**Non-Execution, Article 46(4), and the European Court of Human Rights:**

**A Note of Caution**

Abstract

Non-execution of the judgments of the European Court of Human Rights is a matter of considerable concern. Recent proposals suggest that more recourse ought to be had to Article 46(4)—the infringement procedure—in order to address this. In response, we argue that attention to both the true nature of non-execution and the potential implications for politics and the resources of the Court of using Article 46(4) demonstrate that the judicialisation of execution in this way is an ill-suited and ill-advised approach to what is, fundamentally, a political problem in the Council of Europe.

**Introduction**

Although judgments of the European Court of Human Rights (henceforth: the ECtHR or the Court) are expressly binding on the parties to whom they are addressed,[[1]](#footnote-1) and are generally complied with,[[2]](#footnote-2) they are not *always* executed by the contracting parties; a state of affairs that causes some considerable unrest. It has recently been suggested that non-execution might be effectively addressed through the use of Art. 46(4); the infringement proceeding of the Convention.[[3]](#footnote-3) This paper responds directly to this suggestion, and thus addresses a narrow question: can the use of Art. 46(4) effectively address the non-execution of judgments? The answer, we claim, is ‘no’.

The supervision of the execution of judgments is primarily a matter for the Committee of Ministers[[4]](#footnote-4) and, since Protocol 11, has been an essentially political element of the working of the European Convention on Human Rights (henceforth: the ECHR or the Convention). However, since Protocol 14 the question of execution has acquired a potentially judicial dimension. This can be discerned in the introduction not only of infringement proceedings under Art. 46(4) ECHR (the focus of this paper), but also in pilot procedures, clarificatory judgments from the Court,[[5]](#footnote-5) and the development of general remedies to address systemic violations that would remain notwithstanding individual remedies.[[6]](#footnote-6) This trend towards what might be termed the ‘juridification’ of execution has deepened further in recent months with the proposal that Art. 46(4) ECHR—the infringement provision—should be used more readily by the Committee of Ministers in the attempt to address serious problems of non-execution of the Court’s judgments.[[7]](#footnote-7)

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 Art. 46(4) ECHR as a response to non-execution, as recommended by de Vries in September 2015.[[8]](#footnote-8) 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.[[9]](#footnote-9) While this paper most directly addresses the (un)suitability of Art. 46(4) to address non-execution, its broader point—that non-execution cannot be properly addressed unless we understand its nature and implications—is of wider application in 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 emanate from principle, and others from dilatoriness.[[10]](#footnote-10) 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—Art. 46(4) ECHR proceedings—and argue that it is both unlikely to work on its own terms and unlikely to address the real problems of and arising from non-execution. We thus argue against adopting the proposal to address execution through recourse to Art. 46(4) ECHR.

**Non-Execution, Legitimacy and Effectiveness**

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 is a matter of serious concern from the perspective of legitimacy and effectiveness and, indeed, the interaction between the two.[[11]](#footnote-11)

Although effectiveness (in the sense of achieving established objectives) and legitimacy are not necessarily synonyms, 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).[[12]](#footnote-12) Bearing this in mind, we can postulate that ‘effectiveness’ indicates ‘legitimacy’ and, by correlation, that ‘ineffectiveness’ indicates ‘illegitimacy’. In the context of an international court, such as the ECtHR, effectiveness should be understood in the context of the objectives for the Court itself.

Readers will recall that there was originally no permanent Court to supervise the enforcement of the Convention; rather, the Court became permanent only in 1998, at which point the Commission on Human Rights was abolished.[[13]](#footnote-13) Taking the *travaux preparatoires* of the Convention into account, the objectives of a Convention-related Court might be summarily described as being (i) the interpretation of common standards of rights protections to be enjoyed as a minimum across the Contracting Parties,[[14]](#footnote-14) (ii) the adjudication of whether Convention rights have been infringed[[15]](#footnote-15) by means of reaching a ‘clear and unchallengeable judgment’,[[16]](#footnote-16) and (iii) the operationalision of states’ commitment to guaranteeing Convention rights in a manner supplementary to domestic politico-legal arrangements.[[17]](#footnote-17) Although Mr Fayat of Belgium opined that if the Court were to have ‘a really precise and practical jurisdiction, then the question of the means of enforcing its judgments appears of only subsidiary importance’,[[18]](#footnote-18) it might be readily conceded that achieving these three objectives is dependent on the judgments of the Court being accepted and implemented (i.e. executed) by the Contracting Parties. That is, on the authority of the Court to carry out these functions being accepted. Should judgments remain un-executed, 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, it may indicate that perceived illegitimacy on the part of the Court may result in its judgments being seen or perceived as illegitimate. Perceived illegitimacy of the Court’s judgment may underpin a (political) claim from a Contracting Party that it need not be executed, notwithstanding the clear *legal* obligation to do so. As further considered below, the UK’s principled 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 (i.e. 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 (i.e. is not respecting its subsidiarity and thus is acting illegitimately). Thus, this claim relates to both input and output legitimacy as commonly understood.

The second connection between ineffectiveness and legitimacy relates to outcome legitimacy: an ineffective Court does not ‘effectively’ protect rights (i.e. 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’. Of course, in real terms in the context of the ECHR this is more accurately stated as ‘the system does not work to effectively protect rights’ where the system is (rightly) seen as comprising contracting parties (that violate rights), the Committee of Ministers (that fails to ensure execution), *and* the Court (whose judgment is not executed).

