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The Participation of Non-Governmental Organisations and National Human Rights Institutions in the Execution of Judgments of the Strasbourg Court

Exploring Rule 9 Communications at the Committee of Ministers

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Abstract

Although relatively unknown, a formal role has been devised for non-governmental organisations and National Human Rights Institutions in the execution process of the judgments of the European Court of Human Rights. By virtue of Rule 9 of the Rules of the Committee of Ministers, NGOs and NHRIs are empowered to be involved in this process by submitting written Communications for consideration by the Committee of Ministers. This exploratory research identifies the role NGOs and NHRIs play through Rule 9, and demonstrates the added value of involving these actors in this respect. As such, this article provides a first inventory and exploration of these Rule 9 Communications, detailing the extent to which Rule 9 is made use of, by whom, in what way and, finally, whether these Communications (visibly) play a role in the supervision process. Combined, this reveals that NGOs and NHRIs use Rule 9 to review, assess and report on the performance of domestic authorities with regard to the execution of judgments of the ECtHR. In doing so, they appear to act as an *amicus* in the execution process, by providing valuable observations at the ECHR level and, as such, it is argued that their participation is a welcome one.

Keywords

European Court of Human Rights – Committee of Ministers – Rule 9 Communications – Non-Governmental Organisations – National Human Rights Institutions

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1 Introduction

Non-governmental organisations (NGOs) and National Human Rights Institutions (NHRIs) play a fundamental role in implementing international human rights law at the national level. Indeed, the involvement and participation of NGOs and NHRIs, or lack thereof, has been used to explain States' respect for human rights,[1] including in the context of the European Convention on Human Rights (ECHR or the Convention) system.[2] The engagement of NGOs and NHRIs in helping translate international human rights law into practice does not only take place on the national level. Indeed, these actors can also be given a formal role in international procedures for the purpose of human rights monitoring, for instance by engaging in the reporting processes of international human rights regimes. For instance, NGOs and NHRIs are able to give input to the State-led peer review mechanism set up by the United Nations Periodic Review.[3] Although relatively unknown, a formal role has also been devised for these actors in the execution process of the judgments of the European Court of Human Rights (ECtHR or the Court).

As prescribed by the ECHR, if the Court finds that one or more of the rights enshrined in the Convention have been violated, its judgment is transmitted to the Committee of Ministers, the body charged with supervising the execution of the Court's judgments by the States. In fulfilling its supervisory role, the Committee of Ministers is assisted, in particular, by the Department for the Execution of Judgments of the ECtHR (Execution Department).[4] By virtue of

1 See, e.g., J Krommendijk, 'The domestic effectiveness of international human rights monitoring in established democracies. The case of the UN human rights treaty bodies' (2015) 10 *The Review of International Organizations* 489; B Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics* (Cambridge University Press 2009) and E Neumayer, 'Do international human rights treaties improve respect for human rights?' (2005) 49(6) *Journal of Conflict Resolution* 925. For NHRIs specifically, see for instance, A Buyse, 'The Court's Ears and Arms: National Human Rights Institutions at the European Court of Human Rights' in K Meuwissen, J Wouters (eds.), *National Human Rights Institutions in Europe: Comparative, European and International Perspectives* (Intersentia 2013).

2 E L Abdelgawad, 'Dialogue and the implementation of the European Court of Human Rights' Judgments' (2016) 34(4) *Netherlands Quarterly of Human Rights* 340, 361; D Anagnostou and A Mingui-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter' (2014) 25(1) *The European Journal of International Law* 205, 224.

3 Human Rights Council Resolution 5/1, 'Institution Building of the United Nations Human Rights Council' of 18 June 2007: <https://ap.ohchr.org/documents/alldocs.aspx?doc_id=13360>.

4 A Szklanna, 'Delays in the implementation of ECtHR judgments. Examples cases concerning electoral issues' in W Benedek, P Czech, L Heschl *et al.*, *European Yearbook on Human Rights 2018* (Intersentia 2018) 446. The Execution Department is also assisted by a Secretariat, which

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Rule 9 of the Rules of the Committee of Ministers, NGOs and NHRIS can similarly be involved in this process by submitting written Communications directed to the Committee of Ministers.[5] NGOs and NHRIS have started to make use of this possibility not long after its introduction in 2006, yet, to date, relatively little is known about this practice.[6]

The scarce literature[7] that discusses or touches upon the possibilities offered by Rule 9, however, does underscore the importance of this procedure, predominantly in relation to NGO involvement. It has, for instance, been argued that it is fundamental that NGOs 'share their expertise with the [Committee of Ministers]'[8] as they are 'the eyes and ears on the ground' that can offer useful 'shadow reports' that provide 'insider' information.[9] In spite of this, the role these Rule 9 Communications play in the execution process of the Court's judgments remains underexplored; thus far, no comprehensive and empirical examination of the Communications has been made. Such an examination is

ensures the proper workings of the DH meetings. For an elaboration on its tasks and powers, see for instance, L R Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016).

5 See, Rule 9(2) of the Committee of Minister Rules. Pursuant to paragraphs 1 and 3 of Rule 9, the applicant, the applicant's representative, international organisations and the Council of Europe Commissioner for Human Rights may also submit Communications. These actors are not discussed here, given this article's sole focus on NGOs and NHRIS.

6 See, CM/Del/Dec(2006)964. The first registered Communication was submitted in 2008 by the NGO Association Nationale D'Assistance Aux Frontière Pour les Étrangers in the case of *Gebremedhin v France* App no 25389/05 (ECtHR, 26 July 2007). Haddad has found that the creation of this possibility was the result of NGO input and lobbying at the CDDH of the Committee of Ministers. The NGOs Amnesty International, the AIRE Centre and the European Human Rights Advocacy Centre, advocated for the involvement of NGOs in the execution process, 'based on symbolic claims that civil society represents petitioners and advocates for the public interest'. For this, see H N Haddad, 'Seeking Voice at the European Court of Human Rights' in H N Haddad, The Hidden Hands of Justice. NGOs, Human Rights and International Courts (Cambridge University Press 2018) 78–79.

7 See, Haddad (n 6); L McIntosh Sundstrom, 'Advocacy beyond litigation: Examining Russian NGO efforts on implementation of the European Court of Human Rights judgments' (2012) 45 *Communist and Post-Communist Studies* 255; A Szklanna, 'The Standing of Applicants and NGOs in the Process of Supervision of ECtHR Judgments by the Committee of Ministers' in W Benedek, F Benoît-Rohmer, W Karl and M Nowak (eds.), *European Human Rights Yearbook 2012* (Intersentia 2012); E Lambert Abdelgawad, 'The Court as a part of the Council of Europe: the Parliamentary Assembly and the Committee of Ministers' in A Follesdal, B Peters and G Ulfstein (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 263 and L Miaria and V Prais, 'The role of civil society in the execution of judgments of the European Court of Human Rights' (2012) *European Human Rights Law Review* 1.

8 Abdelgawad (n 7) 287.

9 Miaria and Prais (n 7) 5.

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particularly timely because of the current trend of growing participation by NGOs and NHRIs in the execution process of ECtHR judgments, as evidenced by an increase in Rule 9 Communications submitted in 2019.[10]

Accordingly, this exploratory research aims to help fill this gap by conducting a study into Rule 9 Communications. It aims to identify the role these Communications play in the execution process of the Court's judgment and, in particular, their added value in this respect. For that purpose, this study first provides a depiction of the Communications thus far submitted by NGOs and NHRIs before the Committee of Ministers in terms of numbers, with the aim of revealing to what extent Rule 9 is made use of and by which actors. This is then enriched by a desktop study that identifies and analyses patterns in the contents of a number of selected Communications so to uncover the kind of information that is provided to the Committee of Ministers by NGOs and NHRI. Finally, this study investigates whether, and if so how, the information submitted through Rule 9 is used by the Execution Department in its capacity of assisting the Committee of Ministers as well as by the Committee of Ministers itself in its decision-making process. Combined, this allows for tentative conclusions as to the role that the Rule 9 procedure plays in the execution process of the Court's judgments, as well as its added value.

