



The Execution of Judgments of the European Court of Human Rights

Human Rights Law Centre, School of Law, University of Nottingham

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Session 1: The Measures Required of States by the Court in its Judgments and its Role in Ensuring Compliance

Chair: David Harris, Professor Emeritus and Co-Director, Human Rights Law Centre, University of Nottingham

The Development of Article 46 Judgments by the European Court of Human Rights

Presentation by: Alastair Mowbray, Professor of Public Law, University of Nottingham

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David Harris: May I welcome you all to this event. It is very much a joint event, one that's been organised by the Department for the Execution of Judgments of the European Court of Human Rights in collaboration with the Human Rights Law Centre of the University of Nottingham. The proposal arose out of side conversations at the workshop in honour of Michael O'Boyle in Strasbourg in February 2016 on the occasion of his retirement as Deputy Registrar of the Court, a very happy event.

The question of the execution of judgments of the European Court of Human Rights is one that is being considered in many quarters, a fact that signals its importance for the Court and the Convention system. The Department thought that a workshop such as the present one, considering the execution of judgments generally but focusing especially on the problems that arise in connection with the procedural obligation in Articles 2 and 3, would be of value. It would provide an occasion to consider how the execution system is working at present and how it might be improved. How execution by States might be facilitated and what more the Department and the Committee of Ministers might do in achieving compliance with Court judgments, particularly concerning the procedural obligation in Articles 2 and 3. Most of the presentations in the workshop will directly address the question of the extra-judicial execution of the Court's judgments. But, to place this in context, the two presentations in this first session will consider the role that the Court itself may play in the execution of its judgments, either by what it says in the judgments or in the course of post judgment initiatives under Article 46(4).



Alistair Mowbray: The Development of ‘Article 46’ Judgments by the European Court of Human Rights

I would like to share some of my thoughts and insights on a recent piece of my research on Article 46 of the European Convention on Human Rights (ECHR). I want to begin by stressing my limitations in what I’m going to be saying because I appreciate that around the table there are a number of people who have first-hand experience of the matters that I, as an external academic, am going to offer some thoughts about.

As academics, most of the time we focus on the substantive law and the rights. Although the remedial role of the Court is very important it has sometimes been somewhat neglected. Exactly 20 years ago, I published the first major study, in a British legal academic journal, on the powers of the Court to award just satisfaction [“The European Court of Human Rights’ Approach to Just Satisfaction” [1997] *Public Law* 647] . There, I found that the Court, having undertaken its primary role of finding violations, developed rules which showed that it considered that its next, remedial, role was essentially confined to deciding on monetary levels of compensation-- pecuniary, non-pecuniary damages, and legal costs.

At that time, and for some years subsequently, when you read the case law, you come across various requests by successful applicants asking the Court to make specific orders to strike down a law, to require the State to do something to change its practices, to free someone from detention, or to take other forms of remedial action. And, almost invariably, the Strasbourg Court said no, we have no remedial powers, other than awarding just satisfaction. However, in more recent times occasionally one comes across judgments where the Court was not simply finding a violation, and then deciding whether to award just satisfaction under Article 41, but was also indicating further specific remedial measures. It was this development that caught my interest.

This was a development which I thought worthy of some academic analysis. The most recent issue of the Human Rights Law Review [volume 17 (2017) pp. 451 ff] has the text of my full analysis of this development. However, for the purposes of my talk this morning, I’ve been able to slightly update some of the information contained in that article, which was drafted a few months ago.

First I should draw a distinction between Article 46 judgments, which I will be focusing on, and pilot judgments. Article 46 judgments, as they can be called, are not pilot judgments. I think we can put pilot judgments into a separate category of judgment. Why? Well, they are of course based on a resolution [Resolution *Res (2004)3*] in which the Committee of Ministers invited the Court to undertake this rare process of adopting pilot judgments where there were serious structural defects in a state’s legal system revealed by a Court judgment. Pilot judgments thus have a different origin from Article 46 judgments. Secondly, pilot judgments now have a specific rule, Rule 61, in the Court’s Rules of the Court, which elaborates the process and which has been regularly updated and revised. Reflecting this distinction, the Committee of Ministers has since 2013 included a separate appendix in their (very informative) annual reports on the supervision of the execution of Court judgments for these Article 46 judgments, separate from pilot judgments. So, I think,



for a number of legal and practical reasons, we can distinguish between pilot judgments, and what I will focus upon, Article 46 judgments.

Now, about the description “Article 46 judgments” , I take the wording from the Committee of Minister’s annual supervisory report in 2013. There on my power point slide you will see, towards the end of that quote, the Committee of Ministers says:

“The European Court’s interaction with the Committee of Ministers, in implementing Article 46, is constantly evolving. For several years now, the Court contributes to the execution process more and more frequently and in various ways, e.g. by providing, itself, in its judgments, recommendations as to relevant execution measures (so called quasi-pilot judgments or “Article 46 judgments”)...”

The annual report does not define Article 46, or quasi-pilot, judgments. So, I think we’ve got a practical issue, how do we distinguish them? Well, as I have just noted, since 2013 the Ministers’ annual reports have had this separate appendix for them. So, for the purposes of my research, since 2013 I was able to look at the appendix and see which cases the Committee of Ministers has identified as Article 46 judgments.

More broadly, of course, if there are indications in the operative part of Court judgment going beyond the award of just satisfaction, then that’s clearly an Article 46 judgment, because the Court is indicating that measures should be taken apart from paying financial compensation.

Also, it’s quite common now in Article 46 cases that in the text of the judgment there will be a sub-heading and maybe several paragraphs of text where the Court sets out how it approaches Article 46 in the particular case, and why it’s using that Article to justify whatever measures it’s recommending. So, we can find from the text of judgments which cases are expressing referring to Article 46

What about the legal basis of Article 46 cases? Well, I’ve just put the first two paragraphs of Article 46 on my power point presentation. Professor De Londras in her paper will be looking at the later sub paragraphs of Article 46, that were added by Protocol 14. Of course, paragraphs 1 and 2 of Article 46 are not saying anything empowering the Court to give indications of non-financial remedies, and it’s emphasised in paragraph Article 46 (2), that it is the Committee of Ministers that has the primary responsibility of supervising execution. But it’s Article 46 that the Court has used in recent times to justify the legal basis for giving these sorts of remedial indications.

So, how has the Court’s approach been developing over the years, in terms of, and going beyond simply awarding just satisfaction to rectify breaches? Well, the classic approach of the Court, going back to the original Court, is that of the very well-known case of *Marckx v Belgium*, in 1979, where the Court said, “the Court’s judgment is essentially declaratory and leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligation under Article 53 (now Article 46)”.

In *Marckx*, the Court says the judicial role is basically declaratory. We are not getting involved in telling respondent states when we’ve found a violation what they must do to



remedy it. As a result, in the *Marckx* case itself, the Strasbourg Court did not tell Belgium how it should go about amending its family law to recognise the legal relationship between unmarried mothers and their children.

But then we come to the ground-breaking case of *Papamichalopoulos v Greece* in 1995. That was an Article 1, Protocol 1 property case, where the Court found a breach of the property right of the applicants. In a separate just satisfaction judgment, the Court said that the Greek authorities should return specific property within six months and if the government did not return that property within six months, it should pay a defined amount of compensation in lieu of that action. Furthermore, that remedial indication was put in the operative part of the judgment.

That's the first clear indication of a Court giving instructions to a respondent State beyond simply paying compensation. That was to return property. Then we jump forward to 2004 and two momentous decisions of Grand Chambers. The first one is the case of *Assanidze v Georgia*, where *Assanidze* had been detained and imprisoned by the Ajarian Autonomous Republic authorities in Georgia. The Georgian President had granted him a pardon, and the Georgian Supreme Court, having found this detention unlawful, ordered his release. But he was still being detained by the autonomous authorities. He takes his case to Strasbourg, and the Grand Chamber, in the operative part of its judgment, instructs Georgia, 'to secure the applicant's release at the earliest possible date'. So, the Court is instructing the respondent State to take measures way beyond paying financial compensation.

Exactly three months later, in *Ilascu and Others v Moldova*, another Grand Chamber, but with 10 members of the Grand Chamber being the same as in the earlier *Assanidze* case, delivers judgment concerning the breakaway Moldavian Transdniestrian Republic's detention and serious abuses of *Ilascu* and the other applicants. The Grand Chamber, again in its operative provisions, in *Ilascu* tells Moldova and Russia they must do all you can to ensure the release of these detainees from the breakaway authorities as soon as practicable. So again, it's a step change, it's a different type of remedial instruction in *Assanidze* and *Ilascu*. So, from the property case to unlawful detention cases, we've seen the Court moving way beyond simply awarding financial compensation when it finds a breach of Convention rights.

Now, let me move into more recent times. What we find in the annual supervisory reports since 2013 is that they identify the sorts of measures that are contained in these Article 46 judgments. The supervisory reports distinguish between individual measures and general measures. Obviously, individual measures are specific for the individual applicant, such as in *Ilascu* ordering his release. General measures are changes in laws or the legal system, introducing new systems of judicial discipline *etc.*

Now what the annual reports don't do, it's not part of their remit, is identify the legal importance of these Article 46 cases. So what I thought would be interesting, for the purposes of my research, would be to tabulate and to demonstrate the legal importance of these various Article 46 judgments, where the different types of remedies are being



indicated. As you will all be well aware, the HUDOC database classifies all judgments of the Court in a ranking order as follows: case reports, being most important; Level 1 cases, very important; level 2 cases, medium importance; and level 3 cases, legally not that important at all.

I thought it would be interesting to take the information from the annual supervisory reports, and map it on to how those judgments have been classified in terms of legal importance. You will see this is done in my power point tables (from 2013 to 2016). Now, what sorts of conclusions can we draw from these statistics? Well, first of all, when we look at these cases, we actually find that the Court has been mainly indicating general measures. Not individual measures.

So in the 2013-2016 cases there were 41 judgments concerned with general measures and 13 judgments concerned with individual measures. Now this came as a surprise to me, because, having looked at the earlier leading cases, including *Assanidze*, *Ilascu*, they're all focusing on the Court indicating individual measures, saying "release this person" or "restore this property" and such like. It actually seems, in recent times, that by far the overwhelming majority of Article 46 judgments are concerned with general measures. 'Change this part of your legal system', 'change this statutory provision', 'introduce a form of new domestic redress' or whatever it might be.

Remember, as I was saying earlier, these are Article 46 cases, they are not pilot judgments. And so you'll be thinking that if there were systemic failures, requiring general measures, they'd be primarily dealt with by pilot judgments. But these are non-pilot judgment cases, even though most of the remedies being recommended are general provisions.

