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The Execution of Judgements of the European Court of Human Rights

A Reflection on Article 46.4 ECHR

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<td>Steering Committee for Human Rights</td>
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1 Introduction

1.1 Background
The emergence of authority of the European Court of Human Rights (hereafter the Court) has sometimes been described as one of the most remarkable phenomena in the history of international law.¹ Member States of the Council of Europe have given their consent to be put under the judicial supervision of an international court, allowing individuals under their jurisdiction to bring a case before the Court against the State itself. However a finding of a violation of the European Convention on Human Rights (hereafter the Convention or ECHR) by the Court is not the end in itself. The judgement can also be seen as a promise for the future, and it is clear that it would have little value without compliance and enforcement.² The execution of judgements of the Court is therefore important for the credibility of the human rights protection system in Europe³ and for the guaranteed rights in the Convention not be illusory.

According to article 46 of the European Convention of Human Rights all Member States undertake to abide by the final judgement of the Court, and it is the Committee of Ministers (the Committee) that has the primary responsibility for supervising the execution of judgements. The supervisory function of the Committee is based on collective responsibility. This means that the execution of a judgement is a common concern for all Member States of the Council of Europe and not only a legal obligation for the State concerned.⁴ Historically the Committee has to a large extent, relied on good faith and diplomatic pressure to ensure compliance with the Court’s judgements, and the sanctions available are limited.⁵ During the past two decades the Court has experienced an increased caseload.⁶ This has also resulted in an increased number of cases for the Committee to supervise. The growing ranges of established structural

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⁵ B. Rainey et al, The European Convention on Human Rights, 64.
problems\textsuperscript{7}, as well as some cases of late or non-compliance with the Court’s judgements have begun to cast doubts on the efficiency of the system.\textsuperscript{8}

Efforts made to safeguard the efficiency, and with that also the credibility, of the system led up to the creation and adoption of Protocol No. 14 to the Convention that came into force on 1 June 2010. One particularly important aspect of Protocol No. 14, as expressed in the Explanatory report and other preparatory documents, is the possibility for the Committee to refer questions back to the Court. This can be done either where the Committee has a question concerning the interpretation of a judgement (article 46.3 of the Convention) or where a State has failed to fulfil its obligation to abide by the judgement of the Court (article 46.4 of the Convention). These provisions are considered to be additional and stronger means for the Committee in its supervision of the execution of the Court’s judgements. In particular the infringement procedure in article 46.4 ECHR.\textsuperscript{9}

Up until today the amendments to article 46 have never been used. No later than this September the Parliamentary Assembly of the Council of Europe (PACE) decided on a recommendation to the Committee to further explore the means given to them in article 46.\textsuperscript{10} Several NGOs with interests in the full implementation of the judgements of the Court has called on the Committee to use the infringement procedure in article 46.4.\textsuperscript{11} The former president of the Court has encouraged the Committee to recall upon the existence of article 46.4 in speeches before the Committee as well as at High-Level Conferences and in front of PACE.\textsuperscript{12} All together this could be seen as a joint call for the Committee of Ministers to make use of the tool given to them in article 46.4 of the Convention. The consequences of the application of article 46.4 of the Convention are however not formulated, and the impact it will have on the execution of judgements is therefore unclear.

\textsuperscript{7} B. Rainey, E. Wicks & C. Ovey, The European Convention on Human Rights, 64.
\textsuperscript{8} See eg. Hirst v. The United Kingdom (No. 2), no. 74025/01, 6 October 2005.
\textsuperscript{9} Explanatory report to the Protocol No. 14, para 99.
\textsuperscript{10} Parliamentary Assembly recommendation 2079(2015).
\textsuperscript{11} Eg. DH-DD(2015)257.
\textsuperscript{12} Eg. D. Spielmann, speech, 30 September 2015.
1.2 Purpose and Research Questions

Given the to some extent pressed situation and the uncertainty that surrounds article 46.4 of the Convention, the purpose of this thesis is to examine what impact article 46.4 of the European Convention on Human Rights (the infringement procedure) could plausibly have on the execution of judgements of the European Court of Human Rights. With this as the prime research question, this thesis will also try to answer the subsidiary questions on what added value a second decision of the Court in relation to paragraph 4 and paragraph 5 of article 46 could have, as well as in relation to what type of cases the infringement procedure would be most successful as a means to further enhance the execution of judgements. These research questions will be answered through a reflection on article 46.4 ECHR and its application by the Committee and the Court both. The infringement procedure was never discussed in detail during its introduction and there is therefore a need for a further clarification. The aim is not to formulate a guide for the application of article 46.4 ECHR, but rather to reflect upon an unproven provision and serve as a possible source for practitioners and future research.

1.3 Methodology and Material

The point of departure for the method used in this thesis is the legal dogmatic method. The legal dogmatic method consists in interpretation and systematisation of valid law.13 When interpreting sources of law (statues, precedents, travaux préparatoires, doctrine etc.) the aim is to attain knowledge of the law.14 The main sources for this thesis have been the travaux préparatoires and doctrine as well as other relevant sources such as decisions adopted by the different bodies of the Council of Europe. All sources may not be considered to be strictly legal sources, and some may argue that they do not fall under the legal dogmatic method. This can for example be the case of academic commentaries given in a speech, or a recommendation adopted by PACE. The method used can therefore, to some extent, be seen as an extensive interpretation and application of the legal dogmatic method. There are no precedents in relation to article 46.4 ECHR since it has never been used, however some case law from the Court has been used where the Court has mentioned or given an indirect reflection on the article. Sources have primarily been in English and French since these are the working languages at the Council of Europe. Regrettably the travaux préparatoires of the

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14 Ibid, 6.
amendments of article 46 had, at the time of this thesis, not yet been compiled into one comprehensive folder. As a result a number of documents could not be found in its original form and it is possible that some documents could still be unknown to me. Due to inadequacies in the available materials as well as lack of precedents, other complementing methods were necessary to achieve the aim of this thesis.

As article 46.4 ECHR is often mentioned in relation to the comparable infringement procedure in the European Union, further light could be shed on the relevant article by making a comparison between the infringement procedures in the two different European systems. The comparison was also conducted to allow a deeper analysis of the infringement procedure of the Council of Europe. By contrast, drawing conclusions from this comparison has required a lot of discretion since there are significant differences between the two systems. The comparison has nonetheless been considered to be necessary due to the linking between the two procedures that is often automatically done by both practitioners and academics.

Additional qualitative studies have been conducted through observations and semi-structured interviews. Some would name this a sociological approach, due to its purpose of looking at the impact of the law in practice. It seeks to gain empirical knowledge and knowledge of how the law and legal proceedings impact on the parties involved. This method was used to fill the gaps of the legal dogmatic method. When dealing with compliance in international law it has been noted that the discrepancy between the law in the books and the law in action is a problem, and that more empirical work is needed to understand compliance. Since the consequences of the infringement procedure have not been explicitly formulated in the available sources of law, the impact will depend a lot on the parties to the procedure. It was therefore necessary to complement the available sources with interviews.

Observations of the Committee of Ministers were made at two human right meetings and at several ordinary meetings. As an intern at the Permanent Representation of Sweden to the Council of Europe I was also able to attend informal briefings and other preparatory phases to the meetings. Observations were hence made in an informal

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15 G. J. K. van Hoof, Rethinking the Sources of International Law, Kluwer Law and Taxation Publisher, Deventer, 1983, 39.
manner. No details can be given from these observations since the meetings are confidential but they have been important for the deeper understanding of the system as a whole.

Semi-structured interviews were conducted to gain more knowledge of the possible impact of article 46 ECHR on the execution of judgements. Informants for the interviews were chosen on a basis of their function. The aim was to interview both members of permanent representations responsible for the human right meetings in the Committee, as well as judges of the Court. Secondly the informants were chosen for their experience and knowledge. Those who had been working at the Council of Europe for a long time or/and who had a lot of knowledge about article 46 were picked out. Lastly some consideration was made in relation to what Member State the informant belonged, to achieve more diverse opinions and information. Six judges of the Court were asked to participate. Two declined. Ten members of national representations were asked to participate. Six agreed. Consequently, ten formal interviews were conducted in total even though many informal talks were held.

The interviews conducted were semi-structured. This means that a few general questions were prepared and asked. However these questions left a lot of room for the informant to speak freely. Follow up questions thus depended on each individual interview. The questions asked were primarily about how the informant perceived the supervision process and the peer pressure as a method; why article 46.4 ECHR has not been used and what the role of the Court is. The interviews were approximately 30 minutes long and were held in place chosen or agreed to by the informant. Consent has been given by the informants to use the material in this thesis. Due to the political sensitivity of the matter no informant will be named and no direct quotes will be made. For the same reason no thorough elaboration of the results of the interviews will be reported since this would make an identification of the informants possible.

The chosen method can be criticised for many reasons. Firstly I cannot guarantee that the informants have spoken openheartedly since this can be seen as a politically sensitive issue and the informants may be held back by their obligations to their Member State. The limited number of informants can also be criticised. A larger field work would however not have been possible seen to the size and time limit of this
thesis. This method was chosen because it was the most apt method to explore and consider the pieces that were lacking in other sources.

