Future outlook: foreseeable challenges with regard to the execution of judgments of the ECtHR

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Introduction

This has been an interesting day with a lot of useful information and food for thought. I have been asked to present some reflections about "Future outlook: foreseeable challenges with regard to the execution of judgments of the ECtHR". I would like to emphasize the word "foreseeable". We have seen several unexpected developments in Europe and may continue to do so. But what we – and I – can do, is to use the current situation and trends, and make some qualified predictions about future challenges.

The focus of the attention has shifted somewhat over the years. Several of the Interlaken Ministerial Conferences – including Brighton and Copenhagen – emphasized the Court' s backlog of pending cases and the backlash against the Court – including the debate on the breadth of the margin of appreciation.

Now, the attention is directed towards the challenges of execution of the Court's judgments. As the High-Level Reflection Group stated:

> "There are signs of an *increasing* lack of compliance with the most basic human rights standards of the Organisation in member states, which requires serious attention and more resolute action on the part of states within the collective system of the Council of Europe".[1]

This is confirmed by the Committee of Ministers' (CM) 2022 annual report on supervision. It says:

> "… as of the end of 2022, there was *a new record number* of 2,257 cases (the highest number since 2011) on which information on payment of just satisfaction was not submitted by respondent States to the Committee of Ministers (…). In addition, 2022 witnessed an *increased delay* in the

[1] Council of Europe (2022). Report of the High-level Reflection Group of the Council of Europe. (emphasis added).

> submission by States of action plans and information within the required deadlines."[2]

I will first identify the different foreseeable future challenges, before I discuss, respectively the roles of the Court, the Committee of Ministers and the national judiciary in addressing these challenges.

What are foreseeable future challenges?

Inter-state and quasi inter-state cases

Let me first start with the inter-state and quasi inter-state cases. Inter-state cases seemed for a long time to belong to the history, including the old cases against Greece and Turkey. However, they have been revived in the wake of Russian aggression against neighbouring states, as well as in some other conflicts between states, such as *Armenia v. Azerbaijan* and *Lichtenstein v. the Czech Republic*. A total of 13 inter-state cases are pending (covering in total 17 applications).[3] Furthermore, approximately 10 000 individual applications are related to ongoing conflicts.[4]

These cases do not only pose special problems, such as fact-finding, but they also require much resources from the Court and they raise issues about the relationship between inter-state cases and the individual applications connected to the conflicts, i.e. the quasi inter-state cases. The expulsion of Russia from the Council of Europe means that there will be no new Russian cases, but the pending inter-state and quasi inter-state cases will continue to require attention. Furthermore, we cannot exclude that there will be more inter-state cases in conflict situations between states in the future.

Domestic structural challenges

Turning now to domestic structural challenges. The Court has addressed structural problems in member states in transition from communism by the use of pilot judgments in repetitive cases, and to some extent by using the *Burmych* approach concerning follow-up to unsuccessful pilot judgments. The pilot judgments were first used in some Polish cases in 2004 and 2006. Such judgments provide the opportunity to give the respondent state some general guidance on how to resolve the structural problems and the Court will adjourn cases of a similar character until the structural problem is resolved. Pilot

[2] Council of Europe (2023). Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2022. (emphasis added)
[3] Q & A on Inter-State Cases (18 July 2023).
[4] O'Leary, S. (2023). Speech by Síofra O'Leary, Solemn hearing.

judgments have in later years also been used against Italy, Germany, Greece, the United Kingdom and Belgium – and may be required also in the future.

Democratic backsliding

The President of the Court, Síofra O'Leary, emphasized in her the Solemn hearing speech this year the need to consolidate democracy and to counter democratic backsliding.[5] The rise of populism and authoritarianism in member states is a recent but serious threat to the values the Convention shall protect. It has also been pointed out that authoritarian regimes misappropriate the human rights language to further their goals, but in reality are "generally seeking to reverse or undo previous human rights developments and commitments».[6] These developments not only threaten human rights values, but if it undermines the effective protection of human rights by the domestic judiciary, may also result in new floods of cases to the Court.

The Court's protection of key civil and political rights is essential in countering democratic backsliding. The President highlighted specifically four judgments handed down in 2022 in relation to the rule of law crisis in Poland. She also emphasized the synergy between the Strasbourg Court and the Court of Justice of the European Union in combating these developments.