Beyond the implications for the Court’s legitimacy of non-execution, a further concern of so-called ‘contagion’ arises. Although in the analysis that follows we distinguish non-execution of the prisoner voting cases from the wider phenomenon of non-execution that we classify as dilatoriness, this is not to underplay or discount the seriousness of non-execution by the United Kingdom or, in the future, by similarly high-compliance and influential contracting parties. The UK is an important norm entrepreneur in the European system and its actions can embolden or inspire those of others.[[19]](#footnote-19) There is, thus, a risk of ‘contagion’, i.e. a risk of dilatory non-execution being passed off as principled non-execution. Indeed, this appears to be materialising in recent months with the entry into force of a new Russian law that would allow the Constitutional Court to disregard rulings from international human rights courts, including the ECtHR. This law has already been described by the Venice Commission as ‘incompatible with international law’.[[20]](#footnote-20) Given the very high volume of cases brought to the Court concerning Russia,[[21]](#footnote-21) and their relatively high success rate[[22]](#footnote-22)—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’.[[23]](#footnote-23) The appearance of principled non-execution is also emphasized by the fact that it was the case of *Anchugov and Gladkov v Russia*,[[24]](#footnote-24) 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 executed.[[25]](#footnote-25) However, it is also important to note that the non-execution of these cases can be related to an inconsistency between the terms of the Russian constitution and the requirements of the Convention in respect of prisoner voting so that that this indicates the possibility that some cases of non-execution may have a principled element to them, even when also explicable by dilatoriness.

**Execution of Judgments: The Convention System**

The ECtHR enjoys a high level of compliance with its judgments when compared with other regional or global human rights tribunals.[[26]](#footnote-26) Unlike many other human rights judicial institutions[[27]](#footnote-27) the Court has a well-established mechanism for supervising the execution of its judgments, with primary responsibility resting with the Committee of Minsters. Before outlining how the system currently works, however, it is germane to pause for a moment on the deceptively complex concept of ‘execution’ here.

In relatively simple terms, we might say that ‘execution’ comprises ‘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 a straightforward concept in terms of remedy and, correspondingly, determining execution in this respect is relatively uncomplicated. Art. 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.[[28]](#footnote-28) In many individual applications and in some inter-state cases 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 a simple matter of determining whether the awarded sum has actually been paid to the successful applicant.[[29]](#footnote-29)

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 injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention’.[[30]](#footnote-30) The Contracting Parties to the Convention are under international obligation to comply with individual measures as they are under the obligation to pay just satisfaction.[[31]](#footnote-31) Individual measures are directed at a form of restitution for the successful applicant: have her rights been appropriately restored? Individual measures are not prescribed in every case; rather they are likely to arise in cases where restitution of rights by such a measure is deemed possible and appropriate. The well-known case of *Volkov v Ukraine*[[32]](#footnote-32) is an apposite example. In this case, which concerned the corrupt removal of the applicant from his post as a judge of the Supreme Court, the ECtHR ordered the individual measure of reinstatement. Determining whether such a remedy has been provided and, thus, whether the judgment has been executed is, once again, relatively straightforward. If Mr Volkov has been reinstated as a Supreme Court judge (which he has[[33]](#footnote-33)) then the individual measure in question has been complied with and, to that extent, the judgment has been executed.

Finally, the third level of execution is the most challenging one: general measures which are ‘adopted …[to] prevent … new violations similar to that or those found or [to] put… an end to continuing violations’.[[34]](#footnote-34) General measures, thus, require substantial change at a systemic level, as was the case in *Hirst No 2* regarding prisoners’ voting rights in the United Kingdom.[[35]](#footnote-35) Indeed, in some cases the Court orders only general measures, eschewing just satisfaction and individual measures entirely. For instance, in *Hirst No 2* the Court did not grant any just satisfaction or individual measures, instead it pointed out that implementation of general measures (namely allowing some prisoners to vote) would be a sufficient remedy.[[36]](#footnote-36) General measures can be particularly challenging from the perspective of determining whether execution has taken place; unlike just satisfaction or (in most cases at least) individual measures, the question of execution in such cases is one of interpretation.

In recognition of the complexity of supervising execution, Protocol 14 to the Convention 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 (i.e. Art. 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 Art. 46(3) ECHR still awaits its debut before the Court its usefulness is not yet clear.

**Types of Cases under Review before the Committee of Ministers**

Before exploring the dynamics of non-execution, it is useful to consider the types of cases that are currently under review by 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.

