

## MISSION IMPOSSIBLE? ADDRESSING NON-EXECUTION THROUGH INFRINGEMENT PROCEEDINGS IN THE EUROPEAN COURT OF HUMAN RIGHTS

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**Abstract** Non-execution of the judgments of the European Court of Human Rights is a matter of serious concern. In order to address it, the reasons for and dynamics of non-execution need to be fully considered. This paper engages with non-execution by sketching the underpinning issues that help to explain it and, we argue, must shape our responses to it. Through this engagement, we conclude that non-execution is properly understood as a phenomenon that requires political rather than legal responses. This calls into question the usefulness of the infringement proceedings contained in Article 46(4) of the Convention and which it has recently been suggested ought to be embraced in attempts to address non-execution. We argue that, even if the practical difficulties of triggering Article 46(4) proceedings could somehow be overcome, the dynamics of non-execution suggest that such proceedings would be both futile and counterproductive, likely to lead to backlash against the Court and unlikely to improve States' execution of its judgments.

**Keywords:** European Convention on Human Rights, European Court of Human Rights, execution of judgments, infringement proceedings, law reform, legitimacy.

### I. INTRODUCTION

Although judgments of the European Court of Human Rights (the ECtHR or the Court) are expressly binding on the parties to which they are addressed,<sup>2</sup> and are generally complied with,<sup>3</sup> they are not *always* executed by the Contracting

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<sup>2</sup> Art 46(1) ECHR.

<sup>3</sup> According to the annual report for 2015 the Committee of Ministers closed 1537 cases that have been executed by the Contracting Parties. During the same year only 1285 cases were received for execution. There is a major backlog of cases (over 10,000) but the tendency is positive. Moreover, not all of these cases are problematic in terms of execution; some of them simply require time to be implemented, but do not attract any dispute as to execution from the State in question. See more in 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights. 9th Annual Report of the Committee of Ministers', <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168062fe2d>> 58–60.

Parties, a state of affairs that causes some considerable unrest. It has recently been suggested that non-execution might effectively be addressed through the use of Article 46(4), the infringement proceeding within the Convention.<sup>4</sup> Were this recommendation to be embraced, it would be a significant shift in attempts to secure execution under the European Convention on Human Rights (the ECHR or the Convention), from the political to the judicial.

While we accept the worrying nature of non-execution for both the Court and the protection of rights in Europe more broadly, and share widespread concern about non-execution, we caution against the use of Article 46(4) ECHR as a response.<sup>5</sup> This caution emanates from a simple concern that the infringement procedure in Article 46(4) is an ill-suited ‘solution’ to a real, but ultimately political, problem.<sup>6</sup> While this paper most directly addresses the (un)suitability of Article 46(4) to resolve non-execution, its broader point—that non-execution cannot properly be addressed unless we understand its nature and implications—is of wider relevance to debates about execution.

Thus, we begin by making clear what is at stake in non-execution, stressing the implications for both the legitimacy and the effectiveness of the Convention system. Then, having outlined the working of the system at present and the nature of the cases before the Committee of Ministers, we turn to considering the dynamics and nature of non-execution. Here we make clear that not all cases of non-execution are the same; rather, we claim that some can be said to emanate from principle, and others from dilatoriness.<sup>7</sup> This is not to suggest that some are ‘more’ worrying than others, but rather to illustrate the point that non-execution is a complex and polycentric problem likely to withstand ‘simple’ solutions.

Having thus ‘set up’ the problem of non-execution we move to consider the proposed solution. We argue that it fails to account for the nature and dynamics of non-execution, and that Article 46(4) cannot effectively address non-execution. Instead, it is our contention that relying on infringement proceedings would both further overburden the Court *and* exacerbate some of the tensions about international judicial supervision that underpin non-execution in the first place. It would, thus, be a counterproductive and ultimately unsuccessful approach to

<sup>4</sup> K de Vries, ‘Implementation of Judgments of the European Court of Human Rights’ (PACE, Report, 9 September 2015, Doc 13864) <[www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=22005&lang=en](http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=22005&lang=en)>.

<sup>5</sup> *ibid.*  
<sup>6</sup> In a recently published report of the Council of Europe on the long-term future of the ECtHR the Steering Committee for Human Rights (CDDH) has acknowledged that ‘[t]he implementation of some judgments is problematic for reasons of a more political nature’. ‘CDDH Report on the Longer-Term Future of the System of the European Convention on Human Rights’ <[http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/CDDH%282015%29R84\\_Addendum%20L-EN-Final.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/CDDH%282015%29R84_Addendum%20L-EN-Final.pdf)> para 134.

<sup>7</sup> The members of the Steering Committee for Human Rights came to a similar conclusion that non-execution is caused by either political reasons or by the complexity of execution. *ibid* para 134–5. Although we acknowledge that some delays in execution can be caused by complexity of the measures that should be adopted by the Contracting Parties complexity is not determinative of the effort Contracting Parties give to execution. Therefore, categorization of non-execution below into principled non-execution and dilatoriness is more appropriate for the purposes of this paper.

addressing the serious problem of non-execution; a problem, we claim, that is properly construed as political rather than legal.

## II. THE PROBLEMATIC NATURE OF NON-EXECUTION

Quite beyond the (not insignificant) fact that an unexecuted judgment means that serious rights violations remain unaddressed in a Contracting Party to the Convention, non-execution raises concerns as to the legitimacy and effectiveness of the ECtHR and, indeed, the interaction between the two.<sup>8</sup> Although effectiveness (in the sense of achieving established objectives) and legitimacy are not necessarily synonymous, it is true that the effectiveness of a system can point to its perceived legitimacy on the part of relevant stakeholders. In other words, it can suggest that the system in question ‘works’ because it is perceived as legitimate in terms of input, output and outcome (or a combination of the three).<sup>9</sup> In a relatively straightforward if somewhat simplistic sense, the aim of the Court is to resolve disputes as to alleged rights violations by producing authoritative judgments that are routinely executed by the Contracting Parties. Should judgments remain unexecuted, the Court will not have effectively interpreted, adjudicated upon, and ensured compliance with rights as protected by the Convention.

Quite beyond the instinctive general statement that routine execution may point to perceived legitimacy, it is possible to articulate two particular legitimacy implications of non-execution. First, perceived illegitimacy on the part of the Court may result in its judgments themselves being seen as illegitimate. This in turn can underpin a (political) claim from a Contracting Party that a judgment need not be executed, notwithstanding the clear *legal* obligation to do so. As further considered below, the UK’s non-execution seems to rest on such an implicit (and sometimes explicit) (il)legitimacy claim, namely that the Court is interpreting the Convention beyond its original intended meaning to an extent that exceeds the original consent of States (ie is exercising judicial power illegitimately) *and* is failing to take proper account of domestic judicial and democratic processes of decision-making in respect of these kinds of rights disputes (ie is not respecting its subsidiarity and thus is acting illegitimately). Thus, this claim relates to both input and output legitimacy as commonly understood.

<sup>8</sup> See H Keller and C Marti, ‘Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights’ Judgments’ (2015) 26 EJIL 829, 830; C Hillebrecht, ‘Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals’ (2009) 1 Journal of Human Rights Practice 362.

<sup>9</sup> On the interaction of these elements in theories of democratic legitimacy see, for example, Y Chistyakova, ‘Democratic Legitimacy, Effectiveness, and the Impact of EU Counter-Terrorism Measures’ in F de Londras and J Doody (eds), *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism* (Routledge 2015) 114.

The second connection between ineffectiveness of execution and legitimacy relates to outcome legitimacy: an ineffective Court cannot protect rights properly (ie by ensuring remedial action at individual and/or systemic levels in the Contracting Party). Thus, while its process and outcome (judging and judgment) might be seen as legitimate, institutional legitimacy might be diminished by the sense that the Court simply ‘does not work’. This is notwithstanding that fact that in the context of the ECHR this is more accurately stated as ‘the system does not work to effectively protect rights’, where the system comprises Contracting Parties (that violate rights), the Committee of Ministers (that fails to ensure execution), and the Court (whose judgment is not executed).

