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Seminar

"Binding Force: Institutional Dialogue Between The ECHR and The Committee of Ministers under Article 46 of The European Convention on Human Rights"

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The avenues for institutional dialogue between the Committee of Ministers and the European Court of Human Rights

Institutional dialogue between the Committee of Ministers and the Court happens on a number of various levels, and in different ways. I will identify - I hope in a useful way - those main avenues available but of course limited in scope to the time we have today. And then I will comment a bit on each avenue of dialogue available and provide a bit of analysis that could be food for thought.

So, what avenues are available?

Starting at the most general level, these avenues can be divided into two types. They are avenues of dialogue when the Committee is acting as the supervisory body under Article 46 of the Convention. And, when it is not.

In the **first** avenue, the Court speaks to the Committee through its decisions and judgments. All levels of the Court's decisions can form part of this dialogue, from Committee to Grand Chamber. The Committee is able to speak to the Court through its decisions and its *acquis* in the supervision context. The Committee's decisions encompass a variety of different forms as they include interim resolutions and final resolutions. This avenue of dialogue is naturally more interesting for us today, and legally richer.

We'll go into detail on that in a moment.

Turning to the **second** avenue of dialogue, this encompasses communications from the Committee that do not emanate directly from its supervision work but are still referred in the Court's judgments as having a certain relevance – depending on the context. In this avenue, there are the Committee's for example the Committee's Resolutions of a standard setting nature. These may touch on all the substantive areas of the Court's work.

Finally, under this avenue there is some degree of institutional dialogue which happens on a slightly more personal level. Here we have the example of the President of the Court addressing the Committee of Ministers twice per year.

Let us look now at these two avenues of dialogue in a bit more detail.

The **first avenue**, as I mentioned, is that which occurs when the Committee is acting as the supervisory body for the execution of judgments under Article 46.

This dialogue always starts with the Court, because under Article 46 the Committee has no role unless a violation is found. As the Court has said -

> *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B:
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> "Article 46 applies to every judgment in which the Court finds a breach of the Convention. Article 46 mean that the Court's finding imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences."

At the outset, when thinking about dialogue within the context of Article 46, its important to consider **language. Legal language.**

Because of course for good communication, it is not only sufficient to look at the institutional framework which dictates when a dialogue occurs, but we should consider whether those speaking share some kind of mutually intelligible language.

The Court speaks through its judgments and decisions. Of course, it uses the language of the Convention case-law when it does so. As said, the Court always 'speaks' first in the context of Article 46. So, the next question is how does the Committee interpret the Court what the Court is saying?

Of course, the Committee's starting point is Article 46 (1) of the Convention: *The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties*.

The question for the Committee is – what does 'abide' mean?

The Committee's rules and practice and the Court's case law give us many indications.

Papamichalopoulos, which I just cited is a really important baseline. Article 46 means that the Court's finding imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences.

The legal framework setting out that obligation is set out in the Committee's Rules specific to the Supervision of the Execution of Judgments. There are two central elements. There are individual measures. These stipulate that an individual should be put back into the position they were in had the violation not occurred. And general measures, which are designed to prevent similar violations occurring.

As the Court has observed in its case-law the root of these principles are in international law and in particular the Articles of States Responsibility for Internationally Wrongful Acts. Concerning the individual measures, this legal background as interpreted by the Court give us some additional points. That is that in exercising their choice of individual measures, a respondent state must bear in mind their primary aim of achieving *restitutio in integrum* (§ 191 *Ilgar Mammadov* (15172/13) Article 46 § 4, Grand Chamber, 29/05/2019). Another key element is that individual measures taken should be

"timely, adequate and sufficient to ensure the maximum possible reparation for the violations found by the Court" (§ 155 ibid).

However, in circumstances where restitution is "materially impossible" and "involves a burden out of all proportion to the benefit deriving from restitution instead of compensation", the Committee could accept that it cannot be provided. In other words, while restitution is the rule, there may be circumstances in which the State responsible is exempted – fully or in part – from this obligation, provided that it can show that such circumstances obtain (see *Ilgar Mammadov*, ibid § 86, with futher references including *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 84, ECHR 2009).

