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Unlimited access to member States, including “grey zones”, by Council of Europe and United Nations human rights monitoring bodies

Report¹

Committee on Legal Affairs and Human Rights

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Summary

The Committee on Legal Affairs and Human Rights deplors all instances of failures by States to co-operate with international human rights monitoring mechanisms and insists that any member State concerned should engage in full, unconditional co-operation without delay.

The activities of human rights monitoring bodies with respect to territories under the control of *de facto* authorities do not constitute and should not be presented as recognition of those authorities' legitimacy. Exercise of *de facto* authority does however bring with it a duty to respect the rights of all inhabitants of the territory in question. The committee welcomes instances where Council of Europe and United Nations human rights monitoring bodies have obtained access to such “grey zones”.

The Committee of Ministers should hold an urgent discussion whenever a Council of Europe human rights monitoring body is denied access to a member State's territory. It should consider the introduction within the Council of Europe of a presumption that member States have consented to visits by human rights monitoring bodies in circumstances where there is reason to believe that there are serious violations of fundamental human rights and dignity. It should also review the state of co-operation between Council of Europe and United Nations human rights monitoring mechanisms, with a view to enhancing co-ordination and maximising synergies.

1. Reference to committee: [Doc. 14275](#) Reference 4292 of 30 May 2017.



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A. Draft resolution²

1. The Parliamentary Assembly notes with concern the speeches addressed by Mr Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, to the 33rd, 35th and 38th sessions of the United Nations Human Rights Council, in which he drew attention to difficulties encountered by his own Office and other United Nations human rights monitoring bodies in obtaining access to the territory of numerous States, including certain Council of Europe member States. It recalls that Council of Europe monitoring bodies have encountered similar problems, often in relation to the same situations or geographical locations.

2. The Assembly reaffirms the legal obligations on Council of Europe member States to co-operate fully and in good faith with those international human rights monitoring mechanisms, including those of the Council of Europe and the United Nations, whose mandates they have accepted, in compliance with the established conditions and procedures of the relevant bodies. It deplores all instances of States' failures to co-operate with international human rights monitoring mechanisms and insists that any member State concerned should engage in full, unconditional co-operation without delay. It fully supports the relevant bodies in their efforts to fulfil their mandates.

3. The Assembly considers that activities of human rights monitoring bodies with respect to territories under the control of *de facto* authorities, including their contacts with such authorities and visits to the territories in question, do not constitute and should not be presented as recognition of those authorities' legitimacy under international law. It does, however, consider that exercise of *de facto* authority brings with it a duty to respect the rights of all inhabitants of the territory in question, as those rights would otherwise be respected by the authorities of the State of which the territory is a part; even illegitimate assumption of the powers of the State must be accompanied by assumption of the corresponding responsibilities of the State towards its inhabitants. This includes a duty to co-operate with international human rights monitoring mechanisms. The Assembly also calls on third States which exercise effective control over territories where local *de facto* authorities operate to exercise their influence so as to enable effective monitoring by international human rights bodies.

4. The Assembly welcomes instances where Council of Europe and United Nations monitoring bodies have obtained access to "grey zones" (territories of States within the mandates of those bodies that are under the control of *de facto* authorities). It emphasises that such activity requires a constructive attitude on the part of both the central *de jure* and local *de facto* authorities: in particular, the former must allow a proper dialogue to develop between the monitoring body and the local *de facto* authorities, and the latter must accept that monitoring visits take place in full compliance with the mandate of the relevant monitoring body. The Assembly thus especially welcomes the visits by the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) to Transnistria and Abkhazia and encourages the respective *de facto* authorities, along with the legitimate authorities of the Republic of Moldova and Georgia respectively, to work towards a resumption of CPT monitoring in those territories. It also encourages the *de facto* authorities of South Ossetia to co-operate with the CPT. The Assembly welcomes the willingness of those "grey zones" that have co-operated with the Office of the United Nations High Commissioner for Human Rights and other international human rights monitoring mechanisms aimed at better protection of human rights in conflict zones.

5. The Assembly also supports the efforts of other monitoring bodies to examine the situation in territories to which access has been denied, or allowed only on conditions that would be politically unacceptable or incompatible with the body's mandate. It welcomes the efforts of the Council of Europe's Advisory Committee for the Protection of National Minorities to examine the situation in Crimea following its illegal annexation by the Russian Federation, despite being unable to access the Crimean peninsula. It underlines, however, that such activities, whilst still valuable, cannot fully substitute for monitoring conducted in full compliance with the mandate of the relevant body, including fact-finding visits where relevant.

6. The Assembly favours an approach whereby States are presumed to have consented to visits by human rights monitoring bodies both on a regular basis and in circumstances where there is reason to believe that there are serious violations of fundamental human rights and dignity such as threats to life, torture, inhuman or degrading treatment or denial of basic humanitarian needs. Such a presumption could be made practicable by allowing States to rebut it in exceptional circumstances, for instance where denial of access is necessary for reasons relating to national defence, public safety or serious local public disorder. It would, however, be for the State to raise such objections upon being informed of a monitoring body's intention to visit in circumstances that invoke the presumption of consent.

2. Draft resolution adopted unanimously by the committee on 10 September 2018.

7. The Assembly welcomes the established, ongoing co-operation between Council of Europe and United Nations human rights monitoring bodies, with a view to maximising the impact, efficiency and effectiveness of their respective activities, by benefitting from one another's knowledge, experience and expertise. It encourages all efforts to enhance such co-operation in the future.