Bearing all of this in mind, it is apposite to note that, in fact, the ECtHR enjoys a high level of compliance with its judgments when compared with other regional or global human rights tribunals.<sup>10</sup> However, non-execution is a persistent challenge. Before exploring the system for supervising execution and the dynamics of non-execution, it is useful to consider the types of cases under the supervision of the Committee of Ministers. In doing so, some simplification is necessary, but bearing this in mind these cases can be divided into three broadly-drawn types, determined by the stage of execution, and the sensitivity and resource implications of the cases. These are ‘simple’ cases, resource-intensive cases, and politically sensitive cases. As will readily be seen, the real challenge of non-execution relates to cases that fall into the latter categories.

The Committee of Ministers of the Council of Europe recognizes that some cases are ‘simple’ and thus that its limited resources should not be primarily spent on these cases. Here ‘simple’ does not refer to the facts of the case or the complexity of the reasoning but *purely* refers to the execution measures. This is reflected in the working methods of the Committee of Ministers. In 2011, supervisory procedures were divided into two broad categories: standard supervision and enhanced supervision.<sup>11</sup> Most if not all cases that we call ‘simple’ would fall under standard supervision. In contrast, the enhanced procedure is used where the Committee of Ministers or the Court has identified a structural or complex problem, as well as those cases in

<sup>10</sup> About 60 per cent of all leading cases are executed in under five years, of which more than 20 per cent are executed within two years. ‘Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights. 9th Annual Report of the Committee of Ministers’ (n 3) 75. Although similar statistics are not available for the Inter-American Court of Human Rights (IACtHR), it has been pointed out that the compliance rate with their judgments is not particularly high. See, for example, S Dothan, *Reputation and Judicial Tactics. A Theory of National and International Courts* (Cambridge University Press 2015) 55; L Burgorgue-Larsen and A Úbeda de Torres, *The Inter-American Court of Human Rights: Case-Law and Commentary* (Oxford University Press 2013) 213.

<sup>11</sup> ‘Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights. 8th Annual Report of the Committee of Ministers (2014)’ <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680592ae9>>28 see also Keller and Marti (n 8) 830.

which urgent individual measures are required, ie for resource-intensive and politically sensitive cases in the main. Moreover cases that at first fall into the category of ‘simple’ and are thus under standard supervision may be escalated into enhanced supervision as the matter of execution becomes complex for political, economic, or other reasons.<sup>12</sup>

The majority of the cases currently under review before the Committee of Ministers can be classified as ‘simple’. These cases are unproblematic and can be resolved through ‘normal’ bureaucratic procedures. Almost all Contracting Parties have created an infrastructure through which simple cases are executed by legislative or administrative change or payment of just satisfaction. These cases are, therefore, not a matter of great concern and are not the subject of execution-related anxiety within the Council of Europe.

The second type of cases under review before the Committee of Ministers relates to judgments the execution of which would be very resource intensive. For example, they might concern a large number of applications, require the introduction of major reforms in the Contracting Party, or simply oblige the Contracting Party to pay significant sums of just satisfaction.<sup>13</sup>

The third type of case under review before the Committee of Ministers relates to judgments the execution of which require political decisions in sensitive areas within domestic politics, including (but not limited to) those that might carry negative consequences for the ruling elites in the respondent State. ‘Political decisions’ here include legislative changes or changes of legal and politico-legal practice in the Contracting Party. Of course, many such cases *are* executed (consider, for example, the introduction of the Protection of Life During Pregnancy Act 2013 in Ireland by way of executing *A, B & C v Ireland*<sup>14</sup>), however that is by no means always the case (for example the prisoner voting cases against the UK<sup>15</sup> and LGBTQ equality cases in Russia<sup>16</sup>).

The persistent concerns about non-execution in the Council of Europe relate, primarily, to cases that we might say fall into Types 2 and 3 here, ie cases the execution of which would be resource intensive and/or relates to a matter of

<sup>12</sup> ‘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’ CM/Inf/DH(2010)37 (6 September 2010) <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804a327f>>.

<sup>13</sup> The problem identified in the pilot judgment in *Ivanov v Ukraine*, App No 40450/04, Judgment of 15 October 2009 is an example of such a situation. This case concerned violations of arts 6 and 13 ECHR as final judgments of Ukrainian national courts could not be executed. This related to a large number of cases, the resolution of which would put extra pressure on the already stretched budget of Ukraine, and a large number of which are still not executed. ‘Current State of Execution of Pending Case *Zhovner v Ukraine*’ <[www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=zhovner&StateCode=UKR&SectionCode=](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=zhovner&StateCode=UKR&SectionCode=)>.

<sup>14</sup> *A, B and C v Ireland*, App No 25579/05, Judgment of 16 December 2010.

<sup>15</sup> *Hirst v the United Kingdom (No 2)*, App No 74025/01, Judgment of 6 October 2005; *Greens and MT v the United Kingdom*, App Nos 60041/08 and 60054/08, Judgment of 23 November 2010.

<sup>16</sup> *Alekseyev v Russia*, App Nos 4916/07, 25924/08 and 14599/09, Judgment of 10 October 2010.

domestic political sensitivity. These, in turn, tend to be cases the non-execution of which is likely to be motivated by either principle or dilatoriness.

### III. EXECUTION OF JUDGMENTS: THE CONVENTION SYSTEM

Unlike many other human rights judicial institutions<sup>17</sup> the Court has a well-established mechanism for supervising the execution of its judgments, with primary responsibility resting with the Committee of Ministers. Before outlining how the system currently works, however, it is germane to reflect for a moment on the deceptively complex concept of ‘execution’. In relatively simple terms, we might say that ‘execution’ means ‘giving effect to the remedy as ordered in the judgment’. However, the multiplicity of remedial forms in the ECtHR means that there are at least three levels of execution for many judgments: just satisfaction, individual measures, and general measures.

Just satisfaction is usually straightforward. Article 41 ECHR allows for the Court to award just satisfaction where there has been a violation, the domestic law of the respondent State ‘allows only partial reparation to be made’, and the Court considers an award of just satisfaction to be necessary.<sup>18</sup> In many individual applications and in some inter-State cases<sup>19</sup> the Court awards just satisfaction which covers pecuniary and non-pecuniary damage that should normally be paid by the respondent State within three months of the entry into force of the judgment. Whether or not the just satisfaction element of a judgment has been executed is simply a matter of determining whether the awarded sum has actually been paid to the successful applicant.<sup>20</sup>

The second level of execution of judgments is that of individual measures. These are designed ‘to ensure that the violation has ceased and that the

<sup>17</sup> Although one cannot say that for instance the IACtHR and the UN Human Rights Committee do not have any supervisory mechanism of compliance with their decisions, their mechanisms are fundamentally different to the one provided by the ECHR.

<sup>18</sup> On the working of art 41 ECHR see, for example, D Harris, M O’Boyle, E Bates and C Buckley, *Harris, O’Boyle and Warbrick: Law of the European Convention on Human Rights* (Oxford University Press 2014) 155–62.

<sup>19</sup> *Cyprus v Turkey* (just satisfaction), App No 25781/94, Decision of 12 May 2014.

<sup>20</sup> This is not to suggest that some complex matters (eg interest payments, and whether payment has been made by the correct date) do not arise. It is also the case that in some cases, such as *Loizidou v Turkey*, App No 15318/89, Judgment of 18 December 1996, (non-)payment is perceived by the State as a matter of principle, which may add a further layer of complexity and indeed the payments in that case are now under enhanced supervision procedures. This is because, ‘the Turkish authorities have not complied with their obligation to pay the amounts awarded by the Court to the applicants in those cases, as well as in 32 other cases in the *Xenides-Arestis* group, on the grounds that this payment cannot be dissociated from the measures of substance in these cases’ (Status of Execution, *Xenides-Arestis v Turkey*, App No 46347/99, Judgment of 22 December 2005 <[http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=Xenides-Arestis&StateCode=TUR&SectionCode=>](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Xenides-Arestis&StateCode=TUR&SectionCode=>)). However as a general matter determining whether or not payment has been made in full and on time is a ‘simple’ or straightforward matter.

injured party is put, as far as possible, in the same situation as they were in prior to the violation of the Convention'.<sup>21</sup> The Contracting Parties are obliged to comply with individual measures,<sup>22</sup> although they are only likely to arise in cases where restitution of rights by such a measure is deemed possible and appropriate. This was so in *Volkov v Ukraine*<sup>23</sup> where the Court ordered reinstatement of the applicant to his post as a judge of the Supreme Court. In such cases, determining compliance with individual measures is also quite straightforward.