The second surprise for me, was that I was expecting these rare Article 46 cases to be concerned with the legally most important cases. But, actually, you can see there from the statistics that 32 of the Article 46 judgments between 2013 and 2016 were concerned with levels 2 and 3 legal cases. Which in the view of the Court, are legally not really the most important cases. So, actually we're having quite powerful remedial indications being given by the Court in cases which the Court itself does not think are particularly of enormous legal importance.

And then, the third general conclusion, as you can see there are declining numbers of Article 46 cases over the last 2 years. So in 2015 there were 13 cases in total, and last year, there were 11 cases. Are we seeing a withering of Article 46 judgments? But that's something I'll come back to in my overall conclusions.

Then there is a subset of Article 46 judgments, where the Court gives its remedial indications in the operative part of the judgment, not just in the text of the judgment under an Article 46 sub-heading, but also in the operative part. These are a smaller number of this type of Article 46 cases (see the power points slides).

In 2013 there were 6 operative part indications. In 2014, there were fewer, only 2, (both level 1 cases, one individual and one general). In 2015, only 1 operative part, and that



was level 2 individual measures. And 2016, only 1 operative part and that was level 2 individual measures. So, we can see from this smaller number of operative part indication judgments that they are primarily concerned with individual measures.

Enough of statistics. I then looked at the jurisprudence of the Court and tried to find out from the Court's judgments--as an academic lawyer and an outsider, all you can go by is the text of the judgment--what justifications the Strasbourg Court was articulating to justify moving beyond simply finding violations or awarding financial forms of just satisfaction. The first general justification I can find for the Court giving Article 46 judgments is because the case discloses a systemic problem. And a number of cases justify this. I'll just give you one example. This is the case of *Statileo v Croatia*, a complaint by a landlord saying the legal regulation of landlords was limiting their rent and unduly protecting tenants, which was in violation of the landlord's right to property under Article 1 of Protocol 1. Well, the Court finds a breach of Article 1, Protocol 1, and awards several thousand euros compensation (pecuniary and non-pecuniary). But then the Court goes on, in para 165, to say:

"Whilst in finding a violation of Article 1 of Protocol No. 1 to the Convention in the present instance the Court has primarily focused on the particular circumstances of the applicant's case, it adds by way of a general observation that the problem underlying that violation concerns the legislation itself and that its findings extend beyond the sole interests of the applicant in the instant case (see paragraph 77 above). This is therefore a case where the Court considers that the respondent State should take appropriate legislative and/or other general measures to secure a rather delicate balance between the interests of landlords" and their tenants.

So what the Court is saying there, in paragraph 165, is that this one case is symptomatic of a general defect in the legislation in Croatia on the landlord/tenant relations, and therefore it is necessary for Croatia not simply to pay this one landlord compensation, but also to change their regulatory system. However, the Court is being sensitive to the fact that this is a very difficult socio-economic issue, and so the Court does not in its judgment say 'your legislation should embody a, b, and c' it's saying 'you should change your law to get a fairer balance' but it's leaving it to the State to decide what that balance should be.

The second justification for Article 46 judgments is that the particular case indicates a problem that may reoccur in many future applications. An example of this situation is the Maltese case of *Suso Musa v Malta*, one of the many cases involving migration across the Mediterranean. Suso Musa, a Sierra-Leonean national, arrived in Malta by ship, claimed asylum, and was detained for about 18 months in military barracks. Asylum having been refused, he then brought a case to Strasbourg arguing breaches of Article 5 in terms of detention conditions, and also Article 5(4), not having a swift judicial remedy to challenge his allegedly unlawful detention in Malta.

The Strasbourg Court finds breaches of Article 5(1) and 5(4), awards several thousands of euros compensation to Mr Musa, but goes on to say, in paragraph 121 of the judgment, that 'the problems detected in the applicant's particular case may subsequently



give rise to numerous other well-founded applicants which are a threat to the future effectiveness of the system put in place by the Convention.... The Court's concern is to facilitate the rapid and effective suppression of a defective national system hindering human rights protection. In that connection, and having regard to the situation which it has identified.... the Court considers that general measures at national level are undoubtedly called for in execution of the present judgment.'

So here the Court's saying that Malta has to implement general measures-- swifter judicial review, improved conditions of detention of people seeking asylum claims. And, why is the Court making these recommendations, these indications? Because the Court foresees there will be many other cases against Malta if it doesn't change its legal system to provide better domestic remedies.

There is some overlap between the first justification we've just seen in terms of the Court identifying systemic failures and *Suso Musa* saying, looking to the future, if the State doesn't sort this problem out, there will be lots of cases for the Courts. They are maybe two sides to the same coin; these cases are identifying general problems in the legal system of Member States. And that is why Court wants to indicate some type of general measures.

The third justification I could find in Strasbourg's case law for the Court indicating Article 46 remedies is the nature of the violation. And my example of a case that uses this justification is *Del Rio Prada v Spain*. This was a case of a domestic terrorist in Spain found guilty of many murders and receiving a total of about 3,000 years detention for these various very serious crimes. These sentences were aggregated downwards by the Spanish courts, in accordance with their national law, to a combined sentence of about 30 years imprisonment. Spanish law had provisions for early release (parole), if a person serving a sentence behaved well in prison and, under existing law, the applicant was entitled to early release after about 20 years. The prison authorities sought to obtain permission from the courts to release her after 20 years. However, the senior Spanish courts changed the system of parole and said 'no, she's got to serve longer, she's got to serve about 30 years before she can be entitled to release'. She takes her case to Strasbourg, eventually reaches the Grand Chamber. And, as you can see from my power point, the Grand Chamber in *Del Rio Prada* replicates the language of the earlier *Assanidze*, *Ilascu* cases and says:

"[i]n other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it (quote Assanidze). The Grand Chamber agrees with the Chamber's finding and considers that the present case belongs to this last mentioned category".

So the nature of the violation was such that she was being unlawfully detained, and the obvious remedy was to secure her release. I will say a little bit more about this case later on.

Next I want to consider the justification(s) the Court provides for deciding to give these Article 46 indications in the operative part of the judgment. The first reason I can find for the Court deciding to give operative part indications was the urgent need to end the violation, and the fact that the violation was a certain type, so that there was only one



simple remedy that was appropriate. So, both an urgent case and there being no alternative remedy. Most of these cases would be the unlawful detention cases discussed earlier. But I also have an example of a case of this kind which wasn't an unlawful detention case. This was the case of *Grande Stevens and Others v Italy*. The applicants here were senior business figures and professional advisers (including lawyers) involved in the corporate affairs of the Fiat company. They had been found by the Stock Exchange authorities in Italy to have given false information about the financial transactions of the Fiat company with respect to its share value. They were fined several million euros by the Stock Exchange Authority in Italy, in administrative proceedings that were considered by the Court to be criminal proceedings for the purposes of the Convention. After the Stock Exchange imposed those severe financial penalties on Grande Stevens and the other applicants, the Italian prosecution authorities began criminal proceedings against them, and Grande Stevens and the other applicants were then subject to separate criminal proceedings, concerning charges based on the same facts. And so, Grande Stevens and the other applicants then took their case to Strasbourg, arguing successfully that this would amount to a violation of Article 4 of Protocol Number 7. Basically, the prohibition of being tried twice for the same offence.

The Chamber determined:

"as regards individual measures, the Court considers that in the present case the nature of the violation found is such as to leave no real choice as to measures required to remedy it".

And then the Court went on,

"in these conditions, having regard to the particular circumstances of the case and – note-- the urgent need put an end to the violation". The Court then instructed the Italian authorities in the operative part to stop those criminal prosecutions as soon as possible. So, I think we can see from the judgment the Court's justification is that the nature of the violation has only one suitable remedy, and it's an urgent case. And that's why the Court decided to use the operative part indications rather than textual indications.

Now, that seems to me to indicate that the severity of the breach found in the particular case is a significant factor in the Court's mind as to why the Court is going to use an operative part indication, rather than a textual indication, of a specific remedy. And to support that conclusion I draw upon Judge Mahoney's dissenting opinion in *Del Rio Prada*, where he disagreed with the necessity to use an operative part indication, as he did not think the severity of the violation for her, being detained longer due to the change of judicial interpretation of parole rules, was of the same harshness as people like Assanidze and Ilascu suffered during their detention. So that suggests to me that this notion of urgency as a key component of the Court using the operative part goes to the seriousness, the gravity of the breach.

Another reason the Court indicated remedial measures in the operative part of a judgment that I could find is that the case discloses a systemic problem. I refer to the absolutely tragic case of *Zorica Jovanovic v Serbia*, where the applicant has a child born in a State hospital in the 1980s, the baby is taken away from her and she is then told by the



authorities that the baby has died. The body of the baby is never returned, and she never gets any information as to why it has died. By the early 2000s many hundreds of women are raising similar concerns and fearing that sometimes their healthy babies/children were taken away and given to other people. So there were hundreds mothers wanting to know what happened to their babies.

The Serbian Parliament organises an investigation, finds that the previous system had weaknesses in it. There's not much done about it. There's an Ombudsman's report a few years later in Serbia, very critical of a lack of response, and so then Zorica takes her case to Strasbourg. You can see there (on my power point) that the Strasbourg Court finds a breach of the right under Article 8. It goes on to say:

In view of the above, as well as the significant number of potential applicants, the respondent State must, within one year from the date on which the present judgment becomes final in accordance with Article 44 § 2 of the Convention, take all appropriate measures, preferably by means of a lex specialis ... to secure the establishment of a mechanism aimed at providing individual redress to all parents in a situation such as, or sufficiently similar to, the applicant's... This mechanism should be supervised by an independent body, with adequate powers, which would be capable of providing credible answers regarding the fate of each child and awarding adequate compensation as appropriate."

During that year the Court said it would adjourn consideration of all similar applications. So, this, I think, is a classic example of a case that meets the earlier definition in the annual supervisory report, which referred to these cases as quasi-pilot judgments. *Zorica* follows the type of procedure used in formal pilot judgments. A systemic breach is found, general remedial measures are necessary, the State is given time to deal with, and come up with those remedies, and other similar cases are adjourned at Strasbourg. But *Zorica* was not a pilot judgment.