1.4 Disposition
This thesis will consider the possible impact of article 46.4 of the Convention on the execution of judgements of the European Court of human rights. The first chapter will open with an overview on the monitoring mechanism of the Committee of Ministers. Against this background it will then look at the difficulties in monitoring compliance by the Member States, met by the Committee and the system as a whole. The subsequent chapter will move into a short elaboration on the reform process but in particularly address the preparatory phase leading up to Protocol No. 14 and the purpose of the amendments made to article 46 ECHR. The elaboration will open up to an in-depth analysis of article 46.4 in the next chapter. This chapter is divided into two subchapters: one focused on the Committee of Ministers and the other on the European Court of Human Rights. The first subchapter will examine the interpretation of article 46.4 made by the Committee as well as address the question on what type of cases would be most suitable for the infringement procedure. The latter subchapter will analyse the role of the Court as well as the function of its second decision and possible consequences of it. Against the background of the analysis of article 46.4 ECHR the following chapter will elaborate on the infringement procedure in the European Union and make a comparison between the two systems’ infringement procedures. The thesis will finally examine what impact article 46.4 of the Convention could plausibly have on the execution of judgements, followed by a summary and concluding remarks.

1.5 Delimitation
The examination of the possible impact of article 46.4 ECHR on the execution of judgements of the European Court of Human Rights is to some extent a broad and never-ending topic. The thesis does not, however, intend to investigate all possible implications of the article, but to focus on the likely implications of it in relation to used research material and studies.

Many subsidiary questions of interest arise during the time of writing of the thesis, which I do not intend to elaborate on. Firstly, this thesis does not intend to examine other means or tools given to the Committee of Ministers in its supervision of the execution of judgements, unless it is necessary for the understanding of article 46.4
ECHR. Furthermore the thesis does not intend to look closer at the role of the Court in the execution of judgements, but will only examine it in the light of its impact on the execution of judgements in relation to article 46.4 ECHR. In the same way very scarce attention or none at all, will be given to the role of other organs of the Council of Europe in the execution of judgements such as PACE or the Secretariat. Furthermore I will not take a position as regards a specific country’s fulfilment of its convention obligations generally. Finally, this thesis will have a continuous legal perspective, and will at its outmost try to avoid political considerations. Nonetheless some political considerations may not be possible to avoid due to the political dimensions of the execution of judgements.
2 Execution of Judgements

In a speech referring to the establishment of a European Court of Human Rights made by Winston Churchill in the Consultative Assembly in August 1949, the Court was visualised to be a body that could bring violations of human rights to the judgement of the civilised world. Churchill further explained that such a court would have no sanctions, and would depend for the enforcement of their judgements on the individual decision of the States.17

2.1 Supervision by the Committee of Ministers

Article 46 of the Convention establishes that the High Contracting Parties undertake to abide by the final judgement of the Court in any case to which they are parties and that the final judgement of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. The Committee of Ministers consists of the Ministers of Foreign Affairs of each Member State. However the actual Ministers only meet once a year and the daily work at the Council is performed by their deputies at the permanent representations in Strasbourg.18 The Committee of Ministers is therefore an organ consisting of career diplomats, and an organ of a political nature. As far as the Council of Europe has separation of powers the Committee of Ministers is the executive power, divided from the judicial role of the Court.19 It is also the decision making body of the Council.20

To supervise the execution of judgements of the Court the Committee of Ministers meets in four three-day sessions each year.21 These are called human right meetings, also referred to as DH meetings. The supervision is done through the twin-track procedure. As the name suggests the twin-track procedure allows two different procedures: the standard procedure and the enhanced procedure. The majority of cases

supervised by the Committee follow a standard procedure. However the system allows the Committee to decide to examine a case under an enhanced supervision procedure to enable priority attention to some specific cases. The criteria for placing a case under the enhanced procedure are that it requires urgent individual measures or, that it is revealing important structural or complex problems as well as if it is an inter-State case. When a case is placed in the enhanced supervision procedure, the Secretariat will engage in more intensive and pro-active discussions with the respondent State which can result in expert assistance in the preparation of action plans, seminars to discuss the underlying issue, etc. These cases will also be regularly included in the Committee’s human right meeting’s agenda.

Although the Committee is tasked to supervise the execution of all judgements of the Court, the number of cases included in one human right meeting’s agenda is only around twenty to thirty cases. Additionally the majority of these cases’ decisions are taken in a written procedure, which means that in the end not even half of the cases listed for one session are debated. The cases on the agenda of a human right meeting are cases under the enhanced supervision procedure, and often those cases that are considered to benefit from the collective pressure of the Committee. Due to this the cases debated during the human right meetings are limited, and could be thought of as the tip of an iceberg of cases. On the other hand the twin-track procedure has allowed the Committee to focus its attention on those cases where its supervision is most needed. The continuous supervision work, to a large extent based on bilateral dialogue, is handled by the Department of Execution of Judgements. Its task is to assist the Committee in managing the supervision as well as prepare the cases for examination at the human right meetings.

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26 Informant 1, 2.
27 Explanatory report to the Protocol No. 14, para 16.
28 Ibid, 182.
2.2 Breaches of the Convention

In accordance with international law every treaty in force is binding upon the parties to it and must be performed by them in good faith. Article 3 of the Statue of the Council of Europe formulates that every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council. This is also reflected in article 1 of the Convention which states that the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention’s first section.

As a consequence the finding of a violation by the Court imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences so that the situation can be restored as far as possible to the one existing before the violation. This means that the applicant should be put in the same position, as far as possible, as he/she was in before the finding of the violation. Measures taken to restore the situation for the individual are referred to as individual measures. If the Court has awarded just satisfaction this must also be paid by the respondent State. Beside the payment of just satisfaction and the individual measures, measures must also be taken to prevent future and similar violations from occurring. These need to be taken so that the respondent State does not continue to violate the Convention in breach with international law. General measures to prevent future violations can be combined with a lot of difficulty for the respondent State since it often requires legislative changes and administrative changes, and sometimes amendments in a State’s constitution.

Article 1 of the Convention largely leaves the way in which to execute a judgement to the respondent State’s own discretion, as long as it is in line with the Court’s decision. The States are often in a better position to assess what means are appropriate and the freedom of choice also mirrors the subsidiarity of the Court in relation to the Member

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30 Papamichalopoulos and Others v. Greece(Article 50), no. 14556/89, 31 October 1995, §34.
31 European Commission for Democracy through Law, 8.
33 W. A. Schabas, The European Convention on Human Rights; a commentary, 861.
34 Ibid.
States. This can be referred to as the State’s margin of appreciation. Despite the freedom to choose the means the nature of some cases leave no choice about the measures that must be taken.

2.3 Collective Responsibility

The supervision of the execution of judgements of the Court is based on collective responsibility and moral pressure through publicity. This means that the execution of judgements depends a lot on the determination of the Member States to have the control mechanism functioning. The main tool at the Committee’s disposal is peer pressure. Decisions are taken at every human right meeting to express concern or acknowledge progress as well as to encourage the respondent States to continue their efforts to execute the judgements. Should ordinary decisions of the Committee not be enough, further measures can be taken such as adoption of public interim resolutions and communication between the Chair of Committee and the Minister of Foreign Affairs of the respondent State among others. Additional tools of a slightly different character are those offering support to the respondent State by other Council of Europe bodies or Member States. It has been shown in earlier cases that the solution of a more complex execution situation requires both peer pressure and support. Support may be given through expertise or through the experience of other Member States or bodies so that a State learns how to handle a problem, while pressure is needed to encourage developments on national level. As a last resort expulsion from the Council of Europe as well as the threat of it in line with article 8 of the Statue of the Council of Europe is possible.

The execution of judgements is to an extent relying on separation of powers. The Court has always been strict with acknowledging its lack of competence when it comes to article 46 and the execution of its judgements. It can therefore be argued that the

35 Article 1 ECHR.
36 Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland, no. 32772/02, 30 June 2009, § 82.
37 European Commission for Democracy through Law, 11.
38 Ibid.
41 Article 8 and article 3 of the Statue of the Council of Europe.
43 See for example Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland, no. 32772/02, 30 June 2009.
issue of execution of judgements is a political issue. On the other hand it can be argued that the role of the Committee when supervising the execution is strictly legal, since all States are under a legal obligation to execute the judgements. Giakoumopoulos has argued that there may be complex legal questions combined with the supervision of the execution of the Court’s judgements. These are however not the problem faced by the Committee. The problem is the inertia and the excessive political cautiousness of the Member States, which are highly political questions. Peer review monitoring mechanisms as the one in the Council of Europe are typically criticised for their lack of reliability. The unavoidable self-interest that comes with States monitoring other States can manifest itself in different ways. States may avoid criticising others of fear of being targeted by reciprocal criticism. States may also push for interpretation of rules that are politically more favourable for themselves. When dealing with international law it can be easy to doubt the efficiency of peer pressure. Nonetheless the potency of peer pressure should not be underestimated. It has been argued that any State would be reluctant to see its government being painted as a violator of human rights, which may be true for the larger majority of States.

2.4 Difficulties with the Enforcement of Judgements

2.4.1 The Multiform Nature of Non-compliance

When discussing the execution of judgements of the European Court of Human Rights, one always needs to keep in mind that the majority of cases are executed. Systematic refusal to execute judgements by the Court is unusual, and non-compliance has traditionally not been a real problem. However a full execution of judgements helps to enhance the Court’s authority and the effectiveness of its actions, as well as it helps

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44 European Commission for Democracy through Law, 13-14.
45 Ibid.
48 Ibid, 306.
50 Informant 1, 2, 3, 4, 5, 6.
limiting the number of applications submitted to it.\textsuperscript{53} The refusal to execute judgements of the Court is not as simple as one might believe, and it is somewhat multiform.\textsuperscript{54} According to an early examination made by PACE the problems connected to the execution are at least sevenfold. There are political reasons; reasons to do with the reforms required; practical reasons related to national legislation procedures; budgetary reasons; reasons to do with public opinion; judgements that are casuistical or unclear, and reasons relating to interference with obligations deriving from other institutions.\textsuperscript{55} Others would today narrow it down to three main reasons: Lack of political will, cost, and complexity.\textsuperscript{56} What is certain is that there are many aspects to the problem.