Concerning general measures, there is a bit less guidance in the case-law of the Court. The essential question is simply whether a measure has prevented similar violations.

Then there are also some other general elements of interpretation which are not in the Committee's rules but found in the case-law of the Court.

The Committee is directed to take into account the "conclusions and spirit" of the Court's judgments. This is a legal test explicitly identified by the Court in the *Ilgar Mammadov* Grand Chamber judgment (§ 182). It is repeated again in the *Kavala* judgment. Its roots are in the Court's caselaw going back some years in *Egmez v. Cyprus (dec.), no. 12214/07, § 48-49, 18 September 2012* and *Emre v. Switzerland (no. 2), no. 5056/10, § 75, 11 October 2011).*

It some ways it is quite an open question to ask what are the "conclusions and spirit" of the Court's judgment. In the *Ilgar Mammadov* and *Kavala* judgments, the Court indicates that this include an assessment of whether the State party acted in "good faith" (§ 217). This is certainly an important criterion but perhaps one that would tend to emerge more in cases where there had been a violation of Article 18 – as was the situation in those two cases. However given the Court emphasises throughout its case-law the general obligation on States to perform treaties in good faith, as noted, in particular, in the third paragraph of the Preamble to, and in Article 26 of, the Vienna Convention on the Law of Treaties 1969, it may be considered that this element is nonetheless relevant.

Another principle which guides the Committee's assessment in general terms in the execution process and is again articulated in the *Ilgar Mammadov* judgment on the basis of the Court's well established caselaw, is whether the measures "make practical and effective" the protection of the Convention rights which the Court found to have been violated (§ 217).

This is a brief overview of the framework for the assessment that a respondent State should take into account in deciding what measures to take and then the Committee must then refer to when making its evaluation in the supervision process. They are applied each time the Court gives a violation judgment.

The **legal language**, if you will, in which the Committee is working and dialoguing when it carries out its Article 46 function.

I would like to now speak about the **structure** in which institutional dialogue can occur in the context of Article 46.

Both the Court and the Committee of Ministers have a prioritised system of case processing. The Court with its categories of case processing and of course its divisions between Committee, Chamber and Grand Chamber. The Committee operates a prioritised system of case processing through its division of cases into 'standard' and 'Enhanced' procedure. As to be expected, the content of the decisions adopted by the two Convention bodies are briefer with less reasoning in relation to the cases as the 'bottom' of these priority systems. And much more comprehensive for those at the top.

I would therefore propose to go from the **bottom to the top**. Looking first at the cases where the decisions of the two bodies, and how they might dialogue, is relatively sparse and then moving on to the cases where you can find more complex and detailed dialogue.

Before I do, it should be first be said that a case which is perhaps a priority case, or complicated from a jurisprudential reason for the Court, is not necessarily one merits classification in the enhanced procedure. So, we should not have the assumption that what is straightforward from a jurisprudential point of view for the Court is the same for the Committee and vice versa.

For example, consider the case of *Big Brother Watch v UK* (58170/13, 62322/14, 24960/15 (Grand Chamber) 25/05/2021). This was a Grand Chamber judgment of the Court concerning bulk surveillance methods. In it the Court specifically addresses the issue of whether the case should by the Grand Chamber and then goes on to consider at length how the provisions under Article 8 should apply to bulk interception regimes.

The judgment is fascinating, albeit incredibly long!

However, in the execution phase, the Committee classified the judgment in the standard procedure because it didn't meet any of the criteria, including that of complexity, that would require it to be classified in the Enhanced procedure. That is because the domestic legal regime analysed by the Court in the 2021 judgment was replaced by an entirely new legal regime in 2018 before the judgment was given. This new regime included most of the safeguards that the Court eventually found to be absent under the old regime. There are steps which remain to be taken before the Committee could assess the case as ready for closure but it remains that what was a case prioritised by the Court given its complexity, was not prioritised – for different reasons – by the Committee. This difference is not a problem, it is just something which emerges from the different processes before the Court and the Committee and is important to bear in mind.