The Committee of Ministers of the Council of Europe recognises 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.[[37]](#footnote-37) Most 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 which urgent individual measures are required, i.e. 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 elevated into enhanced supervision as the matter of execution becomes complex for political, economic, or other reasons.[[38]](#footnote-38)

The majority of the cases currently under review before the Committee of Ministers can be classified as ‘simple’. By this we mean that their execution does not require vast resources and that they do not touch on issues of particular political sensitivity within the Contracting Party. 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 tend to be under review by the Committee of Ministers simply because execution is in train: there is neither principled non-execution nor dilatoriness. Rather, ‘normal’ processes of execution are underway. These cases are, thus, 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 concern a large number of applications, require the introduction of major reforms in the Contracting Party, or simply require the Contracting Party to pay significant sums of just satisfaction. The group of cases that followed the pilot judgment in *Ivanov v Ukraine[[39]](#footnote-39)* is an example of such situation. This case concerned violations of Art. 6 and 13 ECHR when final judgments of Ukrainian national courts could not be executed. This relates to a large number of cases, the resolution of which would put extra pressure on the already stretched budget of Ukraine. Although there are certain developments in relation to these cases[[40]](#footnote-40) they have not been fully implemented yet. Although the Ukrainian authorities have adopted a legal remedy that is supposed to fix the systemic problem of non-execution of final judgments of national courts,[[41]](#footnote-41) the real challenge here is the lack of resources to pay compensation for delays in the execution of thousands of judgments.[[42]](#footnote-42) The Committee of Ministers has concluded that ‘the funds allocated [by the Ukrainian authorities] for the enforcement of judicial decisions is [sic!] not sufficient to enforce all the decisions pending for enforcement’.[[43]](#footnote-43) Taking into account that Ukraine is in turmoil, fighting hyperinflation, military aggression and internal instability, it seems to be highly unlikely that the authorities will reallocate resources to comply with the judgment of the Strasbourg Court.

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 means of execution of *A, B &C v Ireland*[[44]](#footnote-44)), however that is by no means always the case. The prisoner voting cases against the UK fall easily into this category:[[45]](#footnote-45) as outlined below they relate to a matter of real political sensitivity (both in terms of subject matter and, perhaps more pertinently, in terms of where political authority lies). In these cases execution does not require any major resource outlay, but rather legislative change.Another example of this sort is the execution of the LGBTQi equality cases in Russia. Recent developments in Russia show anything but improvements in fighting discrimination against members of the LGBTQi community. In spite of this, the judgment in the case of *Alekseyev v Russia*[[46]](#footnote-46) has not yet been executed.[[47]](#footnote-47) In this case the Court found that repeated bans on the holding of gay pride parades and pickets in Russia are disproportionate and violate the Convention. However, in the domestic sphere Russian authorities adopt a (not unpopular) homophobic stance and perpetuate anti-gay propaganda[[48]](#footnote-48) so that softening their approach to the LGBTQi might be perceived by some people in Russia as weakness resulting in the loss of face. Persistent non-execution in this field, together with continued sanctioning of or indifference to homophobic attitudes and brutality,[[49]](#footnote-49) suggest that the political elites are arguably not prepared to lose political standing in order to comply with the judgments of the ECtHR asserting LGBTQi rights.

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, i.e. cases the execution of which would be resource intensive and/or relates to a matter of 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.

**The Reasons for Non-Execution**

Although most judgments of the Court *are* executed, some are not. In our view we can broadly categorise these as cases where (i) 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, and (ii) states are generally dilatory in their execution of adverse judgments from the Court. 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.

*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,[[50]](#footnote-50) which division might be pre-determined 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.[[51]](#footnote-51) The Russian Constitutional Court has taken a similar approach (now also supported by domestic legislation considered above), and the Italian Constitutional Court has at least intimated its inclination towards a similar position.[[52]](#footnote-52) Thus, non-execution by both the UK and Russia in respect of ECtHR judgments on prisoner voting can be said to be examples of principled non-execution, and other examples are imaginable in the future.

In this respect it is instructive to focus briefly on the United Kingdom. The UK is an important norm entrepreneur and high compliance state whose posture in respect of the ECtHR is a matter of general concern: ‘the Court has rather a lot to lose if…high-compliance states[] 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’.[[53]](#footnote-53) In this context, the standoff between the United Kingdom and the Court as regards prisoner voting rights[[54]](#footnote-54) 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 Court.

It is not necessary, here, to rehearse the well-known facts of these cases,[[55]](#footnote-55) in which the Court established that the blanket ban preventing all convicted prisoners in the United Kingdom from voting violates Art. 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 reinstated relatively recently and, in spite of a process of ‘reflection’ and consideration of possible reforms[[56]](#footnote-56) since the *Hirst* judgment, the *status quo ante* remains in place. Indeed, it might well be said to have become further entrenched, the refusal to be ‘dictated to’ by Strasbourg on something on which Westminster had already made a decision appearing to be a strongly held point of principle, (so much so that the Prime Minister, David Cameron, has said that the thought of prisoners having a right to vote makes him ‘physically ill’[[57]](#footnote-57)). Democratic participation for imprisoned criminals ‘damn well shouldn’t’ be allowed to happen, the Prime Minister says.[[58]](#footnote-58) If the Court thinks otherwise, it seems, ‘we need to clip its wings’.[[59]](#footnote-59)

When these cases are seen as relating solely to a straightforward question of whether incarcerated persons can vote *per se*, the strength and depth of the conviction of the Prime Minister (and many others in the UK) may seem baffling. However the standoff between the UK and 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. Lest we consider this is ‘only’ a Conservative phenomenon, it is important to note that the roots of this current crisis can be said to go back at least as far as the Blair government’s frustration with the Court’s insistence that some parts of its counter-terrorism agenda are in violation of the Convention, and the use by British courts of Strasbourg jurisprudence in finding incompatibilities with the Human Rights Act 1998. Of course, in the British constitutional tradition it is politics that determines the constitution, not courts, and that deep-seated constitutional tradition inevitably struggles with a strong judiciary.[[60]](#footnote-60) While a muscular European judiciary might have led to some discontent in the past, the Human Rights Act 1998 has brought that muscularity ‘home’[[61]](#footnote-61) 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.[[62]](#footnote-62)

Thus, the UK’s non-execution, 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.