Bad faith implementation (article 18)

A new feature of the Court's case-law is its use of article 18 in cases of bad faith-implementation of the Convention. This is a means to address unwillingness among certain states to implement the Convention in a faithful way. By the end of 2022, "there were 13 pending cases concerning six States (as opposed to five in 2021), where the Court had found violations of Article 18 of the Convention». The six cases concerned Azerbaijan, Bulgaria, Georgia, Russia, Türkiye and Ukraine.[7] Unfortunately, these challenges may continue, and may even increase.

Persistent non-implementation

Another new feature is the CM's use of the infringement procedure against states in cases of serious and persistent non-implementation. So far, this procedure has only been used in two instances, *Mammadov v. Azerbaijan* and

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[5] Ibid.

[6] de Búrca, G. and K. G. Young (2023). "The (mis)appropriation of human rights by the new global right: An introduction to the Symposium." International journal of constitutional law **21**(1): 205-223.

[7] Council of Europe (2023). Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2022.

Kavala v. Turkey. The use of the infringement procedure may also be increasingly used in the future.

Domestic backlash
Finally, there are instances or subject areas of resistance against the Court's practice that are less dramatic than those in the article 18 bad faith cases. As already mentioned, there was much focus at the Brighton and Copenhagen Ministerial meetings on whether the Court had gone too far in its effective and dynamic (evolutive) interpretation of the Convention – and on the possible expansion of the margin of appreciation. There may be less vocal opposition today, but resistance may remain in certain areas, such as in cases of immigration or LGBTI rights – and the resistance may even increase.

The role of the Court
Let me start with how the Court should address these challenges. The Reykjavik Declaration states:

> "… that the Court's current resources are *insufficient and unsustainable* to adequately deal with the influx of new and pending applications, including inter-State applications arising from conflicts, many of which concern complex legal, political and societal issues as well as repetitive cases, which place a significant burden on the Court;"[8]

The Court is faced with new kinds of human rights issues, most prominent may be artificial intelligence (AI) and climate change cases. However, also traditional issues need continued attention. The backlog figures do not seem to decline, rather the opposite. The Court's 2022 annual report states that 70 150 cases were pending before the Court at the close of 2021, whereas 74 650 were pending at the end of 2022. Of the pending cases, 74% concern five countries: Türkie, Russia, Ukraine, Romania and Italy.

The Court has been given tools to address the influx of cases in Protocol 14 and has itself implemented extensive effectiveness measures, following the Interlaken process. What further measures may be considered?

- First, the balance between the Court's competence to choose its cases and thereby only deal with precedence cases and the most important cases, and, on the other hand, the right of individual applications, is a continuous dilemma. In Reykjavik, the member states reaffirmed their

[8] Emphasis added.

"strong attachment to the right of individual application to the Court as a cornerstone of the system protecting the rights and freedoms set forth in the Convention". However, the admissibility requirements, Court's procedural mechanisms and priority policy has to some extent alleviated the problem.

- Second, the Court could become less active in ensuring the effective and dynamic (evolutive) interpretation of the Convention and it could widen the margin of appreciation – and thereby be less intrusive towards member states. There is an academic debate on the extent to which the Court has already become more defensive in its supervision.[9] However, the Court is there to ensure effective control of the Convention rights.
- Pilot judgments should be continued, leaving the possibility of the CM – in dialogue with the relevant state – to find constructive solutions to structural problems, and thereby limit repetitive cases.
- The Court will also continuously face the dilemma of how specific orders or advice it shall provide on how to execute its judgments. On the one hand, the Court should respect the right of member states – as an aspect of the principle of subsidiarity – to choose the appropriate measures. On the other hand, more specificity by the Court may be useful both for the relevant state and for the CM in its supervision of execution. We have seen that the Court provides such guidance, both in pilot judgments and in so-called article 46 judgments. There are also interesting social science studies on the effectiveness of different kinds of remedies.[10]
- Article 18 on bad faith implementation should continue to be used, but selectively and as a last resort.
- It has also been argued that the Court should be more specific in its orders in infringement judgments.[11]
- Finally, member states may want to consider whether the Court should be given the possibility to impose sanctions in the form of fines against recalcitrant member states.[12] Lessons may be learnt from the experience by the Court of Justice of the European Union on the use of such fines.

However, it is important that the Court should not be too much focused on backlog figures. There are limits to what the Court can do if states do not implement its judgments. The Court's credibility rests ultimately upon the

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[10] Stiansen, Ø. (2019). "Delayed but not derailed: legislative compliance with European Court of Human Rights judgments." The international journal of human rights **23**(8): 1221-1247.