Having made that point, I'd like to return to the structure that I mentioned earlier and go to the cases at the 'bottom' of the pile and look at the possibilities for institutional dialogue that there are here.

So, to start with I'll briefly explain that the Committee of Ministers divides its cases into standard and enhanced supervision. In fact, the default should be that a case goes into the standard supervision unless the four objective criteria identified in the Committee's Working Methods apply. Cases in the standard procedure have only two decisions from the Committee of Ministers, that is the one to classify the case, and the one to close the case. For procedural efficiency, these two decisions are of a procedural nature and are standard and do not contain that much information. Of course, they do nonetheless contribute something to institutional dialogue. The first decision on classification tells the Court that the Committee does not consider the case to disclose a complex or structural problem, nor any urgent individual measures. The second decision to close a case tells the Court that the Committee is satisfied that the violations found in the judgment have been remedied, which may of course be very relevant to the Court when examining its incoming complaints.

These decisions of the Committee of Ministers are not the only elements that can contribute to institutional dialogue at this stage. The main detail of the measures taken by a state to execute a

judgment of the Court will be found in the Action plans and ultimately the Action report. The Action report is attached to the Committee's decision (called a final resolution) to close a case and thus explains the current legal situation and gives the reasoning on which the Committee has been able to come to its conclusion.

Despite their simplicity, these documents can contribute greatly to the institutional dialogue. For example in *G v Germany* (9173/14) the applicant came back to the Court a second time. The first time he had complained to the Court, he had been detained in a psychiatric hospital on the basis of a decision which permitted retrospective detention. The Court found a violation of Article 7 (1) (no punishment without law) as in effect the applicant had been detained for reasons not foreseen in the legislation governing his criminal offence. The case was examined by the Committee in the standard procedure. According to the Action report provided by the government the matter had been resolved in 2004 when a different criminal code came into force providing an appropriate legal basis for the applicant's detention in a psychiatric hospital.

The applicant's second complaint to the Court was that the refusal to reopen the initial criminal proceedings against him meant that his continued detention was in violation of Article 5. He also complained under Articles 7 and 46 of the Convention. The Court in its judgment refers in detail to the Committee of Minister's final resolution closing supervision of the case, and the Action report provided by the government which was attached to it.

Ultimately, it concludes that the applicant does not complain of any 'new issue' applying the usual test in what was then the most recent Grand Chamber judgment on the topic, *Moreira Ferreira v. Portugal (no. 2)* of 11 July 2017. The case is a neat illustration of institutional dialogue at this level.

As I mentioned, the case of *G* was examined in the standard procedure. the Court's inadmissibility decision was at the Chamber level (not committee), but here I think we can say that we are nonetheless we are looking towards the lower end of significant cases.

However, problems can arise at this lower level of priority can exist where there are not enough elements in the Court's decision for the Committee to make any assessment of what individual or general measures are needed. This can occur where there is a 'reverse *Big Brother Watch*' situation. That is to say, the judgment was very straightforward for the Court but necessitated at least some execution measures to be taken in order achieve redress for the violation found. If the dialogue is missing from the Court at the beginning of the process, its can be hard for respondent States to understand and in turn the Committee to supervise the measures needed because in such circumstances asking and answering the legal tests imposed under Article 46 – that I outlined a moment ago – is really difficult.

This type of situation is most likely to occur in those low priority cases in which the Court can give a WECL judgment.

The 2021 decision in ***Porcelli and others v Italy*** concerns non-execution or delay in the execution of domestic decisions under the "Pinto" remedy. It is a friendly settlement – so excuse me for straying a bit outside Article 46 – but it has an undertaking that the government will ensure the necessary individual measures. That is probably to ensure the domestic proceedings are accelerated and completed. There are hundreds of cases and thousands of applicants concerned and very minimal information in the Court's decision. As the government has indicated in the information they provided, that has made it quite complicated to provide the Committee the necessary information; they are

working on it. This will no doubt contribute to the cases remaining much under supervision for quite some time. The paucity of information in the judgment, has limited the dialogue here.