Well, it seems to me that where the Court gives Article 46 indications in the either the text or in the operative part of the judgment, one consequence we can see is that it is likely that when the case goes to the Committee Ministers for supervision, those Article 46 judgments are put on the enhanced supervisory route. And this may well of course be part of the Court's objective in providing such indications. Using the enhanced route, there is a much more activist role taken by the Department for Execution. Using the standard route, it's really up to States to produce their action reports and action plans. Whereas the enhanced supervision produces more pressure, more support, given from the Department for Execution. You can see there in the statistics (on the power point), that in the years 2013-2016, there were forty-nine Article 46 cases put on the enhanced route out of sixty-four Article 46 judgments. Hence the overwhelming majority of Article 46 judgments received enhanced supervision.

Then let's try and find a little bit more about what are the consequences of the Court giving Article 46 judgments. It seems to me that where the Court decides to give an Article 46 judgment with operative part indications that may enhance the opportunity for the



applicant to get a swifter response, a swifter remedy, it may encourage the State to provide a more expeditious remedy.

Can I find a support for this proposition? What I did was I looked at the 2013 operative part indications, and there were 6 of them given in that year. And I found that by the end of 2016, 3 out of 6 operative part judgments from 2013 had been fully or partially resolved by the Committee of Ministers. So, half of the operative part resolution cases had been partially or finally solved. This, I might add, often involved a great deal of work from the Department of Execution with interim resolutions and regular monitoring.

If we contrast that with the 11 other Article 46 judgments given in 2013, where there were remedial indications in the text of the judgments, only 1 out of the 11 had been fully resolved by November 2016. So, greater achievement of satisfactory outcomes for judgments with operative part indications compared to other Article 46 judgments.

Then we come to some recent jurisprudence that I find absolutely fascinating. This is the Grand Chamber's judgment, in July of this year [2017], in the *case of Moreira Ferreira v Portugal (No2)*. As you will know, the major issue there was where the Court had the power to order States to re-open criminal proceedings where the Court had found a breach of Article 6. The Grand Chamber said no, it did not have that power to instruct the re-opening of proceedings. What is interesting for us, looking at Article 46 indications that the Court put in the text of the judgment, was the dissenting judgment by Judge Pinto de Albuquerque, supported by 6 other colleagues. You can see there, in paragraph 17, Judge Pinto de Albuquerque sets out his views about the factors influencing the Court in deciding what the language to use, whether to put indications in the text or the operative part of the judgments. Judge Pinto de Albuquerque says:

"it is undeniable, that in the long-standing practice of the Court, obligations imposed in the operative part and those included only in the reasoning part of the judgment have the same legal force".

Now, I find that really surprising. It was my belief that if the Court decided to provide remedial indications in the operative part of its judgment that's a very important difference from indications in the text of the judgment. As we have seen in the statistics, only a few of the Article 46 cases have operative part indications. So, I have always read this as meaning that the Court is saying that this is a really important remedy that must be provided, and that's why we're putting it in the operative part, as opposed the textual part, as it has greater legal force there. But I stand corrected by Judge Pinto de Albuquerque, who is saying there is no legal difference between indication in the text or the operative part. Judge Pinto de Albuquerque continues:

"to conclude otherwise would mean either that the judgments' language is dictated by whimsical changes of mood, or, even worse, by political considerations. The choice of the formula in the Court judgments is neither a matter of taste of the drafter nor of Chamber politics determined by the need to confer a more or less emphatic tone to the individual measure in view of the respondent State's expected abeyance or reluctance to follow suit".



Now, is that a statement of fact, or is a statement of a wish and desire? It seems to me, as an academic I can only go by the text of judgments, that it is absolutely crucial as to the language the Court is using in its judgments to indicate remedies. There are enormous differences between the indications in *Statileo*, (policy balances were primarily for the domestic authorities) and *Ilascu* where specific indications were given by the Court. I would have thought, absolutely, that these involved crucial matters of deliberation by the Chambers and Grand Chambers. And there must be all sorts of policy factors that influence when the Court decides what sort of language, and whether to put that in the text or the operative part.

Indeed, Judge Sicilianos published a fascinating piece [“The Involvement of the ECtHR in the Implementation of its Judgments”, 32 Netherlands Quarterly of Human Rights 235 (2014)] where he elaborates in great detail the multitude of different remedies and language used by the Court in its Article 46 judgments. The language used varies a great deal, from very precise and directive to much more general language. It seems to me that these are very important factors in the Chambers’ and Grand Chamber’s deliberations.

In conclusion, what have we discovered? Well, first of all, as a factual matter we have seen that, although there are limited numbers of Article 46 judgments, there are significantly more Article 46 judgments than pilot judgments. Between 2013 and 2016 there were 64 final Article 46 judgments, compared to 10 pilot judgments. Then, in Article 46 judgments, as we have seen, the major forms of remedies being indicated are general remedies, not individual measures. And that links back to what we have discovered from the case law where the Court justifies why it’s giving Article 46 judgments, which is because of a systemic failure, or because it fears a flood of cases on the same matter in the future. This raises in my mind the question whether the Court has been using Article 46 judgments in recent times to deal with the recurrent problem of repetitive and clone cases, where there are systemic failures in particular States on particular issues, and the Court considers that it is necessary for that State to introduce general measures to resolve that systemic problem.

And then, my last point, which goes back to the declining number of Article 46 judgments in the last couple years, is there developing a more frosty atmosphere at Strasbourg amongst the States towards Article 46 judgments? In some of the earlier annual supervisory reports, the Committee Ministers was very positive in their comments about the Court giving these sorts of remedial indications in their judgments. But then, last year, the Committee of Ministers’ Expert Steering Committee for Human Rights in their report on the long-term future of the ECHR system delivered this chilly and very limited support for the Court indicating Article 46 remedies. The Steering Committee:

“does not support a regular recourse to this practice, beyond these exceptional cases, where the nature of the violation found may be such as to leave no real choice as to the measure(s), in particular individual ones, required to remedy it”.

I wonder then, if the Committee of Ministers and Member States are becoming less supportive of Article 46 measures, whether that attitude has been taken note of by the



Court? Does that explain why in 2015 and 2016 there were fewer Article 46 judgments being delivered by the Court?

Discussion of presentation

Ed Bates: I have the following question. You refer to the first individual measure cases, like the Georgian case and the *Ilascu* case concerning Moldova and then the case concerning *Del Rio*. When the Court specifically says that someone who is in detention, as in those cases, must be released, might that trap the Court in other cases where it does not say that? I am thinking, in particular, of the *Mammadov* case in which the Court didn't actually say this person should be released, much as I would expect that this would be a natural implication of the judgment. So, my point is, are there dangers in the Court's approach, because of other cases in which the state might say we are not being required to release.

Paul Mahoney: I first have another comment. I would disagree with the separate opinion of Judge Albuquerque in the case of *Moreira Ferreira*. I think most judges would accept that there is a legal difference between what appears in an operative provision and what appears in the body of the judgment. Otherwise, you wouldn't have operative provisions.

On Ed Bates' point, in fact the nature of the compliance measures that will be required of a respondent State are variable, and so is the nature of the indication that the Court will think should be given. There's a very wide spectrum, it ranges from 'do something to change the law or practice so as to remove the violation for all persons in a comparable position to this applicant', to the other end of the spectrum, saying 'release this particular person immediately'. The view I took in *Del Rio Prada* was that the latter category, where States are really being told to do some specific act within their internal legal order, should be reserved for rare cases. *Assanidze* and *Ilascu* were cases of wholly arbitrary deprivations of liberty. Whereas in *Del Rio Prada* expectations of release were defeated by a change of case law, made in good faith by the superior courts of the country. And that's quite different I think from a wholly arbitrary deprivation of liberty. That's why I thought that the Court was overstepping the mark in *Del Rio Prada*. The Court has no power to issue injunctions, it's not like the Inter-American Court of Human Rights. But it goes as far as it can. It tries not to give the impression of giving injunctions or instructions, instead just giving guidance, but in language from which the Government and the Execution Department are expected to read between the lines and see the signals. The Court is aware that it doesn't have a legal power to issue injunctions, except in very rare circumstances, and therefore sticks to diplomatic language giving guidance, and this is precisely because it needs to keep the confidence of Governments. It doesn't want to give Governments a sense of interpretation creep, a sense that the Court is changing the terms of Article 46. Article 46 makes it as clear as daylight that the Court has no power, no competence, within the sphere of execution of judgments.

That power is reserved, first of all, to the respondent State, and then the supervisory review of the Committee of Ministers. The Court cannot change the terms of the Convention. It has to steer a very clever course, so as not to give the impression to the States that it is simply ignoring the text that governs this particular area. I would add that



there may be contradictions in the Court's decisions. There are five Sections and many Chambers in the Court, and the Court is working under tremendous pressure. We do have an internal mechanism for trying to ensure coherence and consistency, that's the Jurisconsult's role. But nothing is ever perfect, there are bound to be inconsistencies, and it is, in a sense, your job as academics to try and bring the ship back on course when you do see inconsistencies. But I don't think you should get over-excited when you do see them, for the reasons I mention. We do not have a judicial system of execution of judgments under the Convention. It doesn't exist, the Convention doesn't provide for it. But the Court and the Committee of Ministers in a sense try to get as near to that as possible within the legal framework that exists.

Pavlo Puskar: Just to note a couple of things on the cases you have commented on. Basically, I have checked on our database in the course of your presentation whether the cases you referred to were complied with and the applicants were released. In all the cases you have mentioned, *Ilascu*, *Assanidze*, *Del Rio Prada*, the authorities released the applicants on the basis of the indications in the judgments. And within fairly short periods of time, even in the case of *Ilascu*—not an entirely short period of time in that case, but after five interim resolutions of the Committee of Ministers--the applicant was eventually released.

Finally another comment as to *Moreira Ferreira v Portugal*. As a part of the Execution Department I am fully bound by the content of the judgment itself. Of course, in an ideal world, one can think about the separate opinion attached to the judgment as an opinion that facilitates execution, and may explain something additionally that would help out to enforce the judgment. And that usually might come from the national judge, as it was in the case of *Oleksandr Volkov v Ukraine*, with individual indications of reinstatement of the judge of a Supreme Court. There the national judge explained the background of the domestic law, that actually probably helped to enforce the judgment eventually. I think here in *Moreira Ferreira* it is probably very difficult to see that this dissenting opinion of six judges would facilitate, in a certain way, an understanding of the content of the measures to be taken. So, I would agree Judge Mahoney on this. The dissent in *Moreira Ferreira* [paragraph 17] rejecting the special binding standing of the operative provisions in the judgment is not the approach in the Court's established jurisprudence.

David Harris: Clearly, those who have spoken have the same response to Judge Albuquerque's suggestion in his dissenting opinion of a lack of distinction between the operative provisions and other parts of the judgment. Though it is interesting to note that a number of other judges joined Judge Albuquerque.