Finally, there are general measures which are 'adopted ... [to] prevent ... new violations similar to that or those found or [to] put ... an end to continuing violations'.<sup>24</sup> Such measures require substantial change at a systemic level, and in some cases these are the only remedy ordered (for example, in *Hirst No 225*). General measures can be particularly challenging from the perspective of determining whether execution has taken place as here the question of execution is one of interpreting whether what the State has done is sufficient to constitute the general measure that was ordered.

In recognition of the complexity of supervising execution, Protocol 14 introduced a procedure by which the Committee of Ministers could refer a case back to the Court for clarificatory interpretation of what the judgment requires by means of execution (ie Article 46(3) ECHR). One can imagine that in complex cases (perhaps especially relating to general measures) such a decision on interpretation might clarify the intention of the Court and simplify the matter of determining whether a judgment has been executed or not. Thus, it has the potential to enhance collaboration between the Court, the Committee of Ministers and the Contracting Parties in ensuring execution. However, as Article 46(3) ECHR still awaits its debut before the Court, its usefulness is not yet clear.

#### IV. THE REASONS FOR NON-EXECUTION

It is essential that any attempt seriously to address non-execution would recognize the dynamics and reasons for non-execution. It is only once the

<sup>21</sup> 'Appendix 4 (Item 4.4) Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements'. Rule 6, section 2 <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805905e5>>.

<sup>22</sup> See for example *Scozzari and Giunta v Italy*, App Nos 39221/98 and 41963/98, Judgment of 13 July 2000, para 249.

<sup>23</sup> *Volkov v Ukraine*, App No 21722/11, Judgment of 27 May 2013. On compliance with the remedy see 'Oleksandr Volkov Reinstated as Supreme Court Judge in Ukraine' (EHRAC webpage, 2 February 2015) <[www.ehrac.org.uk/news/oleksandr-volkov-reinstated-as-supreme-court-judge-in-ukraine/](http://www.ehrac.org.uk/news/oleksandr-volkov-reinstated-as-supreme-court-judge-in-ukraine/)>.

<sup>24</sup> Appendix 4 (Item 4.4) Rules of the Committee of Ministers (n 21) Rule 6, section 2.

<sup>25</sup> The Court stated that 'it will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the right to vote in compliance with this judgment. In the circumstances, it considers that this may be regarded as providing the applicant with just satisfaction for the breach in this case'. *Hirst v the United Kingdom (No 2)* (n 15) para 93.

root causes have been identified and considered that solutions can be devised or, indeed, that the insoluble nature of some challenges can be recognized. Thus, we propose here that non-simple non-execution can be broadly said to fall into two categories: principled non-execution and dilatory non-execution. The former can be said to relate to cases where States refuse to execute because of a deep-seated disagreement not only with the outcome but, perhaps more significantly, with the *principle* of an international court's decision 'overturning' a domestic, democratically arrived at position in respect of a particular matter. There are very few instances of this type of non-execution, which is ultimately related to the fact that reasonable disagreement about human rights and about the meaning of a human rights treaty is possible, even when parties truly believe in and are committed to the protection of human rights per se.<sup>26</sup> The latter relate to cases where States are generally dilatory in their execution of adverse judgments from the Court, so that individual cases of non-execution might be connected to this general pattern of resistance to giving effect to the outcome of international judicial supervision in the area of rights. The vast majority of cases of non-simple non-execution would fall into this broadly defined category. Importantly, the same State might well be a principled non-executor in some cases and a dilatory one in others. These two (very broadly conceived) categories are not the same, although both pose challenges for the Court. Thus, they merit some further consideration at this stage.

#### A. Principled Non-Execution

In at least some cases, States may refuse to execute a judgment on 'principled' grounds, where the principle at stake is not one of rights protection per se but rather relates to the perceived appropriate division of authority between domestic and international organs,<sup>27</sup> which division might be predetermined by the constitutional arrangement in the Contracting Party. For example, the German Constitutional Court has declared as a matter of principle that the German Constitution would prevail in situations of conflict between it and a judgment of the ECtHR.<sup>28</sup> The Russian Constitutional Court has taken a similar approach (now also supported by domestic legislation considered below), and the Italian Constitutional Court has at least intimated its inclination towards a similar position.<sup>29</sup> This suggests that if a judgment of the ECtHR is in direct conflict with the domestic constitutional text or norm, it may not be executed *as a matter of principle*.

<sup>26</sup> See J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 YaleLJ 1346.

<sup>27</sup> On the standoff between the UK and the European Court of Human Rights as a dispute as to authority, see B Çali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (Oxford University Press 2015) 1–5.

<sup>28</sup> See *Görgülü*, BVerfG, 2 BvR 1481/04 (14 Oct 2004) 307.

<sup>29</sup> *Corte Costituzionale* (Italian Constitutional Court) Judgment Nos 348 and 349 of 2007.

Of course, the mere fact that this emanates from principle does not rid it of its deeply problematic nature. Such an approach creates a situation in which an international obligation is not complied with, and in which the State finds itself in the difficult position of either violating Convention (by failing to execute) or experiencing domestic constitutional tensions (by executing the Strasbourg judgment even in the face of a domestic constitutional principle, or constitutional court judgment). Not only that but, of course, prioritizing the national constitutional order over a binding judgment of an international court applying an international treaty to which the State is a Contracting Party exposes the deep and ultimately unresolved tensions between international and domestic law. Unless the legal system in question determines to the contrary (eg in relation to the supremacy of EU law), national constitutions usually enjoy legal supremacy within the domestic legal order. Ultimately, non-execution of cases in such a situation calls attention to the fact that this tension has not been resolved. In situations where the meaning or application of a certain right, protected by law, is the subject of good faith dispute, principled contestation is possible. In such cases, domestic actors may not be convinced of the determinative decisional authority of the supranational court *even where* the State in question is generally committed to rights, internationalist, and compliant with adverse judgments from the supranational court. This tension is not necessarily only between domestic and supranational courts; it may also (or otherwise) be between domestic parliament and supranational court, especially where the domestic parliament has a recognized role in determining constitutional and quasi-constitutional norms in the domestic legal system as, for example, in the United Kingdom.

The UK is a high compliance State whose posture in respect of the ECtHR is of general significance: as we have previously written, ‘the Court has rather a lot to lose if ... high-compliance State ... begin to withdraw support and/or seriously question its legitimacy ... a discourse of illegitimacy might emerge that has the potential to destabilise the Court and set the conditions for selective non-compliance even by high compliance States’.<sup>30</sup> In this context, the standoff between the United Kingdom and the Court for example as regards prisoner voting rights<sup>31</sup> is a matter of some considerable concern: while the UK does not *generally* refuse to execute adverse judgments against it, its non-execution of the prisoner voting judgments poses a significant challenge for the Convention system.

<sup>30</sup> F de Londras and K Dzehtsiarou, ‘Managing Judicial Innovation in the European Court of Human Rights’ (2015) 15 HRLR 523, 527.

<sup>31</sup> *Hirst v the United Kingdom (No 2)* (n 15). See also *Scoppola v Italy (No 3)*, App No 126/05, Judgment of 22 May 2012; *Anchugov and Gladkov v Russia*, Apps No 11157/04 and 15162/05, Judgment of 4 July 2013; *Firth and Others v the United Kingdom*, App No 47784/09, Judgment of 12 August 2014.