To achieve these objectives, this article proceeds as follows. First, the execution process of the Court's judgments and the role played by the Execution Department and the Committee of Ministers is described (section 2). Thereafter, before shifting the attention to Rule 9 Communications, some brief comments are applied to the roles played by NGOs and NHRIs in monitoring human rights implementation more generally, so as to put the Rule 9 procedure in perspective. This section also briefly touches upon the ways in which NGOs and NHRIs currently participate in the ECHR system as such, so that Rule 9 can be situated within this context (section 3). The subsequent sections focus on Rule 9 Communications. After having clarified the procedural context of Rule 9, insight is given into the extent to which the option to be involved in the execution process of the Court's judgments is made use of and by what actors (section 4). Section 5 then considers, based on an explorative analysis of selected cases,

10 For this, see the most recent annual report of the Committee of Ministers, which notes the number of Communications submitted by NGOs and NHRIs per year, Council of Europe, 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights' (2019) 12th Annual report of the Committee of Ministers 1, 49: <https://rm.coe.int/annual-report-2019/16809ec315>. For an up-to-date overview, see the Council of Europe database which continuously registers all Rule 9 Communications submitted: <https://www.coe.int/en/web/execution/submissions>.

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the contents of the Communications. This section also reports on whether the Execution Department and Committee of Ministers (visibly) make use of the information provided in the Communications. The final section (section 6) concludes.

2 Executing the Judgments of the ECtHR

Article 44 of the ECHR stipulates that judgments rendered by the Court are final. A Court judgment thus signals the end to a legal dispute concerning the question of whether there has been a breach of Convention rights.[11] If the Court finds that such a breach has occurred, however, a judgment is not the end of the Strasbourg process as such. To the contrary, a final judgment of the Court in which a breach has been identified triggers the State obligation to abide by this judgment.[12] This sets another, equally important process in motion, in that it is the beginning of the three-part process of 'ending, remedying and prevent[ing] […] a (future) violation'.[13] This process translates into two categories of measures that States may have to take in order to discharge their obligation: individual and general measures. Individual measures ensure the termination of the violation in respect of the injured party and provide that party with adequate individual redress. In contrast to such individual measures, general measures – as the name suggests – focus on the more general aspects of a judgment in which the Court has found a breach of the Convention. General measures are often necessary if a violation in an individual case is caused by a systemic problem.[14]

These individual and general measures have to be devised by the State, subject to the supervision of the Committee of Ministers.[15] The Court itself has only a small role to play in this respect. Although it has sometimes used Article 46 ECHR to make a recommendation or to prescribe a certain measure it considers a State should adopt in order to discharge its obligation, such 'prescriptive judgments' only constitute a small portion of the Court's case law, and are

11 Glas (n 4) 207–208.
12 Article 46(1) ECHR.
13 Glas (n 4) 207–208.
14 For instance, the case of *Barta and Drajko v Hungary* App no 35729/12 (ECtHR, 17 March 2014) para 42.
15 See e.g. *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979) para 58 and *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* (no. 2) App no 32772/02 (ECtHR, 30 June 2009) para 61.

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as such highly exceptional.[16] Since the entry into force of Protocol 14 to the ECHR,[17] the Court has been granted two additional competences in relation to the execution of its judgments, which are the power to consider whether a State has failed to abide by a judgment[18] and to revisit its judgment when the Committee of Ministers has found that the execution of said judgment is hampered by a problem of interpretation.[19] However, such powers can only be triggered at the request of the Committee of Ministers and, consequently, the Committee of Ministers and the States have a primary role in giving effect to the Court's judgments.

In its supervision process, the Committee of Ministers is particularly assisted by the Execution Department. Together, the Committee of Ministers and the Execution Department provide for a combination of political, diplomatic and legal oversight. In this respect, the Committee performs the political peer review process of judgment execution, whereas the Execution Department is the organ concerned with the more technical and legal aspects.[20] To be able to explore the formal role NGOs and NHRIs play in the process that is set in motion by the finding of a violation by the ECtHR, it is useful to understand how the execution process works and what the exact role of the Committee of Ministers and the Execution Department is in this regard. This will therefore be explained in more detail below.

2.1 *The Execution Process of ECtHR Judgments: The Role of the Committee of Ministers*

Four times a year, the deputies to the Ministers of Foreign Affairs of the Member States of the Council of Europe – who are entitled to act on behalf of the Ministers of Foreign Affairs who make up the Committee[21] – come together in private to supervise the execution of the Court's judgments during the Deputies' Human Rights ('DH') meetings.[22] States thus supervise each other's

16 A Donald and A K Speck, The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments' (2019) 19(1) *Human Rights Law Review* 83.

17 Council of Europe, Protocol 14 to the ECHR Amending the Control System of the Convention, 13 May 2004, CETS 194.

18 Article 46(4) ECHR; the Committee of Ministers has used this possibility for the first time in the case of *Mammadov v Azerbaijan* App no 15172/13 (ECtHR, 29 May 2019).

19 Article 46(3) ECHR.

20 B Çali and A Koch, 'Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe' (2014) 14 *Human Rights Law Review* 301.

21 Article 14 Statute of the Council of Europe.

22 Often, it is the legal experts working in the States' permanent representations at the Council of Europe and government agents located in the Ministries of Justice or Foreign

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progress with respect to judgment execution. This supervision is done on the basis of action plans in which the States describe the steps they will take, and when, in order to abide by a judgment rendered against them. Towards the end of the supervisory period, States can contend to have all necessary measures taken to execute a judgment in an action report.[23]

Since January 2011, the Committee of Ministers supervises the execution of judgments on the basis of the so-called 'twin-track system' by which cases are classified under the headings 'enhanced supervision' and 'standard supervision'.[24] Most cases are considered under the heading of standard supervision.[25] Cases classified under the 'enhanced procedure' are those cases which require closer scrutiny by the Committee of Ministers.[26] The objective of enhanced supervision is to ensure 'effective, speedy and long-term solutions to problems that are the root cause of violations found by the Court'.[27] The types of cases that are considered under the enhanced procedure are pilot judgments, judgments that require urgent individual measures, judgments in inter-State cases, or cases that otherwise have been identified by either the Court or the Committee of Ministers to disclose major structural and/or complex problems.[28] In addition, when a States does not adhere to the six-month deadline for submitting its action plan after a judgment has become final, and has not provided the action plan by the new deadline given by the Execution Department without any explanation,[29] the Secretariat proposes that

Affairs who attend these meetings, which usually last for two to three days. See Çali and Koch (n 20) 308.

23 The concepts of action plans and reports was introduced in the Committee's working methods in 2004, and its usage was further clarified in a Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights, see Department for the Execution of Judgments of the European Court of Human Rights, 'Action Plans – Action Reports. Definitions and Objectives' (2009) CM/Inf/DH(2009)29-rev: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805adb14>.

24 See the document prepared by the Department for the Execution of Judgments of the European Court of Human Rights, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights: Implementation of the Interlaken Action Plan – Modalities for a twin-track supervision system' (2010) CM/Inf/DH(2010)37: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804a327f>.

25 *Ibid.* para 8; Fiona de Londras and Kanstantsin Dzehtsiarou, 'Mission Impossible? Addressing Non-Execution Through Infringement proceedings in the European Court of Human Rights' (2017)66 *International and Comparative Law Quarterly* 467, 471.

26 *Ibid.* (n 25) para 6.

27 *Ibid.* (n 25) para 9.

28 *Ibid.* (n 25) para 8.

29 For a case classified under the standard procedure, the deadline is three months. For those cases considered under the enhanced procedure, the deadline is two months, see the Directorate General Human Rights and Rule of Law Directorate of Human Rights

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the case will be examined by the Committee of Ministers under its enhanced procedure.[30]

The classification of a case under the enhanced monitoring process does not necessarily mean that such a case is always debated during the DH meetings.[31] Indeed, although only cases for enhanced supervision, or cases proposed to be transferred under enhanced procedure, can be examined on the merits in the context of DH meetings, the cases that are to be discussed or decided on (with or without debate) are determined on the basis of an order of business, which functions as an operational agenda. The motivations for considering a case on the order of business are manifold and include, *inter alia*, a proposal by the Secretariat or a State to include the case, a previous decision of the Committee of Ministers indicating the specific date for resuming the examination of a case or a lack of communication from the respondent State as regards the execution measures required.[32]

To further streamline the supervision system, cases are labelled as 'leading', 'repetitive' or 'isolated'.[33] A leading case is one that reveals 'new structural and/or systemic problems'. These problems can either have been identified by the Court in its judgment, or by the Committee itself in the course of its supervision exercise. A leading case requires the adoption of new general measures so as to prevent similar violations from happening in the future. Second, repetitive cases are those that 'relate to a structural and/or general problem already raised before the Committee in the context of one of several leading cases'. Repetitive cases are usually grouped together under its leading case, that is, the case in which the issue was first identified, and appear on the Committee agenda and in the HUDOC EXEC database under the name of that leading case.