Assessing non-compliance with the Court’s judgements can be problematic. The measures that raise the most concern are the general measures.\textsuperscript{57} These measures fall under the margin of appreciation of the respondent State, and situations can occur when the measures taken are unsatisfactory. States may have taken minimum measures or measures that they argue suffice, while the measures taken only satisfy the letter of the judgements and not the actual situation.\textsuperscript{58} The same goes for significant delays in the execution of judgements where legislative changes are needed. This can either be excused on account of the uncontrollable nature of democratic processes, but on the other hand criticised as a lack of political will.\textsuperscript{59} In the case of individual measures this is often more clear. One example is the case of Ilgar Mammadov v. Azerbaijan.\textsuperscript{60} In this case the Court explicitly stated that the Azerbaijani authorities had imprisoned the applicant for purely political reasons.\textsuperscript{61} There is no complexity and no cost for releasing the applicant, notwithstanding he is still in prison, which is a sign of lack of political

\textsuperscript{53} E. Lambert Abdelgawad, The Execution of Judgments of the European Court of Human Rights, 472.
\textsuperscript{55} PACE Resolution 1226 (2000), para 8.
\textsuperscript{57} European Commission for Democracy through Law, 6.
\textsuperscript{59} European Commission for Democracy through Law, 6.
\textsuperscript{60} Ilgar Mammadov v. Azerbaijan, no. 15172/13, 22 May 2014. This case concerns several violations suffered by the applicant, a political opposition activist, which took place in the context of the criminal proceedings instituted against him in February 2013 for denouncing on his blog the authorities’ official version of the Ismayilli riots of 23 January 2013.
\textsuperscript{61} Ilgar Mammadov v. Azerbaijan, no. 15172/13, 22 May 2014, §143.
will to execute the judgement. The inter-State case Cyprus v. Turkey\textsuperscript{62} is a clear case of non-compliance due to political reasons. There has been an ongoing conflict between the two countries since 1974, and the case can in a sense only be executed when that conflict itself is solved or moving in the right direction. Other cases such as Manushaque Puto v. Albania\textsuperscript{63} are cases that are slow in their implementation due to cost and complexity. These cases are a burden to the respondent States and it can be hard to justify the cost to the public as well as to find the funds to execute them. Many cases concerning structural problems have this character and the respondent States are often in a need of extra support and enhanced pressure to justify the amendments needed to their national parliament and national institutions.

2.4.2 Compliance in Contrast to Effectiveness
Lambert Abdelgawad has argued that a target of 100\% efficient and rapid execution is utopian and that the cases that raise difficulties are those of late execution, not non-compliance.\textsuperscript{64} In this sense it is important to make a distinction between compliance and effectiveness. Effectiveness is not automatically equal to a high level of compliance even though more compliance is of course better.\textsuperscript{65} According to its definition in the dictionary effectiveness can be understood as the degree to which something is successful in producing a desired result.\textsuperscript{66} What can be seen from recent statistics is that lengthy executions have increased tremendously since 2007.\textsuperscript{67} Even though a target of 100\% execution might not be possible, this statistics show that further effort to achieve a more effective execution of judgements is needed to uphold the efficiency of the system. This achievement would however be possible without 100 \% compliance. A system with less compliance is however a system with less authority. The consequences of late or non-compliance can be many for the parties involved. The applicants and the people living under the jurisdiction of a Member State would not be guaranteed their

\textsuperscript{62} Cyprus v. Turkey, no. 25781/94, 10 May 2001. Violations in relation to the situation in the northern part of Cyprus since the military intervention by Turkey in July and August 1974.

\textsuperscript{63} Manushaque Puto and Others v. Albania, nos. 604/07, 43628/07, 46684/07 and 34770/09, 4 November 2014. These cases concern the structural problem of failure to enforce final, domestic judicial and administrative decisions relating to the right of the applicants to restitution or compensation for property nationalised under the communist regime and the lack of an effective remedy in this respect.

\textsuperscript{64} E. Lambert Abdelgawad, The Execution of the Judgments of the European Court of Human Rights, 499.


\textsuperscript{66} Oxford Dictionary.

\textsuperscript{67} E. Lambert Abdelgawad, Conference on the long-term future of the European Court of Human Rights, Council of Europe, Strasbourg, 2014, 166.
rights under the Convention and would have to live under intolerable conditions. The authority of the Court would deteriorate which in turn could lead to a deterioration of authority of the law of the Convention itself. Even a small degree of non-compliance could therefore hurt the human right protection system.

3 The Reform of the Court

3.1 Victim to its Own Success

With the enlargement of Council of Europe and the joining of almost all States on the European Continent, the clientele of the Court grew to 800 million people. This would also come to show in the workload of the Court. The number of applications to the Court increased almost exponentially during the first decade of the new millennium. This workload would as PACE stated, threaten to undermine what had been achieved over the fifty years the Convention had operated. A reform process was initiated to safeguard the efficiency of the system as a result of the European Ministerial Conference on Human Rights held in Rome 2000. It would go in three directions. Firstly it would make proposals to improve the Court’s decision-making capacity. Secondly it would consider how to improve the domestic implementation of the Convention. Lastly and most importantly for the purpose of this thesis; it would consider how to improve the execution of the Court’s judgements.

The Court’s caseload consisted of a significant number of repetitive cases. Many of these applications to the Court would never have reached the Court if previous cases had been executed properly in the respondent State. A more rapid and adequate execution would therefore have an effect on the influx of new applications to the Court. Not only did the increased number of applications to the Court affect the Court’s workload, but as the workload of the Court increased and more decisions were taken, more cases were left for the supervision of the Committee. In 1996 the number of

70 PACE Resolution 1226(2000).
73 Explanatory report to the Protocol No. 14, para 16.
pending cases before the Committee of Ministers was 709, and in 2012 the number had increased to 11099.\textsuperscript{74} During the past few years the number of pending cases has decreased to 10904 cases\textsuperscript{75}, which might be a sign of a changing trend.

3.2 Protocol No. 14 and the Amendment of Article 46 ECHR

The efforts to safeguard the human right protection system led to the adoption of Protocol No. 14 to the Convention.\textsuperscript{76} In contrast to the previous reform in Protocol No. 11 where the structure of the control system was reformed, the main purpose of Protocol No. 14 was to improve the functioning of the system allowing the Court to focus on the most important cases.\textsuperscript{77} Efforts were made to maintain the uniqueness of the system, which consist in the consent of the State Parties to put themselves under the international judicial supervision of the Court, as well as the possibility for individuals to refer a breach of the Convention to the Court against the State.\textsuperscript{78} It is stated in the Explanatory report to Protocol No. 14 that the principle of subsidiarity underlies all measures taken to increase the effectiveness of the Convention’s control system.\textsuperscript{79}

3.2.1 Enhanced Pressure through Article 46.4 ECHR

Even though the supervision of execution of judgements was functioning satisfactorily, improvements were considered to be needed to maintain the system’s effectiveness.\textsuperscript{80} The introduced amendments were therefore primarily targeted on repetitive cases and structural problems.\textsuperscript{81} According to the Explanatory report the most important amendment to the Convention in the context of execution of judgements was to introduce the possibility for the Committee of Ministers to bring infringement proceedings before the Court against any State that refuses to abide by a judgement of the Court.\textsuperscript{82} This was done through the adding of a fourth and a fifth paragraph to article 46 ECHR. Article 46.4 states that if the Committee considers that a State refuses to abide by a judgement it may, after serving formal notice and by a vote of two thirds, refer to the Court the question whether that State has failed to fulfil its obligations under

\textsuperscript{74} Supervision of the Execution of Judgments and decisions of the European Court of Human Rights, 27.
\textsuperscript{75} Ibid.
\textsuperscript{76} F. Sundberg, ‘Control of Execution of Decisions under the European Convention on Human Rights’, 468.
\textsuperscript{77} Explanatory report to the Protocol No. 14, para 7.
\textsuperscript{78} Ibid, para 10-11.
\textsuperscript{79} Ibid, para 12.
\textsuperscript{80} Ibid, para 17.
\textsuperscript{81} Ibid, para 98.
\textsuperscript{82} Ibid, para 16.
paragraph one; hence whether or not the State has fulfilled its obligation to execute the judgement. According to the Explanatory report the Committee should only bring infringement proceedings before the Court in exceptional circumstances, and it should be seen as a further possibility to bring pressure on the States.\textsuperscript{83} It should furthermore be used as an intermediate measure between the adoption of interim resolutions and the nuclear options of expulsion and inhibition of voting rights according to article 8 and article 3 of the Statue of the Council of Europe. The past 50 years has showed that the threat of using article 8 is not probable\textsuperscript{84}, and many believe that it is counterproductive.\textsuperscript{85} It has been perceived as a better option to keep the reluctant and non-complying State inside the organisation so that the pressure can continue, instead of pushing it out of the organisation and leaving the people to their own fate.\textsuperscript{86}

In proposals made by the Steering Committee for Human Rights (CDDH) in 2003 the infringement procedure was introduced as the most important proposal of all.\textsuperscript{87} In its motivation it was stated that the Committee was in need of new means of pressure to ensure the execution of judgements. The infringement procedure would come in addition to other means and it would be used before turning to article 8 of the Statue of the Council of Europe since the latter was an extreme measure that was unlikely ever to be used.\textsuperscript{88} The Committee would as a result be given a power to start a second proceeding before the Court; a procedure that could possibly include payment of a financial penalty.\textsuperscript{89} The financial penalty was however never introduced due to strong opposition to the infringement procedure from one delegation in the Committee.\textsuperscript{90} The French delegation therefore proposed to eliminate the financial penalty, which was accepted with the argument that an infringement finding would have a great symbolic value and that the moral and political consequences would already represent strong pressure on the State concerned.\textsuperscript{91} The preparatory work was finalised in 2004 and the protocol was adopted as it stands today, without the financial penalty.