Paul Mahoney: Well, there's a difference between a joint dissenting opinion, when you can assume that all judges have some sort of input into the drafting, and one judge's dissent which is joined by others, where they simply agree, but it means they've had little or no part in the drafting.

Kanstantsin Dzehtsiarou: I have two very short comments if I may. First in relation to what Ed said, the Committee of Ministers may of course decide that release is still necessary. But I



think that Ed's point was that the seriousness, the value of the decision is much higher when the Court gives an Article 46 indication about the matter, and it will have much more force for the Committee of Ministers if an Article 46 indication is there. But there is still a problem. The more Article 46 indications are given, the more their value diminishes. Because, the more you use a very exceptional tool, the less exceptional it becomes and countries get used to it. There is an analogy with interim measures, to some extent. The more you use interim measures the less likely that they will be complied with.

And my second point is that Alastair's statistical analysis was extremely interesting and very, very, clever, especially in relation to the level of importance of the judgments. I think that that is very telling. I'm not too sure how the Court attaches this legal value—level 1, level 2, level 3-- to different cases. I think it's a legal value in the sense of contribution to the law of the Convention. But my guess is that, sometimes, very terrible cases that require Article 46 indications add nothing to the body of law, which would explain why a level 3 cases merits an indication. For example, a clear-cut torture case doesn't add anything to the law, but maybe it requires an Article 46 indication.

New Speaker: I was wondering about those sixty-four Article 46 cases between 2013-2016, how many of them were intended to cause a controversy in order to push the Steering Committee to encourage the Court not to resort to them too often?

Pavlo Puskas: I think that there has been a general decrease in the number of pilot judgments. There is a tendency to have less pilot judgments, and probably the Court is becoming more consistent in the sense that it has also been giving less Article 46 indications.

Alistair Mowbray: It is arguable that the Court does need to preserve these possibilities for important cases. I'm not going to call Article 46 cases the nuclear option, but they are a very powerful strategy for important cases. I must add that these Article 46 cases are a really small numbers of cases--10-20 a year. Out of the hundreds of thousands of judgments being given every year, it's a very small number. Albeit, for the reason that we are seeing, they are important cases.

David Harris: Alistair was saying that the number of Article 46 cases has been declining, and wondering whether that is because the Court is listening to what States have been thinking about the use of that mechanism. Does anyone have any thoughts about that, and whether the same might apply to pilot judgments?

Stuart Wallace: Yes, I was going to ask a question along those lines, whether you can may be see an overarching trend towards clipping the Court's procedural wings, having these kinds of interventionist mechanisms—pilot judgments, Article 46 indications-- stripped away from it. The same might be true, very dramatically as well, of the reduction in the use of interim measures. It seems that the Court is responding to what the States are saying. States don't want these kind of interventionist measures. I think that we see that as well if we look at the Interlaken Declaration and the Protocol that came out of that with the amendments to the Convention preamble on the margin of appreciation.



Pavlo Puskar: From the point of view of the execution of pilot judgments, I would like to give an example of the difficulties they may present. The only pilot judgment for Ukraine is in the *Yuriy Nikolayevich Ivanov* Group of cases, dating from 2009. It deals with a very delicate matter, with Article 6 indications. A pilot judgment has to address very specific situations within a State and to be timely. If it's not timely, it might block the execution process eventually. Just in June 2017 we had another interim resolution in this group of cases, calling on the authorities to implement the indications in the pilot judgment. I think that the pilot judgment itself was constructed in such way that it no longer reflects the reality of the situation, but the State is still bound by these indications, so it is something that is difficult to address. So if it's not timely, then it might block the process once again.

Paul Mahoney: Can I just say there is a clear difference between pilot judgments and what I would call judgments of principle. Pilot judgments are designed to deal with a situation where there is the prospect of a flood of similar applications coming into the Court. Hundreds or even thousands. The pilot-judgment procedure is designed to deal with a particular situation and it is a formal procedure. The respondent State and the applicant in the pilot case are warned in advance that the Court is envisaging applying the pilot-judgment procedure and the procedure is accompanied by measures in other similar applications. They are put in the fridge – that is to say, the Court announces that it is going to suspend all the other pending and subsequent incoming applications until the pilot case has been decided.

Furthermore, the intention in pilot judgments finding a violation is not to give detailed instructions to the respondent Government. You will see that in the first pilot judgment adopted, *Broniowski v. Poland* (2004), in which I was privileged to participate as Registrar of the Court, the respondent Government were given very general indications. The legislative scheme for compensation of appropriated property which was found to be in violation of the Convention just was not working. The respondent Government were told: “*You have to change the system so that the applicant, and all others in his position, can enjoy their right of property. Or, you are to give other appropriate relief in lieu of changing the system.*” Thus, the Government were given quite a wide range of choices; they were not given specific instructions.

That then was the original intention of the pilot-judgment procedure in *Broniowski v. Poland*. Maybe in subsequent cases some chambers were more prescriptive. Personally, I am against being too prescriptive, because of the risks, although sometimes it may prove necessary to go into specifics if there is a really serious case of individual injustice or arbitrariness that has to be dealt with. But for pilot judgments, which concern systemic or structural shortcomings in the national legal order such as defective legislative schemes, there is usually no need to be so prescriptive.

Judgments of principle are where the violation is located not in a one-off incident but in some factor of general application. There are potential victims, but no risk of a flood of cases coming in as in pilot cases. This was so as regards trial *in absentia* in Italy. There was no risk of thousands and thousands of applications clogging up the Convention system, but



the question of compliance with the Convention raised by the case was one of principle, in that it was capable of affecting not just that particular applicant but also others.

In both categories (pilot judgments and judgments of principle), there will be issues of principle to be decided and, therefore, a call to give some kind of guidance as to the general measures that might be required in order to implement the judgment. But there are quite significant differences as to the incidence of the judgment for the functioning of the Convention system. That is why I agree that the pilot-judgment procedure should be restricted to situations where it is really justified. That does not exclude judgments of principle where the Court feels it necessary to give some kind of appropriate guidance to the respondent State as to general measures for eliminating the kind of violation found. In such cases there exists an enormous spectrum available to the Court as to what kind of guidance it gives.

Olga Chernishova: Just maybe to add a few examples of what former Judge/Registrar Mahoney has said, which he certainly gives an accurate representation of the Court's approach. The pilot judgment procedure is one that the Court does not take on lightly. If you go into pilot judgments then you are expecting that the state would be ready to implement them. It takes two to tango. You wouldn't go for a pilot judgment without having first understood that this is a procedure which is worth embarking on. At least this is the way it should work ideally. For example, Russia remains in the top five states among the Court's 'clients', but we've only had three pilot judgments so far. Two of these you can consider successful: they are the judgments that concerned non-execution of domestic judgments in two particular areas. In the first one, the legislation that was adopted following *Burdov (No 2)* completely remedied the situation. The problem had been at the source of an avalanche of cases before the Court. Ten years ago, about 45% of all non-inadmissible cases pending before the Court against Russia was about this particular problem. So, following this judgment, all these complaints against Russia were resolved by domestic law. We don't have these cases anymore. You could say that the subsidiarity principle worked as it should do.

A similar process is now in motion for the second judgment of this kind, in the post in the so-called post *Gerasimov* cases, which are about non-enforcement not of financial payments, but of obligations to grant benefits in kind confirmed by the judgments of the domestic courts against the authorities. Again, a law has been adopted, which came into force in 2017. The Court will very soon evaluate its application and the answers that the law has given to the applicants' grievances.

The third and final pilot judgment is *Ananyev*, concerning the conditions of detention in prison. The Rules of Court [Rule 61 (6)(a)] say that when adopting a pilot judgment the Court 'may' adjourn other similar applications. They don't oblige the Court to do so, but it may freeze the other cases, depending on whether the Court considers it necessary. In the two first judgments I mentioned—*Burdov* and *Gerasimov*-- the Court froze them, and so other similar cases were not processed. In the *Ananyev* case, the Court chose not to freeze similar applications. This was because these are Article 3 complaints, and because the scope of measures, relatively speaking, is much wider--- it is impossible to expect that just by



adopting one legislative amendment, you could remedy the conditions of detention for about 600,000 people detained. This is obviously a much longer and more complex process. So the cases were not frozen. But the time frame was there, and the Russian government continues to provide quite detailed and active collaboration in the follow up to that judgment. Which doesn't prevent the Court in the meantime finding hundreds of violations, or accepting unilateral declarations, because one of the things that happens of course is that the Government, understanding that this is more or less a settled legal issue, will go into settlement, massively, and they won't want to have all of the violations.

So the pilot judgment procedure really is a very specific one, and is a procedure which presupposes cooperation with the national authorities. The other type of judgments which you addressed, Alastair, in your very interesting and very complete overview is often referred to, in the Court's language, as leading judgments. So they would address a problem, but not necessarily reflect this in the operative provisions, individual measures apart of course, but in what can included earlier in the judgment text as general guidance, addressing wider implications, as Judge Mahoney indicated, where you have a whole range of possibilities.

Joanna Evans: Olga, when you said the Court would not adopt the pilot judgment procedure unless it thought that it would be worthwhile, do you mean by that there is some sort of preliminary indication from the State that they will comply before you start?

Olga Chernishova: There is a formal communication. You indicate to the government that the Court is considering embarking on that kind of judgment

Ayşe Bingöl Demir: In relation to Turkey, I have had a similar experience about pilot judgment procedure, which is not always perfect in its operation. It was in relation to *Dogan and Others v Turkey* (2004), regarding the forced eviction of the Kurdish villages in the 1990s. There were more than a thousand cases registered with the European Court in early 2000s regarding those events. In the *Dogan* judgment, the Court found a violation of the Convention rights of the applicants but did not give its decision in relation to just satisfaction, stating that the Court was not ready to determine just satisfaction and referring to the parties the possibility of reaching an agreement. One aspect of the judgment was that actually the government in a way convinced the Court that there was going to be a domestic consideration of the situation. That is to say a new domestic remedy was going to be introduced. Because, during the 1990s, it was not possible at all for people to litigate domestically against village evictions. Following the *Dogan* judgment, the Court decided *Icyer and others v Turkey* in 2006 in which it found the remedy introduced by Turkey to compensate for the damages suffered by persons forced to leave their villages to be a remedy that needed to be exhausted. It found the application inadmissible in *Icyer* on this ground, as it did with all other similar applications. But I don't necessarily think that it was a well-tailored process, either by Turkey or the Court. Because with the Court's *Icyer* decision, thousands of people were left very unprotected domestically. The implementation of the compensation law Turkey adopted following *Dogan* was highly problematic. Even now, there are still ongoing cases. I do understand the Court's approach in somehow trying to find a way to remedy systemically problematic situations, but I don't think that the pilot



judgment mechanism is well-tailored in all cases. There are certain safeguards the Court could place before adopting similar decisions on admissibility such as ensuring that the applicants are protected enough in the remedies newly introduced, considering how to monitor the implementation afterwards in line with an intention to ensure a real and just implementation of the Court's judgments.