*Dilatoriness*

In contrast with what we have characterised 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 8th report on the implementation of judgments, presented by Mr Klaas de Vries in September of 2014,[[63]](#footnote-63) 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, re-opening 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 behavior 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 organisational resistance to the idea of rights protection, to liberal democracy founded on rights and constitutionalism, and to judicial authority *per se*.In others states this non-execution reflects a long-standing failure to organise the organs of the state and administration of state power in an effective, accountable, and rights-respecting way. 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. While these are not problems of the ECtHR itself, they fundamentally undermine its capacity for the effective protection of rights in these countries.

**The Proposed Solution: Art. 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.[[64]](#footnote-64) 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.

The possibility of persistent non-execution has always been accepted and contemplated in respect of the Convention. As early as 1949, the International Council of the European Movement recommended that the Council of Europe ‘shall decide on such measures as are appropriate’ to address any ‘case of persistent failure to execute’ recommendations of the then-Commission or judgments of the Court.[[65]](#footnote-65) Indeed, as Schabas shows,[[66]](#footnote-66) it was not intended that the Court would have enforcement powers *per se*; rather, as Churchill said in debates on the draft Convention, the Court would ‘depend …on the individual decisions of the States’[[67]](#footnote-67) for enforcement. Notwithstanding this, it seems to have been contemplated that states who signed up to the Convention *would* abide by their obligations as ‘States existing by right of law’,[[68]](#footnote-68) with substantial debate as to the appropriateness of involving the Committee of Ministers in a substantial way in supervising the execution of judgments.[[69]](#footnote-69) In the end, Art. 54 of the original text provided that ‘The judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution’. This subsequently became Art. 46(2) ECHR, following ratification of Protocol 11, which dissolved the Commission, made the Court permanent, and saw the extension of Convention membership to almost all European states.

The original position conveys a sense of optimism that states will abide by and execute judgments to which they have volunteered to be bound, and that supervision by the Committee of Minister would need to be only somewhat light touch. In reality, however, a real challenge with execution emerged. 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 drafted and open for ratification. Between 1999 and 2007 the number of pending judgments grew from 1607 to 6017.[[70]](#footnote-70) Between 1999 and 2002 the number of pending cases then doubled.[[71]](#footnote-71) This suggested that the drafters’ faith in ‘States…by right of law’ may have been misplaced, or perhaps that the Court, the Convention and the membership of the Council of Europe had changed so fundamentally that a new structure to support realisation of the expectation of compliance was necessary. In any case, 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’[[72]](#footnote-72) 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 (i.e. cases the execution of which were resource intensive or politically sensitive), which in turn fed into the problem of repetitive applications before the Court.[[73]](#footnote-73)

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 Art. 46(3) ECHR—allows the Committee of Ministers to ask the Court to interpret a judgment in order to better enable its supervision and was considered above. The second change—in what is now Art. 46(4) ECHR—is altogether different. This allows the Committee of Minsters 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 credibility and effectiveness’.[[74]](#footnote-74) 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 Art. 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 Art. 46(4) ECHR proceeding ‘add further possibilities of bringing pressure to bear’ and ‘should act as an effective incentive to execute the Court’s judgments’.[[75]](#footnote-75)

As is well known, there was a considerable delay in Protocol 14 coming into force, largely caused by Russia’s failure to ratify it. It has now been in force since 1 June 2010, but the problem of non-execution has not gone away. Indeed, it has arguably worsened, even with the threat of an Art. 46(4) ECHR proceedings on the books.[[76]](#footnote-76) It has now been proposed that actually using Art. 46(4) ECHR might go some way towards resolving this persistent challenge of non-execution.[[77]](#footnote-77) However, we caution against adopting this proposal because, in our view, Art. 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 ‘dilatory’ non-executing state.

**An Ill-Suited Solution**

Given the nature of the non-execution problem as we have outlined it above, we argue that Art. 46(1) ECHR is an ill-suited solution on three main grounds: practicality, futility, and potential backlash. All of these concerns arise regardless of the type of non-execution (simple, resource intensive, or politically sensitive) because of Art. 46(4)’s fundamental inability to address the *reasons* for non-execution.

*Practicality*

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

Art. 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 super-majority requirement is, no doubt, a pragmatic one designed to limit vexatious use of Art. 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.

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 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’.[[78]](#footnote-78) Thus, the Committee is involved in many aspects of functioning of the Council of Europe,[[79]](#footnote-79) and before any decision to try to trigger Art. 46(4) ECHR would be taken, consideration of the implications of such a move for the Committee’s ability to fulfill its broader functions would be required. Certainly, one can foresee that infringement proceedings against Country X 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 Art. 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, 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 Art. 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.