\textsuperscript{83} Explanatory report to the Protocol No. 14, para 99.
\textsuperscript{84} E. Lambert Abdelgawad, ‘Le Protocol no 14 et l’exécution des arrêts’, 89.
\textsuperscript{85} Ibid.
\textsuperscript{86} Informant 2, 3.
\textsuperscript{87} CM(2003)55, para 20.
\textsuperscript{88} Ibid.
\textsuperscript{89} Ibid.
\textsuperscript{91} Ibid.
3.2.2 An Infringement Procedure without Financial Sanction

The nature of the Convention’s control system has always been non-coercive.\textsuperscript{92} It is stated in the Explanatory report that it was felt that the political pressure exerted by the proceedings in the Grand Chamber and by its judgement should suffice.\textsuperscript{93} It has however been argued that the infringement procedure is an incomplete tool without the financial penalty, and that its impact will be significantly reduced without it.\textsuperscript{94} The question of financial sanctions was also discussed by CDDH and the Venice Commission in relation to a reform proposal of introducing daily fines made by PACE.\textsuperscript{95} This proposal was met with doubt. CDDH noted that the European Union had introduced the same type of system and that a Member State of the Council of Europe had already asked for a financial penalty to facilitate its national implementation. Nevertheless it doubted the efficiency and appropriateness of such a system in the light of the situation of a State’s persistent refusal to abide by a judgement and the fact that adoption of general measures often required lengthy procedures.\textsuperscript{96} The Venice Commission argued that introducing daily fines would also introduce a notion of punishment which did not exist in the Convention system, and that despite the possible enhanced pressure this would result in, the added value of such a mechanism was unclear and that it could not justify a reform of the Convention.\textsuperscript{97}

4 The Infringement Procedure in Article 46.4 ECHR

4.1 Application and Interpretation: the Committee of Ministers

4.1.1 Refusal to Execute a Judgement

The wording of article 46.4 ECHR establishes that an infringement procedure can only be introduced before the Court if a ‘High Contracting Party refuses to abide by a judgement’. Furthermore the Committee of Ministers needs to serve ‘formal notice on

\textsuperscript{92} E. Lambert Abdelgawad, The Execution of the Judgments of the European Court of Human Rights, 492.
\textsuperscript{93} Explanatory report to the Protocol No. 14, para 99.
\textsuperscript{94} Informant 3, 4, 5.
\textsuperscript{95} PACE Recommendation 1477(2000).
\textsuperscript{96} CDDH(2001)035 Appendix IV, para 9.
\textsuperscript{97} European Commission for Democracy through Law, para 79-85.
that Party’ followed by a ‘decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee’.

The key point of article 46.4 ECHR is that a State needs to refuse to abide by a judgement of the Court. If a State is simply unable, and not unwilling, to execute a judgement, the additional pressure of an infringement procedure would most probably not serve its purpose. According to the Explanatory report a State’s refusal can be both expressly or through conduct.\(^\text{98}\) Since the decision to introduce infringement proceedings needs to be adopted by vote, and with a majority of two thirds, two thirds of the Committee need to be convinced that a State is unwilling to execute a judgement, in contrast to being unable to do so. This should be seen in the context that there are very few cases where a State expressively states that it refuses to abide by a judgement. The situation is more likely to be that a State has taken general measures within its margin of appreciation that do not show the expected result, or are slow in its implementation. This could be a refusal from the State to make any real efforts to execute the judgement, as well as it could be a simple failure of the means taken.\(^\text{99}\) A failure or inability to execute a judgement should be met by support, while unwillingness should be met by enhanced pressure on the State. The distinction is therefore critical.

The complexity of the criterion of refusal can be illustrated by the perceptions of some representatives in the Committee. Certain of these believe that no State is ever one hundred percent unwilling while others believe that an outright expressed refusal from the State is necessary and others again, believe that a lengthy execution process with no effective measures taken should be enough to establish a refusal.\(^\text{100}\) Should a significant number of the representatives in the Committee believe that a State is never unwilling to execute a judgement, infringement proceedings would never be brought. It is however more likely that a middle way will be found, which most probably will be that an expressed refusal by a State is necessary, even though this is not needed according to the Explanatory report. To establish a State’s refusal is however not uncommon for the Committee. One example can be given in an interim resolution in September 2014 in the cases Varanava v. Turkey and Xenides-Arestis v. Turkey. In this interim resolution

\(^{98}\) Explanatory report to the Protocol No. 14, para 98.  
\(^{99}\) Informant 1.  
\(^{100}\) Informant 1, 2, 5, 6.
the Committee used the wording ‘the continued refusal to pay the sum’. This illustrates that the difficulty with article 46.4 goes beyond simply establishing a refusal.

4.1.2 The Procedure of Two Decisions
The procedure in the Committee before infringement proceedings are brought to the Court has two phases. The first phase is the giving of a formal notice to the respondent State of the Committee’s intention to bring a proceeding. This notice should take the form of an interim resolution adopted by a majority vote of two thirds, and preferably six months before the proceeding is initiated unless the Committee decides otherwise. If it is found to be necessary the Committee of Ministers will move into the second phase which is the adoption of a second interim resolution, again by a majority vote of two thirds, before handing over the case to the Court for a judgement. The first phase of a formal notice should serve the purpose of a warning and could in itself contribute to ensure a rapid execution. As stated in the Explanatory report the procedure’s mere existence, and the threat of using it, should act as an effective new incentive to execute the judgements. With this interpretation of article 46.4 the time period of six months between the formal notice and the second decision of the Committee is required to give the respondent State a chance to take necessary measures in response to the Committee’s decision. However this time period is left open for the Committee to decide. The time lapse of six months has been of some concern to some representatives in the Committee. Cases with urgent individual measures that need to be executed cannot benefit from the additional pressure of the infringement procedure as the risk of the individual situation becoming worse due to a lengthy proceeding is imminent. There is a possibility for the Committee to decide upon an alternative time period between the formal notice and the second decisions, and it may be in relation to urgent individual measures that this possibility should be used. However that would take away the deterrent character of the procedure. For this reason, the infringement procedure might not be a means suitable for cases with urgent individual measures.

104 Explanatory report to the Protocol No. 14, para 100.
105 Informant 1, 2, 4, 5.
4.1.3 Majority Vote of Two Thirds

Another obstacle is the need for a majority vote of two thirds of the representatives entitled to sit in the Committee. Two thirds of the Committee need to be convinced that a State is refusing to abide by a judgement, but they also need to believe that the infringement procedure is the right tool to deal with it. As stated above there could be situations where the Committee agrees on the fact that a State is refusing to abide by a judgement, but they do not believe that it is a case for an infringement proceeding. The requirement of a supermajority differs from the standard requirement when the Committee is taking decisions which is: two thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit in the Committee of Ministers.\textsuperscript{106} All informants from the Committee have stated that this is a hard thing to achieve. The arguments against the use of an infringement proceeding can be many. One expressed argument could be that the Convention is based on collective responsibility and common concern, and some States of the Committee could be unwilling to use the tool since it does not follow the ordinary practice.\textsuperscript{107} The Convention is about involving States and a decision against a State should include the State itself.\textsuperscript{108} Another argument expressed was that other tools are more correct and effective than the infringement procedure.\textsuperscript{109} Lastly, States would probably make political considerations, and they would think broader than the case by case basis they are supposed to apply. Due to the seriousness of the infringement procedure, the Committee may be unwilling to use it against States that otherwise have a good record or against States that are their allies.\textsuperscript{110} Most probably States will also be reluctant to support an infringement proceeding if they believe that they will be the next in line.\textsuperscript{111} This also reflects the main critics against a monitoring system based on peer review as already mentioned above. Thus there are different reasons for being reluctant to use the infringement procedure, and they all lead up to the difficulty in achieving a majority vote of two thirds in the Committee.

\textsuperscript{106} Statue of the Council of Europe, §20d.  
\textsuperscript{107} Informant 6.  
\textsuperscript{108} Informant 6.  
\textsuperscript{109} Informant 3.  
\textsuperscript{110} Informant 1, 5.  
\textsuperscript{111} Informant 1, 5.
4.1.4 Effect on Different Types of Cases

Many of the informants uttered the opinion that the first infringement proceeding brought by the Committee must give a positive result.\textsuperscript{112} If not, the credibility of the Court as well as the Committee will be hurt. This in turn will lead to a drop of credibility of the whole human right protection system.\textsuperscript{113} The argument is that the right case for the infringement procedure has not appeared. The three main groups of cases under the enhanced supervision procedure, and hence prioritised by the Committee, are cases involving urgent individual measures, cases that involve structural or complex problems and lastly inter-State cases. As was mentioned above cases concerning urgent individual measures may not be the most appropriate cases for the infringement procedure, as the urgency of the case will not benefit from the possibly lengthy proceeding.\textsuperscript{114} Additionally, individual measures often do not leave any doubts to what measures need to be taken. Thus there are often no doubt as to whether or not the respondent State has executed the judgement or not. Inter-State cases often involve political disputes going beyond the human rights violations alleged, and there is a common understanding that they will need fruitful negotiations in other formations before the judgement of the Court can be implemented.\textsuperscript{115} The chain of events is the reverse; the inter-State conflict will first need to be solved for the judgement to be executed. There is therefore less probability of the infringement procedure making any difference to the situation.