B. Draft recommendation³

1. The Parliamentary Assembly recalls its Resolution ... (2018) on unlimited access to member States, including “grey zones”, by Council of Europe and United Nations human rights monitoring bodies.
2. The Assembly calls on the Committee of Ministers to hold an urgent discussion whenever a Council of Europe human rights monitoring body is denied access, or allowed access only on conditions that are politically unacceptable or incompatible with the body’s mandate, to all or part of a member State’s territory. Such a discussion should aim at finding rapid, effective solutions to such situations, where appropriate by applying diplomatic pressure on the responsible authorities, including, where applicable, through the State exercising effective control over a territory and its *de facto* authorities.
3. The Assembly also calls on the Committee of Ministers to consider the introduction within the Council of Europe of a presumption that all member States consent to visits by Council of Europe and United Nations human rights monitoring bodies in circumstances where there is reason to believe that there are serious violations of fundamental human rights and dignity such as threats to life, torture, inhuman or degrading treatment or denial of basic humanitarian needs. Such a presumption could be rebuttable in exceptional circumstances, for instance where denial of access is necessary for reasons relating to national defence, public safety or serious local public disorder. It would, however, be for the State concerned to raise such objections upon being informed of a monitoring body’s intention to visit in circumstances that invoke the presumption of consent.
4. The Assembly further calls on the Committee of Ministers to undertake a detailed, systematic review of the state of co-operation between Council of Europe and United Nations human rights monitoring mechanisms, in co-operation with the United Nations, with a view to enhancing co-ordination and maximising synergies. Such a review should include exploration of possibilities for reinforcing the overall human rights monitoring of “grey zones” (States’ territories that are under the control of *de facto* authorities) within Council of Europe member States, including through joint activities of bodies responsible for monitoring comparable human rights issues, whilst respecting the particularities of those bodies’ mandates, composition, structures and working methods. The review could also engage with relevant monitoring mechanisms of other international organisations, including the Organization for Security and Co-operation in Europe.

3. Draft recommendation adopted unanimously by the committee on 10 September 2018.

C. Explanatory memorandum by Mr Frank Schwabe, rapporteur

1. Introduction

1. On 21 March 2017, I tabled a motion inspired by a speech given by the United Nations High Commissioner for Human Rights, Mr Zeid Ra'ad Al Hussein, to the 33rd session of the Human Rights Council on 13 September 2016. In this speech, Mr Al Hussein expressed his concern at “the growing refusal on the part of an increasing number of [United Nations] Member States” to grant his office, or other human rights mechanisms, access to their countries generally or specific regions of them. These included several examples that concerned Council of Europe member States, in particular south-east Turkey, the Ukrainian region of Crimea (illegally annexed by the Russian Federation), the Georgian regions of Abkhazia and South Ossetia (self-proclaimed States, unrecognised by almost all members of the international community, supported by Russia), the Nagorno-Karabakh region of Azerbaijan,⁴ whose self-proclaimed independence has not been recognised by the international community, under the effective control of Armenia,⁵ and Armenia. The motion then noted that also Council of Europe monitoring bodies, notably the Commissioner for Human Rights, had had difficulties in accessing certain member States or areas. Council of Europe member States should set a positive example in co-operating with all human rights bodies in which they participate and should enable co-operation between Council of Europe and United Nations bodies, to enhance synergies and avoid duplicated efforts. The motion therefore proposed that the Assembly examine ways and means of improving co-operation between human rights monitoring bodies and ensuring their unimpeded access to all parts of our continent.

2. The Assembly referred this motion to the Committee on Legal Affairs and Human Rights on 30 May 2017. I was appointed rapporteur on 9 October 2017. On 18 June 2018, I visited Geneva, where I met the United Nations High Commissioner for Human Rights, Mr Al Hussein. On 28 June, the committee held an exchange of views with Mr Christos Giakoumopoulos, Director General of Human Rights and Rule of Law, Council of Europe.

3. This report addresses three aspects of this situation: first, the extent to which Council of Europe member States do not co-operate with United Nations and Council of Europe human rights monitoring mechanisms, and how the two organisations have responded to this problem; second, existing co-operation between the United Nations and the Council of Europe on issues relating to human rights monitoring; and third, whether and how closer co-operation and co-ordination between the two organisations could reinforce human rights monitoring in problematic situations.

2. Speech(es) of the United Nations High Commissioner for Human Rights to the Human Rights Council

4. In his forceful and passionate speech of September 2016, Mr Al Hussein made several points with which I wholeheartedly agree and that are well worth recalling here. “I am told repeatedly by members of Government ... that human rights are being misused as a pretext for interference in the affairs of sovereign nations... Statements by my Office regarding credible allegations of violations ... are deemed ‘biased’, ‘irresponsible’, ‘misleading’ or based on ‘false’ premises”, he said. We have heard such statements from the authorities and representatives of Council of Europe member States, including within the Assembly. Mr Al Hussein asked the question, of fundamental importance to any international organisation devoted to promoting and protecting human rights, “Are human rights exclusively a national issue? Governments have the responsibility to uphold their human rights obligations and to respect the standards. But the human rights of all people, in all countries, also require – unquestionably – our collective attention.” He then drew a clear conclusion concerning countries that refuse to co-operate with international human rights monitoring mechanisms: “Human rights violations will not disappear if a government blocks access to international observers and then invests in a public relations campaign to offset any unwanted publicity. On the contrary, efforts to duck or refuse legitimate scrutiny raise an obvious question: What, precisely, are you hiding from us?”