It is not necessary, here, to rehearse in detail the well-known facts of the prisoner voting cases,<sup>32</sup> in which the Court established that the blanket ban preventing all convicted prisoners in the United Kingdom from voting violates Article 3 of Protocol 1 to the Convention. It is clear that the United Kingdom government vehemently disagrees with the idea that imprisonment should not result in an automatic and blanket ban on voting; the ban had been debated and approved relatively recently when the Court made its decision and, in spite of a process of ‘reflection’ and consideration of possible reforms<sup>33</sup> since *Hirst*, the *status quo ante* remains in place. To understand this standoff one must return to a fundamental principle of UK constitutional law: the sovereignty of Parliament and its ability to decide complex matters of internal politics, including human rights. Parliament has considered the matter, including the rights-related issues, and has decided that a blanket ban is appropriate. Within the UK constitutional context, a court should not disturb that decision, except, perhaps, in exceptional situations. Thus, for example, even if a domestic court considered this to be incompatible with the Convention as implemented through the Human Rights Act 1998, it could not strike it down; rather it would make a declaration of incompatibility (which Parliament could act on or not and which would not disturb the validity of the law),<sup>34</sup> or it would ‘interpret’ the law in a manner that made it human rights compatible,<sup>35</sup> following which Parliament could explicitly amend the law to return it to its original effect thus signifying its clear intent. It is, perhaps, little surprise then that these cases have elicited such a response that the prisoner voting ban has arguably become *more* entrenched in the past decade; the refusal to be ‘dictated to’ by Strasbourg on something on which Westminster had already made a decision appears to be a strongly held point of principle, (so much so that then-Prime Minister, David Cameron, has said that the thought of prisoners having a right to vote makes him ‘physically ill’<sup>36</sup>). Democratic participation for imprisoned criminals ‘damn well shouldn’t’ be allowed to happen, the former Prime Minister said.<sup>37</sup> If the Court thinks otherwise, it seems, ‘we need to clip its wings’.<sup>38</sup> And although the UK government has never officially declared that it is not going to execute the judgment in *Hirst No 2*

<sup>32</sup> *Hirst v the United Kingdom (No 2)* (n 15); *Greens and MT v the United Kingdom* (n 15).

<sup>33</sup> See ‘The ‘Backbenchers’ Debate on Prisoners’ Voting’ (Hansard Report, 10 February 2011) <[www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110210/debtext/110210-0002.htm](http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110210/debtext/110210-0002.htm)>. See also ‘Proposals by the Joint Select Committee, “the Draft Voting Eligibility (Prisoners) Bill”’ <[www.publications.parliament.uk/pa/jt201314/jtselect/jtdraftvoting/103/10311.htm#a45](http://www.publications.parliament.uk/pa/jt201314/jtselect/jtdraftvoting/103/10311.htm#a45)>. The Select Committee proposed to allow those prisoners who serve less than 12 months imprisonment to vote, as well as those who are due to be released within the next 6 months.

<sup>34</sup> Section 4, Human Rights Act 1998.

<sup>35</sup> Section 3, Human Rights Act 1998.

<sup>36</sup> ‘Prime Minister’s Questions’ (Daily Hansard: Debate, 3 November 2010) <[www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101103/debtext/101103-0001.htm](http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101103/debtext/101103-0001.htm)>.

<sup>37</sup> ‘Prisoners “damn well shouldn’t” be given right to vote, says David Cameron’ (*The Guardian*, 13 December 2013) <<https://www.theguardian.com/politics/2013/dec/13/prisoners-right-to-vote-david-cameron>>.

<sup>38</sup> *ibid.*

before the Committee of Ministers in Strasbourg, the rhetoric of legislative and executive bodies and a clear lack of progress show that the UK is involved in principled non-execution.

When these cases are seen as relating solely to a straightforward question of whether incarcerated persons may vote, the strength and depth of the conviction of the government (and many others in the UK) may seem baffling. However the standoff between the UK and the Court in respect of prisoner voting, which manifests itself in a refusal to execute the relevant judgments, is not *really* about prisoner voting: it is about fundamental disagreements between the United Kingdom and the Court about the role and nature of human rights and about the judicial function. In the British constitutional tradition it is ultimately politics that is said to determine the constitution, not courts, and that deep-seated constitutional tradition inevitably struggles with a strong judiciary.<sup>39</sup> While a muscular European judiciary might have led to some discontent in the past, the Human Rights Act 1998 has brought that muscularity ‘home’<sup>40</sup> together with the rights protected by the Convention; it has caused a constitutional disruption of substantial proportions. The ECtHR has been dynamic, sometimes provocative, and often expansionist for quite some time, but under the Human Rights Act 1998 that can no longer be ignored or left to the international sphere within a classically dualist construction. Rather, it flows into every Magistrates’ Court and public authority in the United Kingdom.<sup>41</sup> Thus, the UK’s non-execution of these cases, while of course problematic, can be said to be *principled*. As a phenomenon it is polycentric with roots in British constitutional culture, governmental frustration, the cut and thrust of constitutional change in the United Kingdom, and institutional jealousy all of which are mapped onto frustrations with the ECtHR and come together to form a rhetorically powerful claim of illegitimacy in Strasbourg.

Given its status as a norm entrepreneur<sup>42</sup> within the Convention system, it is perhaps to be expected that the prisoner-voting saga has resonance well beyond the UK itself. The clearest example is that of Russia, which, appearing to be emboldened by the UK’s stance, has introduced a law that allows the Constitutional Court to declare rulings from international human rights courts, including the ECtHR, non-executable in Russia due to their incompatibility with the Constitution of Russia. The Venice Commission has

<sup>39</sup> Classically, see JAG Griffin ‘The Political Constitution’ (1979) 42 MLR 1.

<sup>40</sup> This refers, of course, to *Bringing Rights Home* (Labour Party, 1996) in which the Labour Party outlined its vision of the Human Rights Act 1998 itself.

<sup>41</sup> See generally Human Rights Act 1998.

<sup>42</sup> Cass Sunstein described ‘norm entrepreneurs’ as ‘people interested in changing social norms’ (C Sunstein, ‘Social Norms and Social Rules’ (1995) 36 Chicago John M Olin Law & Economics Working Paper 1, 6). Here we use the phrase to refer to parties interested in, and capable of, changing norms through their behaviours, eg of leading in a community (in this case of States) through behaviour, State practice, and utterance.

already described this law as ‘incompatible with international law’,<sup>43</sup> and given the very high volume of cases brought to the Court concerning Russia,<sup>44</sup> and their relatively high success rate<sup>45</sup>—not to mention Russia’s extensive non-execution problem—it is difficult to reach any conclusion other than that this law is intended to provide *the appearance* of a principled non-execution (along the lines of the UK’s), not least because the law allows the Court to disregard such judgments to ‘protect the interests of Russia’.<sup>46</sup> The appearance of principled non-execution is also emphasized by the fact that it was the case of *Anchugov and Gladkov v Russia*,<sup>47</sup> finding that a blanket ban on prisoners’ voting violates the Convention, that was said to trigger the introduction of this law. Moreover, the Russian Constitutional Court has been quick in utilizing this law and claiming that the judgment in *Anchugov and Gladkov* cannot be fully executed.<sup>48</sup>

### B. Dilatoriness

In contrast with what we have characterized as principled non-execution, is simple dilatoriness on the part of States. This accounts for by far the greatest proportion of problematic non-executed cases before the Court. In the report on the implementation of judgments, presented by Mr Klaas de Vries in September of 2015,<sup>49</sup> the nine States in relation to which the non-execution problem is most acute are named as Italy, Turkey, the Russian Federation, Ukraine, Romania, Greece, Poland, Hungary and Bulgaria.

The major problems identified are strikingly similar across many of these States. These are problems—in all nine States—with the duration, reopening

<sup>43</sup> ‘Venice Commission, Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation’ (Venice Commission, 15 March 2016) <<http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282016%29005-e>> para 98.