*Futility*

Even if, somehow, those practical difficulties could be overcome, we are left with what seems to us a fatal flaw in the proposition that Art. 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 Art. 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.[[80]](#footnote-80) 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 Art. 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 addition, one must consider what will happen in respect of the implementation of the initial judgment (which is often an incremental process) once Art. 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 Art. 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), 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[[81]](#footnote-81) already constitute a heavy burden for this part of the Court. At present the Grand Chamber tends to deal with around twenty cases per year, and proceedings going to the Grand Chamber last over five years. Either Art. 46(4) ECHR proceedings will fall into this long queue, or they will displace cases already waiting to be heard by the Grand Chamber. Art. 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 our sense that neither the Committee of Ministers nor the respondent state will do much in terms of implementing the judgment while the Grand Chamber proceedings are pending and in train is correct, 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 Art. 46(4) ECHR to address non-execution: what, if anything, will it achieve? The reality is that an Art. 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, Art. 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 Art. 46(4) proceeding might be capable of providing an answer in such 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?

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 state’s fellow Contracting Parties have already unsuccessfully attempted to ensure execution. That precisely such a potential outcome seems to underpin the conviction that infringement proceedings might address the Court’s non-execution problem reveals, we argue, 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 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 Art. 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 Art. 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 specter 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.

Thus, our argument of futility can be illustrated by returning to the categories of case and the reasons for non-execution that we outlined above. Simple, politically sensitive and resource intensive cases might all be cases of non-execution for reasons of *either* principle or dilatoriness. The particular dynamics of non-execution will be dependent on the combination of type and reason, but in all cases simply sending the case to the Court for an Article 46(4) solution fails to address the problem. Take, for example, a *simple* case not executed for reasons of principle; here, the decision of the Court will not address the principled basis of non-execution regardless of the simplicity of the case from an abstract perspective. The *principle* here—that the European Court of Human Rights ought not to be deciding on this, that domestic decision-making should prevail, that the Constitution is superior to the Convention—is utterly undisturbed by the infringement procedure regardless of the outcome. The same is true regardless of the type of case where the underpinning reason for non-execution is one of principle. Where the underpinning reason is one of dilatoriness Article 46(4) will be similarly unsuccessful, but here for different reasons. Thus, where for example a politically sensitive case is not executed for reasons of dilatoriness rather than of principled objection about authority, the further judgment of the Court will not be an effective lever for change for the reasons outlined above. There is no effective reputational damage by reference to the factors that make the case politically sensitive (i.e. domestic politics) so that the root cause of non-execution is quite simply not addressed. Thus, even if one could overcome all of the practical difficulties of actually using Article 46(4), which we outlined above, the infringement procedure simply cannot be effective because it does not address the root cause of non-execution.

*Possible Backlash*

We have already outlined the potential for the use of Art. 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 skepticism about the Court, involving the Court in the (ultimately political) process of execution may well add fuel to the fire of the illegitimacy discourse. 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* 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? It has already been made clear by the Prime Minister that the United Kingdom will not rule out withdrawal from the Convention. 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 Europe further emboldened, by such an act.

Thus, not only would Art. 46(4) ECHR proceedings 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.

**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. However, as our characterisation of the dynamics of non-execution and sketch of the types of cases under review by the Committee of Minister shows, 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 Art. 46(4) ECHR, or the innovative use of the pilot procedure in coming years) can truly address the underlying issues that non-execution reveals. Even if one were to argue that legal avenues should be pursued to address non-execution, we argue that Art. 46(4) ECHR is ill-suited to the reality of non-execution as it stands within the Council of Europe. Not only are the practicalities of using Art. 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 makes this avenue one in which, we argue, extreme caution should be displayed.