5. Mr Al Hussein returned to the theme of access when addressing the 35th session of the Human Rights Council on 6 June 2017. Once again, he deplored Turkey’s denial of his efforts to enquire into allegations of serious violations in the south-east of the country; on the other hand, he welcomed Armenia’s intention to

4. See United Nations Security Council Resolution 884 (1993), 12 November 1993.

5. European Court of Human Rights, *Chiragov and others v. Armenia*, Application No. 3216/05, judgment of 16 June 2015 (Grand Chamber).

upgrade its engagement with his office. He also applauded the fact that Georgia and Italy had both received more than five country visits from holders of Human Rights Council special procedures mandates in the previous five years.

6. On 18 June, the day that I met him, Mr Al Hussein made what will be his final (see next paragraph) address to the Human Rights Council, at its 38th session. He again focused on “the troubling failure by a number of countries to grant access”, which he described as “a serious affront to our work”. He noted that his Office was still denied access to south-east Turkey, although he did note that Turkey had received visits from United Nations bodies dealing with torture, freedom of expression and enforced disappearances in 2016. He deeply regretted that there had been “no progress” in obtaining access to “all protracted conflicts in the South Caucasus”, including by “the authorities in control” of certain parts of Georgia, in the framework of Human Rights Council resolutions. Mr Al Hussein noted that Russia’s replies to requests by his Office, as well as by UN special procedures mandate-holders, to visit Crimea were “incompatible with General Assembly resolutions”, although they did “recognize that international human rights mechanisms must extend their reach to Crimea”. He was also critical of Russia for its formal refusal to respond to any communications from the Human Rights Council’s Independent Expert on sexual orientation and gender identity – despite serious allegations of persecution of the lesbian, gay, bisexual, transgender and intersex (LGBTI) community, especially in the Chechen Republic – as an example of “an approach [that] would eviscerate the meaning of the Council’s decisions”. Mr Al Hussein also mentioned the fact that his Office and mandate holders had been given access to the Transnistria region in the Republic of Moldova.

7. The issue of access was far from the only concern raised by Mr Al Hussein before the Human Rights Council in these speeches, but it is the one that coincides with my own mandate as rapporteur. His overall concerns, relating both to the conduct of States and the possibilities for achieving change through UN bodies, have continued unabated. This situation contributed to his decision not to stand for a second four-year term of office: in an email to the staff of his office, he stated that “in the current geopolitical context, [to do so] might involve bending a knee in supplication; muting a statement of advocacy; lessening the independence and integrity of my voice”.⁶ It is deeply regrettable that such a tireless and fearless promoter and defender of human rights as Mr Al Hussein will step down as High Commissioner, although one hopes that he will be succeeded by someone of the same calibre. What is even more disheartening is that he is stepping down essentially because a large number of States, including members of the Human Rights Council, have persistently failed to live up to their obligations, and because he feels that he lacks the political support to hold those States effectively to account.

8. Two recent examples of Council of Europe member States’ failures to co-operate with mandatory visits by UN treaty monitoring bodies concern the Sub-committee for the Prevention of Torture (SPT), established under the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). In September 2014, the SPT suspended a visit to Azerbaijan after it has been “prevented from visiting several places where people are detained and was barred from completing its work at other sites”, which it considered to amount to “serious breaches of Azerbaijan’s obligations” such that the “integrity of its visit ... had been compromised to such an extent that it had to be suspended”.⁷ In May 2016, the SPT “suspended its visit to Ukraine after being denied access to places in several parts of the country where it suspects people are being deprived of their liberty by the Security Service of Ukraine”, including “some places where we have heard numerous and serious allegations that people have been detained and where torture or ill-treatment may have occurred”; again, the SPT “concluded that the integrity of the visit ... had been compromised to such an extent that it had to be suspended as the SPT mandate could not be fully carried out”.⁸ Although both visits were subsequently able to proceed with unhindered access, the activities of detention-monitoring bodies such as the SPT (and the Council of Europe’s European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)) depend on being able to conduct unannounced, unhindered visits to all places where persons may be deprived of their liberty; obstruction and delay undermine the effectiveness of detention monitoring by allowing an opportunity to improve conditions and remove any evidence of ill-treatment.

9. A 2016 study presented data that underlines the High Commissioner’s concerns as regards the activities of Human Rights Council special procedures. Between 2006, when the Human Rights Council was established, and 2015, there was a significant increase in the number of completed country visits by the various special procedures. At the same time, however, the number of “requested” country visits (requested

6. “U.N. Human Rights Chief to Leave, Citing ‘Appalling’ Climate for Advocacy”, *Foreign Policy*, 20 December 2017.

7. “Prevention of Torture: UN human rights body suspends Azerbaijan visit citing official obstruction”, Office of the High Commissioner for Human Rights (OHCHR), 17 September 2014.