Department for the Execution of Judgments of the European Court of Human Rights, 'Guide for the drafting of action plans and reports for the execution of judgments of the European Court of Human Rights' (2015), 10.

30 See the Document prepared by the Department for the Execution of Judgments of the European Court of Human Rights, 'Supervision of the execution of the judgments and decisions of the European Court of Human Rights Implementation of the Interlaken Action Plan – elements for a roadmap' (2010) CM/Inf(2010)28-rev: <https://rm.coe.int/16805d1fbd>, para 27. For the information on the Secretariat, see fn 4.

31 Cases that fall under the enhanced supervision procedure may be supervised by means other than debate, e.g. through support by the Execution Department in drawing up and implementing action plans and more intensive bilateral consultations, for more on this see Document CM/Inf(2010)28-rev (n 30) para 9.

32 For the whole list of criteria, see appendix I of GR-H(2016)2-final: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168063o3a9>.

33 These three labels are derived from the Glossary of the Council of Europe's website. See, Council of Europe, 'Glossary' (*Council of Europe*): <https://www.coe.int/en/web/execution/glossary#{"15005454":[28]}>.

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Measures envisaged or taken for the leading case are similarly deemed to apply to the repetitive cases of that group. Consequently, when the Committee considers the leading case closed, the associated repetitive cases are similarly considered to have been fully executed.[34] Finally, in isolated cases, the 'violations found appear closely linked to the specific circumstances'.[35]

Throughout the supervision process, the Committee of Ministers can make use of a number of 'tools of political pressure' to nudge States into compliance with a judgment, which range from letters by the Committee's Chair to the national government to the adoption of interim resolutions in which the Committee 'provides information on the state of progress of the execution or, where appropriate, express concern and/or make suggestions with respect to the execution of a judgment'.[36] The supervision process is closed if the Committee of Ministers determines that a State has fully complied with its obligation to abide by the Court's judgments, which it accordingly affirms in a final resolution.[37]

2.2 *The Execution Process of the ECtHR Judgments: The Role of the Execution Department*

The Execution Department is located within the Directorate General of Human Rights and Legal Affairs of the Council of Europe. It assists and advises the Committee of Ministers and provides support to respondent States in discharging their obligations.[38] The Execution Department has accordingly been defined as an 'interface' between the Committee of Ministers and the respondent States.[39] Once a judgment has become final and is transmitted to the Committee, the respondent State is – as noted previously – expected to devise the measures it intends to take as soon as possible, but at least within six months after the judgment has become final, and send these intended measures to the Execution Department.[40] When the Execution Department has

34 See the handbook from the European Implementation Network, 'Implementation of Judgments of the European Court of Human Rights. A handbook for NGOs injured parties and their legal advisers' (2018): <https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/5d1af89d5758020001327f66/1562048743990/EN_Handbook_EIN_2019.pdf> 5.

35 For these classifications see (n 33).

36 Rule 16 of the Committee of Ministers Rules.

37 *Ibid.* Rule 17; de Londras and Dzehtsiarou (n 25) 485.

38 Department for the Execution of Judgments of the European Court of Human Rights, 'Presentation of the Department' (*Council of Europe*) <https://www.coe.int/en/web/execution/presentation-of-the-department>.

39 Glas (n 4).

40 Çali and Koch (n 20) 317.

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collected all the information it requires, it prepares an information note entitled 'State of Execution', which sets out the measures the State intends to take or has taken. This document is put on HUDOC EXEC, and is thus made public.[41]

In addition to this, the lawyers of the Execution Department may assist States with the drafting of their action plans and reports, and they evaluate them once they are submitted. Further, the Execution Department can make proposals as to the initial choice to supervise a case under the standard or enhanced procedure and may subsequently propose to transfer a case from one monitoring standard to the other or to close supervision of a case.[42] Furthermore, it proposes cases to be included in the order of business of the DH meetings, and indicates which cases require a detailed examination, and further supports these meetings by providing draft decisions and draft resolutions. If decisions or resolutions have been adopted by the Committee, the Execution Department follows up on these.[43] The Execution Department keeps track of States' progress in terms of execution, for instance by tracking the payment of just satisfaction. Finally, they are the point of contact for the various actors involved in the execution process, including NHRIs and NGOs.[44]

The above has made clear that the process of executing ECtHR judgments consists of an interplay between various actors, including the States, the Committee of Ministers and the Execution Department. The following section considers the manner in which NGOs and NHRIs fit into this. Before turning to this, however, the following section first briefly explains the role NGOs and NHRIs play in the monitoring of human rights more generally and, thereafter, it discusses the manner in which NGOs and NHRIs currently participate in the ECHR system as such, so that Rule 9 can be situated within this context.

3 NGOs and NHRIs: Partners in Implementing International Human Rights Law

Although different in character and institutional design, both NGOs and NHRIs have been recognised as being indispensable to a well-functioning human rights machinery.[45] NGOs are private actors that advance specific aims and

41 *Ibid.* 317.
42 *Ibid.* 315–316.
43 Glas (n 4) 377.
44 *Ibid.*
45 E.g. M A Nowicki, 'NGOs before the European Commission and the Court of Human Rights' (1996) 14 *Netherlands Quarterly of Human Rights* 289, 289.

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function fully independently from governments. Those NGOs with a specific focus on human rights monitoring are known to review, assess and report on what domestic authorities do. In doing so, they often rely on national constitutions and international treaties.[46] This allows NGOs to play an important role in notifying the public of particular human rights issues and they help put such issues on national or international policy agendas.[47] Many NGOs are further known for their activism, for being 'watchdogs', for pushing for change by visibly holding States accountable for human rights violations and for pressuring authorities into complying with international human rights law.[48] Literature on NGOs also recognises that, in addition to these rather well-known advocacy activities, some NGOs may take up governance roles (e.g. citizenship education, provision of information), thereby becoming more of a hybrid entity engaged in both service provision as well as advocacy.[49]

NHRIs, on the other hand, while formally operating independent from States, are 'bod[ies] established by a [g]overnment under the Constitution, or by law or decree'.[50] They are, in that sense, public institutions that promote a wide range of human rights, and monitor their States' human rights performance. Depending on their mandate and powers, some may even act as a quasi-judicial institution.[51] NHRIs derive from the idea that, if international human rights were ever to gain traction on the national level, they 'had to be firmly implanted within countries – within domestic laws and administrative practices […]'.[52] Since the adoption of the Paris Principles in the early 1990s – the document which sets outs the responsibilities, composition and working

46 See, as an example, A Buyse and M Glasius, *'Human Rights' in The International Encyclopaedia of Civil Society* (Springer 2020); J Mertus, 'From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society' (1999) 14(5) *American University International Law* Review 1335.

47 Buyse and Glasius (n 46).

48 See, e.g. C Hillebrecht, 'The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change' (2014) 20(4) *European Journal of International Relations* 1100, 1105; R A Cichowski, 'Civil Society and the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (University of Oxford University Press 2011) 82; Mertus (n 46); Simmons (n 1).

49 Haddad (n 6) 31.

50 See, Richard Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (2010) 10(1) *Human Rights Law Review* 1, 2.

51 *Ibid.* 2.

52 S Cardenas, The Self-Restraining State' in S Cardenas, *The Chains of Justice: The Global Rise of State Institutions for Human Rights* (University of Pennsylvania Press 2014) 2.