1. Art. 46(1) ECHR. [↑](#footnote-ref-1)
2. According to the annual report for 2015 the Committee of Ministers has 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>, visited 4 June 2016, p. 58-60. [↑](#footnote-ref-2)
3. 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), visited 17 February 2016. [↑](#footnote-ref-3)
4. Art. 46(2) ECHR. This is not to suggest that other elements of the Council of Europe have no role in the supervision of execution; this matter has become considerably more multi-party and complex in recent years. For an overview see, for example, E. Lambert Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* (Council of Europe Publishing 2008); A. Drzemczewski, ‘The Parliamentary Assembly’s Involvement in the Supervision of the Judgments of the Strasbourg Court’, 28 *NQHR* (2010) p. 164. [↑](#footnote-ref-4)
5. Clarificatory judgments were introduced by Protocol 14 to Art. 46(3). Pursuant to it ‘[i]f the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation.’ [↑](#footnote-ref-5)
6. See, for example, P. Leach, ‘No Longer Offering Fine Mantras to a Parched Child? The European Court’s Developing Approach to Remedies’, 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) p. 142. [↑](#footnote-ref-6)
7. *Supra* n 3. [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. 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/GT-GDR-F/CDDH%282015%29R84_Addendum%20I_EN-Final.pdf>, visited 4 June 2016, para. 134. [↑](#footnote-ref-9)
10. The members of the Steering Committee for Human Rights came to a similar conclusion that non-execution is caused by either political reasons of the reasons of complexity of execution. *Ibid*., para. 134-135. Although we acknowledge that some delays in execution can be caused by complexity of the measures that should be adopted by the Contracting Parties a really challenging aspect of execution is when the Contracting Parties do not put efforts into execution regardless of whether the measures are complex or less so. Therefore, categorisation of non-execution below into principled non-execution and dilatoriness is more appropriate for the purposes of this paper. [↑](#footnote-ref-10)
11. See, H. Keller and C. Marti, ‘Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights’ Judgments’, 26 *EJIL* (2015) p. 829, at p. 830; C. Hillebrecht, ‘Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals’, 1 *Journal of Human Rights Practice* (2009) p. 362. [↑](#footnote-ref-11)
12. 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) p. 114. [↑](#footnote-ref-12)
13. It was provided by Protocol 11 to the ECHR which entered into force in 1998. [↑](#footnote-ref-13)
14. Commentary by the European Movement on its Proposed Articles 1-5 (and final Article 1) of the Convention, *Travaux Preparatoires on Art. 1 ECHR*, 1 March 1977, at p. 2-3. See also the statement of Mr Dominedo (Italy) at the First Session of the Consultative Assembly of the Council of Europe, plenary sitting of 19 August 1949, that the Court would have ‘the power to declare the law’ and the ‘prestige to enable it to apply indirect sanction for the enforcement of judgments’, *Travaux Preparatoires on Art. 45 and 49 ECHR*, CDH (70) 32, at p. 4. [↑](#footnote-ref-14)
15. See the motion proposed by Mr Ruini et. al. at the First Session of the Consultative Assembly of the Council of Europe, plenary sitting of 17 August 1949 (seeking ‘an immediate agreement for the establishment of [a court that] will consider violations of the fundamental rights of freedom, which are now guaranteed by the constitutions, legislations, and political customs of each of the States’). See also the statement of Mr Foster (United Kingdom) at the First Session of the Consultative Assembly of the Council of Europe, plenary sitting of 19 August 1949, that ‘[t]he object of this Court of Human Rights is to be able to judge any alleged infringement of the Human Rights laid down in’ the Convention, *Ibid.*, p. 5. [↑](#footnote-ref-15)
16. Commentary by the European Movement on its Proposed Articles 1-5 (and final Article 1) of the Convention, *Travaux Preparatoires on Art. 1*, *supra* n.14, p. 3. [↑](#footnote-ref-16)
17. Statement of Mr Teitgen (France) at the First Session of the Consultative Assembly of the Council of Europe, plenary sitting of 17 August 1949 (*Ibid.*, p. 8), of Mr Foster (United Kingdom) at the First Session of the Consultative Assembly of the Council of Europe, plenary sitting of 17 August 1949 (*Ibid.*, p. 11), [↑](#footnote-ref-17)
18. Statement of Mr Fayad (Belgium) at the First Session of the Consultative Assembly of the Council of Europe, plenary sitting of 19 August 1949, that the Court would have ‘the power to declare the law” and the “prestige to enable it to apply indirect sanction for the enforcement of judgments’, *Travaux Preparatoires on Articles 45 and 49, supra* n. 14, p. 4. [↑](#footnote-ref-18)
19. For a cogent ‘warning’ in this respect see, for example, P. Leach and A. Donald, ‘Hostility to the European Court and the Risks of Contagion’, *UK Human Rights Blog*, 21 November 2013, [www.ukhumanrightsblog.com/2013/11/21/hostility-to-the-european-court-and-the-risks-of-contagion-philip-leach-and-alice-donald/](http://www.ukhumanrightsblog.com/2013/11/21/hostility-to-the-european-court-and-the-risks-of-contagion-philip-leach-and-alice-donald/), visited 5 January 2016. See also N. Muižnieks, Memorandum to the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, 10 October 2013, [www.wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2365759&SecMode=1&DocId=2062696&Usage=2](http://www.wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2365759&SecMode=1&DocId=2062696&Usage=2), visited 5 January 2016. [↑](#footnote-ref-19)
20. Venice Commission, Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, 15 March 2016, available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282016%29005-e>, visited 4 June 2016, para. 98. [↑](#footnote-ref-20)
21. 9207 applications were 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), visited 18 February 2016. [↑](#footnote-ref-21)