Moving up in priority – turning perhaps into the middle lane of this avenue of institutional dialogue - we can turn to some examples of that dialogue which have come from the cases classified in the Enhanced procedure.

Here, we could take a look at the Grand Chamber case of *Ališić and Others* (60642/08 (Grand Chamber) 16/07/2014), which was brought against a number of States, but the Court only ultimately found violations against Serbia and Slovenia. As you are aware, the case concerned the applicants' inability to recover "old" foreign-currency savings following the dissolution of former Socialist Federal Republic of Yugoslavia. The pilot judgment given by the Court announces itself as such and identifies that there are 1 850 similar applications pending concerning 8 000 applicants. The Court then goes on to give quite a detailed and specific indication under Article 46. It indicated that within one year (i.e. by July 2015) and under the supervision of the Committee of Ministers, Slovenia and Serbia must make necessary arrangements, including legislative amendments, in order to allow the applicants and all other persons in their position to recover their "old" foreign-currency savings under the same conditions as their nationals who held such savings in the domestic branches of Slovenian and Serbian banks. It decided to adjourn the similar cases in the meantime.

This judgment clearly disclosing a structural problem was classified by the Committee in the Enhanced procedure. As Committee of Ministers' watchers know, that means that this case would be regularly included on the Committee's CM DH meetings and the Committee will adopt decisions on the progress of the case and setting out its assessment on what has been done so far, and what remains to be done. For cases on the order of business, those decisions, which are the operative position of the Committee are accompanied by comprehensive legal advice from the Department from the Execution of Judgments, advising the Committee on the progress in supervision. There will also be information in the form of the, hopefully regularly updated, action plans/reports provided by the respondent State(s).

Thus, we can see that in such a context, the level of institutional dialogue is quite rich. What is interesting about the pilot judgment aside from its content, is that it also gives information about the number of similar cases pending and the Court's intention in relation to them. So here we have a dialogue about more than just the facts of the case and the finding of a violation. On the Committee's side - as said - we have the Committee's decisions, supplemented by the legal analysis of the Execution Department and the information from the respondent States. The Committee took 12 decisions in this case, the first 9 or so were when the judgment initially became final, and the Committee examined the case at every meeting until around the end of 2016 when the Committee's examinations diminished in frequency given most of the issues had been resolved.

All those decisions and accompanying documents contain detailed analysis of the all the measures including the central ones. Those were the adoption of the the law introducing a repayment scheme for the deposits held in Ljubljanska Banka's branches in Sarajevo and Zagreb, adopted in July 2015, so far as it concerned Slovenia. And, adoption of the the Ališić Implementation Act by Serbia in 2016. It transpires from the wealth of information in these decisions and related documents that extensive efforts were made over this period in the context of the execution proceedings to achieve the implementation of these judgments.

From the subsequent inadmissibility decisions in *MURATOVIĆ v Serbia*, 6799/02, Court (Third Section) 13/04/2006) and *Hodžić v Slovenia* (28932/14, 04/04/2019), we understand that the Court also found these measures satisfactory. The Court also explains in those decisions that it found the

applicants had not exhausted domestic remedies as they needed to use the remedy now available, that had been put in place under the pilot judgment. A successful application of the pilot judgment procedure.

The only element that could arguably considered missing in this process was detailed comment from the Court about the execution process. There is no mention in the inadmissibility decisions of any of the activities of the Committee of Ministers in supervising the execution of Ališić. However, I suppose this doesn't matter. The most important dialogue from the Court came at the outset. Therefore, the Court's reference to the Committee of Ministers in the pilot judgment about the measures to be taken at the outset of the process was the time when the institutional dialogue was vital.

I will turn now to the **final, very small category of cases** where there is very extensive institutional dialogue between the Court and the Committee, those are the two cases which the Committee has referred under Article 46 (4) of the Convention. I won't go into great detail about them [because other speakers have addressed them].