Dominic McGoldrick: My instinct as a human rights lawyer is that you want the Court to indicate specific remedies. But there's a terrible risk that the more specific you are, the more obvious it is if it isn't done. Which then undermines the Court's legitimacy and integrity. For lack of detail in the Court's judgments, the impression for students is that the European system is very credible, states generally comply. In contrast, the exact opposite is true of the Inter-American Court, which has gone off on its own tangent, indicating all sorts of specific implementation measures, but not with great success, so it is seen as not doing very well. One last comparison is with the Human Rights Committee, which has always been very specific about what States have got to do, but they probably know that everyone is going to ignore it anyway. They have a follow up procedure, but that just shows the low level of compliance. When you read what the Committee of Ministers wants, you end up slightly sympathetic towards States, with a feeling of just how difficult it is sometimes to work out what would be an appropriate answer. It's not always black and white.

Laurence Lavreysen: I remember that after the *Ferreira* judgment in the Strasbourg Observers blog we published a blog post by Alice Donald on the case. She said that she had conducted research, and had undertaken interviews with people at the Department for the Execution of Judgments and also with domestic actors involved in the execution of judgment, and that, in many of her findings, many of these actors wanted the Court to be more directive because they didn't really know what to do. They were begging for more directions from the Court.

Pavlo Pushkar: I may perhaps comment on this, because I was probably one of the persons contacted by Alice. I don't think that I was the person who said that the Court should be more direct in indicating measures. I think there is no single solution, because you are dealing with different legal systems. I deal with 15 different countries, the UK, Russia and Ukraine included. So you have completely different situations. Moldova, Iceland or Lichtenstein are also each very different examples. So you have a completely separate approach to indications by states. In some cases the authorities might say we need a direct indication on the general measures. In other cases, the authorities might say, please allow us to see how we would move in the political context. There are examples where we cannot in fact enforce some judgments because of very direct indications, because they are just not accepted domestically. So it's a big issue, and I don't think there is one single solution. The more direct you become, in a very a positivistic setting for instance, the more difficult it is to enforce the judgment.

Leiry Cornejo Chavez: I would like to refer to the reception by the Committee of Ministers of Article 46 indications, especially when it comes to individual measures. Does the Committee of Ministers see them as equivalent to pecuniary compensation orders? Or do they put them in another category? And is there any discussion about the legal basis for



what is done? Whether, for example, the release of prisoners is based on Article 41 or 46. And, if it is Article 46 instead of Article 41, is there any discussion on what the legal basis is, and why this is not just satisfaction?

Pavlo Pushkar: Just satisfaction is of course definitely a part of Article 41. That's clear. Article 46 indications are something separate. They are based on the general obligation to comply with the judgment. I will be speaking about that in the afternoon, so I think I will abstain at this moment from going into details. But one of the main principles for individual measures is the principle of *restitutio in integrum* for the applicant. As for general measures, it is more based on the idea of preventing similar violations in the future. I think that the Committee of Ministers sees these indications in Article 46 judgments as friendly recommendations to a State in some cases, but this is not something that is written in stone. You might have an indication, as in the Ukrainian case I mentioned, to create a remedy, but then this indication is no longer relevant after ten years. But the State is still obliged to deal with it. So you have to find a solution as to how to respond to this indication.

Alistair Mowbray: On a potential legal basis for the Strasbourg Court giving indications beyond just satisfaction, in my Article I have a section based on Judge Sicilianos' paper, where he identifies a whole range of other Articles, apart from Article 46, which he suggests are a basis for the Court giving indications. He, for example, refers to Article 32. He also talks about general public international law principles, and the State parties established practice afterwards. There is a wide discussion in the literature about other bases in the Convention apart from Article 46.

Pavlo Pushkar: It's also Article 1, Article 13, etc.

Alistair Mowbray: What I find fascinating about our discussion and very reassuring is that the insight we are gaining from colleagues that have practical involvement in these processes suggests to me that it is actually a very strategic process that the Court is engaged in when it's looking at the various sorts of indications that are possible, and whether to put them in the text of the judgment or whether to put them into operative parts, and what level of generality to put them in. It's clearly a thoughtful and reasoned process, with the relevant Chamber or Grand Chamber taking account of wider policy factors in deciding what to do.



Fiona De Londras: Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights

I will talk about Article 46(4) and the infringement proceedings under it. I will base my presentation on an article that Kanstantsin Dzehtsiarou and I published earlier this year in the ICLQ. There's a good bit of attention given to the categorisation of non-execution in that article. We talked of the idea of principled non-execution, and maybe we shouldn't have used the word 'principled', because actually we just wanted to do that categorisation in order to think a little bit about what dynamics of non-execution might be. And to think about whether or not Article 46(4) is a solution that responds to those dynamics. And that's where I'll focus on a little bit here.

We take it, well I'll only speak for myself, I won't speak for Kanstantsin, I take it that the objective of invoking Article 46(4) is primarily to secure execution of a judgment. There may be ancillary objectives, but the primary objective is to secure execution of an otherwise non-executed judgment. And if that is the objective, then my sense is that it is unlikely to succeed.

I want to work through three sets of reasons for this opinion. The first, in the interests of time, I won't dwell on. And that is just practical challenges of engaging with Article 46(4) at all, of triggering it. The second is that a 46(4) proceeding strikes me not to address practical barriers to execution that some States might be facing. And the third is that a 46(4) proceeding would not seem to address the political dynamics of non-execution in some States. So, in other words, it is an ill-suited solution to execution problems if we take that to be the objective of engaging that Article.

I want, at the end, though, to come back to some ancillary reasons why one might engage 46(4) and argue that I can see that there may be other reasons not relating to execution, or primarily not relating to execution, that might make infringement proceedings attractive in some ways. Although I continue to have concerns about potential implications for the Court, or the Court's workload, in relation to that.

You will all be familiar with Article 46(4) and the connected Article 46(5). But just to summarise, if the Committee of Ministers considers that a State has failed to execute a judgment it is bound to execute under the Convention then it can serve a formal notice on that State that it intends to proceed under Article 46(4). And if it secures a vote of two thirds of the members of the Committee of Ministers, it can refer the question of whether the party has failed to fulfil its obligation back to the Court. So, there's only one question that you can ask: Has the respondent state executed the judgment in accordance with the Article 46(1) obligation?

If the Court says that it has not, it refers the case back to the Committee of Ministers for the consideration of measures to be taken, and, if it finds that the State has executed the judgment, the Committee of Ministers closes the case. So, it seems like a pretty standard form of infringement proceedings. But, of course, it hasn't been used thus far.



If we start wondering about whether or not the procedure might work in a situation of non-execution, I think that we have to start with a very obvious observation. That is that even though the contracting parties are unquestionably obliged as a matter of law to execute judgments, this simple legal obligation is not sufficient to actually compel execution or to secure it. That's an obvious observation. But, of course, it becomes relevant again when one considers that the product of an infringement proceeding would be a restatement of a legal obligation to execute a judgment. So it's a restatement of what we already know: that the State has a legal obligation to execute.

The second thing we need to do is think a little bit about the dynamics of non-execution. We considered in our article, and I think we probably are still broadly right in this, that we might say there are two different kinds of sets of dynamics. One result relates to situations where there are simply practical challenges to the execution of a judgment from the European Court of Human Rights. The challenge might be the lack of sufficient resources to give effect to the judgment. So let's say it was something that, in fact, was going to be extremely costly relating to material well-being or something like that. Or the condition of prisons, or something that has a large level of cost implication. And the State either does not have, or decides that it should not, as a matter of priority, allocate resources to that particular issue.

Another kind of practical challenge relates to the nature of domestic legal change that might be required to actually execute a judgment. So, if in some parallel universe, the European Court of Human Rights had found, for example, that the Irish law on abortion violated the Convention in a substantive sense, the only way to resolve that would be to change the Constitution. The only way to change the Constitution in Ireland is to have a referendum, and you can't force people to vote one way or another in a referendum. Other challenges relate to command of sufficient parliamentary majority, and so on.

So there may be just simple practical challenges around non-execution. And I think that we can largely put that into one set of problems that are challenging for execution. Then there is a second set of dynamics around execution. And we call it in the article principled non-execution. What I mean by that is not to say the State is right to resist execution, but rather that the State's resistance to execution may be related to a broader principle. For example, about the proper allocation of authority to decide on a particular question. Or about the principled position that if there has been a rational process of democratic decision making, at a national level, that ought to be able to prevail on, let's say, an issue in relation to which, I think this is Ed's phrase, there are reasonable disagreements, where there is no clear right answer under the Convention as to whether A or B is the correct outcome until the Court decides. Prisoner voting might be an obvious example.

Now, we can respond to that by saying that when you sign up to an international standard or system of supervision you simply concede that if the international standard differs from what your rational domestic system says the solution should be, you are obliged to change what your domestic law is, regardless. But that of course, brings us straight back to a simple 'you are legally obliged to do this' argument. And it doesn't engage the broader authority or principle arguments that are actually going on underneath that. So that kind of



non-execution is actually indicative of a set of deeper or wider issues that require difficult and sometimes uncomfortable exploration. That are not solely about that case, that State or that issue, but might be about those kinds of questions that I've already outlined: why should a State implement a judgment that it thinks is wrong? This goes beyond the simple rule of law answer. Or why should Strasbourg prevail when the democratic system in our State has come to a different solution? So those are the kinds of questions that underpin this form of non-execution. We can recognise that those are the underpinning questions without saying that they are good questions, legitimate questions, or right questions to ask. But they are the questions that underpin the dynamics of non-execution.

Let's say we have a situation of non-execution and all the ordinary processes have been completed and nothing effective is happening, and we're going to have to go back to the Court for an infringement proceeding. The first thing, of course, that we would need to do, is to secure the vote to do that under 46(4). And that is challenging. A two thirds vote in the Committee of Ministers to return something as an infringement proceeding to the Court requires at least 31 States to engage. That's not insignificant. It also requires two thirds of the States to make a pragmatic decision that trying to secure execution for this case is worth the potential cost to their broader relationship with the state, with which they might be working on a range of other kinds of rights enhancing measures or issues. It also requires that many States to make a pragmatic decision that getting this infringement procedure going for anyone is worth the risk of it then being used in more cases, so many states could subject to this procedure.

