General and to the Commissioner.[84] Since the inception of the pilot-judgment procedure, the idea was thus to involve the Commissioner with the expectation that the systemic problems unveiled by this procedure become a priority in the continuous dialogue between the Commissioner and the member state in question. The case of *Kurić and Others v. Slovenia*[85] provides a good example of the Commissioner's involvement in a pilot case. The Commissioner has addressed the issue of the "erased" in Slovenia on a number of occasions and addressed recommendations to the government in order to remedy the situation, before but also more intensely after the Court delivered its pilot judgment.[86] In 2013, Nils Muižnieks was also invited to engage with a UK Parliamentary Committee by submitting his views on the UK's non-implementation of the *Hirst (nº2)* and *Greens and M.T.* (pilot) judgments concerning voting rights for prisoners,[87] an issue already raised by his predecessor.

The amendment introduced in 2017 to the *Rules of the Committee of Ministers for the supervision of the execution of judgments* (*Rule 9*)[88] now allows the Commissioner to submit written comments on the execution of judgments directly to the Committee of Ministers. The Commissioner started to use this new possibility in 2020, in three cases covering issues related to access to legal abortion and women's sexual and reproductive health and rights in Poland, one case relating to the detention of a human rights defender in Turkey and another regarding the protection of women from gender-based violence in

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defamation and the arbitrary application of criminal legislation to limit freedom of expression in the country.

83 Council of Europe, Committee of Ministers, 114th Sess, *Resolution (2004)3 of the Committee of Ministers on Judgments Revealing an Underlying Systemic Problem* (2004).

84 *Ibid*; the pilot-judgment procedure was codified in *Rule 61* of the *Rules of the Court*, *supra* note 60; see also John Darcy et al, *Pilot Judgement Procedure in the European Court of Human Rights and the Future Development of Human Rights' Standards and Procedures: Third Informal Seminar for Government Agents and Other Institutions*, 1st ed (Warsaw, Poland: Kontrast, 2009) at 94-98.

85 *Kurić and Others v Slovenia* [GC], no 26828/06, [2012] IV ECHR 1 [*Kurić*].

86 See Letter from Nils Muižnieks to the Prime Minister of Slovenia, Mr Janez Janša (10 January 2013),; in an opinion editorial, published on 19 October 2013 in the Slovene daily newspaper *Delo*, the Commissioner pointed to certain human rights priorities to be met while addressing the issue of the erased in Slovenia. Lastly, in a 2017 report, he called on the authorities to provide a way to regularize the status of the remaining "erased" people who wish to reintegrate into Slovenian society (Council of Europe, Commissionner for Human Rights, *Report by Nils Muižnieks, Commissioner for Human Rights, Following his Visit to Slovenia, from 20 to 23 March 2017*, CommDH (2017) 21 (2017) at para 106). The Commissioner's involvement has therefore continued after the Committee of Ministers decided to close the monitoring of the *Kurić* case in May 2016, as his monitoring had revealed some remaining problems.

87 *Memorandum from Nils Muižnieks, Council of Europe Commissioner for Human Rights to Mr Nick Gibb MP, Chair of the UK Joint Parliamentary Committee on the Draft Voting Eligibility (Prisoners) Bill* (10 October 2013).

88 *Rule 9*, *supra* note 42.

Romania.[89] This indicates that such submissions are not limited to cases in which the Commissioner previously intervened as a third-party, and suggests that similar criteria to those used to select cases for third-party interventions also apply to *Rule 9* submissions, in a manner that brings the most added value to the execution process.

Although the Committee of Ministers already took into consideration the Commissioner's work in making assessments for the execution of judgments before the Commissioner started making submissions under *Rule 9*,[90] the contribution by the Commissioner to the execution of judgments in general is expected to have greater impact with this new procedure.[91] While this new channel allows the Commissioner to intervene with flexibility and on an ad hoc basis in the execution process, the Commissioner intends to continue to address issues pertaining to the execution of judgments more generally when she deems it relevant for her country or thematic work. This flexibility, along with the independence which characterizes the Commissioner as an institution, means that the Commissioner should be able to react to the most urgent situations, without any legal or political constraints.

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The Commissioner does not operate in a vacuum[92] but within the wider context of the Council of Europe human rights protection's system, and in particular the *Convention* system in which the institution now plays an important role.

In accordance with *Resolution (99)50*, the Commissioner pursues his/her activities while fully respecting the competence of the supervisory bodies set up under the *Convention*. The Commissioner's role is complementary to and reinforces the

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89 Submission by the Commissioner for Human Rights under Rule 9.4 of the Council of Europe, Committee of Ministers, 964th meeting of the Ministers' Deputies, *Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements* (2006) in the cases of *Tysiąc v Poland*, n°5410/03, [2007] I ECHR 219 [*Tysiąc*]; *R. R. v Poland*, n° 27617/04, [2011] III ECHR 209 [*R. R. v Poland*]; *P. and S. v Poland*, n° 57375/08 (30 October 2012) (27 January 2020); *Kavala v Turkey*, n° 28749/18 (10 December 2019) (18 June 2020); and *Bălşan v Romania*, n° 49645/09 (23 May 2017) (20 July 2020); these submissions are available online: <www.coe.int/en/web/commissioner/rule-9>.

90 See for instance Council of Europe, Committee of Ministers, 1324th meeting of the Ministers' Deputies, *H46-22 Incal group (Application N°22678/93), Gözel and Özer group (Application N°43453/04), Altuğ Taner Akçam (Application N°27520/07) and Nedim Şener group (Application N°38270/11) v Turkey: Supervision of the execution of the European Court's judgments*, CM/Notes/1324/H46-22 (2018) at para 3.

91 In a decision in the cases *Tysiąc, supra* note 89; and *R.R. v Poland*, *supra* note 89 adopted on 5 March 2020, the Committee of Ministers refers explicitly to the conclusions of the Commissioner, expressed in the Rule 9 submission (Council of Europe, Committee of Ministers, 1369th meeting, *H46-21 Tysiąc and R.R. v Poland (Applications N°5410/03, 27617/04): Supervision of the Execution of the European Court's Judgments*. CM/Notes/1369/H46-21 (2020).

92 Thomas Hammarberg & John Dalhuisen, "The Council of Europe Commissioner for Human Rights", in Gundmundur Alfredsson et al (eds), *International Human Rights Monitoring Mechanisms*, *Essays in Honour of Jakob Th. Möller*, 2nd Revised Edition (Leiden, Netherlands: Martinus Nijhoff, 2009) at 517.

established procedure for the control of the respect of *Convention* obligations and for the supervision of the execution of Court's judgments and cannot supplant them under any circumstances. The four Commissioners who have held office since the creation of the institution have certainly contributed to a dynamic interpretation of the *Convention* standards, with the ultimate aim of reinforcing human rights in Europe.