8. “UN torture prevention body suspends Ukraine visit citing obstruction”, (OHCHR), 25 May 2016.

but not yet agreed to, undertaken or completed) also increased substantially; in 2015, there were almost as many “requested” as “completed” visits. This study, and data available on the OHCHR website, show that the number of States that have extended “standing invitations” to all thematic special procedures has also increased substantially; by 5 July 2018, all Council of Europe member States other than Russia had extended standing invitations. Whilst this is to be welcomed, the 2016 study notes that “many States [that have extended a standing invitation] reject, ignore or delay ... requests” to visit.⁹

3. The situation in the Council of Europe

10. Mr Al Hussein mentioned several territories within the Council of Europe area known to be problematic from the perspective of human rights protection and accountability: south-east Turkey, Crimea, Abkhazia, South Ossetia and Nagorno-Karabakh. Apart from south-east Turkey, all of these have the common characteristic of being territories where local claims of sovereignty are disputed, either because their self-declared independence has not been recognised by the international community or, in the case of Crimea, because they have been illegally annexed by another country. One should add to this list of problematic territories the northern part of Cyprus, whose self-declared independence is recognised only by Turkey; Transnistria, recognised only by the *de facto* authorities of Abkhazia, South Ossetia and “Artsakh” (Nagorno-Karabakh); Kosovo*,¹⁰ recognised by a majority of Council of Europe member States; and the self-proclaimed Donetsk and Luhansk “People’s Republics” in eastern Ukraine, both of which are recognised only by the *de facto* authorities of South Ossetia. When it comes to human rights monitoring by the Council of Europe, however, there are important distinctions to be drawn between these different territories, which I shall examine below.

11. The situation in the Russian Federation is also complicated, in particular as regards monitoring by the Commissioner for Human Rights and the Parliamentary Assembly. The Commissioner for Human Rights cancelled his October 2016 visit to Russia in response to “unacceptable restrictions imposed to his programme” and has not visited the country since. This has not prevented him from engaging with issues concerning Russia, including through statements, articles and third-party interventions before the European Court of Human Rights (“the Court”). Such actions do not, however, constitute effective monitoring by the Commissioner, as foreseen in his mandate. As for the Assembly, its ability to engage with the Russian authorities and thereby contribute to implementation of Council of Europe human rights standards in the North Caucasus or in relation to the murder of Boris Nemtsov, for example, has since April 2014 been severely hampered by the Russian parliament’s decisions not to co-operate with the Assembly and, since January 2015, not to send a delegation.

12. Although the Court, through its doctrine of extraterritorial jurisdiction based on exercise of effective control, has ensured that individual applicants and States can bring cases from or concerning “grey zones”, problems may arise in relation to implementation of the Court’s judgments. In relation to Transnistria, for example, Russia consistently claimed to be unable to implement the *Ilascu* judgment, despite the Court having found that Russia exercised extraterritorial jurisdiction over the region.¹¹ As regards other judgments concerning Transnistria, however, the Council of Europe enjoys much better co-operation with both Russia and the Republic of Moldova, with regular meetings to discuss progress.¹² In contrast to its position on the *Ilascu* judgment, Russia has expressed its willingness to implement Court judgments relating to Simferopol in Crimea delivered prior to its illegal annexation, even though the respondent and still sovereign State is Ukraine. Whilst this may be of potential advantage to respect for human rights in Crimea, for the Council of Europe it is legally and politically extremely problematic.

13. In principle, the Commissioner for Human Rights represents the most flexible monitoring mechanism. Commissioners Gil Robles and Hammarberg both visited the Northern Caucasus; Commissioner Muižnieks did not, although he addressed issues relating to the region in other ways.¹³ Successive Commissioners have also visited and reported on Kosovo.¹⁴ As part of his visit to Cyprus, on which he reported in 2004, Commissioner Gil Robles addressed the situation in the northern part of the island.¹⁵ Commissioner

9. “Country-specific scrutiny at the United Nations Human Rights Council: more than meets the eye”, Ted Piccone and Naomi McMillen, Project on International Order and Strategy at Brookings, May 2016.

10. * All reference to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

11. *Ilascu and others v. Moldova and Russia*, Application No. 48787/99, judgment of 8 July 2004 (Grand Chamber).

12. For example, International Conference, “Enforcement of the European Court of Human Rights’ Decisions Originating from the Transnistrian Region of the Republic of Moldova”, Chisinau, Republic of Moldova, 19 February 2018.

13. For example, his public statement, “Russia must shed full light on attacks against journalists and human rights defenders in Ingushetia”, 10 March 2016.

Hammarberg met the *de facto* authorities of South Ossetia and Abkhazia when he visited in 2007,¹⁶ and was particularly active in the aftermath of the 2008 South Ossetia conflict, when he proposed “six principles for protection of the victims” and facilitated a number of prisoner exchanges.¹⁷ In January 2012, Commissioner Hammarberg visited Transnistria “to discuss with the *de facto* authorities ... and representatives of the human rights structures pressing issues affecting the protection of the rights of the people living in the region”.¹⁸ Commissioner Muižnieks also visited Transnistria in October 2017, as part of a visit to the Republic of Moldova.¹⁹ In September 2014, Commissioner Muižnieks visited Kyiv, Moscow and Simferopol when preparing the first *in situ* assessment by an international institution of the human rights situation in Crimea since March 2014.²⁰