So, you have practical issues around the broader implications, and of course you have the practical interests of particular states. That, I suggest, all makes it highly unlikely that you would manage to trigger an infringement proceedings. But let's say, all the stars were aligned, and we did. And it went to the Grand Chamber, and we took on board all of the practical costs also, of sending something to the Grand Chamber, of having the oral hearing and all the rest of it. What is the product of that? And how useful would that potentially be in a broader sense?

The first product is actually related to the allocation of resources within the Court: we now funnel things into this infringement proceeding, and that has other broader implications. These costs might be worth bearing, that's fine. But it is something to think about. Another potential product is that any activities the respondent State is already engaged in, either in relation to this judgment or more broadly, get put on hold. Because, well we're not going to play ball now. You could of course have the opposite. They could escalate everything and say 'fine, fine, fine, don't, we're just going to sort it out'. So that's also possible. I think if we're at that stage I'm going to say the opposite is unlikely. We're at the stage when we're going to the Court anyway.

If the Court is satisfied that there has been a failure to carry out the obligation under Article 46(1), all it does is to find a further violation of the Convention. So, it reiterates the initial violation and then finds a further violation of Article 46(1), and it sends it back to the Committee of Ministers. There may be lots of practical usefulness to that in other ways, but, in terms of legal findings, it doesn't seem significant. If there were a good faith dispute



about whether or not what the State had done was sufficient, then I suspect we'd use 46(3), and ask the Court to clarify what was required to execute the judgment, rather than to engage in an infringement proceeding.

So we have this, on its own terms, not immediately particularly useful product that comes out of an infringement proceeding. We have a product that doesn't actually help to resolve the issues that may underpin the non-execution in the first place. So, if the non-execution relates to those practical difficulties that I spoke about earlier and there is nothing in the finding under an Article 46(4), how is the State to resolve those practical difficulties it already faces?

The procedures for domestic legal change will remain procedures for legal change. We might argue that this very clear statement from an international court might get things moving in a direction that they were not already moving in, so that more people might say 'oh, well we really must comply with that obligation', so we vote yes in a referendum. Or more parliamentarians might say, 'okay we'll take you seriously now and we'll vote in a way that changes the law to comply'.

But, again, you're just saying the same thing you'd already been saying. And if we weren't convinced by our failure to comply with international obligations earlier, it's not immediately clear to me why we would be later. But this all depends, of course, on the dynamics of the State, how internationalist, populist it is, and what the different political routines are. So, it's not necessarily going to resist.

Of course, 46(4) doesn't produce more resources. So if your problem is a lack of resources to address material well-being for example, this doesn't produce more resources to address it. It may produce a further nudge to allocate resources, but there's still a process of decision making as to where to take the resource from and to allocate it to that particular issue, with all sorts of conflicts, knock on effects about budget planning and so on. It doesn't help, for example, to ensure that a massive administrative system that had broken down, like a criminal justice system with high levels of delay, would get fixed. The kind of things that are required for that are both tangible and intangible resources. Money and willingness to put it very simply.

So, if we fall into that first category, of lack of resources, an Article 46(4) finding doesn't really help the State to execute the judgment, I would think. It's even less clear that it helps in situations where a State is simply unwilling to execute a judgment because it has some principled objection to it--either with the outcome, or with what the outcome might say about the relationship between Strasbourg and their domestic legal and political structures. In these kinds of cases the State is already simply no longer on board with the arrangement of authority between Strasbourg and the domestic system. The state has indicated that, in one way or another, that arrangement has been ruptured. Or their agreement to it has been ruptured. So that reiterating the international obligation doesn't actually resolve that broader issue. It doesn't resolve in the way that, let's say, judicial dialogue might help to resolve distance between the national and international authorities



about what an obligation might mean. Because it reinforces the original interpretation that they've already disagreed with.

So it doesn't help with those dynamics, and in fact it might even be counterproductive. I can imagine, for example, the reaction in Ireland if the Court found that the constitution had to be changed in *A, B and C v Ireland*, and then reiterated it. I can tell you it would simply entrench the view that we are not going to change the constitution simply because somebody told us that we had to. It's a matter of particular national sensitivity of course. I don't think Ireland would be obnoxious in that way, but such a reaction would also be spread across the population, because there's a sense that this is an issue on which we have a national position that is exceptionalist. You can imagine here in the UK, if we had a 46(4) proceeding on *Hirst*, for example, it would hardly help matters. In fact, it would fuel and fan the fires, with politicians and others saying 'who do they think they are to continue to tell us that we have to do this?'. So where there is already a poor relationship, that is manifesting itself in a particular kind of non-execution, and where it's really about things that are bigger than the judgment itself, not only would an Article 46(4) proceeding not work, but it might even further damage the situation between the parties.

So, in my view, Article 46(4) proceedings have these potentially broader implications in failing to address the exacerbating questions that at least sometimes underpin non-execution. They also potentially overburden the Grand Chamber. And I have concerns about packing more and more execution work into the Court, when the Court already is overburdened and, very frankly, when it is not at all clear that an 46(4) procedure will work.

What about ancillary benefits? Because, of course, people do call for Article 46(4) proceedings to be triggered, and I'm pretty sure they don't do so thinking it'll actually result in execution of a judgment. There are ancillary benefits. I can think of at least four. One is that the more 46(4) talk there is, potentially the stronger the nudge that the respondent State has towards, at least, some, substantive and meaningful engagement with execution in order to avoid the 46(4) proceeding. I think that that's, in a way, at the base of this. I've said that Article 46(4) is about securing execution---what it's really about trying to use the politics of reputation, embarrassment and avoidance to nudge compliance. And so if that is the reason, it might help, but again, that will depend. If you have an absolutely endemic resource problem, the State can want to avoid the embarrassment all they want, they still may not be able to execute. And if you have an entrenched position where the establishment has decided that the Court is wrong, and they also don't care about further embarrassment, it also isn't an incentive.

A further ancillary benefit, of course, is that engaging Article 46 and 46(4) talk is a sign that States are taking execution seriously. So, 31 States voting to trigger 46(4) would be a very serious statement, not just about that case but about commitment to execution in general. I think, probably, one of the most important ancillary benefits is that it can create a conduit for activism, or a source, a focal point for activism in the domestic sphere, by having yet another string to pull on internationally. And that will of course be the case where civil society is repressed. And where it is difficult to make the structures of domestic law-making work in particular ways. So where, let's say, normal processes, of pressure and advocacy



might not work. Or where the normal processes of pressure and advocacy are frustrated by the particular nature of the topic in question--highly unpopular rights claimants, or what have you. So, it can be very useful for that third reason, to circumvent national suppression.

The fourth potential ancillary benefit is of course, a step towards suspension. That's, of course, not required. There's no requirement that you would go through an infringement procedure before suspending a State. Also, suspension isn't just about non-execution of a particular judgment. It's more broadly about the serious violation of Article 3, but it may be the case that a 46(4) proceeding might be taken in relation to a totemic case to legitimate or proceduralise the movement towards suspension. Whether suspension itself is a good or a bad thing, is another matter, in terms of rights protection within the State.

So, the overall point, and I think it's not an elaborate point in any way, is to say that, while I can see that there are reasons why we might engage in Article 46(4), I cannot see that that reason would actually be to secure execution of a judgment. I cannot see how it would be likely to succeed if we were in a situation where we'd gotten to a point where the infringement proceeding is the only way we can go. So that causes me to wonder a little bit at the continuing amount of attention being focused on Article 46(4), outside maybe of some particular strategic totemic cases in States where there is clearly no capacity to engage either the national judicial processes or civil society in order to get the State to the place that execution of a judgment would have suggested they should have gotten to in the first place.

Discussion of presentation

Ed Bates: I read and agree with what you say in your Article. Your Article made me go back and look at what the intention was, and of course Article 46(4) came from Protocol 14 in 2004. It was quite a different environment back then. Reading an article written by Martin Eaton [26 HRLJ 1], who was involved in the negotiation of Protocol 14, he suggested, if I'm quoting him correctly, that the real reason for it was to add another weapon to the Court's arsenal, another sanction. Because the Committee of Ministers only had interim measures or the nuclear deterrent of expulsion. And so it was a weapon one would hope that would never really be used. It was a threat more than anything.

But I would like to make two other points. First, on the Committee of Ministers referring points of interpretation of a judgment back to the Court under Article 46(3) to help with its execution, I wondered to what extent scenarios do arise when there can be a genuine difference of opinion between the Execution Department and the State as to what is required to execute a judgment, such that might require a reference under Article 46(3)? In other words, cases where the State thinks, 'yes, we've done it', but the Department is saying 'no, you haven't, okay, we'll get the Court to answer the question'.

The second point is whether there are examples of cases when use of Article 46(4) has been avoided because the Court itself has changed its position. I know you'll be familiar with the *Vinter* case, leading to the *Hutchinson* case, which actually saw the Grand Chamber



alter its position on whether UK law met the requirements of Article 3 in relation to life sentences without parole. Here we see the Court getting itself out of a position that could have ultimately led to this type of Article 46 non-execution problem.

Pavlo Puskar: I'm not sure whether we have ever used the Article 46(3) procedure for interpretation. Important here is the general idea that decisions from the Committee of Ministers are taken by consensus, so that in most of the cases, when the decision is taken, it's taken without voting. So the decision is taken by compromise. I think in most of the cases there is a strong agreement within the Committee as to the content of general and individual measures required by the judgment. That means that, basically, there has been no recourse to interpretation, but I don't exclude it as a possibility in the future. There might be a situation where it might be necessary to clarify, for instance, the scope of outdated indications in the judgment, so that might be one of the situations when it might be applied.

Kanstantsin Dzehstantsiou: I obviously agree with Fiona, as her co-author. But I have a comment about the ancillary benefits of Article 46(4). If you tell someone that there is a demon in your wardrobe, you can go and open the wardrobe and check there is no demon there. But if you use these threats over and over again, at some point their effect diminishes. So, this is a very dangerous technique from the legitimacy point of view, and I'm not sure that it's a good technique overall.

Alistair Mowbray: I want to go back to Ed's point about the sanction part of Article 46(4). I seem to recollect in the earlier stages of the deliberations about what became Protocol 14, there were suggestions that maybe the Court should have the power to impose some sort of financial penalty if the State didn't comply. So I wonder if the infringement process that actually became Article 46(4) in the final draft of Protocol 14 was in some way watering that down to say 'yes, we're creating some new measures'. But nothing anything like as Draconian as *financial* sanctions.