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methods of the NHRIs –, NHRIs have been established across the world.[53] As such, their establishment forms part of a broader trend to 'promote the diffusion of legal and institutional innovations across national boundaries'.[54] NHRIs similarly play a vital role in respect of human rights implementation by, among other things, promoting and ensuring the 'harmonisation of national law with international human rights instrument to which their State is party' and encourage 'ratification of international instruments' and by advising their respective national governments, parliaments or other bodies on matters concerning the protection of human rights.[55]

As was noted in the introduction, NGOs and NHRIs do not just operate on the national level; they can also be involved in international procedures. NGOs and NHRIs can engage with the ECHR system – the focus of this article – in various ways. NGOs can petition to the Court if they suspect that their own rights are violated, they may represent victims in their litigation efforts before the Court,[56] they may seek to influence the Court through the filing of an *amicus curiae*[57] and they have a role to play in processes of reform of the Court's procedures.[58] The participation of NHRIs at the level of the ECHR system are generally less extensive, but these actors may also play a role in the Court's procedure through, for instance, the filing of an *amicus*.[59] By acting as an *amicus*, the intervening actors can provide the targeted body with, for instance, legal expertise regarding the national system or factional information that puts the views of the parties to a case into perspective. Such interventions may further serve the function of shedding light on the broader context of a case and

53 K Meuwissen and J Wouters (eds.), *National Human Rights Institutions in Europe: Comparative, European and International Perspective* (Intersentia 2012) 3.

54 T Pegram, 'Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions' (2010) 32 *Human Rights Quarterly* 729, 730.

55 See UNGA, Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights, adopted 20 December 1993, U.N. Doc. A/RES/ 48/14; Carver (n 50) 11.

56 See, e.g. P Leach, *Taking a case to the European Court of Human Rights* (Oxford University Press 2017) for an elaboration on all admissibility criteria for lodging a case before the Court, or intervening as a third party.

57 N Bürli, *Third-Party Interventions before the European Court of Human Rights* (Intersentia 2017); L van den Eynde, 'An Emprical Look at the Amicus Curiae of Human Rights NGOs before the ECtHR' (2013) 31(3) *Netherlands Quarterly of Human Rights 271.*

58 See, Haddad (n 6).

59 See, for instance, the *amicus* of the Dutch NHRI, Het College voor de Rechten van de Mens, in the communicated cases of *Hasselbaink v the Netherlands* App no 73329/16 and and *Zohlandt v the Netherlands* App no 69491/16. See also the information page of the Dutch NHRI: <https://www.mensenrechten.nl/nl/publicatie/5b46fce1748c2212a54517ea>.

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the national human rights situation in a particular country, or highlighting the potential implications of a judgment to those not party to the case. By doing so, through an intervention, the intervener can serve a certain public interest, or, at least, they can promote the interest that the intervening party aims to serve. Finally, by submitting briefs, the intervening actors can signal that they 'remain vigilant at a particular issue'.[60] Before the ECtHR in particular, it has been shown that NGOs aim to 'challenge national laws, practices and interpretations, to establish precedents, to inform and influence the Court and to extend the interpretation given to the Convention'.[61]

In addition to being involved in the procedure before the ECtHR, NGOs and NHRIs can also play a role in the execution process of the ECtHR's judgments. The following section elaborates on how these actors are involved in this process.

4 The Involvement of NGOs and NHRIs in the Execution of Judgments of the ECtHR

4.1 *Rule 9 Communications: Procedural Context*

NGOs and NHRIs can choose to become involved in the Committee's process of the supervision of the execution of judgments by virtue of Rule 9(2) of the Rules of the Committee of Ministers. This broadly worded provision stipulates that –

> [t]he Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention.

This goes to show that Communications can be submitted by all kinds of NGOs and NHRIs.[62] There is no requirement of registration, or a requirement to be based in one of the signatory States to the ECHR, nor are there any formal requirements to be met in terms of size, objectives or organisation. Similarly, there are only a few procedural constraints. Communications can be submitted throughout the entire execution process, that is, until the Committee

60 For these arguments, see mainly van den Eynde (n 57) and also Haddad (n 6) 66.
61 Van den Eynde (n 57) 275.
62 See also Miara and Prais (n 7).

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considers a case closed. Communications can address all cases, irrespective of their classification as standard or enhanced by the Committee of Ministers, and they can address all State action envisaged, or taken, as articulated in the action plans or reports.[63]

Once an NGO or NHRI has submitted its Communication, it is handled by the Execution Department.[64] The Department sends the Communication to the respondent State concerned, which has five working days to submit a response. If the State responds within this given time frame, the Communication as well as the response of the State are put online and thus made public. If there is no response by the State within these five days, the Communication is not made public immediately, but is brought to the attention of the Committee of Ministers. After another ten working days, the Communication is published online, irrespective of the (lack of a) response by the State. If the State has responded in the meantime, its response is included in the publication. If a State chooses to respond to the Communication after these deadlines, its response is circulated and published separately. In the event that a State has chosen not to respond at all, the Communication is published by itself.[65]

4.2 *Rule 9 Communications in Numbers and Types*

To explore the role that is currently played by NGOs and NHRIs in the process of supervision by the Committee of Ministers in the execution of ECtHR judgments, it is useful to consider the extent to which Rule 9 is used by these actors. The online database on the execution of Court judgments – HUDOC EXEC – and the database of the Council of Europe that collects all Communications submitted under Rule 9 show that over 800 Communications have been submitted since the introduction of Rule 9 in the Committee's Rules in 2006.[66]

63 European Implementation Network (n 34) 9. The Execution Department has devoted a webpage to guide NGOs and NHRIs in submitting their Communications which, *inter alia*, indicates the most appropriate time to submit Rule 9 Communications, see Department for the Execution of Judgments of the European Court of Human Rights, 'Communications by NHRIS/NGOS' (*Department for the Execution of Judgments of the European Court of Human Rights*): <https://www.coe.int/en/web/execution/nhri-ngo#{"44361690":[1]}>. Pursuant to Rule 9, the applicant or their representative may also submit a Communication. However, such a Communication can only address individual measures.

64 Çali and Koch (n 20) 317.

65 Rule 9(6) of the Committee of Ministers Rules.

66 This total number of Communications covers those submitted up until 12 May 2020. See the HUDOC EXEC Database of the ECtHR: <https://hudoc.exec.coe.int/eng#{%22EXECDocumentTypeCollection%22:[%22ngo%22]}>. For the Council of Europe Database, see: <https://www.coe.int/en/web/execution/submissions>. This concerns *all* Communications submitted under Rule 9, including, for instance, submissions from the international

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The most recent annual Committee report on the execution of judgments shows that between 2011 and 2018, the number of Communications ranged from 47 to 90 Communications per year and in 2019, 133 Communications were submitted concerning 24 States.[67] As revealed by HUDOC EXEC, the large majority of these Communications have been submitted for leading cases, cases considered under the enhanced procedure and those that concern complex problems. Communications have similarly been, though to a lesser extent, submitted for pilot judgments, as well as for cases classified as revealing a structural problem, concerning urgent individual measures and inter-State cases.[68]

To uncover information going beyond the data provided through the online databases of the Court and the Council of Europe, for the purpose of this article, an inventory was made listing all the NGOs and NHRIs that have submitted Rule 9 Communications. This showed that, when comparing NGO and NHRI involvement, NGOs are the main actors in the execution process before the Committee.[69] In this regard, over the years, various types of NGOs have made use of Rule 9. Such NGOs include large international NGOs with broad human rights mandates, which are often specialised in advocacy or litigation before national or international courts[70] (such as Amnesty International,[71] Human

organisations like the UN Refugee Agency and responses by States that have been issued separately.

67 Council of Europe, 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights' (2018) 11th Annual Report of the Committee of Ministers 1, 73; Council of Europe (n 10) 49.

68 This data was extracted from the HUDOC EXEC database, and shows that until 12 May 2020, 525 Communications have been submitted for cases considered under the enhanced procedure and 98 for cases under the standard procedure. As for the classification criteria, 9 have been submitted for inter-State cases, 10 for cases involving urgent individual measures, 65 for pilot judgments, 69 for cases revealing structural problems and finally, 497 for cases revealing complex problems. Of these cases, 628 are still pending and 192 have since been 'closed'.