As for cases concerning complex or structural problems the situation is slightly different. First of all, even though the infringement procedure can be used for every case under the supervision of the Committee\textsuperscript{116}, these kinds of cases were especially mentioned in relation to the infringement procedure in the preparatory work. The purpose for the reform in itself was to find tools to deal with repetitive cases, often caused by structural or complex problems.\textsuperscript{117} These cases have also been shown to benefit from the debates and peer pressure during the human right meetings, and it is not uncommon that the Member State itself asks for a debate of its case.\textsuperscript{118} Decisions taken in the Committee are used in the Member State to convince the internal system.

\textsuperscript{112} Informant 1, 2, 4, 5.
\textsuperscript{113} Informant 1, 2, 4, 5.
\textsuperscript{114} Informant 1, 2, 4, 5.
\textsuperscript{115} Informant 1, 4, 5, 6, 7.
\textsuperscript{116} Exec/Inf (2010)1, para 11.
\textsuperscript{117} See the references made above.
\textsuperscript{118} Informant 1, 2, 4, 5.
and public opinion of the necessity of change.\textsuperscript{119} Some of the informants have on the other hand expressed that there is an additional criterion, namely that the breach of the Convention, at least for the first case, needs to be a grave one.\textsuperscript{120} The additional criterion of graveness is nowhere to be found in the preparatory work, other than that the infringement procedure only should be used in exceptional circumstances. If that is to say especially grave cases is not improbable but yet not clear. Especially since the purpose of the infringement procedure was to give the Committee additional and stronger means with the target on repetitive cases. Many structural or complex problems are not perceived as being grave violations of human rights. Yet one solution could be that the criterion could be achieved by considering a case within its types of cases. This would change the level of graveness.

4.2 Application and Interpretation: the Court

4.2.1 A Case brought to the Court

The infringement procedure does not aim to reopen the question of a violation.\textsuperscript{121} The Court is merely to judge if the respondent State has fulfilled its obligation under paragraph one of article 46 ECHR. This should be done in the form of a judgement. When an infringement proceeding has been brought to the Court, the Court will sit as a Grand Chamber.\textsuperscript{122} This means that the Grand Chamber will consist of seventeen judges including: the judge of the respondent State; the President of the Court; the Vice-Presidents; the Presidents of the Sections. In addition, the members of the Chamber or Committee that rendered the judgement in the case concerned shall be included. If the judgement was rendered by the Grand Chamber, the Grand Chamber shall be constituted as the original Grand Chamber. A drawing of lot shall be executed among the remaining judges.\textsuperscript{123} According to paragraph five of article 46 ECHR, the Court can either find that the State \textit{has not} fulfilled its obligation to execute the judgement and send it back to the Committee for consideration on measures to be taken or; the Court may find that the State \textit{has} fulfilled its obligation and refer the case back to the Committee for closing of examination.

\textsuperscript{119} Informant 1, 2, 3, 4, 5, 6.
\textsuperscript{120} Informant 1, 2, 4, 5.
\textsuperscript{121} Explanatory report to the Protocol No. 14, para 99.
\textsuperscript{122} Ibid.
\textsuperscript{123} Rules of the Court, Council of Europe, Strasbourg, 2015, rule 24.
Far from every judge in the Court has given the infringement procedure any consideration. As a consequence the product of the second judgement of the Court is unclear. This stands in contrast to the preparatory work which stated that the infringement procedure needed careful consideration and that a point to ensure was that the consequences of the Grand Chamber’s judgement were clearly defined. Nonetheless a common view of the informant judges was that the case brought to the Court would be handled in a strictly legal way, meaning a simple evaluation of the question of whether or not the respondent State has fulfilled its obligation under the Convention. It would thus be a limited role. While most opinions of the informant judges were advocating the need for the Court to be careful not to step outside its competence, one opinion expressed was that the role of the Court in the infringement procedure could depend on the case brought before it. For certain cases in which a violation of article 46 was to be found, the Court would need to give indications on further measures, while others would leave nothing to be added. While acknowledging that some indications could be inevitable, thought was also given to the need for the Court to be restrained not to overstep the limits of its judicial role. The weight that the Council of Europe and the Committee have put on the subsidiarity of the Convention and the margin of appreciation was, however, something that was stressed by the informants and it is therefore unlikely that the Court would do anything radical. The exact composition of the Court could however play an important role in deciding the impact of article 46.4 ECHR. Judges of the Court have said that new principles will be laid down with the first infringement proceeding before the Court, and the judges deciding will then play an important part in doing this.

4.2.2 Separation of Powers

In the preparatory work to Protocol No. 14 the Court was very hesitant regarding the introduction of an infringement procedure. A significant number of judges felt uncomfortable with infringement proceedings and foresaw important legal and practical obstacles to their implementation, and most judges felt that the most appropriate forum

124 Informant 8,10.
126 Informant 7,8,9,10.
127 Informant 7.
128 Informant 7,8.
for such a procedure was the Committee itself.\textsuperscript{130} The distinct competences of the two bodies have always been repeated by the Court when dealing with article 46 ECHR.\textsuperscript{131} The execution of judgements is closely linked to Member States’ national policies and their margin of appreciation, which goes beyond the Court’s competence. One of the informant judges mentioned that in essence dealing with repetitive cases is a political problem.\textsuperscript{132} The Court is always acting in the borderline between law and policy and the distinction is subtle.\textsuperscript{133} The fact that some judges consider that the infringement procedure raises problems regarding the separation of powers has not stopped the Court from evaluating the execution of its own judgements implicitly in other ways.

4.2.3 Alternative to the Infringement Procedure

One situation that was referred to by some of the informants was the situation of a second application to the Court from the same applicant.\textsuperscript{134} This indirect way of judging on the state of execution also seems to be a preferred alternative to the infringement procedure. The latest case that raised this question was \textit{Sidabras and Others v Lithuania} that became final 23 September 2015. The case concerns three applicants that lodged their original complaints to the Court around year 2000.\textsuperscript{135} The judgements became final and the cases were handed over to the Committee for supervision. The new application to the Court addressed the continued discrimination which was the same reason as in the first application, combined with a complaint that, in breach with article 46 of the Convention, the State had not respected their rights, even after the Court had ruled in their favour.\textsuperscript{136} In its assessment the Court states that ‘it is very doubtful whether article 46 §1 may be regarded as conferring upon an applicant a right that can be asserted in proceedings originating in an individual application’.\textsuperscript{137} It continued by stating that the adding of article 46.4 by Protocol No. 14 can be seen as a confirmation of its lack of jurisdiction to verify, by reference to article 46.1, whether a Contracting Party has complied with the obligations imposed on it by one of the Court’s judgements.\textsuperscript{138}

\textsuperscript{130}Ibid.  
\textsuperscript{131}\textit{VgT v. Switzerland (No. 2)}, no. 32772/02, 30 June 2009.  
\textsuperscript{132}Informant 8.  
\textsuperscript{133}Informant 7.  
\textsuperscript{135}\textit{Sidabras and Others v Lithuania}, nos. 50421/08 and 56213/08, 23 June 2015, §4.  
\textsuperscript{136}Ibid.  
\textsuperscript{137}\textit{Sidabras and Others v Lithuania}, nos. 50421/08 and 56213/08, 23 June 2015, §103.  
\textsuperscript{138}Ibid.
Principles established in earlier cases have however allowed the Court to examine whether measures taken by a responding State were compatible with the Convention if the new application also raises issues that have not been decided by the previous judgement.\footnote{VgT v. Switzerland (No. 2), no. 32772/02, 30 June 2009, Emre v. Switzerland (No. 2), no. 5056/10, 11 October 2011, The United Macedonian Organisation Ilinden and Others (No. 2) v. Bulgaria, nos. 41561/07 and 20972/08, 18 October 2011.} Due to the judgement’s vagueness on article 46, it resulted in two concurring opinions. Judge Keller argued that ‘the Convention must be read as a whole and that the examination of whether there has been a fresh violation...must take into account the importance in the Convention system of effective execution of the Court’s judgements’.\footnote{Concurring opinion Judge Keller, §§5-6. In Sidabras and Others v Lithuania, nos. 50421/08 and 56213/08, 23 June 2015.} She further argued that the introduction of an infringement procedure under article 46.4 of the Convention seemed to confirm that the Court could examine the execution of judgements under article 46, despite the absence of an individual right. This she meant was in line with the Courts evolving role and the current trend of interpreting implementation as a shared responsibility.\footnote{Ibid, §10.} The second concurring opinion by Judges Spano and Kjolbro contradicts this argument by quoting the Court in a different case which establishes that the question of compliance with the Court’s judgement by the Member States falls outside the Court’s jurisdiction if it is not in the context of an infringement procedure.\footnote{Concurring opinion Judges Spano and Kjolbro, §8. In Sidabras and Others v Lithuania, nos. 50421/08 and 56213/08, 23 June 2015.} The judgement itself, as well as the two concurring opinions, shows that there is an ongoing discussion among the judges of the Court on the topic of article 46, which could have an impact on the infringement procedure. Would the evolving role of the Court begin to nag on the infringement procedure, the procedure could lose its importance. Some judges of the Court have earlier interpreted the possibility of deciding upon the non-compliance of the respondent State in a second decision as an infringement procedure as such.\footnote{M. K. Larsen, ‘Compliance with Judgements from the European Court of Human Rights’, 500.} Would this become a widespread opinion among the judges I would say that it would render the infringement
procedure in article 46.4 ECHR otiose. In any event the separation of powers argument has resulted in the Court declaring most of these cases inadmissible.\(^\text{144}\)