<sup>44</sup> There were 9207 applications brought against Russia in 2015. Italy, Turkey, Ukraine and Russia are ‘responsible’ for more than a half of all complaints brought to the Court in 2015, ‘Analysis of Statistics 2015’ <[www.echr.coe.int/Documents/Stats\\_analysis\\_2015\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2015_ENG.pdf)>.

<sup>45</sup> The Court has delivered 1720 judgments in cases brought against Russia (until December 2015) and at least one violation was found in 1612. ‘Violations by Article and by State 1959–2015’ <[www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2015\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf)>.

<sup>46</sup> Quoted in BBC News, ‘Russia passes law to overrule European human rights court’ (4 December 2015) <[www.bbc.co.uk/news/world-europe-35007059](http://www.bbc.co.uk/news/world-europe-35007059)>. For further analysis see P Leach and A Donald, ‘Russia Defies Strasbourg: Is Contagion Spreading?’ (EJIL: *Talk!*, 19 December 2015) <[www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/#more-13922](http://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/#more-13922)>.

<sup>47</sup> *Anchugov and Gladkov v Russia* (n 31).  
<sup>48</sup> Judgment of 19 April, 2016 No 12-Π/2016 on the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 4 July 2013 in the case of *Anchugov and Gladkov v Russia* in connection with the request of the Ministry of Justice of the Russian Federation, <[http://www.kstrf.ru/en/Decision/Judgments/Documents/2016\\_April\\_19\\_12-P.pdf](http://www.kstrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf)>. For a short commentary see K Dzehtsiarou, S Golubok and M Timofeev, ‘Imaginary Dialogue and Fictitious Collaboration: Russian Response to the Prisoner Voting Judgment’ (ECHR Blog, 29 April 2016) <<http://echrblog.blogspot.co.uk/2016/04/the-russian-response-to-prisoner-voting.html>>.

<sup>49</sup> de Vries (n 4).

and enforcement of judicial decisions and lack of effective remedy; unfair trials in Ukraine; the expulsion of foreign nationals in violation of the Convention in Italy, Russia and Bulgaria, and their detention in Greece; conditions of detention in Italy, Russia, Ukraine, Romania, Greece and Hungary (where the concerns reach ill-treatment levels); violations of freedom of expression, assembly and association in Turkey, Russia, Ukraine and Greece; excessive detention in Turkey and Russia; the behaviour of security forces in Turkey, Romania, Russia (where concerns as to torture and ill-treatment arise), Greece and Bulgaria (where the use of lethal force and deaths in custody arise); the treatment of Cypriots (in Turkey), Chechens (in Russia) and Roma (in Hungary); and failure to compensate for nationalization in Romania.

These are not problems that display any deep-seated politico-philosophical disagreements with the Court's interpretation of a particular provision, or with the concept of international supervision per se. They are not, in other words, disputes as to principle. Rather here non-execution is a simple dilatory tactic and, in at least some cases, reveals deeply problematic attitudinal and/or organizational resistance to the idea of rights protection, to liberal democracy founded on rights and constitutionalism, and to judicial authority per se.<sup>50</sup> In other States this non-execution reflects a long-standing failure to organize the organs of the State and administration of State power in an effective, accountable, and rights-respecting way.<sup>51</sup> There are problems here of corruption, autocracy, geopolitics, formal legality without commitment to the liberal construction of the Rule of Law, and systematic disregard for judicial authority and, in some cases, independence. Indeed, the ECtHR developed the pilot judgments procedure precisely because its judgments concerned with systemic problems were not properly executed.<sup>52</sup> While these are not problems of the ECtHR itself, they fundamentally undermine its capacity for the effective protection of rights in these countries.

This can readily be seen by dwelling slightly on the example of Azerbaijan. Azerbaijan became a Contracting Party to the ECHR in 2002, and currently has 1589 applications pending before the Court.<sup>53</sup> Although it has long been in what might be described as 'a pseudo-democratic condition',<sup>54</sup> there has been a

<sup>50</sup> For example, Azerbaijani authorities have failed to execute *Ilgar Mammadov v Azerbaijan*, App No 15172/13, Judgment of 22 May 2014, concerning the detention of an opposition political leader, in spite of repeated calls from the Committee of Ministers to do so.

<sup>51</sup> For example, it has been widely stated that the long-standing problem of undue delays in criminal trials in Italy results from structural problems within the Italian judicial system, repeated reform attempts of which have been largely unsuccessful. See *Scordino v Italy (No 1)*, App No 36813/97, Judgment of 29 March 2006, *Cocchiarella v Italy*, App No 64886/01, Judgment of 29 March 2006.

<sup>52</sup> See, for example, *Burdov v Russia (No 2)*, App No 33509/04, Judgment of 15 January 2009.

<sup>53</sup> 'Azerbaijan: Country Press Profile' (Press Unit ECtHR, November 2016). <[http://www.echr.coe.int/Documents/CP\\_Azerbaijan\\_ENG.pdf](http://www.echr.coe.int/Documents/CP_Azerbaijan_ENG.pdf)>.

<sup>54</sup> J Gadirov, 'The European Convention on Human Rights and Fundamental Freedoms in Azerbaijan' in L Hammer and F Emmert (eds), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (Eleven International Publishing 2011).

notable and severe crackdown on human rights defenders, opposition politicians, and the work of human rights lawyers in recent years, while at the same time the executive has acquired increasingly expansive powers and the judiciary continues to suffer from a lack of effective independence.<sup>55</sup> The ECtHR has been critical in cases that have come before it. In *Mammadov v Azerbaijan*,<sup>56</sup> for example, the Court found the arrest and detention of an opposition politician and political blogger, Ilgar Mammadov, to have violated Article 11 (right to assembly). This is not the only time the Court has found Azerbaijan to have violated the Convention for arresting and detaining opposition politicians,<sup>57</sup> while at the same time many NGOs in the country have been forced to close and the space for civil society activism and criticism is steadily shrinking.<sup>58</sup> In this context of steady and deliberate repression, it is perhaps little surprise that Azerbaijan's consistent non-execution of judgments, and general non-implementation of the Convention, has attracted concerted attention. The State has been criticized by the Committee of Ministers for its failure to execute individual judgments,<sup>59</sup> and in late 2015 the Secretary General launched an inquiry into respect for human rights in the country. This was the first time that the power to launch an inquiry on national implementation of the Convention under Article 52 was used by Secretary General Thorbjørn Jagland. In spite of all of this, Azerbaijan continues in its non-execution of ECtHR judgments in a manner that is, clearly, dilatory, and reveals a complex story of repression and disrespect for rights within the country.

#### V. THE PROPOSED SOLUTION: ARTICLE 46(4) ECHR

Although States are obliged to execute the judgments of the ECtHR that are addressed to them, how they do so has conventionally been considered to be largely a matter of State discretion.<sup>60</sup> This is why the supervisory role of the Committee of Ministers is so important: it is that body which decides whether or not the actions taken on the part of States are sufficient to constitute execution of the Court's judgment.

<sup>55</sup> See generally *ibid*.

<sup>56</sup> *Ilgar Mammadov v Azerbaijan* (n 50).

<sup>57</sup> See also, for example, *Insanov v Azerbaijan*, App No 16133/08, Judgment of 14 March 2013.

<sup>58</sup> See for example 'The Country Report' (Freedom House 2015) <<https://freedomhouse.org/report/freedom-world/2015/azerbaijan>>.

<sup>59</sup> See, for example, 'Committee of Ministers Interim Resolution CM/ResDH(2015)156 on Execution of the judgment of the European Court of Human Rights: *Ilgar Mammadov v Azerbaijan*' (24 September 2015) <[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805c2de7](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c2de7)>.

<sup>60</sup> See *Marckx v Belgium*, App No 6833/74, Judgment of 13 June 1979, para 58. Although the Court has somewhat toughened its position in more recent cases, it rarely prescribes certain particular actions to be undertaken by the respondent State to repair the violation. Keller and Marti (n 8) 835–9.