69 The inventory made for this article disclosed that, up to 14 May 2020, 790 Rule 9 Communications have been submitted by NGOs and NHRIs (thus excluding Communications by other international organisations and responses to Communications from States that were published separately). 746 of these Communications were registered in the Council of Europe database under Rule 9(2) as coming from NGOs, 26 of these were registered as coming from NHRIs and 3 from an ombudsperson. In addition to this, a further 16 Communications by NGOs and NHRIs were registered under Rule 9(3). Of these, 14 were submitted by NHRIs, 2 by an ombudsperson and 1 by an NGO.

70 Bürli (n 57).

71 See, e.g., the Communications by Amnesty in *M. S. S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) DH-DD(2017)307: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680 6fe355> and *Garabayev v the Russian Federation*

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Rights Watch[72] and the Open Society Justice Initiative[73]) as well the Helsinki Committees, which are based in various countries.[74] National and smaller, local or highly specialised NGOs also submit Communications. Such NGOs range from some quite well-known organisations such as the AIRE Centre (a UK based organisation that focuses on a large variety of human rights) to lesser-known local NGOs, which sometimes have specific ties to the case in question. To illustrate, the NGO, 'the Belgrade Group of Parents of Missing Babies' submitted a Communication for the case of *Zorica Jovanovic.* In this case, the Court had found a violation of Article 8 of the Convention on account of the continued failure of the Serbian authorities to provide the applicant information on the fate of her son, who had allegedly died in a State-run hospital after having been born there.[75] The applicant in this case had not been informed of the cause of death, had had no opportunity to see the body of her son and had not been informed of the burial place.[76] The NGO that submitted the Rule 9 Communication is made up of affected parents who are, as such, directly involved and implicated in the successful implementation of the case.[77]

As mentioned above, NGOs need not be based in a signatory State in order to submit a Rule 9 Communication. Indeed, the inventory has shown that non-European NGOs sometimes also make use of the procedural possibility created by Rule 9. In the cases of *P. and S. v Poland*, for example, which concerned

App no 38411/02 (ECtHR 30 January 2008) DH-DD(2019)302: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680939ade>.

72 Human Rights Watch submitted Communications in the case of *Sejdic and Finci v Bosnia and Herzegovina* App nos 27996/06 and 34836 (ECtHR, 22 December 2009) DH-DD(2016)773: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168067f2ae>.

73 The Open Society Justice Initiative has submitted numerous Communications, for instance in *Al Nashiri v Poland* App no 28761/11 (ECtHR, 16 February 2015) DH-DD(2016)1007: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806a3b15;> *El-Masri v the Former Yugoslav Republic of Macedonia* App no 39630/09 (ECtHR, 13 December 2012) DH-DD(2016)1082: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806aaaf6> and *D. H. and Others v the Czech Republic* App no 67325/00 (ECtHR, 13 November 2007) DH-DD(2018)554: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808af412>.

74 The Hungarian Helsinki Committee has, for instance, submitted a Communication in the cases *of Istvan Gabor and Varga v Hungary* App nos 15707/10, 14097/12 (ECtHR) DH-DD(2020)396: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809e4ab3>.

75 *Zorica Jovanovic v Serbia* App no 21794/08 (ECtHR, 9 September 2013) para 3.

76 Ibid., Status of Execution on HUDOC EXEC.

77 See the Communication by the Belgrade Group of Parents of Missing Babies in *Zorica Jovanovic* (n 75) DH-DD(2019)1045: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168097e389;> *Zorica Jovanovic* (n 75) para 12, 72.

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abortion and reproductive rights, the 'Center for Reproductive Rights' – a New York-based international NGO that works to advance reproductive freedom as a fundamental human right – submitted a Communication together with the Polish-based Federation for Women and Family Planning.[78] This example also shows that NGOs may wish to submit a joint Communication, together with other NGOs.

Finally, whereas NGOs that want to submit a Rule 9 do not need to have been involved before the Court procedures – and many only get involved after a judgment has been rendered by the Court – the inventory discloses that some NGOs have in fact also been involved in the proceedings before the Court. An example of such involvement can be seen in the case of *Centre for Legal Resources* ('CLR') *on Behalf of Valentin Câmpeanu v Romania*.[79] This case concerned deficiencies in the legal protection and medical and social care afforded to Câmpeanu, a 'vulnerable' person. Exceptionally, before the Court the CLR, a Romanian NGO, was allowed to act on behalf of Câmpeanu, who had died before the application to the ECtHR was lodged and who did not have any next-of-kin who could continue his case.[80] In its judgment, the Court identified numerous violations of the Convention and during the subsequent execution process, CLR submitted numerous Rule 9 Communications detailing systemic problems that lie at the heart of the *Câmpeanu* case.[81] Another example is the case of *Grabowski v Poland*, where the Court found a violation on account of the deprivation of liberty without a specific court order of the applicant, a juvenile, in the framework of correctional proceedings rendered against him.[82] Before the Court, the Helsinki Foundation for Human Rights submitted a third-party intervention and thus stayed involved during the execution phase by providing the Committee with a Rule 9 Communication.[83]

When compared to NGO involvement, relatively few NHRIs have become involved in the execution process before the Committee by entering Rule 9

78 The Center for Reproductive Rights and the Federation for Women and Family Planning in *P. and S. v Poland* App no 57375/08 (ECtHR, 28 November 2011) DH-DD(2019)235 : <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168093 4b24>.

79 *Centre for Legal Resources on Behalf of Valentin Campeanu v Romania* App no 47848/08 (ECtHR, 17 July 2014).

80 *Ibid.* paras 104, 114.

81 Communication by the Centre for Legal Resources in *Valentin Campeanu* (n 79) DH-DD(2017)237: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806f93cb>.

82 *Grabowski v Poland* App no 57722/12 (ECtHR, 30 September 2015) para 3.

83 Communication by the Helsinki Foundation for Human Rights in Grabowski (n 82) DH-DD(2019)220: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680933b9c>.

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Communications. Whereas, in particular, the French NHRI, the Commission Nationale Consultative des Droits de l'Homme ('CNCDH'), has relatively frequently submitted a Rule 9 Communication, and although other NHRIs have become involved through Rule 9 as well – including, for instance, the Dutch NHRI, the Polish, Armenian and Czech, to name but a few – their overall submission rate is relatively low. The cases in which these NHRIs have submitted Communications concern a variety of human rights issues, ranging from the eviction of travellers from land where they had lived for quite some time in contravention of Article 8 in *Winterstein*,[84] to the refusal to grant legal recognition in France to family relations with a child born out of a surrogacy arrangement and their intended mother in *Mennesson*,[85] to the conditions of detention facilities in the case of *Corallo*.[86] Some NHRIs have, to date, not submitted a Communication.

The above has shown that a variety of NGOs have availed themselves of the opportunities offered by Rule 9 and, though to a lesser extent, NHRIs as well. It is difficult to derive from the submissions as such which strategies have informed the choice of NGOs and NHRIs to submit a Communication for some cases and not in others, or why some NGOs and NHRIs have already submitted Communications whereas others have not made use of the possibility of Rule 9. Nonetheless, as noted earlier in the introduction, Rule 9 submissions appear to be on the rise, although, when put in perspective by considering the number of Rule 9 Communications submitted and the number of judgments pending execution, the number of Rule 9 Communications pale in comparison.[87]

84 *Winterstein and Others v France* App no 27013/07 (ECtHR, 17 October 2013) para 3.

85 *Mennesson v France* App no 65192/11 (ECtHR, 29 September 2014) para 43. On 10 April 2019, the ECtHR rendered its first ever advisory opinion since the entering into force of Protocol 16 in the case of *Mennesson*. The French NHRI submitted observations for consideration by the Court for its advisory opinion, but these were not made use of by the Court. See Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother Request No. P16-2018-001 (ECtHR, 10 April 2019) para 6. See also Défenseur des Droits, 'Décision 2019-016 du 22 Janvier 2019 portant observations devant la CEDH dans le Cadre d'une demande d'avis consultative de la Cour de Cassation portant sur la reconnaissance dans l'orde juridique interne du lien de filiation, légalement établi à l'étranger, entre les enfants nés d'une gestation pour autrui (GPA) et leurs parents' (2019): <https://juridique.defenseurdesdroits.fr> 28 September 2019.