**4.2.4 Added Value of a Second Decision**

The added value of the Court’s second decision is something that has raised a lot of questions among the representatives of the Committee of Ministers.\(^\text{145}\) Many of the representatives do not see the point of bringing a case before the Court, merely to get a confirmation of what they already know.\(^\text{146}\) If the case is sent back to the Committee in accordance with paragraph five of article 46 of the Convention, the Committee will be back on square one.\(^\text{147}\)

Since the infringement procedure does not have other sanctions than the enhanced pressure on the State, it is not surprising that doubts have been expressed about the value of it. However some see the role of the Court a bit differently. One opinion expressed stresses the role of the Court in any dispute: to give a definite answer with the result that the parties cannot disagree anymore.\(^\text{148}\) If the respondent State is of the belief, or argues, that the measures taken are enough to fulfil its obligation under the Convention but the Committee is not, the role of the Court and the second judgement could play an important role in solving the dispute. It could help giving a clear yes or no answer to a political discussion, and decide whether or not the State needs to take further measures. It could also be interpreted as a means to save the Court from getting overwhelmed by repetitive cases.\(^\text{149}\) It would then be a way for the Court to help in the execution of its own judgements. One informant stated that one needs to assume that the infringement procedure will be an incentive for States to execute the judgements. Other infringement procedures in international law such as in the European Union have worked out well. Part of the system relies on the belief in the system. A general conclusion is that a State does not want to be brought before an international Court twice.\(^\text{150}\)


\(^{145}\) Informant 1, 2, 3, 4, 5, 6.

\(^{146}\) Informant 2, 3.

\(^{147}\) Informant 3.

\(^{148}\) Informant 9.

\(^{149}\) Informant 8.

\(^{150}\) Informant 7.
5 The Infringement Procedure in the EU

When discussing the infringement procedure in the Convention system references are often made to the infringement procedure in the European Union (EU). It is also clear that inspiration to the infringement procedure within the Council of Europe was sought with the EU.\(^{151}\) This chapter will therefore look into the functioning and result of the infringement procedure in the EU and then make a comparison between the two proceedings in the different European systems.

5.1 Articles 258 and 260 TFEU

5.1.1 A Two-step Procedure

The EU infringement procedure consists of two procedures stipulated in article 258 TFEU and article 260 TFEU. It is the Commission that oversees the application of Union Law under the control of the Court of Justice of the European Union.\(^{152}\) This means that one of the Commission’s tasks is to monitor Member State compliance and respond to non-compliance.\(^{153}\) Article 258 TFEU allows the Commission to take actions if it considers that a Member State has failed to fulfil an obligation under the Treaties. There is also a possibility for Member States to bring actions against another Member State\(^ {154}\), this is however politically sensitive and has been little used.\(^ {155}\) In support of this, article 260 TFEU imposes an obligation on Member States to comply with the judgements of the European Court of Justice (ECJ) and raises the possibility for a second judgement of the Court that can be combined with a financial sanction.

The initial infringement procedure in article 258 TFEU can be divided into four stages.\(^ {156}\) The first is called the pre-contentious stage and gives the Member State the occasion to explain its position and the opportunity to reach accommodation with the Commission. This is the first opportunity for the Commission to examine whether or not there has been a breach of the treaties, and also a way for the Member State to make corrections before the formal procedure begins.\(^ {157}\) The second stage is the formal notification of the infringement in a letter from the Commission to the Member State, in

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\(^{151}\) W. Vanderhole, ‘Execution of Judgments’, 119.

\(^{152}\) Article 17 TEU.


\(^{154}\) Article 259 TFEU.


\(^{156}\) P. Craig & G. de Burca, EU LAW, 435-36.

which the Commission states its point of view. The Member State will have the opportunity to answer this notification and the Commission will then decide if it will proceed with the case or not. The initial letter has shown to be an important step to encourage compliance by the Member States. Although the figures differ from year to year, the formal notification generally has the effect of settlement in 50 percent of the cases.\textsuperscript{158} The third stage is issuing of a reasoned opinion by the Commission. The reasoned opinion will set out the grounds for the infringement and marks the beginning of the time period within which the Member State must comply if it want to avoid the final stage.\textsuperscript{159} The vast majority of infringement proceedings are closed before reaching the final stage.\textsuperscript{160} The final stage is the referral of the matter by the Commission to the European Court of Justice. When reaching the ECJ, Member States often invoke, in order to explain their non-compliance, issues relating to national legal systems and State separation of powers or, that the non-compliance was unintentional.\textsuperscript{161} The former argument of defence has however always been rejected by the ECJ. The latter has been ignored since the ECJ is only to judge whether or not the infringement has occurred, not to decide if it was intentional.\textsuperscript{162} This first judgement of the ECJ is only declaratory and merely requires the Member State to take all necessary measures to comply with it.\textsuperscript{163} The ECJ has no power to establish concrete measures that the respondent State is compelled to take.\textsuperscript{164} However judgements frequently suggest more or less implicitly what is required in order for the Member State to comply.\textsuperscript{165} Nonetheless the infringement procedure does not end with this. Member States are placed under a further obligation under article 260 TFEU to comply with the first judgement of the ECJ. According to case law this means that Member States need to initiate the compliance process immediately and complete it as soon as possible.\textsuperscript{166} If they do not, article 260 TFEU allows the Commission to bring a second proceeding.

\textsuperscript{158} Ibid, 223.
\textsuperscript{159} P. Craig & G. de Burca, EU LAW, 435-436.
\textsuperscript{160} S. Andersen, The Enforcement of EU Law: The Role of the European Commission, 52.
\textsuperscript{162} Ibid.
\textsuperscript{163} N. Foster, Foster on EU law, 224.
before the Court. However this time the ECJ has the mandate to fine Member States for breaches of EU law. The penalty can take the form of a lump sum or periodic payment. The penalty payment has the aim to induce the Member State to put an end as soon as possible to a breach. The lump sum on the other hand, is intended to sanction an infringement that has occurred and deter similar infringements. The proceedings in article 258 and article 260 are, as one can see, not identical. The first aims to establish that an infringement has occurred and that the conduct must terminate. The second deals with the Member States non-compliance with the first judgement, that is to say repetitive infringements. The scope of article 260 TFEU is thus much narrower than article 258 TFEU since it is only designed to persuade the Member State to comply. Despite this difference the two procedures have the same purpose, which is to ensure the effective application of EU law.

5.1.2 Evolution of the Infringement Procedure

Harlow and Rawlings have identified three distinct stages in the evolution of the infringement proceeding. The first phase was the diplomatic phase when the Commission had the delegated power to hold a Member State accountable for violations of EU law as an agent of all Member States. The second phase was the negotiating phase when the ECJ gradually moved to a judicialisation of key elements of the procedure. However the process still left a lot of discretion to the Commission, at the same time as it lacked sanctions. It was then reflecting the Commission’s negotiation efforts. The last phase is the phase after the Maastricht Treaty: the judicial phase. As the ECJ was able to fine a Member State’s breach of EU law, the Commission’s administrative proceedings became more of a pre-trial proceeding. The negotiating came into the shadow of the possible sanctions.

No provisions were made, in the original Treaty of Rome, for sanctions against Member States that had failed to comply with EU law. The only sanction available to the ECJ was to require compliance. The Commission had the opportunity to begin a second proceeding before the ECJ; this could however only result in the ECJ requiring the

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167 Article 260 TFEU.
169 S. Andersen, The Enforcement of EU Law: The Role of the European Commission, 44.
171 Ibid.
Member State to remedy the infringement.\textsuperscript{172} It was assumed that a Member State would be shamed into compliance by having its infringement dealt with in public.\textsuperscript{173} Article 258 TFEU and article 260 TFEU were therefore almost identical before the Maastricht Treaty, despite the fact that they were intended to tackle different types of non-compliance.\textsuperscript{174} By the time of the conference that lead to the Maastricht Treaty it became clear that the EU could no longer rely on Member States to be shamed into compliance.\textsuperscript{175} The cases referred to the ECJ were excessive and many were referred to the ECJ a second time for non-compliance with the first judgement.\textsuperscript{176} Reluctance to impose financial sanctions before the Maastricht Treaty has by large been explained with reasons relating to national sovereignty.\textsuperscript{177} It could be perceived as a creation of federal power, not only a sacrifice of sovereignty.\textsuperscript{178}

The past years the Commission has put emphasise on reducing the cases under the infringement proceeding. Attention has been drawn to a range of complementary mechanisms for solving non-compliance such as national mediation and promotion of peer pressure.\textsuperscript{179} The Commission’s conception of the centralised EU enforcement procedure today seems to be that of a mechanism to be used in a carefully targeted and strategic manner, ideally as a last resort mechanism, after other problem-solving efforts and strategies to encourage compliance have failed, and where negotiation and constructive intervention have not succeeded.\textsuperscript{180} Sanctions are therefore not foreseen as the immediate response to an infringement. According to Andersen the real significance of the economic sanction is to bolster the interactive process of discourse and problem-solving between the Commission and a Member State in the period prior to the actual judgement.\textsuperscript{181}

\textbf{5.2 Comparative Approach}

The most fundamental difference between the two European systems, and something that constantly have to be kept in mind, is the character of the organisation. The

\begin{flushleft}
\textsuperscript{173} Ibid.  \\
\textsuperscript{174} S. Andersen, \textit{The Enforcement of EU Law: The Role of the European Commission}, 45.  \\
\textsuperscript{175} I. Kilbey, ‘The Interpretation of Article 260 TFEU’, 371.  \\
\textsuperscript{176} Ibid.  \\
\textsuperscript{177} S. Andersen, \textit{The Enforcement of EU Law: The Role of the European Commission}, 99.  \\
\textsuperscript{179} COM(2002)725.  \\
\textsuperscript{180} P. Craig & G. de Burca, \textit{EU Law}, 435.  \\
\textsuperscript{181} S. Andersen, \textit{The Enforcement of EU Law: The Role of the European Commission}, 123. \\
\end{flushleft}
European Union is a centralised organisation, which has had European integration as its aim. Member States have agreed to give up their sovereignty in certain areas to a centralised power. The Council of Europe on the other hand is an intergovernmental organisation. It was founded in order to promote greater co-operation and understanding between European States.