In 1998 the new ECtHR replaced a permanent Commission on Human Rights and a part-time ECtHR. This reform was in response to the increase in the number of Contracting Parties with a new set of human rights challenges and as a result of it an increased number of applications, which in turn led to a higher number of judgments. As a result the Committee of Ministers was exposed to a greater number of non-executed judgments which it was supposed to supervise. By the time that Protocol 14 was being negotiated this challenge was quite evident. Protocol 14 was opened for ratification and signing in 2004. At that time, a clear trend of increasing numbers of pending cases before the Committee of Ministers could be observed, and this continued after the Protocol was opened for ratification. Between 1999 and 2008 the number of pending judgments grew from 1607 to 7328.<sup>61</sup> In 2010 when Protocol 14 entered into force 9899 cases were pending before the Committee of Ministers; this number peaked in 2012 at 11099 and slightly decreased by 2015 (10652). Importantly between 1999 and 2002 the number of pending cases then doubled.<sup>62</sup> Protocol 14 was drafted in partial recognition of the view that ‘The Court’s authority and the system’s credibility both depend to a large extent on the effectiveness’<sup>63</sup> of execution; the political failure to execute was damaging the Court, and something was to be done about it. In particular, there was concern that cases pointing to structural problems in the Contracting Parties were not being executed (ie cases the execution of which were resource intensive or politically sensitive), which in turn fed into the problem of repetitive applications before the Court.<sup>64</sup>

Motivated by a desire to address this phenomenon, Protocol 14 introduced two new procedures, both of which involved the Court in the execution of judgments, an activity that was previously exclusively the domain of the political institutions of the Council of Europe and the Contracting Parties themselves. The first of these changes—in what is now Article 46(3) ECHR—allows the Committee of Ministers to request the Court to interpret a judgment in order to better enable its supervision and was considered above. The second change—in what is now Article 46(4) ECHR—is altogether different. This allows the Committee of Ministers to bring infringement proceedings against a Contracting Party that has failed to execute the judgment, even after being served with a notice to comply by the Committee.

The explanatory materials to this change make it clear that the new measures were motivated by a particular concern with non-execution of judgments that revealed (and required resolution of) structural issues in the State in question, and with the implications of non-execution for ‘the Convention system’s

<sup>61</sup> ‘Statistical Data on Execution of Judgments of the European Court of Human Rights’ <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168065156c>>.

<sup>62</sup> *ibid.*

<sup>63</sup> ‘Explanatory Report to Protocol 14’ (Council of Europe, 13 May 2004) <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380f>> para 16.

<sup>64</sup> *ibid.*

credibility and effectiveness'.<sup>65</sup> The power was intended to give the Committee of Ministers an alternative, but still strong, instrument to use against recalcitrant States, so that suspension from the Council of Europe (the strongest sanction available and contained in Article 8 of the Statute of the Council of Europe) would not be necessary. Suspension, it was thought, 'would prove counter-productive in most cases', whereas an Article 46(4) ECHR proceeding might 'add further possibilities of bringing pressure to bear' and 'should act as an effective incentive to execute the Court's judgments'.<sup>66</sup>

It has been proposed that actually using Article 46(4) ECHR might go some way towards resolving this persistent challenge of non-execution.<sup>67</sup> However, we caution against adopting this proposal because, in our view, Article 46(4) ECHR is an ill-suited 'solution' to the true nature of the non-execution problem when it is understood in the manner outlined above and may, indeed, have negative implications for the Court should it be used to address either the 'principled' or 'dilatatory' non-executing State.

#### VI. AN ILL-SUITED SOLUTION

Given the nature of the non-execution problem as we have outlined it above, we argue that Article 46(4) ECHR is an ill-suited solution on three main grounds: practicality, futility and potential backlash. While the first of these—the objection of practicality—is a general concern with Article 46(4), the concerns of futility and possible backlash are clearly informed by a critical appreciation of the dynamics of non-execution as outlined above. Even if the practical shortcomings of Article 46(4) could somehow be overcome, infringement proceedings do not address or even aid the resolution of either the complex contestations that underpin principled non-execution, or the structural and political difficulties of rights enforcement that underpin dilatatory non-execution. It is apposite, however, to start with the general difficulty of practicality before moving on to the critiques that map most closely onto an understanding of the dynamics of non-execution.

##### *A. Practicality*

Our first concern is quite straightforward: Article 46(4) ECHR is simply impractical.

Article 46(4) ECHR can only be triggered by a vote of at least two-thirds of the members of the Committee of Ministers following a Contracting Party's failure to execute a judgment after service of an official notice to comply. The supermajority requirement is, no doubt, a pragmatic one designed to limit vexatious use of Article 46(4) ECHR and to signify that non-execution must reach a stage of grave concern for the Court to be involved in this way.

<sup>65</sup> *ibid* para 98.

<sup>66</sup> *ibid* para 100.

<sup>67</sup> de Vries (n 4).

Even if that unhappy state of affairs were to transpire, however, actually achieving a two-thirds vote would be extremely politically challenging. The first challenge is, of course, to convince two-thirds of the States' representatives to agree to refer the case back to the Court. That this will ever happen seems a remote possibility to us, particularly when one takes into account the nature of the Committee of Ministers. As well as having a role in the supervision of judgments, the Committee is a political body 'where national approaches to European problems are discussed on an equal footing and a forum to find collective responses to these challenges'.<sup>68</sup> Thus, the Committee is involved in many aspects of functioning of the Council of Europe,<sup>69</sup> and before any decision to try to trigger Article 46(4) ECHR would be taken, consideration of the implications of such a move for the Committee's ability to fulfil its broader functions would be required. Certainly, one can foresee that infringement proceedings against one of the members of the Council of Europe might 'cool' dialogue with that same State in respect of other areas of the Council of Europe's work. Broader institutional dynamics and geopolitical concerns are, thus, likely to impact on decisions about whether to use Article 46(4) ECHR in a way that makes calling (not to mention winning) a vote seem unlikely.

A further, and serious, political concern relates to the fact that many European States have failed to execute judgments. Although, as outlined above, there are particular concerns about nine dilatory States, as well as about the United Kingdom and Azerbaijan, in fact any number of States might, conceivably, have infringement proceedings taken against them. For an infringement procedure to be initiated it would have to be supported by at least 31 Contracting Parties, which might themselves face similar infringement procedures in the future, potentially dissuading its use in practice. Relatedly, political complications are likely to arise in respect of which country is the first to have infringement proceedings taken against it. Such a State may well consider the initiation of infringement proceedings to be illegitimate on the basis that it is being unfairly targeted by the Committee of Ministers; 'why us, when so many others also fail to execute?'. Certainly, if Article 46(4) ECHR is to be used *some* discernment will be required: we cannot refer all cases of concern to the Court. How, then, is political backlash (with the potential to call into question the legitimacy of the Court *and* the Committee) to be avoided? It seems to us that the practical difficulties are, effectively, insurmountable in this respect.

<sup>68</sup> About the Committee of Ministers <<http://www.coe.int/en/web/cm/about-cm>>.

<sup>69</sup> The Committee of Ministers 'decides the Council's policy. It also determines the action to be taken on recommendations of the Parliamentary Assembly and the Congress of Local and Regional Authorities and the proposals from various intergovernmental committees and conferences of specialised ministers. It approves the Council of Europe's Programme and Budget. The Committee of Ministers also supervises the execution by member states of judgments of the European Court of Human Rights.' *ibid.*

*B. Futility*

Even if, somehow, those practical difficulties could be overcome we would be left with what seems to us a fatal flaw in the proposition that Article 46(4) ECHR might be the answer to non-execution: its almost certain futility.

First, and taking into account all of the political challenges outlined above, an Article 46(4) ECHR proceeding would be an implicit acceptance of ‘defeat’ by the Committee of Ministers; by referring the case back to the Court, the Committee accepts that politics has failed. As has been observed by Lambert-Abdelgawad, international institutions do not readily make manifest their failures in such a way.<sup>70</sup> Given this, it is likely that infringement proceedings would be seen as a measure of penultimate resort (suspension being the measure of last resort) so that Article 46(4) ECHR would not be triggered until the non-execution had continued for a protracted period of time, calling into question its potential to really assist with the realization of rights.