86 Communication of the Dutch NHRI in *Corallo v the Netherlands* App no 29593/17 (ECtHR, 9 October 2018) DH-DD(2019)194: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680932f11>.

87 The 2018 Annual Report of the Committee of Ministers reports that there are 5,231 cases pending. For a critical view on the execution process, and problems in that regard, see G Stafford, 'The Implementation of Judgments of the European Court of Human Rights:

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Yet, recent developments at the European Network of NHRIs give the impression that national NHRIs are stimulated to make (more) use of Rule 9. In a document meant to guide NHRIs in their support to implement judgments of the ECtHR, NHRIs are informed of the possibility to submit a Rule 9 Communication. Information on when a Rule 9 Communication can be submitted, and some information on the procedural context, is provided. Similarly, the document stipulates that a Communication 'may be equally or more relevant after engagement with the national authorities'.[88] In a similar vein, the Network has encouraged the Committee to 'actively request information from civil society and NHRIs under Rule 9 of its procedures, in those cases where such information would enhance the supervision process'.[89] As for NGOs, the European Implementation Network, a platform that supports domestic NGOs in their engagement with the execution process at the level of the Committee of Ministers, advises and assists NGOs wanting to submit communications, and encourages them to do so.[90] Thus, not only do NGOs and NRHIs make use of Rule 9, their participation has increased and may continue to do so. It is therefore important to identify the role NGOs and NHRIs play in the process of supervision of the Court's judgment and to find out what their added value is. The following sections sees to this.

5 Rule 9 Communications: An Explorative Study

5.1 *Rule 9 Submissions by NGOs and NHRIs*

Now that the previous section has provided an overview of Rule 9 submissions, the present section aims to present an exploratory study into the use of the mechanism by NGOs and NHRIs, based on the contents of a number of Communications. An inductive approach was adopted in this respect,

Worse Than You Think – Part 2: The Hole in the Roof' (*ejil: Talk!*, 8 October 2019): <https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-2-the-hole-in-the-roof/>.

88 European Network of Human Rights Institutions (ENNHRI), 'Guidance for National Human Rights Institutions in Support of implementation of Judgments from the European Court of Human Rights': <http://ennhri.org/wp-content/uploads/2019/10/ennhri_guidelines-v2_a4_web.pdf>.

89 Submission of the European Network of National Human Rights Institutions (ENNHRI) on Brussels Declaration 26–27 March 2015: <https://www.cncdh.fr/sites/default/files/ennhri_common_position_on_draft_copenhagen_declaration.pdf>.

90 Find the information webpage of the European Implementation Network here: <http://www.einnetwork.org/>.

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as this approach allows for the research findings to emerge from frequent, dominant or significant themes that were detected in the documents studied.[91] To enable such an inductive exploration of Rule 9 Communications, ten ECtHR cases were selected (see selection criteria below in the footnote), using the various labels provided by the HUDOC EXEC database. On the basis of the selected cases and accompanying Rule 9 Communications, non-exhaustive patterns were identified and analysed based on the contents of the submissions.[92]

Doing so reveals that Rule 9 presents a significant outlet for NGOs and NHRIs to engage in their human rights monitoring activities. Indeed, due to the limited constraints attached to submitting Rule 9 Communications, as noted above, these actors can use the submissions to show how they review, assess and report on the performance of domestic authorities; in doing so, they may rely on the action plans and reports that the national governments have submitted as part of the supervision process. In that sense, NGOs and NHRIs appear, by virtue of Rule 9, to act as an *amicus* – as described above – to the Execution Department and the Committee of Ministers. Indeed, using either their particular (legal) expertise, or drawing upon information they have at their disposal, NGOs and NHRIs can be seen to provide factual and legal (background) information to the Execution Department and the Committee of Ministers. They use the Communications to describe and critically evaluate relevant national legislation or practices, to provide illustrations of the national situation or developments on the national level, or to submit statistical information in respect of a particular issue.

91 T R David, 'A General Inductive Approach for Analyzing Qualitative Evaluation Data' (2016) *American Journal of Evaluation*.

92 The classification criteria of the Committee of Ministers were leading in the selection of cases. From each criterion, one case was randomly selected. This resulted in 76 individual Rule 9 Communications, submitted by either NGOs or NHRIs. The tags include: leading case; repetitive case; cases requiring urgent individual measures; cases revealing complex problems; inter-State cases; cases considered under the enhanced procedure and cases of which the Committee has since closed its supervision. This resulted in the selection of the following cases, each of which are at least considered under at least one of these tags: *Ilgar Mammadov v Azerbaijan* App no 15172/13 (ECtHR, 13 October 2014); *Alekseyev v the Russian Federation* App nos 4916/07, 25924/08 and 14599/09 (ECtHR, 11 April 2014); *Grabowski v Poland* (n 82); *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008); *Al Skeini and Others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011); *Tysiac v Poland* App no 5410/03 (ECtHR, 24 September 2007); *D. H. and Others* (n 73); *Gharibashvili v Georgia* App no 11830/03 (ECtHR, 29 October 2008); *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001) and *Corallo v the Netherlands* (n 86). Note that Communications submitted for *Tysiac v Poland* often also address other abortion cases from Poland.

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To illustrate, the NGOs Center for Reproductive Rights and the Federation for Women and Family Planning submitted a Rule 9 Communication for, among others, the case of *Tysiac*, in which the intervening NGOs criticised the overly formalistic character of procedures introduced by new legislation in the wake of the *Tysiac* judgment. In *Tysiac*, the Court had found violations on account of the refusal of an abortion on medical grounds.[93] In an effort to implement these judgments, the Polish authorities adopted the 'Act on Patient Rights and the Patient Rights' Ombudsman'. Pursuant to this Act, women can object to a doctor's opinion that they do not qualify for the legal abortion service. According to one of the intervening NGOs this complaint procedure 'fails to meet requirements of effectiveness, accessibility and timeliness'.[94] Drawing upon research data, the NGOs illustrated that from the numerous complaints regarding the lack of access to legal abortion care, most were dismissed because they failed to meet the formal requirements of the complaint procedure introduced by the new legislation.[95]

The Rule 9 Communications submitted for the case of *Alekseyev v Russia* similarly provided the Committee of Ministers with data in respect of the particular issue at stake. In *Alekseyev* the Court found numerous violations of the Convention due to the disproportionate interference with the applicant's right to freedom of assembly on account of repeated bans on gay rights marches.[96] In one of its Rule 9 Communications, the NGOs Gay Russia and Moscow Pride informed the Committee that 'all notifications for hundreds of political assemblies in support of the rights of sexual and gender minorities applied for during the last three years were rejected'.[97] Most of these rejections were, according to the NGOs, based on the basis of the Russian Federal Law prohibiting the 'propaganda of non-traditional sexual relations among minors'.[98]

Finally, in another Polish abortion case, a Rule 9 Communication was used to provide information on developments on the national level, relating it to the execution of the particular case in question. In *P. and S. v Poland*, which concerned, *inter alia*, the failure of the Polish authorities to provide information on the conditions and procedures for accessing lawful abortion to the applicants,

93 *Tysiac* (n 92).

94 The Center for Reproductive Rights and the Federation for Women and Family Planning in *P. and S., R. R. and Tysiac v Poland* DH-DD(2018)814: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808d297d> 4.

95 *Ibid.* 4.

96 *Alekseyev* (n 92).

97 GayRussia and MoscowPride in *Alekseyev* (n 92) DH-DD(2018)775: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680 8ccba2> 1.

98 *Ibid.* 2.

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a minor who had been raped and became pregnant as a result of that, and her mother,[99] the Polish Bar Association brought a national case to the attention of the Committee, the facts of which were similar to those of *P. and S*, attempting to illustrate the persisting character of the violations found.[100]

In addition to this, Rule 9 Communications are also used by the intervening actors, in light of their own expertise and views on the matter, to make recommendations on the steps they think it should take in order to ensure the proper execution of a judgment. Such recommendations include the steps NGOs and NHRIs think the national authorities should take at the domestic level, and the steps they think are appropriate for the Committee to take. As for the former, one of the Communications in the *D. H. and Others* case of the Ombudsperson of the Czech Republic, the Public Defender of Rights, can serve as an example. The *D. H.* case concerned the indirect discriminatory placement of Roma children in classes for children with special education needs or mental disabilities.[101] In her submission, the Public Defender of Rights made recommendations as to how to gather information on the ethnicity of pupils in schools.[102] As for the latter, such recommendations range from, for instance, advising the Committee to debate a case on its merits, adopt interim resolutions on non-implementation, start infringement proceedings, conduct country visits, or to make a certain choice of the mode of supervision, that is, to supervise a case under the enhanced procedure (this can be done very early in the supervision process, before an action plan from the State is received).