Fiona De Londras: The point that Ed raised about sanctions is a really good one because under 46(4) the Court can only answer one question: 'Did the State execute the judgment?' One of our colleagues already mentioned that, no matter what has happened subsequent to a case, the obligation to execute remains. You could have this insidious position where the Court is forced into finding a further violation for non-execution in respect of a standard which it has already moved on from in its other jurisprudence. But if you complicate it, if you add the subsequent jurisprudential developments to the questions the Court considers in infringement proceedings, then you simply are creating some kind of internal inconsistencies and complexity. Further, it's not even infringement anymore, it's something different. And of course, that's utterly unworkable as well. So the financial sanction for non-execution might have been better in such a case. Kanstantsin thinks you should fine States a million euros a month or something if they don't execute, instead of taking infringement proceedings.

Ed Bates: But they won't execute that!



Pavlo Pushkar: One might find an analogy between this process and the pilot judgment process. In those cases the problem may have been identified ten years before the pilot judgment and yet there is the same kind of legal obligation in the pilot judgment because of non-compliance with the first judgment on the problem, although the legal situation may have changed.

Ed Bates: I would like to ask about the *Mammadov* case, where are we on that? I did have chance to look at the latest resolution, which seemed to be a precursor to actual use of Article 46(4). It was asking the Department to draw up an interim resolution that might be used. Is that correct? What would the next steps be then? This resolution calling on the application of Article 46 will be before the Committee at the next meeting and they'll have to decide what to do with it, and, I think, looking at Article 46, it requires two thirds of the members, so presumably a third can block it, but if they abstain?

Pavlo Puskar: I think I can only cite you the text of the decision itself, because these are questions that are rather difficult to answer. This is the text of the decision from the September 2017 meeting, which was last week. Quite an intensive meeting I have to say. Instructive. It's point 5 of the decision, instructing the secretary to prepare a draft interim resolution giving formal notice to Azerbaijan of the Committee's intention under Article 46(4) to bring before the Court the question whether Azerbaijan has failed to fulfil its obligations under Article 46. For consideration at the 25th October meeting of the Committee of Ministers. So, this will happen not within the so-called human rights meetings, but at a regular meeting of the Committee of Ministers, should no tangible progress be made in ensuring the applicant's release by then. So, there is still reference to the possibility of release. That could possibly be taken into account.

Leiry Cornejo Chavez: I think there are some lessons to be learned from the Inter-American Court of Human Rights in this. That Court has dealt many times, on a regular basis actually, with the execution of judgments. Sometimes it happens that the State and the victims disagree whether the measures have been complied with. Then the Court decides, but it decides sometimes that it cannot really say whether these measures have been complied with because the orders given have been so open, so vague. Sometimes they just declare that these issues should go to the domestic courts. That could also be a problem if we use to the Article 46(3) option in the European Court of Human Rights.

Kanstantsin Dzehtsiarou: Can I just to clarify, is this decision in *Mammadov* already a notice or is it a decision to prepare a notice, so that it's not a notice yet.

Pavlo Pushkar: It's not a notice yet. This follows the usual practice of the Committee of Ministers. In order to have an interim resolution on a case you need to prepare it, you cannot just go to the interim resolution immediately. You need to prepare for one of the forthcoming meetings. The idea is that the notice would be adopted in an interim resolution at a later meeting. I think there can be a vote on an interim resolution. But then it would be a specific vote under the rules of the Committee of Ministers. It should be two thirds majority. And it's out of 47 members, it has to be at least 32 as far as I understand.



Session 2: The Role of the Court and the Department for the Execution of Judgments

Chair: Carla Buckley. Research Fellow, Human Rights Law Centre, School of Law, University of Nottingham

Violations of Articles 2 and 3: The Court's Practice in the Light of General and Individual Measures Taken by States

Presentation by: Olga Chernishova, Head of Division, Registry of the European Court of Human Rights

The Role of the Committee of Ministers and the Department for the Execution of Judgments

Presentation by: Pavlo Pushkar, Department for the Execution of Judgments of the European Court of Human Rights

Carla Buckley: In this session we have two presentations on the roles of the Court and of the Committee of Ministers and the Department for the Execution of Judgments in the execution of judgments. The presentations are by members of the Court Registry and the Execution Department respectively. On the role of the Court, we will be hearing from Olga Chernishova, Head of Division, Court Registry. On the role of the Department for Execution of Judgments and the Committee of Ministers, the presentation will be by the Head of its Legal Division of the Execution Department, Pavlo Pushkar.



Olga Chernishova: Violations of Articles 2 and 3: The Court's Practice in the Light of General and Individual Measures Taken by States

When the Court first found a violation of Article 2 in 1995 in the individual case of *McCann v UK*, one could witness the storm of reactions, and I will never forget that. In the past 20 years or so, the number of complaints for Article 2 rose steadily, and now it's among the top six Articles of the Convention where a violation has been found. I looked at the statistics of all judgments that have been rendered by the Court between 1959 and 2016. There are detailed statistics about procedural and substantive violations, and, as you can see, Articles 2 and 3, on the most fundamental rights under the Convention, are in the top six Articles. This is public data available on the Court's website. What it signifies is that Articles 2 and 3 generate, literally, hundreds, thousands of complaints. Most of them are in fact repetitive complaints that arise from a limited number of similar situations. The second table, breaking down numbers into substantive and procedural violations of Articles 2 and 3, shows you the top countries, where Russia and Turkey predictably hold the first places in the numbers of violations in judgments of the Court. For comparison, Ukraine and Bulgaria, which occupy places 3 and 4, have incomparably lower.

So, most of the judgments rendered under Articles 2 and 3 are concerned with a limited number of situations. To use the words of Judge Sicilianos, 'Let us begin with an observation: all the conflicts which have taken place on our continent, at least since 1990, have been—or are being—addressed by the Court in one way or another'.

The oldest conflict concerned Cyprus, and we could look at the inter-state case of *Cyprus v Turkey*, although there were individual complaints against both Cyprus and Turkey. Very important in terms of jurisprudence were the cases concerning the 'troubles' in Northern Ireland. Then came complaints concerning the emergency situation in Turkey; and the events in the former Yugoslavia. Lately, there have been the events of the South Caucasus, including individual cases that have followed the admissible interstate complaint of *Georgia vs Russia*. There are lots of these individual complaints that haven't been resolved yet but are pending before the Court. And since the early 2000s, of course, the Court has been faced with allegations of grave and numerous violations arising out of the events in the Russian northern Caucasus.

Let's look at Russia in particular, which is responsible for more than half of all substantive violations of Article 2 ever found by the Court, and more than a quarter of all Article 3 substantive violations ever found by the Court. 270 judgments were rendered by the end of 2016, and you can see this figure, out of a total of 482 judgments against all countries which concerns a substantive violation of Article 2, the gravest violations of the Convention that you can imagine. More than 250 cases in fact fall under so called *Khasiyev and Others* Group of cases the execution of which is pending before the Committee of Ministers. For Turkey, the *Bati*, *Erdogan* and *Aksoy* groups covered about 250 cases concerning allegations of abuses by members of the security forces, including ill-treatment, death and enforced disappearances. A few other cases (deaths, disappearances) are covered by *Varnava* and *Cyprus v Turkey*.



In such circumstances, the processing of individual cases that come before the Court cannot be seen as a rendering on separate legal acts, without taking into account the situation in the countries concerned, the general measures that have been taken by the respondent states following similar previous violations and any other relevant domestic measure. These are not individual acts of justice.

I will try very sketchily to look at three areas of the Court's practice in particular. I will start by the continuing pending obligation to investigate where the state's agents were involved, which is the outcome normally of a violation of Articles 2 and 3. I will look at the disappearance cases, as a particular case study which is very interesting in terms of correlation between individual and general measures. And I will say a few words about other Articles 2 and 3 cases just to complete the picture.

The obligation to investigate, of course, was first pronounced in the *McCann* case, which I want to compare, in its significance, to an additional protocol to the Convention. Of course, I will be very, very brief in my comments on the obligation in the presence of Professor Mowbray who is a leading expert on the subject. First of all, it may be worth recalling that the Court is unable to carry out proper fact-finding, certainly today since fact-finding missions have become virtually non-existent. The finding that the Court makes is often a finding by default, so the exact circumstances, for example of a disappearance or death, are not really established.

Here, of course, I am not underestimating the judicial narrative value of the judgments, which actually yields credit to the story of the victim, and there have been very interesting reports on that. But still the fact finding as such by the Court, especially in disappearance cases, is limited. The Court and the Committee of Ministers insist on the continued procedural obligation to investigate and this obligation cannot be extinguished simply by compensation or by simple acknowledgment of the violation, without the undertaking to conduct an investigation in compliance with the requirements of the Convention. The latest Grand Chamber judgment, *Jerónovičs*, and previously in *Tahsin Acar*, the Court has gone into great depth analysing the limits of unilateral declarations in such cases. And explaining what it means by the continuing obligation to investigate.

The basic requirements of effective investigation are adequate, thorough, impartial and independent, prompt public scrutiny. I am sure, we shall hear more of them today and tomorrow. But I might mention that the Committee of Ministers in 2011 issued a document with guidelines on eradicating impunity for serious human rights violations. This is a very helpful document which speaks of the required investigation measures as a combination of prosecution, non-judicial mechanisms, and reparation. As to prosecution, the state has a duty to prosecute where the outcome of the investigation warrants this. The guidelines repeat that there can be no guarantee of prosecution or conviction in a particular case, but, where the facts warrant this, the authorities should take the necessary steps to bring those who have committed serious human rights violations to justice. By non-judicial mechanisms we mean parliamentary, public enquiries, ombudspersons, commissions, mediation. They are called useful complementary procedures, complementary to domestic judicial remedies.



As to reparation, there is an obligation that the victim receive broad and adequate reparation for the harm suffered.

The Court sees the discharging of the procedural obligations under Article 2 and Article 3 as acts which are undertaken in the framework of criminal, civil, administrative or disciplinary proceedings, which are capable of leading to the identification and punishment of those responsible. Under these Articles, It specifically excludes other types of enquiries such as through commissions, and that was mentioned in the Grand Chamber case of *Janowiec*.