In some cases, States have explained non-execution by citing their inability to force the national parliament to change national laws or by references to the statements of national constitutions. Of course, Article 27 of the Vienna Convention on the Law of Treaties states that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty, but this does not resolve the very real practical difficulties that arise where domestic legal change is required. No infringement procedure can remove the obstacles to execution that the non-executing party is experiencing, and neither does it make the original judgment *more* binding. Those barriers continue to exist, and the judgment was always binding. Thus, the infringement proceeding adds little to this standoff in legal terms.

In addition, one must consider what will happen in respect of the implementation of the initial judgment (which is often an incremental process) once Article 46(4) ECHR is triggered. It seems likely to us that, even if the respondent State were willing to do *something* (albeit something inadequate to constitute full execution in the view of the Committee of Ministers), it will do *nothing* from the point of initiating Article 46(4) ECHR proceedings to the time when the Court delivers its decision on the infringement proceeding. The likelihood is that this would be a somewhat protracted process. Rule 96 of the Rules of Court provides that the Grand Chamber must hear requests from the Committee of Ministers for execution to be reviewed by the Court. Not only is this challenging on its own (convening the Grand Chamber, with its 17 judges, is burdensome given the heavy workload in the Court and the associated disruption to the Chambers),

<sup>70</sup> E Lambert-Abdelgawad, ‘The Court as a part of the Council of Europe: the Parliamentary Assembly and the Committee of Ministers’ in A Føllesdal, 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) 280.

but this is just one of an increasing number of types of cases that the Grand Chamber is to hear: relinquishments, referrals, and advisory opinions<sup>71</sup> already constitute a heavy burden for this formation of the Court. At present the Grand Chamber tends to deal with around 20 cases per year, and it can take around five years for proceedings to go through the Grand Chamber. Either Article 46(4) ECHR proceedings will fall into this long queue, or they will displace cases already waiting to be heard by the Grand Chamber. Article 46(4) ECHR proceedings will also be time-consuming. Pursuant to Rule 97 the Court should inform the Committee of Ministers and the parties concerned that they may submit written comments on the question referred. Moreover the Court can have an oral hearing in the case of infringement proceedings. If we are right that neither the Committee of Ministers nor the respondent State will do much (or frankly anything) in terms of implementing the judgment while the Grand Chamber proceedings are pending and in train, then this is likely to introduce serious delays. How this improves the effectiveness of the Court is difficult to discern.

This is all the more so when one asks a straightforward, but necessary, question in respect of using Article 46(4) ECHR to address non-execution: what, if anything, will it achieve? The reality is that an Article 46(4) ECHR procedure effectively tells us what we already know: that a State has failed to respect a judgment of the Court. If there were uncertainty about it, Article 46 (3) ECHR—by which the Committee of Ministers asks the Court to give a clearer interpretation of its judgment—should be used, although an Article 46 (4) proceeding might be capable of providing an answer in cases of genuine disagreement as to whether execution has taken place. Apart from that limited circumstance, however, infringement proceedings will not be used unless the Committee of Ministers already knows that the State is non-executing, and so what does it add for the Court to reiterate that? Moreover, the Contracting Party will also be in no doubt that it has failed to execute the judgment because the procedure is designed to deal with clear cases of non-execution. The Committee of Ministers would first use all other tools of political pressure such as discussions at the Committee's meetings, interim resolutions and letters from the Committee's chairperson. Article 46(4) ECHR would, thus, only be used when all other means of attempting to secure execution have failed; in other words, it would be perceived as a punishment for non-execution rather than a discursive tool intended to help find a solution. Moreover, this 'punishment' will be toothless as the Court will not be able to impose any sanctions for non-compliance with its initial judgment.

<sup>71</sup> Although there are very few requests to give advisory opinions at the moment, when Protocol 16 comes into force it is likely that the Grand Chamber will get many more. See K Dzehtsiarou and N O'Meara, 'Advisory Jurisdiction and the European Court of Human Rights: a Magic Bullet for Dialogue and Docket-Control?' (2014) 34 LS 444.

In addition, the formal finding of non-execution does nothing to address the root causes of non-execution. If States fail to execute because of either principle or dilatoriness it seems unlikely that the scolded State would suddenly see the error of its ways were the Court to scold it again, especially after the Committee of Ministers has already unsuccessfully attempted to ensure execution. To claim that an adverse finding in an infringement proceeding would lead a State to see the error of its ways and then execute its judgment seems, to us, to reveal a fundamental misunderstanding of how reputation works in domestic and international affairs.

In a case of principled non-execution, domestic political actors will have made clear that their refusal to execute the judgment of the Court relates to something *fundamental*: to the principles of democratic decision-making, or the idea that the State ought not to be ‘dictated to’, or the proposition that judicial power ought to be subject to democratic will determined through an open, deliberative process in Parliament, for example. If this is so, then how can a domestic political actor who has so firmly stated the *principled* nature of her opposition to executing the judgment in question retreat from that position just because the Court has reiterated the original violation, without losing what is likely to be considered an unacceptable amount of domestic political reputation and capital? Principled non-execution is not resolved by a restatement of the original violation, or by confirmation of non-execution. The recalcitrant State here knows that it is in violation of the Convention but either accepts and stands by that violation on the basis of the principle it perceives to be in question, or argues that its actions ought not to be defined as a violation of the Convention. This is decidedly *not* a standoff that can be resolved through further judicial intervention of the kind foreseen by Article 46(4) ECHR.

As for dilatory States, the fact is that these States’ international reputations have already been damaged by the non-execution, which is publicly known, so that it is difficult to see what further *material* or *motivating* reputational damage a finding of the Court might achieve. Rather, it seems to us that all that will be achieved by the use of Article 46(4) ECHR in relation to these States is the further depletion of the Court’s resources (by adding to the Grand Chamber list), and a redoubling of the enforcement crisis by the production of *even more* un-executed judgments. After all, the judgments delivered as a result of the infringement procedure also need to be executed, leading to the spectre of a potentially absurd situation where the issue is sent back and forth between the Committee of Ministers and the Court and the rights violations in question remain unresolved.

### *C. Possible Backlash*

We have already outlined the potential for the use of Article 46(4) ECHR against some, but inevitably not all, non-executing Contracting Parties to

have negative effects within the dynamics of the Committee of Ministers itself. Beyond that, however, a further potential for backlash exists. In a climate in which, in at least some Contracting Parties, there is a deep popular scepticism about the Court, involving the Court in the (ultimately political) process of execution may well add fuel to the fire of the illegitimacy discourse. It is difficult to see how actors who already considered the Court to be illegitimate, interfering and expansionist would have their minds changed by infringement proceedings in which the Court might be said to have a political or self-interested motivation in reaching one conclusion or another, given that it would in some ways be called upon to adjudicate upon the effectiveness of its own judgments.

To take an obvious (but not, we think, unfair) example, one might imagine the reaction in the United Kingdom should infringement proceedings be taken in respect of the State's non-execution of the *Hirst No 2* and *Greens* judgments on prisoner voting. 'Not only', one can imagine the media backlash going, 'did the European judges try to give rapists, murderers and terrorists a vote, but they then told our politicians that we have no right to decide for ourselves about who gets to vote in our elections. Stop European judges dictating to British politicians'. And what of the political backlash? Although the Prime Minister has accepted that she does not believe there is sufficient political will to withdraw from the Convention, we should not take for granted that this would always be the case. We have, indeed, already seen from the Brexit referendum that popular will can be built in support of a retreat from international organizations thought to be overreaching into domestic affairs and, thus, to 'take back control'. Is it wholly unreasonable to expect that, having been forced into a corner by an infringement proceeding (which the UK would no doubt lose), the UK government might find itself with no other realistic political alternative but to make good on that threat of withdrawal? Even if not, surely the rhetoric of illegitimacy would only be further fuelled, and the critics of the European project(s) further emboldened, by such an act.