[11] Çalı, B. (2023). "The present and the future of infringement proceedings: lessons learned from Kavala v Turkiye." E.H.R.L.R.(2): 156-162.

[12] Keller, H. and V. Gurash ibid.""Upping the ante": rethinking the execution of judgments of the European Court of Human Rights." 149-155.

quality of its judgments. Therefore, the efficiency of the Court should never be allowed to trump the quality of its decisions.

The role of the Committee of Ministers

The member states in Reykjavik recalled "that the large majority of judgments are fully implemented» but they "were concerned also by lack of engagement, delays and failings in implementing certain judgments, undermining the authority of the Court and seriously threatening the effectiveness of the Convention".

In the CM's 2022 supervision report, the Committee concluded that "there has been an increase in the total number of judgments currently pending full execution (6,081 compared to 5,533 in December 2021)». It stated that the main challenges of the Committee are two-fold: On the one hand, the political and legal complexity and sensitivity of the issues examined by the Committee of Ministers continue to increase. On the other hand, this challenging situation is compounded by the high number of long-standing systemic or complex problems which have not been resolved by the States concerned and which the Committee therefore continued to examine in 2022.[13]

The CM faces the following challenges:

- First, inter-state and quasi inter-state cases will remain problematic, not only for the Court. The execution of judgments against unwilling states – and not only Russia – may raise formidable problems.
- A pragmatic approach to domestic structural problems should be supported. The High-Level Reform Group stated that a change in paradigm may be needed:

  «the judgment of the Court should not be seen as the end of a process leading to blaming a state party, but rather as an *opportunity for improvement* with the assistance of the Council of Europe, based on an accurate needs assessment performed by the Court and the monitoring bodies. This *should not undermine* the final and binding nature of the judgments of the Court or take away the obligation of all member states to abide by its judgments.»[14]

  I believe that the latter part merits emphasis: judgments are legally binding and must be respected. However, this does not prevent

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[14] Emphasis added.

consultations and assistance concerning how the judgments should best be implemented.

The Reykjavik Declaration follows up the Reform Group's proposal:

"We will continue supporting the Court's efficient and timely response to pending applications and redouble our efforts for the full, effective and rapid execution of judgments, including through developing *a more co-operative, inclusive and political approach based on dialogue*".[15]

It is interesting to note, on the positive side, that in the CM 2022 supervision report, the Committee "recognised the achievements of the Ukrainian authorities who, throughout 2022, continued to work on the supervision of the execution of the judgments against Ukraine in extremely difficult circumstances, demonstrating commitment to the Convention system through the submission of Action plans and reports in many pending cases".[16]

- However, execution may be more difficult where the CM meets political challenges. The High-Level Reform Group stated:

  "Irrespective of the nature of the obstacles and the reasons for the delays in execution, a more *political approach* is necessary, notably for cases where enforcement faces a lack of political will."[17]

  In the Reykjavik Declaration the member states:

  "Affirm the need for a co-operative and inclusive approach, based on dialogue, in the supervision process to assist States in the execution of the Court's judgments; [and they]
  Call on the Committee of Ministers to continue their work *enhancing the tools* available in the supervision of the execution of judgments with *clear and predictable, gradual steps* in the event of non-execution or persistent refusal to execute the final judgments of the Court, in an appropriate and flexible way, that takes into account the specificities of each case."[18]

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[15] Emphasis added.
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[17] Emphasis added.
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> Such political challenges may be more important as we experience more democratic and rule of law backsliding in Europe. These developments can provide the basis for more use of the infringement procedure. But it also raises questions about how far the member states are willing to go in upholding the Convention rights and to increase the scarce resources of the Execution Department.

The role of the national judiciary

Domestic courts shall apply domestic constitutions and legislation. Dilemmas can arise if there are tensions between domestic law and the ECHR. This Conference has focused on issues related to protection of constitutional identity and the *res judicata* status of domestic judgments.

National courts should act as transnational mediators between the national and the international legal system in balancing the respective roles of the ECtHR, the national legislature and national courts. However, it must be emphasized that the national judiciary has an essential role in preventing democratic backsliding by protecting civil and political rights and the rule of law.

Conclusions

This is challenging times for the European human rights system. The current attacks will likely continue and may even worsen. Meeting these challenges requires determination and new responses. But it has been said in a recent textbook on the ECHR that "it is precisely in unprecedented times of crisis that Europe has most need of an international court of human rights" – and, I would add, the equal need for a strong system for execution of the ECtHR's judgments.[19]

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