5.2.1 The Commission as an Independent Body
The negotiating and examination of non-compliance within the EU is handled by the Commission. The Commission is compared to the Committee of Ministers an independent body and acts more like a representative of the EU interest as a whole. As a result the initiation of an infringement procedure is never perceived as initiated by other Member States in the EU. The possibility for a Member State of the EU to begin an infringement proceeding against another Member State has been, as mentioned above, little used due to the political sensitivity. Harlow and Rawlings have argued that direct clashes between Member States are undesirable. The interpolation of the Commission as delegate between Member States serves to deflect their wrath and defuse inter-State battles at the political level. This could illustrate a difficulty with the infringement procedure within the Council of Europe. The Committee is a political body consisting of representatives from each Member State and it is hence sensitive to political considerations and Member State relationships. Member States will most likely avoid initiating a proceeding in which they directly oppose another Member State. Compliance is fully dependant on the respondent State and it is therefore essential to preserve good relations with that State, something that is often forgotten by those who favour a sanctions model of enforcement.

5.2.2 Financial Sanction
The ECJ may, in contrast to the European Court of Human Rights, decide on a financial sanction in case of non-compliance with its first judgement. This was discussed in the preparatory work of Protocol No. 14 to the Convention but fell aside. The infringement

182 P. Craig & G. de Burca, EU Law, 6.
procedure in the Convention system was believed to assert enough pressure on the Member State without a financial penalty. The EU infringement proceeding as it began did not either have any financial penalty. It was something that was added in a time when the shame of a State’s non-compliance was considered to be unsuccessful, and therefore intended to make up for other means, mostly political, to encourage Member States to comply with EU law. The Commission has lately considered the infringement procedure to be a last resort and has sometimes preferred to initiate two proceedings before the ECJ under article 258 TFEU instead. However the focus on other means to encourage the Member States to comply has always been done under the umbrella of the financial sanction, and the Commission itself has not disaffirmed that the threat of the possible final stage in the infringement procedure plays an important role in the control system. As a result the EU has moved away from a system based on discussion and persuasion and replaced it by threats and sanctions.

This may have proven to be a good solution within the EU but to apply the same process in an international organisation dealing with human rights may not be the right approach. The approach followed by the Council is that of persuasion, co-ordination among various national and European bodies concerned, and accountability of authorities at different levels, in keeping with the participatory model of accountability. Punishments as a means bear the risk of undermining a cooperative position where it is motivated by a sense of responsibility. This is something that should be avoided when dealing with human rights. Human rights should be based on the States’ own will to implement them. It is possible that financial sanctions would have worked in a few cases. As CDDH stated in the preparatory work one Member State had even asked for a financial sanction. Even so the system has proved to be

\[187\] P. Wennerås, ‘Sanctions against member states under Art 260 TFEU: Alive, but not kicking?’, 146.
\[188\] P. Wennerås, ‘Sanctions against member states under Art 260 TFEU: Alive, but not kicking?’, 154.
\[193\] Informant 4, 5.
effective despite the increasing caseload and the increasing complexity of the cases and there is no argument to deal in favour of another model at the present time.\textsuperscript{194}

5.2.3 Responsibility of States and the Role of the Court

Andersen points out that the declaratory judgement of the ECJ suggests a need for an interpretative clarification and an assumption that the States will meet the requirements voluntarily.\textsuperscript{195} This assumption could be similarly applicable on the second judgement of the European Court of Human Rights. The assumption is still that the State, as a member of the organisation, realises its duty under international law to comply with the Court’s judgement. The States of the Convention have given their consent to be put under the Court’s jurisdiction and they have also given their consent to abide by the final judgement of the Court. To give the State a reminder of their obligation is therefore necessary. Additionally, as the ECJ proved to give implicit suggestions on what was required in order for Member States to comply with a judgement, even though it did not have the competence to do so, it is similarly likely that the Court will suggest more or less implicitly what measures are required of the Member State in the Council. This assumption may be challenged by the strict application of the principle of subsidiarity in the Council of Europe compared to the EU, but considering the evolving role of the Court and the increased competence given to it by the Committee it is still believed to be probable.

6 Possible Impact of Article 46.4 ECHR

6.1 Reflection on Possible Results of the Infringement Procedure

In an evaluation of Protocol No. 14 following its adoption Salerno argued that the infringement procedure would result in the respondent State being confronted from two directions: the Court on the one hand and the Committee on the other. This would finally make the responsibility for the breach of the Convention of the respondent State unquestionable, and it would be done without having to turn to the nuclear option in article 8 of the Statue of the Council.\textsuperscript{196} This is in line with the thoughts expressed in the preparatory work, namely that a finding of an infringement would have a great symbolic

\textsuperscript{194} E. Lambert Abdelgawad, ‘The Execution of the Judgments of the European Court of Human Rights’, 505.

\textsuperscript{195} S. Andersen, \textit{The Enforcement of EU Law: The Role of the European Commission}, 87.

\textsuperscript{196} F. Salerno, ‘Caractéristiques structurelles de la nouvelle procédure’, 51.
It is however unclear whether the double pressure from the Court and the Committee will affect the pressure on the respondent State. According to the preparatory work, the procedure was intended to give the Committee stronger means as well as it was considered to assert additional moral and political pressure. Since the infringement procedure is not combined with a sanction of any kind, the stronger means and the moral and political pressure referred to in the preparatory work must, in my opinion, mean the double pressure of the Court and the Committee as well as that of being brought a second time before the Court. Lambert Abdelgawad has earlier argued that the preventive effect of the infringement procedure is clear: most Member States fear a procedure as such.\textsuperscript{198}

However some seem to doubt what Lambert Abdelgawad believed as definite. Different factors have pointed in the direction that the tool is not perceived as being sufficient. That the reform process is continuing and that the Committee is looking for new tools or means to enhance their pressure might be a sign of this.\textsuperscript{199} The lack of belief in the tool in the Committee seems to have resulted not only in a reluctance to use it but also in a decrease in deterrent effect. As have been seen in the EU system, most cases of non-compliance or late compliance are solved before reaching the ECJ. A decrease in deterrent effect thus means a decrease in effectiveness. Nonetheless some believe that the infringement procedure would put additional moral pressure on States and that it would in that way enhance the pressure to execute a judgement.\textsuperscript{200} A more common belief is that it would only work on certain States, which are in any case not likely to reach the infringement procedure due to early compliance, while it would not affect States that could be considered to be brought before the infringement procedure.\textsuperscript{201} Those particular States are however likely to have larger problems of compliance with the organisation’s basic values than merely the execution of judgements itself. If the infringement will show to assert enhanced pressure is not possible to tell at this point. What can be told is that the lack of belief in the tool makes it likely that the criterion of majority vote of two thirds of the Committee will not be possible to achieve, seen to the difficulties described earlier.

\textsuperscript{197} W. Vandenhole, ‘Execution of Judgments’, 116.
\textsuperscript{198} E. Lambert Abdelgawad, ‘Le protocole no 14 et l’exécution des arrêts’, 93.
\textsuperscript{199} M. K. Larsen, ‘Compliance with Judgements from the European Court of Human Rights’, 502.
\textsuperscript{200} Informant 6.
\textsuperscript{201} Informant 1,2,4, 5.
Larsen argues that the infringement procedure may well prove to be a valuable and strong tool to promote necessary reforms. He further argues that States have been affected by a second judgement of the Court. This can be seen from the situation of a second decision of the Court made by the applicant, as mentioned above. He noted that the State, in these cases, took appropriate steps to amend their national legislation and to prevent future violations only as a result of the second judgement of the Court. This induces that a second decision could influence the respondent State, which would contradict the ones believing in a paper tiger. That a second decision of the Court has had a positive effect has also been supported by Lambert Abdelgawad in a speech held during a conference in Oslo. Yet the effect seems to be of an uncertain character, which may for some not be worth the risk of non-compliance with the second decision and a perceived loss of credibility both in relation to the Committee and the Court. As the infringement procedure is a tool of a certain gravity to be used before expulsion or suspension of the State’s voting right, and perceived by the Committee to be used as a last resort, the uncertainty of the expected result may not be enough in relation to the risk taken. The risk partly consists in the direct clash between the Member States’ representatives in the Committee and the respondent State when initiating an infringement procedure. In the comparison made with the infringement procedure in the European Union, one observation was that the possibility for Member States of the EU to bring infringement procedures against other Member States has been little used due to political sensitivity. An advantage of the EU system is then the role of the Commission as an independent body, which makes even a small chance of compliance as this worth the risk. The belief in a collective response to an infringement in the Committee is therefore, in my opinion, not likely to take the form of an infringement procedure; if not the respondent State itself wants to get an unquestionable answer from the Court. This should however be a rare situation.