It is important to recognize that, even within a State such as the UK, which is generally a high compliance and internationalist State, the conditions for such a backlash are ripe. This is well illustrated by considering the contentious question of the extraterritorial application of the Convention. Theresa May has committed that the UK 'will never again – in any future conflict – let those activist, left-wing human rights lawyers harangue and harass the bravest of the brave – the men and women of Britain's Armed Forces'.<sup>72</sup> This passage, taken from her first speech to the Conservative Party conference as Prime Minister, was clearly referring to the cases in domestic and European courts through which British troops have been held accountable for breaches of the Convention in overseas operations. These

<sup>72</sup> T May, 'Speech to the Conservative Party Conference' (Birmingham, 5 October 2016) <<http://press.conservatives.com/post/151378268295/prime-minister-the-good-that-government-can-do>>.

cases all require the extraterritorial application of the Convention following *Al Skeini v United Kingdom*,<sup>73</sup> a decision that conservative legal observers have derided as one in which the Court ‘retrospectively extended the reach of the ECHR so that it applied to a wide range of British military action abroad’ and ‘abandoned [the] long-settled understanding [of jurisdiction in Article 1] and instead asserted a new interpretation that turned not primarily on territory but on vague ideas about control, public power, and the use of force’.<sup>74</sup>

It has become axiomatic among some that ensuring human rights law does not apply to British military serving abroad is necessary for the purposes of ‘saving our armed forces from defeat by judicial diktat’.<sup>75</sup> Partly in response, it has been declared that the planned British Bill of Rights (to replace the Human Rights Act 1998) will be expressly territorially limited. While this might well succeed in preventing the application of domestic human rights law abroad, it would not of course impact on the extraterritorial applicability of the Convention as a matter of international law. Thus, applicants may still succeed in securing findings of violation against the UK in the ECtHR and quite likely a finding that the lack of applicability of domestic human rights law violates Article 13’s guarantee of effective remedy. Should that be the case there would be yet another ‘standoff’ in which Strasbourg and Westminster fundamentally disagree ‘in principle’, and execution of the general measures likely to be ordered would be a remote possibility. Should such a situation emerge, it is difficult to foresee any positive outcome for the relationship between the Court and the UK politico-legal system from an infringement proceeding that might be brought if Article 46(4) were to be triggered. Indeed, one can foresee a backlash of substantial proportions against the Court instead.

Thus, in situations of principled non-execution Article 46(4) ECHR proceedings would not only fail to achieve execution of the judgment(s) in question, but they may well aggravate existing wounds (not only in the UK, but elsewhere) in a way that has far broader implications for the effective protection of the rights guaranteed in the Convention. In the context of extended states of emergency in France and Turkey, increasing numbers of attempts to undermine human rights through referenda (in, for example, Switzerland and Hungary), and global shifts in power towards populist and often authoritarian leaders and modes of governance, we must be vigilant about the Convention and its Court. We stand at a delicate point: the Convention and its Court still *generally* command respect and are complied

<sup>73</sup> *Al Skeini v the United Kingdom*, App No 55721/07, Judgment of 7 July 2011.

<sup>74</sup> R Ekins, ‘How to Address the Reach of European Human Rights Law’ (Written evidence submitted by the Judicial Power Project to the Defence Sub-Committee investigation on Ministry of Defence support for former and serving personnel subject to judicial processes inquiry, 18 October 2016) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/written/41201.html>>.

<sup>75</sup> R Ekins, J Morgan, and T Tugendhat, *Clearing the Fog of War: Saving Our Armed Forces from Defeat by Judicial Diktat* (Policy Exchange 2015).

with, they continue to drive positive change in rights protection across Europe, and indeed to be a ‘beacon of light’ for persons and groups unable to acquire appropriate recognition of, and remedy for, rights violations in their domestic legal systems. However, as the changing dynamics of non-execution we have outlined in this Article show, the Court and Convention continue to stand on somewhat vulnerable foundations, reliant on States’ compliance, acceptance of their authority, and ability and willingness to hold one another to account. Backlash following infringement proceedings in cases of principled non-execution is, thus, a significant concern, and a real risk should we turn to Article 46(4).

The risk of backlash is, perhaps, somewhat less serious in situations of dilatory non-execution, but this is simply because, on a very basic level, in many cases commitment to the Court and the Convention is either simply rhetorical or, even when *bona fide*, not accompanied by the resources required to give effect to the Convention. Where the State in question shows nothing more than rhetorical engagement with the Convention and the Court, such as Azerbaijan (to return to our earlier example), infringement proceedings may not attract backlash against the Court (where the performance of respect for rights may continue as a matter of ‘caviar diplomacy’), but within the Contracting Party itself. We have also seen, in that country, the suffocation of the legal profession and NGOs in order, partially, to try to cut off the pipeline of cases to Strasbourg in the first place. How infringement proceedings could do anything but exacerbate such tendencies is not evident to us. Where a government is more concerned with suppressing opposition, maintaining power, and repressing dissent, infringement proceedings may simply add fuel to the already blazing fire. In some other States with persistent problems of dilatory non-execution, such as Greece for example, infringement proceedings will neither produce the resources needed to give effect to the rights in question, nor resolve the difficult decisions of prioritization and resource allocation that have to be made where there are competing needs and extremely limited means. Indeed, infringement proceedings may well simply make these difficult decisions even more difficult, placing politicians and other decision-makers into increasingly tight spots. The pragmatic nature of this concern does not rid it of its seriousness or, indeed, the wisdom of accounting for it before deciding to turn to infringement proceedings in order to address non-execution.

## VII. CONCLUSION

It is beyond question that non-execution is a serious problem for the Convention system, and that its persistence raises difficulties of effectiveness and legitimacy for the Court and the system as a whole. In short: non-execution needs to be addressed for not only for the good of individual rights holders in the contracting parties, but also for the system as a whole. However, as our characterization of the dynamics of non-execution and sketch of the types of

cases under review by the Committee of Minister show, non-execution properly understood is a *political* rather than a legal problem. Understood in this way, one must ask in a general sense whether a legal solution (whether it be Article 46(4) ECHR, or the innovative use of the pilot procedure in coming years) can truly address the underlying issues that non-execution reveals.

Not only are the practicalities of using Article 46(4) ECHR so complex as to make its deployment seem unlikely but—and more importantly—the almost certain futility and possible backlash that would flow therefrom make this avenue one in which, we argue, extreme caution should be displayed. If the Council of Europe is serious about tackling non-execution, then it must focus its attention on politics. It must take seriously the reality that, in some cases and at some times, non-execution is the politically popular and advantageous thing for the State to do with an eye to the domestic polity, and that the politics of reputation and peer pressure within the Council of Europe are not sufficiently strong to counter the domestic political ‘payoff’ of non-execution.

The Court has already developed techniques of self-restraint that respond, implicitly, to some of the claims of illegitimacy that can underpin non-execution,<sup>76</sup> but it cannot address the fundamental refusal in some cases to accept its authority to make the final determination about rights. Achieving that requires hard political and intellectual discussions, not infringement proceedings. Should it be decided that Article 46(4) really is to be relied upon to address the non-execution challenge in the Court, those discussions will be further postponed, the procedure will either prove itself to be unworkable or the Court will be forced into an almost impossible position, more and more resources will be absorbed in trying to hear Article 46(4) proceedings *and* in managing the fallout from them, and rights violations will ultimately remain without remedy.

Non-execution is a political problem requiring political solutions. Failure to recognize that may well spell ‘mission impossible’ for the system; an outcome that would be desired by some States, but disastrous for all European peoples.

<sup>76</sup> See de Londras and Dzehtsiarou (n 30) and E Bates, ‘The UK and Strasbourg: A Strained Relationship – The Long View’ in K Ziegler, E Wicks and L Hodson (eds), *The UK and European Human Rights – A Strained Relationship?* (Hart Publishing 2015) 39.