14. The CPT has been able to visit several “grey zones”. In 2000, 2003 and 2006, for example, it conducted successful visits to Transnistria. Interestingly, the report of the 2000 visit was published with the agreement of “the Moldovan Government and the local authorities of the Transnistrian region of the Republic of Moldova”, and included responses only from the latter.²¹ In 2010, however, the CPT interrupted its visit to Transnistria following the local authorities’ refusal to allow its members to speak to remand prisoners in private; this issue has still not been resolved, and no further visits have taken place.²² Following contacts with the Georgian Government and the *de facto* authorities of Abkhazia, the CPT also made a visit to Abkhazia in 2009, on which it reported to Georgia.²³ During this period, the CPT also had contacts with the *de facto* authorities of South Ossetia, but has not yet visited this territory. The CPT was also able to visit Kosovo from 2006 onwards following agreement with the UN Interim Administration Mission in Kosovo (UNMIK) and an exchange of letters with the Secretary General of the North Atlantic Treaty Organization (NATO). Visits took place in 2007, 2010 and 2015, with reports to and responses from, formally, UNMIK, despite the evolution in the local political and administrative situation following the February 2008 declaration of independence and the beginning of the operations of the European Union Rule of Law Mission in Kosovo (EULEX) in December 2008.²⁴ The CPT was also able to visit Chechnya several times during the period of the conflict and anti-terror operation (1999-2009), including in 2001, 2002 and 2003, with visits to the wider North Caucasus in 2004, 2006 and 2008; unfortunately, Russia has not authorised publication of reports on any of these visits, although the CPT was able to make known some of its findings by way of exceptional public statements in 2001, 2003 and 2007. As regards CPT monitoring of “grey zones”, CPT member Costakis Paraskeva has suggested two preconditions: the *de jure* authorities of the State Party must facilitate the CPT’s work by allowing a proper dialogue to develop between the CPT and the *de facto* authorities before, during and after the visit; and the *de facto* authorities must accept all of the CPT’s prerogatives, even if they do not consider themselves formally bound by the relevant treaty provisions.²⁵

14. “Kosovo: the human rights situation and the fate of persons displaced from their homes”, CommDH(2002)11, 16 October 2002 (Commissioner Gil Robles); “All people in Kosovo should benefit from European standards of human rights protection”, says Commissioner Hammarberg on publishing his report”, 2 July 2009; and “Commissioner Hammarberg calls for stop of forced returns and immediate evacuation of Roma from lead-contaminated camps”, 15 October 2010; and “Kosovo: High time to restore social cohesion and safeguard media freedom”, 9 February 2017 (Commissioner Muižnieks).

15. CommDH(2004)2.

16. “Commissioner for Human Rights concludes visit to Georgia and conflict zones”, 21 February 2007.

17. “Human rights and humanitarian principles have been seriously violated in the South Ossetia conflict, reports Thomas Hammarberg after an eight-day mission. He proposes six principles for protection of the victims”, Commissioner for Human Rights, 5 September 2008; “Georgia: 17 detainees exchanged through good offices of Commissioner Hammarberg”, 25 August 2008.

18. “Sustained efforts needed to ensure effective protection of human rights of persons living in the Transnistrian region”, Commissioner for Human Rights, 18 January 2012.

19. “Republic of Moldova: important advances on addressing domestic violence, but more progress needed in justice reform”, 13 October 2017.

20. “In Crimea serious human rights violations and attacks on journalists require urgent action”, 27 October 2014.

21. CPT/Inf(2002)35. Reports on the other visits have not been published.

22. “Council of Europe anti-torture Committee interrupts visit to the Transnistrian region of Moldova”, 30 July 2010. Following his visit to Tiraspol in October 2017, the Commissioner for Human Rights called on the *de facto* authorities of Transnistria “to resume co-operation with the CPT by extending the possibility for CPT delegations to carry out visits in full compliance with their mandate”: “Republic of Moldova: important advances on addressing domestic violence, but more progress needed in justice reform”, 13 October 2017.

23. CPT/Inf(2009)38.

24. CPT/Inf(2009)3, CPT/Inf(2011)26 and CPT/Inf(2016)23 (reports); CPT/Inf(2009)4, CPT/Inf(2011)27 and CPT/Inf(2016)24 (responses).

25. Presentation at the Conference on Human Dignity in Times of Conflict and Crisis, 26-27 May 2017, Nafplion, Greece.

15. The Advisory Committee for the Protection of National Minorities established under the Framework Convention for the Protection of National Minorities (ETS No. 157) has found ways to report on certain “grey zones”. Under a 2004 agreement between the Council of Europe and UNMIK, the Advisory Committee began monitoring implementation of the Framework Convention in Kosovo, since when four reporting cycles have been completed, in 2005, 2008, 2012 and 2016, with reports and comments on the Advisory Committee’s opinions formally presented by UNMIK. In 2014, the Advisory Committee issued an Ad hoc Report on the situation of national minorities in Ukraine, with particular attention to the situation of Crimean Tatars following the illegal annexation of Crimea by Russia; the delegation did not visit Crimea itself, instead meeting Crimean Tatar representatives in Kyiv and Odessa.²⁶

16. In January 2016, at the request of Secretary General Jagland, Ambassador Gérard Stoudmann of Switzerland conducted the first visit by an international human rights delegation to Crimea for 18 months. The resulting report did not deal with status issues, whilst recalling that the Council of Europe fully respected the territorial integrity of Ukraine. It addressed “issues relating to standards and commitments enshrined in the European Convention on Human Rights (ETS No. 5), as well as recommendations and proposals for possible rapid action, for the attention of the Secretary General”. These issues concerned law enforcement, enforced disappearances, the judiciary, penitentiary establishments, the situation of Crimean Tatars and other minorities, freedom of religion, freedom of expression and media freedom, freedom of association and assembly, education and humanitarian issues.²⁷