They are the institutional dialogue at its most intense. Not only in the sense of content but also because they reflect a new dynamic in the institutional dialogue made possible with Protocol 14. Moreover, because in these judgments the Court is clearly mandated to decide something under Article 46, it may fully analyse how that Article functions, and what it expects to happen under this Article.

Thus, it is worth nothing that the in the *Ilgar Mammadov* judgment, the Grand Chamber took the opportunity to explain how it sees the supervision process and the Committee's role and the principles that are applied in the Supervision process in some detail. This was indeed a very comprehensive institutional dialogue, which went beyond the individual case and set out the stand – in jurisprudential terms – of how Article 46 should function.

Now, I will turn to the **second avenue of institutional dialogue** that I mentioned at the beginning of my intervention. That is dialogue which occurs outside the Committee's supervisory role under Article 46. On the side of the Committee therefore, this dialogue is no longer case specific. It may nonetheless influence the Court's reasoning.

So, to continue with the structure I identified under this avenue at the beginning, let's look first at the Committee's resolutions which are of a standard setting nature. Here there are many different types of Recommendations, from those that go directly to the supervision functions of the Committee like CM/Rec(2000)2 Recommendation 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, cited for example in the Court's reasoning in *Bochan v. Ukraine (no. 2)* (22251/08 , 05/02/2015).

Others go to the substantive elements under consideration by the Court in the case. Here again, there are many examples referred to in the Court's reasoning. The Committee of Ministers' Recommendation no. R (98) 7 concerning the ethical and organisational aspects of health care in prison Recommendations, mentioned for example in *Wenner v Germany* (62303/13, 01/09/2016). Or, the Committee of Ministers Recommendation CM/Rec (2007)2 on media pluralism and diversity of media content referred to in *NIT S.R.L. v. the Republic of Moldova* (GC) (28470/12 , 05/04/2022) *,* amongst its consideration of the need to develop the Court's case-law on media pluralism. Or Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe on the protection of women against violence, referred to by the Court in *M.C. v Bulgaria*

(39272/98, 04/12/2003) when considering the modern conception of the elements of rape and its impact on the substance of member States' positive obligation to provide adequate protection.

This is one part of that dialogue. On the other side, the Court's case-law is of course a constant source of information related to the Committee's work on standard setting, and in its other monitoring activities.

Then finally, as I mentioned at the outset, under this second avenue of institutional dialogue – that is dialogue which occurs outside of the Committee's Article 46 role – the President of the Court addresses the Committee of Ministers twice per year. These are obviously valuable moments for an exchange of information between the two bodies which also give an important medium range vision to the Committee of the Court's situation, what has been achieved and what is to come.

This is a brief overview of the two avenues of institutional dialogue already in existence and their operation. **What could we conclude?**

- Under Article 46 perhaps a better awareness during the drafting process of the questions that respondent States and the Committee are obliged to ask & answer when the Convention has been violated – **the legal language** – that I mentioned.
- The key moment here is when the Court gives its decision, which is not only the start but of course the whole framework for the execution process.
- Moreover, it's worth bearing in mind that a judgment which is jurisprudentially not very interesting may still have concrete consequences for the applicant and maybe others affected under Article 46. If these cannot be easily ascertained by the State, or the Committee it risks adding inefficiencies to the execution phase of the Convention system.
- Is there also something to be said under the **second avenue of institutional dialogue**?
- Probably not so far as it concerns Committee of Ministers' Recommendations on various topics. This is simply ongoing work.
- However, we had a nice development in the 2022 December CM DH meeting when the Deputy Registrar of the Court attended the CM DH to exchange on the treatment of cases pending against Russia. It could be that other topics more relevant to Article 46 might be suitable for such an exchange. There are also discussions about formalising contacts at this level ongoing in the GR-H. s
- Finally, I have only spoken in my presentation about the two decision making bodies under the Convention but not the extremely important legal advisors who support and enable their work: that is the Registry of the Court and the Department for the Execution of Judgments. I think that a maximum level of exchange should be encouraged and facilitated at this level. Events such as this one is a great example, but the maximum amount of technical exchanges and informal consultations should be the goal.

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