To provide a number of illustrations, the NGOs that submitted a joint Communication for the *D. H. and Others* judgment recommended the Committee of Ministers to issue an interim resolution on the non-implementation of the judgment. Indeed, they asked the Committee of Ministers, by doing so, to recognise that, six years after the rendering of the judgment, no actual or meaningful change on the ground had taken place.[103] The intervening NGOs in the case of *Alekseyev* recommended the Committee, on numerous occasions, to refer the question of whether Russia had failed to abide by its obligations

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99 *P. and S.* (n 78).

100 Though not an NGO, the Polish Bar Association submitted a Communication in *Tysiac* and *R. R.* DH-DD(2016)549: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168064a55d> 7.

101 *D. H. and Others* (n 73) para 3.

102 The Public Defender of Rights (Ombudsman) in *D. H. and Others* (n 73) DH-DD(2015)248: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804ad847> 9.

103 E.g., The Open Society Justice Initiative, COSIV and the European Roma Centre in *D. H. and Others* (n 73) DH–DD(2012)530: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804b09a5> 2.

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to implement the *Alekseyev* judgment to the Court by means of an infringement procedure under Article 46(4) ECHR.[104] In the *Salduz* case, the NGO Open Society Justice Initiative recommended that the Committee consider this case under its enhanced procedure. According to the Open Society Justice Initiative, 'structural and complex barriers … remain to the proper implementation of Salduz'.[105] As the root causes of the violations had not been addressed, the NGO considered the enhanced supervision procedure to provide 'more opportunity for the Committee of Ministers and the Turkish government to arrive at effective and long-term solutions to the problem of lack of early access to legal assistance'.[106]

A similar recommendation was made in the Committee case of *Corallo v the Netherlands* by the Dutch NHRI.[107] This case concerned the detention facilities at a police station on the island of St. Maarten, which is part of the Kingdom of the Netherlands. The ECtHR had held that the detention facilities amounted to 'degrading' circumstances and, accordingly, found a violation of Article 3 ECHR.[108] The NHRI alleged that no significant improvements have been made and that poor conditions persisted. In light of this, to ensure 'structural improvements' of St. Maarten's detention system, the NHRI recommended that the Committee consider this case under its enhanced procedure so as to 'underline the seriousness of the matter'.[109] Conversely, NGOs may also recommend that the Committee close its supervision of a particular case. The NGO 'Ordo Iuris Institute for Legal Culture', which can be characterised as a more conservative NGO, submitted a Rule 9 Communication in *Tysiac* and *P. and S.* and expressed the view that by introducing the new Act, as referenced above, Poland had complied with the obligations arising from the ECtHR judgments and accordingly recommended the Committee to close its supervision of the case.[110]

This further analysis into Rule 9 Communications has shed light on the sort of information NGOs and NHRIs bring to the attention of the Execution Department and the Committee of Ministers. This demonstrated that through

104 Gay Russia and Moscow Pride in *Alekseyev* (n 92) DH-DD(2018)210: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168078f2fe> 6.

105 Open Society Justice Initiative in *Salduz* (n 92) DH-DD(2012)292: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168063cfa2> 4.

106 *Ibid.*

107 The Netherlands Institute for Human Rights in *Corallo* (n 86) DH-DD(2019)194: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680932f11>.

108 *Ibid.*

109 *Ibid.* 4.

110 Ordo Iuris Institure for Legal Culture in *P. and S., R. R.* and *Tysiac* DH-DD(2018)924: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808db56b> 10.

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Rule 9, NGOs and NHRIs show the Execution Department and the Committee of Ministers how they review and assess the performance of the domestic authorities in executing ECtHR judgments and provide recommendations as to how to proceed with the execution process. Accordingly, Rule 9 seems a constructive and useful tool that appears to bring relevant information at the ECHR level. To assess fully the functionality of Rule 9 Communications it is useful to, in addition to considering Rule 9 Communications in numbers, types and contents, investigate if, and if so, how these Communications are used by the Execution Department in its capacity of assisting the Committee of Ministers as well as by the Committee of Ministers in its decision-making process. Such an investigation helps depict a complete picture in terms of the role played by Rule 9s in the execution process of the Court's judgments, as well as its added value. The following sections deal with this.

5.2 *Rule 9 at the Execution Department and Committee of Ministers*

On the basis of corresponding documents of the selected ECtHR cases, that is, documents prepared by the Execution Department ('status of execution' and meeting notes) as well as Decisions and Resolutions by the Committee of Ministers,[111] this section considers whether the Execution Department and the Committee of Ministers visibly make use of, and refer to, the information provided in Rule 9 Communications. This will help identify the influence Rule 9 Communications have on the supervision process of ECtHR judgments. Additionally, it is important to find out if the Execution Department and Committee of Ministers visibly make use of the Rule 9 Communications, as such explicit references and reliance can create a feedback loop, implicitly signalling to the NGOs and NHRIs whether their involvement and information was appreciated and useful. This, in turn, can influence the way the NGOs and NHRIs make use of their competence to get involved in the supervision process.

Interestingly, the study of the follow-up documents has indeed shown several direct references and explicit reliance on NGO and NHRI submissions by both the Execution Department and the Committee of Ministers. This ranges from a mere mentioning of the existence of a Rule 9 Communication, to a complete summary of the Communication in the Execution Department's status of execution document, to references to it by the Committee of Ministers. However, no mention of some Communications is made in any follow-up document.

To illustrate the diverse ways in which Rule 9s are reflected in the documents of the Execution Department and the Committee of Ministers, first

111 Amounting to 97 documents in total.

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some examples can be given of cases in which the submissions and their contents were extensively referred to. In *Alekseyev*, the information provided by two NGOs – GayRussia. RU and the Moscow Pride Organizing Committee – can be seen to feature in the 'status of execution' document prepared by the Execution Department. In particular, the Execution Department noted that the action plan of the Russian authorities failed to provide statistical information with respect to the request for public events that are similar to those at issue in *Alekseyev*, notably, gay pride marches. Such information was, as also noted earlier in the previous section, provided by the two intervening NGOs. On the basis of their information, the Execution Department was able to observe that requests for public events in support of LGBTI rights had been rejected in approximately 250 cities in Russia, and that domestic courts had upheld these rejections. Additionally, the Execution Department referred to examples, as reported by the NGOs Coming Out and ILGA-Europe, concerning local authorities' refusals to authorise these public events and limited instances where rallies were allowed to take place. The status of execution document further included other information provided by these NGOs, such as information on how the 'propaganda' laws suppressed these NGOs' access to information. Finally, the Execution Department devoted a paragraph to the recommendations by the NGOs as to the measures needed to ensure implementation of the judgment and safeguard wider freedom of expression and assembly of LGBTI persons.[112]

In a document prepared for the examination of the same case for a different DH meeting, the Execution Department referenced NGO Communications that had provided information as to the arrest and subsequent release and dismissal of the charges of those attempting to organise solo-pickets (which do not require the authorities' prior agreement and which were held in public places without any link to schools and kindergartens etc.) as well as arrests of participants of a flash mob in Moscow.[113] Subsequently, one particular aspect of the Rule 9 Communications submitted for the *Alekseyev* case featured in one of the of Committee's decisions on that case. Specifically, the Committee noted that it 'deeply regretted that the authorities have not been able to provide any statistics in response to the Committee's invitation in December 2016 and noted that the only statistics available, submitted by an NGO, support the assessment that progress so far has been limited'.[114]

112 Committee notes 1331/H46-24, 6 December 2018, 1331st meeting, 4–5.

113 Committee notes 1273/H46-23, 9 December 2016, 1273 Meeting, 4.

114 Ministers' Deputies Decision CM/Del/Dec(2018)1331/H46-24, 1331st meeting, 4–6 December 2018 in *Alekseyev* (n 92) and *Bayev and Others v Russia* App no 67667/09 (ECtHR, 13 November 2018) para 5.