17. Mr Giakoumopoulos emphasised that the problematic “grey” or conflict zones are very diverse and that there is no “one-size-fits-all” solution. Obtaining access for monitoring mechanisms to disputed areas outside the control of the legitimately competent authorities involves various practical or political (although only rarely security) problems. Some problems are both practical and political. The geographical route taken to enter a territory, for example, is both; entry via the sovereign territory’s border with a neighbouring country at a point that is under the control of *de facto* authorities could be seen as recognition of the legality of their authority to control access to or movement within the disputed territory. Similarly, contacts with *de facto* authorities to prepare a visit could also be represented as a form of recognition. Where Council of Europe bodies have managed to obtain access to “grey” zones, this has often been achieved through close co-operation with other international organisations already present on the ground, including in different cases the United Nations, the Organization for Security and Co-operation in Europe (OSCE) and the European Union.

18. As regards treaty-based monitoring – the predominant model of Council of Europe monitoring – the *de facto* authorities would not be legally bound by the relevant treaty. Dialogue between the *de facto* authorities and the monitoring body could not therefore be based on the treaty as such but only on specific technical concerns and arrangements. In cases such as the CPT, whose work requires full and unimpeded access to all places of deprivation of liberty, satisfactory agreements could be difficult to reach, including, for instance, agreements on the immunities of the members and collaborators of the monitoring team. Ad hoc fact-finding visits may be possible but would not be the same, as they would not involve the same process of verification of fulfilment of treaty obligations, followed by recommendations to improve implementation of specific binding standards.

19. Monitoring bodies generally report to States Parties, but where a visit concerns specifically a region outside the control of the State Party’s authorities, a report to the *de facto* authority could be seen as a form of recognition. Moreover, monitoring bodies’ reports also often include replies by the national authorities, but a *de facto* authority’s reply would have no legal basis. Publication of CPT reports in particular requires the authorisation of the State Party; again, this situation is complicated in the case of a visit to a region controlled by a *de facto* authority and has a political dimension: seeking or relying on the *de facto* authority’s “authorisation” as a basis for publication would have no legal basis in the treaty and could be taken as a sign of recognition. The language used to describe the status of territories and authorities in reports, as well as during preparatory contacts, is a crucial element, always very sensitive and often extremely difficult.

20. Human rights monitoring is not equivalent to one-off, ad hoc humanitarian visits; it is about governance, rights and the implementation of legal standards and remedies. Human rights monitoring is closely linked to rule of law issues and aims at improving the situation of the residents of a territory. Monitoring recommendations often contain proposals for normative changes, development of human rights compatible practices and setting up new institutions. In the case of “grey zones”, however, such proposals may create tensions with *de jure* authorities who try to prevent even the appearance of a recognition by an international organisation of the legality of *de facto* authorities. By contrast, where the *de jure* central authorities have a

26. ACFC(2014)001.

27. SG/Inf(2016)15 rev, 11 April 2016.

political interest in rapprochement with the *de facto* authorities, the work of monitoring bodies and their reports and recommendations can become a useful tool for further progress in building confidence and peace on the basis of and in guaranteeing respect for human rights.

21. At a conference on “Human Dignity in times of conflict and crisis – Human Rights and Humanitarian law at a crossroads” (Nafplion, Greece, 26-27 May 2017), Mr Giakoumopoulos’ predecessor as Director General, Mr Philippe Boillat, gave a speech in which he proposed a solution to obstacles faced by monitoring bodies’ interventions in “grey zones”. Drawing on the example of Crimea, Mr Boillat observed that access depended on State consent, in the absence of which no monitoring body – whether one that depended on consent, such as the European Commission against Racism and Intolerance (ECRI), or one whose mandate included no legal requirement of consent, such as the CPT, which had a right to visit all places of detention during peace time, conflict or state of emergency – had visited Crimea since 2014. Mr Boillat argued that the principle of collective responsibility should outweigh a State’s withholding of consent when human dignity was at stake, giving rise to a “presumption of State consent” to intervention by Council of Europe monitoring bodies. At present, non-consent, whatever its justification, prevented any Council of Europe intervention in contested areas. A presumption of consent, even if rebuttable, would reverse this tendency, at least in the most serious cases of violations of human dignity such as threats to life, torture, inhuman or degrading treatment or denial of basic humanitarian needs. From this perspective, Article 9 of the European Convention for the Prevention of Torture (ETS No. 126) was illuminating, as it permitted a State to object to the time or place of a CPT visit “in exceptional circumstances ... only ... on grounds of national defence, public safety, serious disorder in places [of detention], the medical condition of a person or that an urgent interrogation relating to a serious crime is in progress”.