22. 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), visited 17 February 2016. [↑](#footnote-ref-22)
23. 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), visited on 5 January 2016. 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), visited on 5 January 2016. [↑](#footnote-ref-23)
24. ECtHR 4 July 2013, Case No. 11157/04 and 15162/05, *Anchugov and Gladkov v Russia*. [↑](#footnote-ref-24)
25. Judgment of 19th April, 2016 No. 12-П/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 4th 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.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf>, visited 4 June 2016. For a short commentary see, K. Dzehtsiarou, S. Golubok and M. Timofeev, ‘Imaginary Dialogue and Fictitious Collaboration: Russian Response to the Prisoner Voting Judgment’, *ECHRblog,* 29 April 2016, <http://echrblog.blogspot.co.uk/2016/04/the-russian-response-to-prisoner-voting.html>, visited on 4 June 2016. [↑](#footnote-ref-25)
26. The average time for execution of the vast majority of judgments delivered by the ECtHR is slightly over 4 years. Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, 8th Annual Report of the Committee of Ministers (2014), [www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\_annreport2014\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf), visited 13 February 2016. Although similar statistics are not available for the Inter-American Court of Human Rights (henceforth: the 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), p. 55; L. Burgorgue Larsen and A. Ubeda de Torres, *The Inter-American Court of Human Rights. Case Law and Commentary* (Oxford University Press 2013), p. 213. [↑](#footnote-ref-26)
27. 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. In case of the Inter-American system, the IACtHR itself can monitor compliance with its judgments. See *Ibid.*, p. 178*.* The IACtHR and the Inter-American Commission ‘have been authorized to speak before the General Assembly, but this does not give rise to any real political debate worthy of the name between the Sates…’ *Ibid.,* p. 180. In assuming competence to supervise compliance with its own judgments, the IACtHR has expressly distinguished the Inter-American system from the Strasbourg system. The IACtHR stated that ‘[u]nlike the inter-American system for the protection of human rights, in the European system, the Committee of Ministers of the Council of Europe has adopted norms that clearly establish the procedure that this body should use for monitoring compliance with the judgments of the Court. Unlike the procedure in the inter-American protection system, the Committee of Ministers is the political body to which the responsible States submit their reports on the measures adopted to execute judgments. The American Convention does not establish a specific body responsible for monitoring compliance with the judgments delivered by the Court, as provided for in the European Convention. When the American Convention was drafted, the model adopted by the European Convention was followed as regards competent bodies and institutional mechanisms; however, it is clear that, when regulating monitoring compliance with the judgments of the Inter-American Court, it was not envisaged that the OAS General Assembly or the OAS Permanent Council would carry out a similar function to the Committee of Ministers in the European system’. IACtHR 28 November 2003, Series C No. 104, *Baena-Ricardo et al v Panama*, para. 87-88. [↑](#footnote-ref-27)
28. 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), p. 155-162. [↑](#footnote-ref-28)
29. There are some complex elements of payment, such as whether interest has been paid, or whether the payment has been made by the correct date. It is also the case that in some cases, such as *Loizidou v Turkey* [1995] ECHR 10, payment is 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* Application no. 46347/99, Judgment of 22 December 2005). However *as a general matter* determining whether or not payment has been made in full and on time is a ‘simple’ or straightforward matter. [↑](#footnote-ref-29)
30. 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, [www.wcd.coe.int/ViewDoc.jsp?id=999329](http://www.wcd.coe.int/ViewDoc.jsp?id=999329), visited 12 February 2016. [↑](#footnote-ref-30)
31. In *Scozzari and Giunta v Italy* the ECtHR has emphasized that ‘by Article 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, inter alia, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects’. ECtHR 13 July 2000, Case No. 39221/98 and 41963/98, *Scozzari and Giunta v Italy*, para. 249. [↑](#footnote-ref-31)
32. ECtHR 27 May 2013, Case No. 21722/11, *Volkov v Ukraine*. [↑](#footnote-ref-32)
33. ‘Oleksandr Volkov Reinstated as Supreme Court Judge in Ukraine’, *EHRAC web page,* 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/), visited 5 January 2016. [↑](#footnote-ref-33)
34. Appendix 4 (Item 4.4) Rules of the Committee of Ministers, *supra* n. 23, Rule 6, section 2. [↑](#footnote-ref-34)
35. ECtHR 6 October 2005, Case No. 74025/01, *Hirst v the United Kingdom (No 2)*. [↑](#footnote-ref-35)
36. 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’. *Ibid.*, para. 93. [↑](#footnote-ref-36)
37. Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights. 8th Annual Report of the Committee of Ministers (2014). [www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\_annreport2014\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf), visited 13 February 2016, p. 28.; see also, Keller and Marti *supra* n.11, p. 830 [↑](#footnote-ref-37)
38. 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). [↑](#footnote-ref-38)
39. ECtHR 15 October 2009, Case No. 40450/04, *Ivanov v Ukraine.* [↑](#footnote-ref-39)
40. Current State of Execution of Pending Case *Ivanov v Ukraine,* [www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\_en.asp?CaseTitleOrNumber=Ivanov&StateCode=UKR&SectionCode](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Ivanov&StateCode=UKR&SectionCode)=, visited 17 February 2016. [↑](#footnote-ref-40)