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As a further example, in the *Gharibashvili* case, the Execution Department summarised the Rule 9 Communications submitted by the Public Defender of Georgia and by the Coalition for an Independent and Transparent Judiciary, which represents 36 NGOs in Georgia. In this case, the Court had found violations of the procedural limb of Articles 2 and 3 ECHR on account of ill-treatment of the applicant while in police custody.[115] Under the heading of 'status of execution', the Execution Department reported the concerns of the intervening NGOs well as their recommendations for improvement.[116] In another preparation document, the Execution Department again referenced the Public Defender of Human Rights, who had repeatedly expressed concern over the effectiveness of investigations and had reported problems with measures taken to prevent excessive use of force by the police in the course of an arrest.[117] The role of civil society and the Georgian NHRI featured in one of the Committee's decisions, as the Deputies expressed their concern over the effectiveness of investigations and 'invited the authorities to continue the dialogue with civil society [and] the Public Defender of Georgia…'.[118]

In *Tysiac*, the Execution Department devoted half a page of its 'status of execution' document to the observations of NGOs, summarising their main complaints and the subsequent responses by the Polish authorities. As had been described above, the intervening NGOs in this case had, *inter alia*, criticised the overly formalistic character of the procedure instituted in the wake of the judgments. This criticism subsequently featured in one of the Committee's decisions. Having discussed the findings in *Tysiac*, the Deputies 'noted that the objection procedure introduced in response to the *Tysiac* judgment has rarely been used and that it has been criticised by civil society and the Polish Commissioner for Human Rights because of its unnecessarily complex procedural requirements and lack of guarantees of timely decisions'.[119] The Deputies concluded their decision by 'noting the lack of progress since 2014 in the adoption of the necessary reforms' and subsequently 'decided to transfer these cases under the enhanced procedure and to resume consideration of them at the DH meeting in March 2020 at the latest'.[120]

In other follow-up documents, the important role of NGOs and NHRIs was emphasised, or a statement was made informing that a Communication had

115 Gharibashvili (n 92).
116 Ministers' Deputies notes on the Agenda 1294/H46-10, 22 September 2017, 1294th meeting, 4.
117 Notes on the Agenda, 1273/H46-10, 9 December 2016, 1273 Meeting, 6.
118 Committee Decision, 1294/H46-10, 1294th meeting, 6.
119 Decisions 1340th meeting, 12–14 March 2019 (DH), para 3.
120 *Ibid.* para 6.

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been submitted. For instance, the Execution Department underlined the important role of NGOs and the NHRI in ensuring the effective implementation of the case of *D. H. and Others*. It accordingly recommended the Committee to encourage the Czech authorities to cooperate closely with these actors.[121] This recommendation subsequently featured in the Decision of the Committee on this case.[122] For the same case, the Execution Department assessed the action plan of the Czech authorities in a preparation document for the Committee. In doing so, the Execution Department noted that –

> [i]n a response to a submission from a number of NGOs to the Committee of Ministers in December 2018 and again in information submitted in April 2019, the Czech authorities submitted information on statistics which indicate that the number of Roma children educated in 'practical schools' for pupils with 'mild mental disabilities' has fallen since the date of the judgment but remains significant. It is also noted that these figures are challenged by a number of NGOs and monitoring bodies within the Council of Europe whose earlier findings are also referred to in the judgment, on the basis that there has been no real change in the statistics.[123]

Yet at times, only a reference to the existence of a Communication is made, as was done in the final resolution closing the examination of the *Salduz* case, where the Committee of Ministers confirmed having examined the two Communications submitted, but stipulated nothing further.[124] Similarly, for some cases, it appeared that no use had been made of the information submitted through Rule 9. As an illustration, in the *Al-Skeini* case in which the NHRI of England and Wales submitted a Rule 9 Communication to express concern over the execution of the case, no reference to this concern was made. To the contrary, the Committee of Ministers closed supervision of this case after its DH meeting, which took place a couple of months after the Communication had been submitted, creating the impression that the Communication, or what was contained therein, did not have an influence on the Committee's decision making.[125]

121 Committee notes, 1259/H46-11, 9 June 2016, 1259 Meeting, 3.

122 1259th meeting – 7–8 June 2016, Item H46-11, para 4.

123 Document prepared by the Execution Department for the supervision of the case of *D. H. and Others* (n 73) CM/Inf/DH(2010)47 24 November 2010, paras 7 and 8.

124 Committee Resolution CM/ResDH(2018)219, 1.

125 The Equality and Human Rights Commission in *Al-Skeini* (n 92) DH-DD(2015)1374: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804a44d2>;

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As such, it is difficult to derive from these follow-up documents what considerations play a role for the Execution Department and Committee of Ministers in deciding whether to include information submitted through Rule 9, or not. Nonetheless, the above has made clear that references and explicit reliance upon the information submitted by the NGOs and NHRIs can be found in the documents of the Execution Department and Committee of Ministers. As such, this gives the impression that their involvement is taken seriously and it appears to demonstrates that, by means of Rule 9, there certainly is a role for NGOs and NHRIs in the execution process. Similarly, by including references, the Execution Department and Committee of Ministers signal to NGOs and NHRIs that their input *can* be considered.

6 Concluding Remarks

Although the way NGOs and NHRIs contribute to the implementation of international human rights law more generally has been subject of extensive academic scrutiny, the involvement of these actors in the context of ECHR implementation has been studied to a lesser degree. This is all the more so for the possibilities offered to these actors by Rule 9 of the Rules of the Committee of Ministers. This Rule has not just been underexplored by scholars; its existence more generally has remained unknown. For that reason, this study was exploratory in nature, and aimed to identify the role NGOs and NHRIs play in this supervision system and, additionally to uncover the added value of Rule 9 Communications in the execution process.

This showed that NGOs in particular – and a great variety of NGOs in that respect – as well as NHRIs, make use of Rule 9. Further, on the basis of a number of selected cases, this study has found that through Rule 9, NGOs and NHRIs act as an *amicus* to the Execution Department and the Committee of Ministers. Rule 9 gives NGOs and NHRIs the opportunity to offer their insights as to what goes on at the national level, and how they evaluate this in light of the execution of the judgment in question. NGOs and NHRIs may critically evaluate the information provided by the States in their action plans and reports, and they may provide the Execution Department and the Committee of Ministers with their views on the matter, including how they think the State should proceed with the execution of a judgment as well as what steps the Committee of Ministers itself could take in this respect. They similarly provide information from

Resolution CM/ResDH(2016)298 Execution of the judgment of the European Court of Human Rights *Al-Skeini and Others v the United Kingdom*.

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the domestic context either based on their mandate or expertise, or because they are personally affected by the execution of a judgment. By doing so, they can shed light on what goes on at the domestic level, challenge the information provided by the State or fill a lacuna in terms of information needed fully to determine the status of execution of a particular judgment. By reviewing, assessing and reporting on the performance of domestic authorities in relation to human rights implementation, focussing specifically on the execution of a particular judgment as rendered by the ECtHR, they seek to influence the supervision process of the judgments. In a sense, therefore, Rule 9 presents yet another outlet, or another international procedure, that enables these actors to engage in their monitoring activities on an international level.

It was further shown that the Execution Department and the Committee of Ministers can make use of the submitted Communications. The information provided by the NGOs and NHRIs was found, at times, to feed into the decision-making of the Committee of Ministers, not least because it is directly relied on by the Execution Department in preparing the necessary documents for the Committee meetings. Moreover, this study also disclosed that the Committee of Ministers is prepared – though not always – to include visible references to information submitted through Rule 9 submissions in a number of its documents. Such visible referencing range from explicit reliance upon the information provided to calling upon the authorities to respond to a Communication or to simply making mention of the existence of the Communication. The practice of including such visible references, by both the Execution Department and the Committee of Ministers, in addition to being transparent about the information that is available to them, gives the impression that the information provided through Rule 9 is made use. Such reliance upon Rule 9s can be regarded as an incentive to NGOs and NHRIs to make use of the possibilities provided and, in light of the role they play as identified in this article, their involvement in this manner can indeed be encouraged.

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