4. Co-operation between Council of Europe and United Nations human rights mechanisms

22. It is enough to read the preambles of the 1945 Charter of the United Nations and the 1949 Statute of the Council of Europe (ETS No. 1) – both of which confirm a commitment to peace, democracy, human rights and the rule of law – to see the parallels between the two organisations’ essential missions. Their synergistic, mutually reinforcing relationship is illustrated in the preamble to the 1950 European Convention on Human Rights, which resolves “to take the first steps for the collective enforcement of certain of the rights stated in” the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948. Relations between the two organisations are based on an agreement between their respective secretariats signed on 15 December 1951 and an exchange of letters of 19 November 1971 concerning arrangements on co-operation and liaison. Since then, a series of other agreements and memoranda of understanding have been signed by the Council of Europe and various UN bodies, amongst which the Office of the High Commissioner for Human Rights (OHCHR), the Office of the United Nations High Commissioner for Refugees (UNHCR), UNICEF and UN Women. UN bodies also have the possibility of participating in various Council of Europe expert committees: the Office of the High Commissioner for Human Rights, for example, can participate in meetings of the Steering Committee for Human Rights (CDDH), the Ad hoc Committee of Experts on the Rights of Persons with Disabilities (CAHDPH), the Ad hoc Committee of Experts on Roma and Traveller Issues (CAHROM) and the Ad hoc Committee for the Rights of the Child (CAHENF).²⁸

23. High-level contacts have continued to the present day: for example, on 12 February 2015, the United Nations High Commissioner for Human Rights, Mr Al Hussein, addressed the Committee of Ministers; on 23 June 2015, United Nations Secretary General Ban Ki-moon addressed the Parliamentary Assembly; and on 15 February 2018, the President of the UN Human Rights Council, Mr Vojislav Šuc, addressed the Committee of Ministers. Likewise, the Secretary General of the Council of Europe has addressed UN bodies, including the “High-level segment” of the Human Rights Council in 2016. Contacts and information exchanges are also facilitated by common member States’ diplomatic services; for example, on 9 February 2018, the Icelandic ambassador to the United Nations and chair of the Third Committee of the General Assembly, which deals with human rights issues and receives reports of the Human Rights Council’s special procedures, presented an information note to the Committee of Ministers on the Third Committee’s work during the General Assembly’s 72nd Session.²⁹

28. The CDDH falls within the Directorate-General of Human Rights and Rule of Law (DG-I); the other three committees fall within the Directorate-General of Democracy (DG-II), as do, for example, certain monitoring mechanisms, including the Advisory Committee on the Protection of National Minorities and ECRI.

29. CM/Inf(2018)3.

24. Every other year, the UN General Assembly adopts a resolution on “co-operation between the United Nations and the Council of Europe”, based on a draft adopted by the Council of Europe Committee of Ministers, whose chair tables it in New York. The most recent resolution, from 2016, begins by reiterating the General Assembly’s “call for the reinforcement of co-operation between the United Nations and the Council of Europe regarding the protection of human rights and fundamental freedoms, the promotion of democracy and the rule of law and good governance at all levels”. The resolution, whilst somewhat generalistic, nevertheless gives an overview of some of the practical co-operation activities between the two organisations. Amongst other things, it encourages further co-operation between the two organisations’ mechanisms on the prevention of torture, in the fight against trafficking in human beings, on children’s rights, on gender equality, and on freedom of expression, new media and the information society, as well as with the UN High Commissioner for Refugees. The 2016 resolution also notes “the contribution of the Council of Europe to the universal periodic review [conducted by the UN Human Rights Council] regarding the situation of human rights in States members of the Council of Europe” and “the effective implementation of the joint declaration on the reinforcement of co-operation between the secretariat of the Council of Europe and the Office of the United Nations High Commissioner for Human Rights [signed on 26 September 2013]”, and encourages further co-operation between the United Nations, “including the Human Rights Council, its special procedures, the Office of the United Nations High Commissioner and the human rights treaty bodies, and the Council of Europe, along with its Commissioner for Human Rights, with regard to promoting and ensuring respect for human rights and the role of human rights defenders”.³⁰

25. In addition to its direct contribution to the UN Human Rights Council’s Universal Periodic Review, the Council of Europe also contributes to implementation of the United Nation’s “2030 agenda for sustainable development goals”. A document on the Council of Europe’s website lists relevant activities, including on access to justice, constitutional justice, corruption, co-operation against cybercrime and anti-money laundering and on combating the financing of terrorism, freedom of expression, anti-discrimination and promotion and protection of civil society.³¹

26. At their June and July 2018 meetings respectively, the UN SPT and the Council of Europe CPT “decided to reinforce complementarity and subsidiarity to reflect their respective strengths and added values”. Particularly welcome from the perspective of the present report was the SPT’s decision “to pay special attention to the potential for complementary and strengthening activities in those countries where there have been serious failures of co-operation with the CPT”. As the Chairs of the two bodies said, “[ensuring] that the SPT, the CPT and NPMs [national preventive mechanisms] are able to consult each other’s visit reports even before their publication. It is one of the best ways of avoiding duplication, ensuring coherence and enhancing the effectiveness of preventive mechanisms in Europe”. I fully endorse this statement.

27. Although relating to synergies between international bodies monitoring anti-corruption measures, rather than human rights, a recent study by the Council of Europe’s Group of States against Corruption (GRECO) indicates a series of issues that would be equally relevant to many forms of human rights monitoring.³² This notes that whilst (international anti-corruption) monitoring bodies review and assess the implementation of corresponding legal instruments, there are objective differences in how they operate, notably: different legal frameworks; different topics covered by current evaluation cycles, and different timing of cycles; different membership and geographical scope; different composition of plenaries and country delegations; and different mandates, for example inclusion or not of technical assistance. The study also suggests possible measures for enhancing co-operation (concerning, for example, country visits, responses to a State’s non-compliance, drafting of evaluation questionnaires and sharing of information and expertise), co-ordination of organisational aspects (for example annual programmes of visits), data collection and exchange, and training of experts and staff. Again, it is easy to see how such measures would also be applicable to most, if not all human rights monitoring bodies.