41. Ukrainian parliament adopted the law ‘On State guarantees concerning enforcement of judicial decisions’ on 5 June 2012 and it entered into force on 1 January 2013. [↑](#footnote-ref-41)
42. According to information available to the Committee of ministers 26,835 writs of execution for a total amount of 865.45 million UAH (slightly less than €30,000,000) are still pending enforcement. 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)=, visited 14 February 2016. [↑](#footnote-ref-42)
43. *Ibid.* [↑](#footnote-ref-43)
44. ECtHR 16 December 2010, Case No. 25579/05, *A, B and C v Ireland.* [↑](#footnote-ref-44)
45. *Hirst v the United Kingdom (No 2), supra* n 35; ECtHR 23 November 2010, Case No. 60041/08 and 60054/08, *Greens and MT v the United Kingdom*. [↑](#footnote-ref-45)
46. Applications nos. 4916/07, 25924/08 and 14599/09, Judgment of 10 October 2010. [↑](#footnote-ref-46)
47. See, Current State of Execution of Pending Case *Alekseyev v Russia*, <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=alekseyev&StateCode=RUS&SectionCode>=, visited 17 February 2016. [↑](#footnote-ref-47)
48. Russian politicians have indicated on a number of occasions that they are not prepared to comply with general measures stemming from the case of *Alekseyev v Russia*. See the summary in English of one of such statements in K. Dzehtsiarou and A. Greene, ‘Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners’, 12 *German Law Journal* (2011) p. 1707 at p. 1709. [↑](#footnote-ref-48)
49. See for example, Human Rights Watch, *Licence to Harm: Violence and Harassment against LGBT People and Activists in Russia* (2014, New York; HRW). [↑](#footnote-ref-49)
50. 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) p. 1-5. [↑](#footnote-ref-50)
51. See, Görgülü BVerfGE 111, 307. [↑](#footnote-ref-51)
52. Corte Costituzionale (Italian Constitutional Court), Judgment nos 348 and 349 of 2007. [↑](#footnote-ref-52)
53. F. de Londras and K. Dzehtsiarou, ‘Managing Judicial Innovation in the European Court of Human Rights’, 15 *HRLR* (2015) p. 523, p. 527. [↑](#footnote-ref-53)
54. *Hirst v the United Kingdom (No 2)*, *supra* n 35. See also ECtHR 22 May 2012, Case No 126/05 *Scoppola v Italy (No.3);* *Anchugov and Gladkov v Russia, supra* n. 19; ECtHR 12 August 2014, Case No. 47784/09, *Firth and Others v the United Kingdom*. [↑](#footnote-ref-54)
55. *Hirst v the United Kingdom (No 2)*, *supra* n.35, *Greens and MT v the United Kingdom*, *supra* n. 36. [↑](#footnote-ref-55)
56. 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), visited 13 February 2016. See also proposals by the Joint Select Committee ‘the Draft Voting Eligibility (Prisoners) Bill’. 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, [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), visited 13 February 2016. [↑](#footnote-ref-56)
57. Prime Minister’s Questions, 3 November 2010, Daily Hansard – Debate, [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), visited 17 February 2016. [↑](#footnote-ref-57)
58. ‘Prisoners “damn well shouldn’t” be given right to vote, says David Cameron’, *The Guardian*, 13 December 2013. [↑](#footnote-ref-58)
59. *Ibid*. [↑](#footnote-ref-59)
60. Classically, see J.A.G. Griffin ‘The Political Constitution’, 42 *MLR* (1979) p.1. [↑](#footnote-ref-60)
61. 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. [↑](#footnote-ref-61)
62. See generally Human Rights Act 1998. [↑](#footnote-ref-62)
63. de Vries, *supra* n.. [↑](#footnote-ref-63)
64. In early cases the Court has reserved very broad area of discretion for the Respondent parties in relation to execution of its judgments. In *Marckx v Belgium*, the Court stated that ‘the Court’s judgment is essentially declaratory and leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligation under’ the Convention. ECtHR 13 June 1979, Case No. 6833/74, *Marckx v Belgium*, para. 58. Although the Court has somewhat toughen its position later, it rarely prescribes certain particular actions to be undertaken by the respondent state to repairing the violation. Keller and Marti, *supra* n. 7, p. 835-839. [↑](#footnote-ref-64)
65. Recommendation adopted at the meeting of the International Council for the European Movement held at Brussels in February 1949, INF/2/F, p. 3 quoted in W. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015), p. 862. [↑](#footnote-ref-65)
66. *Ibid*. [↑](#footnote-ref-66)
67. Report of the Sitting of the Consultative Assembly of 17 August 1949, 1 *Travaux Preparatoires* 32, 35. [↑](#footnote-ref-67)
68. Comments of Henri Fayat, Report of the Eighth sitting of the Consultative Assembly held 19 August 1949, 1 *Travaux Preparatoires* 36, 154. [↑](#footnote-ref-68)
69. See the account given in Schabas, *supra* n. 52, p. 863-864. [↑](#footnote-ref-69)
70. Statistical Data on Execution of Judgments of the European Court of Human Rights, [www.coe.int/t/dghl/monitoring/execution/Reports/Stats/StatisticsExecutionJudgments\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Reports/Stats/StatisticsExecutionJudgments_en.pdf), visited 15 February 2016. [↑](#footnote-ref-70)
71. *Ibid*. [↑](#footnote-ref-71)
72. Explanatory Report on Protocol 14, para. 16. [↑](#footnote-ref-72)
73. *Ibid.* [↑](#footnote-ref-73)
74. *Ibid*., para. 98. [↑](#footnote-ref-74)
75. *Ibid*., para 100. [↑](#footnote-ref-75)
76. The drafters of the Protocol expected that the mere fact of this measure ‘should act as an effective new incentive to execute the Court’s judgments’. Explanatory Report on Protocol No. 14, *supra* n. 59, para. 9. Unfortunately, these expectations failed to materialize. [↑](#footnote-ref-76)
77. de Vries, *supra* n. 5. [↑](#footnote-ref-77)
78. About the Committee of Ministers, <http://www.coe.int/T/CM/aboutCM_en.asp>, visited 17 February 2016. [↑](#footnote-ref-78)
79. 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*. [↑](#footnote-ref-79)
80. 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) p. 280. [↑](#footnote-ref-80)
81. 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?’, 34 *Legal Studies* (2014) p. 444. [↑](#footnote-ref-81)