Salerno has conveyed that it is probable that the Committee would ask for a declaratory judgement of the Court in cases that need an objective and clear statement of a violation, and where the respondent State persistently refuse to take any real measures

204 M. K. Larsen, ‘Compliance with Judgements from the European Court of Human Rights’, 501.
206 Informant 1,2,3,4,5,6.
to execute the judgement. 207 This opinion is in line with that of some of the judges in Court, who believe that their task is to give an objective answer to the political dispute on whether or not the judgement has been sufficiently executed. Based on the separation of powers and the Court’s reflective approach to the principle of subsidiarity, it is however unlikely that the Court will go beyond the wording of article 46.4 ECHR in its judgement. Some of the informants have expressed an opinion that it would be helpful if the Court could state something more than merely answering the question if there has been an infringement or not. 208 This would help the Committee in the work following the Court’s second judgement and would not take the Committee back to square one as many fear. 209 Many of the judges have pointed at their limited role and the importance of not stepping over their competence. 210 The situation was however similar within the EU. Despite its lack of competence the ECJ proved to give implicit instructions on how a Member State could comply with the judgements. Taking Judge Keller and her belief as an example it is probable that some judges will believe it to be insufficient to purely establish an infringement or non infringement depending on the case in front of them. In my view, this taken together with the comparison with the ECJ makes it probable that the Court may make implicit suggestions in its second decision. If the procedure will ever reach this point is however uncertain seen to the prior obstacles.

6.2 Future Improvements to the System

The introduction of an infringement procedure provided, in theory, more effective sanctions in case of non-compliance. Given the weak response of the Committee of Minister it has been expressed that it is unlikely that the new procedure would strengthen the political will of the States. 211 As a result, propositions for change have begun to appear. Lambert Abdelgawad has stated that there is a number of non-executed cases that had their final decision in the late nineties and it is evident that the Committee is not using all of its available tools including article 46.4 ECHR. A change is therefore necessary if the Committee is to ever use the infringement procedure. As a result she has suggested that it is necessary to change paragraph 5 of article 46. The consequences of the second decision of the Court need to be clear and stipulated in the paragraph. Secondly the gravity of the infringement procedure needs to be lowered. If it is ever

207 F. Salerno, ‘Caractéristique structurelle de la nouvelle procedure’, 52.
208 Informant 1, 4.
209 Informant 1, 4.
210 Informant 7, 8, 9, 10.
going to be used it is not sustainable for it to be used only in exceptional circumstances. The same thoughts have been expressed by Ehrenkrona who asks the question of whether the criteria for the infringement procedure should be alleviated for it to be used more often. When stating this he is especially targeting the criterion of the vote of two thirds majority in the Committee. What seems to be expressed is that the gravity of the infringement procedure in theory does not match its gravity in practice. The same goes for its results. The dilemma is that for the infringement procedure to have any results it needs to be used, but if used there may not be enough result to justify the use of it.

What is clear to me is that the infringement procedure needs to be discussed. As Lambert Abdelgawad has argued the procedure needs to be clarified and the consequences need to be set. This was also reflected in the preparatory work but was never followed up upon. The suggestions targeting the gravity of the infringement procedure and the majority vote of two thirds are sound and seem to be in line with the conclusions made in this thesis. It is probable that the infringement procedure will affect the execution of judgements of the European Court of Human Rights. Nonetheless its gravity and the need for a majority vote of two thirds may be obstacles that cannot be overcome by the Committee. Some kind of change, whether it will be in attitude or in the procedure, is therefore needed.

212 Conference on the long-term future of the European Court of Human Rights, 164.
213 Conference on the long-term future of the European Court of Human Rights, 171.
7 Conclusion

7.1 Summary

Article 46 of the Convention puts a legal obligation on Member States of the Council of Europe to abide by the final judgements of the Court. According to their obligations under international law Member States shall execute the judgements so that conformity with the Convention is ensured. The infringement procedure in article 46.4 of the Convention was introduced to give the Committee a new means of pressure to ensure the execution of judgements. It would be used as an intermediate means before turning to article 8 of the Statue of the Council of Europe and expulsion of a Member State.

Protocol No. 14 has been in force for five years, and the infringement procedure in article 46.4 has still never been used. Meanwhile cases of lengthy executions and non-compliance are increasing. At present some cases have been pending before the Committee of Minsters for more than ten years. The reason why it has still never been used is largely due to a few obstacles identified in this thesis. According to the wording of article 46.4 of the Convention the Committee needs to establish that a Member State is refusing to abide by a judgement followed by a formal notice and a decision; both adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee. The difficulty of establishing unwillingness in contrast to inability may be of some concern, but it is not the most pressing concern. All informants have stated that a vote of two thirds majority is a difficult number to achieve. Not only need the representatives be convinced that a State is refusing to abide by a judgement, but also that the infringement procedure is the appropriate tool to deal with the refusal. Additionally the collective responsibility as such may hamper an action brought directly against another Member State. Since the Committee is of a political nature I find it improbable that a measure of this gravity will be brought by Member States on another Member State.

The type of case that is most likely to benefit from the enhanced pressure of the infringement procedure is, in my opinion, the type concerning structural or complex problems. The purpose of the reform and the introduction of an infringement procedure were partly to deal with repetitive cases and the influx of new applications to the Court, even though the tool may be used for all cases. The types of cases causing repetitive
cases are the structural or complex problems. The representatives in the Committee are on the other hand of an opinion that the case brought before the Court need to achieve certain gravity, seen as the infringement procedure is only to be used in exceptional circumstances. Cases concerning structural or complex problems are most often not perceived as the gravest cases under the Committee’s supervision, which impede the search for the perfect case for the infringement procedure.

The consequences of the infringement and the role of the Court have not been reflected upon by the larger majority of the judges of the Court. What the informant judges seem to agree about is that the role of the Court will be limited. There are however a tendency of some judges that the Court should take a larger responsibility for the execution of its own judgements. My opinion is that this taken together with the practice of the ECJ makes it probable that the Court will pronounce itself more on the measures of execution depending on the case in front of them. The added value of the second judgement of the Court could therefore be both the additional pronouncement of the Court, but most importantly the judgement would decide the ongoing political dispute in the Committee and give an unquestionable answer to whether or not the Member State has done enough to execute the judgement.

With this said I find that the infringement procedure’s plausible impact on the execution of judgements is threefold. Firstly the declaration of an unquestionable breach of the Convention would end the political dispute in the Committee and force the respondent State to take further/other measures. The possibility that the Court would pronounce itself further would also help the Committee in the work following the infringement procedure. Secondly the double pressure of the Court and Committee together as well as the procedure itself would most probably enhance the pressure on the majority of States. Most Member States fear a procedure as such. Whether this would make any difference on those States that are most likely to be put before the infringement procedure is however questionable. In my opinion these States may on the other hand be assumed to have a larger problem of compliance with the organisation’s basic values. Thirdly a second decision of the Court has proved to be effective in exerting further pressure on the respondent State. This has been seen in the cases where a second application has been made to the Court by the same applicant, and the Court has pronounced itself on the execution of the initial judgement. I therefore believe that it is highly plausible that the infringement procedure would have a positive impact on the execution of
judgements. However the impact as such seems to be small in contrast to the gravity of the procedure and the risk of loss of credibility that accompanies it. It is also unlikely that the Committee will succeed to achieve a majority vote of two thirds. Taken together this means that if the infringement procedure will have any impact at all, the gravity of the procedure as well as the criterion on the majority vote would need to be alleviated.

7.2 Concluding Remarks

The infringement procedure is likely to result in an enhanced pressure on the respondent State to execute a judgement. The obstacles met by the Committee of Ministers to initiate it are however too immense for the infringement procedure to be an effective tool in the Committee’s supervision. An amendment to alleviate the gravity and the required majority would possibly result in a tool that could achieve its purpose and be used by the Committee of Ministers. As it stands today the chances are however small that it will ever be used, and the consequences may in the long run be that the authority of the human right protection system in Europe is damaged.

The execution of judgements is a corner stone in the European human right protection system, and Member States’ reluctance to execute judgements of the Court is threatening the system’s credibility. One recent example that can be given is the amendment to the Federal Constitutional Law on the Constitutional Court in Russia, which is aimed at entitling the Russian Constitutional Court to declare decisions of international courts as unenforceable.\footnote{For further reading, European Commission for Democracy through Law, Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, CDL-AD(2016)005, 15 March 2016.} The introduction of an infringement procedure is however only one of many possible tools to deal with a State’s reluctance to execute a judgement, and it is possible that alternatives will emerge, such as for example the possibility for a second individual application to the Court from the same applicant. It could also be that the possible coming into force of Protocol No. 16 to the Convention could facilitate the national implementation.\footnote{For more information, Explanatory report to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 2 X 2013.} Whatever tool will prove to be effective, it is important that the effort to find a working tool is not interrupted.

After working with this thesis for several months, it has become clear that one aspect of the execution of judgements of the European Court of Human Rights needs to be further
explored. The criteria for the Court to declare a second application to the Court admissible, as a result of non-execution and on the grounds of new issues, could play an important part in the Committee’s supervision of the execution of judgements, especially if the infringement procedure would prove to be unsuccessful. Further research in this area is therefore suggested and needed.
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**Participant Observation**

Human Rights meetings in the Committee:

22-24 September – 1236th (Human Rights) meeting of the Ministers’ Deputies

8-9 December – 1243rd (Human Rights) meeting of the Ministers’ Deputies

Ordinary meetings in the Committee:

10 September 2015 – 1234th meeting of the Ministers’ Deputies

15-16 September 2015 – 1235th meeting of the Ministers’ Deputies

7-8 October 2015 – 1237th meeting of the Ministers’ Deputies

14 October 2015 – 1238th meeting of the Ministers’ Deputies

4 November 2015 – 1239th meeting of the Ministers’ Deputies

1-2 December 2015 – 1242nd meeting of the Ministers’ Deputies

16 December 2015 – 1243bis meeting of the Ministers’ Deputies