28. Clearly, therefore, the two organisations share many common goals, maintain ongoing activities in many of the same areas and often have comparable bodies performing similar functions. The example of the CPT and SPT shows that there may always be scope for further enhancing co-operation and synergies, and the example of GRECO provides an analytical framework for determining whether and how that might be achieved. I would encourage the Council of Europe to explore these possibilities systematically for all human rights monitoring mechanisms that have not yet or have recently engaged in such an exercise, which could be extended also to comparable mechanisms of other international organisations, including the OSCE.

30. “Cooperation between the United Nations and the Council of Europe”, A/RES/71/17, 7 December 2016.

31. <https://www.coe.int/en/web/un-agenda-2030/home>.

32. “Enhancing synergies amongst international anti-corruption monitoring bodies (CoE/GRECO, OAS, OECD, UNODC), Greco(2018)3-fin, 22 June 2018.

5. Conclusions and recommendations

29. The speeches by the United Nations High Commissioner for Human Rights paint an alarming picture of rejection by many States of independent monitoring by UN-mandated human rights mechanisms, beginning with his own Office. From a Council of Europe perspective, it is particularly disquieting to see that some of our own member States have failed to co-operate fully with UN mechanisms. On the other hand, there is some reassurance to be had in the fact that several Council of Europe mechanisms, notably the European Court of Human Rights, the Commissioner for Human Rights and the CPT, have been able to address the human rights situation in “grey zones” and other problematic territories, even if the geographical and institutional coverage remains incomplete.

30. It is also encouraging to see that the institutional basis for co-operation between the two organisations is long-standing and reasonably well developed, at least in principle. There is a clear recognition by both organisations that they share common goals, which has led to development of a wide-ranging system of agreements, contacts and co-operation activities. What is less clear, however, is the extent to which this includes human rights monitoring. Indeed, the extent to which co-operation in this area is practicable or legally feasible is uncertain: for example, the CPT works on the basis of confidentiality, which may be difficult to maintain should “outsiders” be involved in the reporting process. Given the recent agreement between the CPT and the SPT and study of co-operation between anti-corruption bodies, which led to several interesting, substantive proposals for possible improvement, organisations such as the Council of Europe, the United Nations and, potentially, others (such as the OSCE), should examine all possibilities for enhancing co-operation, in the interests not only of more effective overall human rights monitoring but also making the most efficient possible use of the resources that States make available to them for this purpose.

31. Given the situation concerning both lack of co-operation with international human rights monitoring mechanisms and the possibility of enhanced co-operation between comparable monitoring mechanisms of different international organisations, I would propose a series of conclusions and recommendations as set out in the draft resolution and draft recommendation.

Appendix – Dissenting opinion³³ by Mr Mustafa Yenerçolu (Turkey, FDG), member of the committee

This dissenting opinion aims to clarify certain arguments made in the report. Herewith I present my own perspective on these given issues.

As a party to the main UN Conventions in the field of human rights, Turkey maintains its uninterrupted constructive co-operation with all UN mechanisms on human rights, including treaty-based bodies and special procedures. In this context, Turkey submits its country reports to the relevant Committees and pays attention to maintain interactive dialogue with all UN Committees.

Having been one of the 116 countries offering an open invitation to the UN special procedures since 2001, Turkey co-operates closely with the thematic rapporteurs. In this context, Turkey has accepted all recent visit requests and necessary scheduling has been made for each one.

It is astonishing to see the claim in the report of the former UN High Commissioner for Human Rights that his efforts to have access to southeast Turkey were denied.

Mr. Zeid Ra'ad Al Hussein was invited to come to Turkey on many occasions. In addition to formal invitations extended to him this invitation was also announced publicly. The invitation was for a visit covering also the south-eastern part of Turkey, if he so wished. He turned down all these invitations.

There is no restriction to visit any part of our country including southeast Turkey. I can give many examples of visits by international mechanisms to Turkey over the last two years:

(Secretary General of the Council of Europe [three times- August and November 2016, February 2018]; European Committee for the Prevention of Torture (CPT) [three times, April 2016, September 2016, May 2017]; OSCE-ODIHR Referendum Observation Mission and PACE Monitoring Committee [March/April 2017], Delegation of the Venice Commission [February 2017]; PACE rapporteurs for the monitoring of Turkey [January 2017], Congress of Local and Regional Authorities rapporteurs for the monitoring of Turkey [December 2016]; PACE Rapporteur Raphael Comte [November 2017], UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression [October 2016]; UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment [November/December 2016]; the UN Working Group on Enforced or Involuntary Disappearances [March 2016], Commissioner for Human Rights of the Council of Europe [April 2016], UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context [Invited])

The international organisations operating in the field of human rights can easily visit the South-Eastern Anatolia Region. In that period of time, in March 2016, the UN Working Group on Enforced or Involuntary Disappearances, and in April 2016, Nils Muižnieks, Commissioner for Human Rights of the Council of Europe which is one of the main pillars of the European human rights mechanisms, visited South-Eastern Anatolia and held discussions with his contacts.

33. Rule 50.4 of the Assembly's Rules of Procedure: "The report of a committee shall also contain an explanatory memorandum by the rapporteur. The committee shall take note of it. Any dissenting opinions expressed in the committee shall be included therein at the request of their authors, preferably in the body of the explanatory memorandum, but otherwise in an appendix or footnote."