At the same time, compliance with the right to know the truth can be seen as a part of the obligation under Article 2 of the Convention. This has long been argued from the Court's Article 2 jurisprudence and the disappearance cases—from the positive obligation to investigate and the Court's putting the stress on the victims' and public access to the materials of the investigation. The Court has contributed to this general development of the right to the truth, as it is known today. In the *Jelić* case, for example, that concerned killings in the context of the war in Croatia in the beginning of the 90s, the Court said that the obligation to investigate Article 2 in this particular case related not only to an isolated event or a killing, a war crime, but also to the whole sequence of similar events. Thus its importance for Croatian society, which consisted in the right of the numerous victims and the society at large to know what had happened, ought to have prompted the domestic authorities to conduct an effective investigation that would cover not only those having the command responsibility, but direct perpetrators as well in order to prevent any appearance of tolerance of, or collusion in, unlawful acts.

The truth finding requirements can find their way into the Court's practice not only under the procedural obligation of Article 2. The Court has said on a number of occasions that Article 13 may also apply, one authority being the *Oneryildiz* judgment, another Grand Chamber case of 2004. However, for the Court, and seen from the standpoint of the interests of the deceased's family and their right to an effective remedy, it does not inevitably follow from the above-mentioned caselaw that Article 13 will be violated if the criminal investigation or resultant trial in a particular case does not satisfy the state's procedural obligation under Article 2, as the elements of that obligation are summarised in, for example, in the judgment in *Hugh Jordan v UK* (see para 94). What is important is the impact the state's failure to comply with its procedural obligation under Article 2 had on the deceased's family's access to other available and effective remedies for establishing liability on the part of state officials or bodies for acts or omissions entailing liability for the breach of their rights under Article 2 and, as appropriate, for obtaining compensation.

In the *Tagayeva*, judgment, which is a recent addition to the Court's practice in this area, the Court decided that there was a failure under the Article 2 procedural obligation, but that Article 13 had not been breached. The general measures that were taken by the state in order to ensure compensation for the victims—who were actually larger in number than the direct victim's immediate circle—provided reparation for the entire community which had been affected in this relatively small town. In view of the scale of the damage caused and the difficulties in establishing the individual circumstances of deaths and



injuries, these measures in fact aimed to benefit all those who had been affected by the events of this large-scale terrorist attack without any distinction. The Court also noted the information provided and the extent to which the parliamentary enquiries, the public enquiries and other procedures had contributed to the securing, collecting and making public information about various aspects of this terrorist attack and the authority's response to it that had been overlooked or insufficiently examined by the investigation. This information could, in the circumstances of that case, be seen as an aspect of effective remedies for the purposes of Article 13 which aimed at both establishing the knowledge necessary to elucidate the facts, and compensating the victims.

Having said that, we have to establish what would be the limits of the positive obligation under Article 2, in particular the obligation to carry out an effective investigation. There are many ways of approaching it, and I look at three particular areas of limitation, where the obligation of a continuing obligation might be facing its limits: practical, legal, and political. I will tell you immediately that I will not go too much into political limits, which may be there, but the Court has never really given such limits much weight. But what is very interesting are the practical and legal limitations of the obligations to investigate.

Loss of evidence, passage of time, steps that have not been taken at the initial stage of the investigation are all matters of practical limitation. The Court can check through these in order to demonstrate that the obligation which is imposed on the state is still a real one, and could still be complied with. Sometimes the Court may refer to the amount of information that has already been collected, sometimes it identifies a few other things. But it is interesting that in both the Committee of Ministers' and the Court's practice you will come across a variety, again, of terms used such as 'that can be done', that 'objectively can be done', 'practical', 'realistically' etc. The Court is perfectly aware that there are limits to the criminal investigation that can be undertaken, and is conscious of that in its practice. One of the manifestations of this is the Court's use of the six-month rule to declare inadmissible complaints of failure to investigate that have been pending for years without any real progress. And the reminder that the applicants do bear a certain responsibility to bring their complaints to Strasbourg without undue delay, so that the Court can still ensure that their complaints can be resolved, and that the obligation to investigate remains a real one. The Court is also conscious of other practical difficulties that can come up in the carrying out of an investigation, especially in conflict or post conflict situations. The *Al-Skeini* judgment is a perfect example of that approach.

Then we come to the legal problems that this obligation to investigate can face. There is of course the question whether it is possible in law to conduct an investigation. Some states which in response to the finding by the Court have altered their legal system, so that, for example, in Turkey, there is now a legal obligation on the authorities to re-open an investigation after the Court's finding, so that there would be a legal possibility for the applicants to ask the authorities to launch an investigation into the death. At least the legal possibility to conduct a new and effective investigation must be there. It is very clear that the mere reference to the domestic legal framework which does not allow, for example, the re-opening of a case, or where there is a relatively tight prescription period for the crime in



question, won't convince the Court and won't detract from the respondent state's continuing obligation under Articles 2 and 3 to carry out an effective investigation, as has been stressed in the *Jerónovičs* judgment.

There is a Grand Chamber case, *Marguš v Croatia*, where the Court said an amnesty for war crimes is not acceptable as an excuse not to prosecute. The Court stated: 'A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of states to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances' (judgment, para 139). Therefore, in setting aside the decisions to prosecute and putting the applicant on trial for grave violations of human rights, Croatia had acted in line with its obligations under Articles 2 and 3 and did not breach Article 6 or Article 7, Protocol 4 (right not to be tried or punished twice).

I will close my discussion on the investigatory obligation and move to the matter of disappearances. The Court has dealt with by now hundreds of disappearance cases. They are not all the same, and so I thought I would look at the nature of the cases that have produced these disappearance claims, and at how the Court has dealt with them. These are multi-faceted violations of the Convention, and concern the material and procedural requirements of Article 2. The material violation of Article 3 concerns the victims' families who continue to suffer the anguish and the unknown. Article 5 for unacknowledged detention also applies, and, very often, also Article 13 for the lack of domestic remedies. The Court has said that in a zone of international conflict contracting states are under an obligation to protect the lives of those not, or no longer, engaged in hostilities and that the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so. The states are under an obligation to protect, and should account for the persons who have gone missing or disappeared while being in their custody.

The procedural obligation under Article 2 in disappearance cases, which are characterised by the absence of information as to what has actually happened to this person and where the remains are, will potentially persist as long as the fate of the disappeared person is unaccounted for, leading to a continuing violation. At the same time, the Court is still mindful of the practical limits and difficulties that are associated with the establishment of the truth and ensuring accountability in post conflict societies, sometimes many years later. For Bosnia and Herzegovina, there were about 25 applications against this country with the Court. There are no new ones currently pending as far as I know. The applications lodged reverted back to the beginning of the 90s, then, of course, Yugoslavia. The Court concluded that the system that had been created by Bosnia and Herzegovina in order to address the issue of enforced disappearances worked well in general. The Court has not



found a single violation of Article 2 in respect of applications concerning the situation in Bosnia.

The first individual disappearance complaint where the Court found no violation was *Palić* in 2011. The Court examined the situation quite closely. The husband of the applicant was missing for about 14 years before his remains were located and identified. The judgment contained a detailed analysis of the measures that were taken by Bosnia in order to organise the search for the disappeared and missing person in the overall situation in Bosnia at the end of the war. The Court found the work done by the ICTY and the National Institute of Missing Persons was highly relevant. It noted the legislation that applied to the situation of the affected families and compensation mechanisms. It found that there were objective reasons for the situation complained of by the applicant, and the domestic authorities had done everything reasonably expected of them to resolve the general problem.

The next case, *Lejla Fazlic*, 2014, went even further in this respect because the Court in that judgment looked back at the measures of investigation it had called for in the Russian case, the *Alaskhanova* case, and it was satisfied with the measures taken for the search for the disappeared, the unrestricted access enjoyed by the family to information and the close corporation with the victim's family and the allocation of significant resources to forensic and other work. Even though, at the time of the judgment, the remains of the applicant's husband had not been found --he remained a missing and disappeared person-- there was no violation. At the same time, I have to say that the UN Human Rights Committee has adopted a number of opinions for Bosnia where it has found individual violations in similar cases.

As for Croatia, about 15 cases have been lodged concerning extra-judicial killings and disappearances. There were five cases that concerned disappearances or war time killings where violations were found. They are pending before the Committee of Ministers for execution under the *Skendžić and Krznarić* group. But the rest resulted in findings of no violations, or inadmissibility, for reasons that were similar to those in the Bosnian cases. The Court acknowledged that the prosecuting authorities did not remain passive but that significant efforts had been made in order to prosecute war crimes. Taking into account the special circumstances prevailing in Croatia, it was also concluded that the investigation had not been shown to have infringed the minimum standards required under Article 2.

Examinations of this particular group continues before the Committee of Ministers. In 2017, it 'noted with satisfaction the measures taken to ensure the independence of investigations as well as access of family members and public scrutiny in investigations into war crimes and therefore decided to close the examination of these issues'; other aspects of investigations are pending. In this sort of generally positive evaluation by the Committee of Ministers and the situation in Croatia, the Court was prepared to accept that no violation of Article 2 had occurred also in war-time killing cases with incomplete investigations, and said that it understood that it must be frustrating for the applicants that potential suspects in the war-time killings had been named but not prosecuted. However, the Court repeated, Article 2 cannot be interpreted as imposing a requirement on the authorities to bring a prosecution



in every case, since this is an obligation of means and not results. It again placed heavy reliance on general measures, etc.

In this context the Court is even prepared to accept unilateral declarations from the government in the absence of the applicant's agreement to settle the case, believing that the general problem is addressed by the Committee of Ministers, however stressing that the decision to strike out the case is without prejudice to the government's continuing obligation to conduct an investigation in compliance with the requirements of the Convention.

Let's now turn to Cyprus, about 12 complaints have been lodged about very old events against Cyprus, by Turkish Cypriots. All have been declared inadmissible. In the latest decisions on inadmissibility in this group of cases, the Court has extended its reasoning, in particular talking about the limits to the historical investigation, and cautioning against relying on evidence which is not sufficiently good to bring prosecutions in such old cases, which the Court even qualified as gossip and hearsay. Two judgments have been given, major judgments, concerning disappearance of Greek Cypriots. *Cyprus vs Turkey*, which concerned about 1500 missing persons, and, in 2014, the *Varnava* judgment. These judgments are pending for execution before the Committee of Ministers.

As for Turkey, there have been about 50 judgments that concerned events mostly in the 1990s. In addition to these, there were more than 20 friendly settlements, and some cases declared inadmissible under the six months rule. In the latest interim resolutions-- again I will not go into this, Pavlo will cover this in his presentation--the Court has taken into account the possibility of re-opening that has been introduced as part of the general measures and noted this as a positive development in a number of cases. Supervision by the Committee of Ministers was closed in 2008 in the Aksoy Group for most general measures, but remains pending for accountability of security officers and others.

And that brings us to the last part of this case study, which is Russia. Here the scale and the time span of this problem is really much worse than anything that has been seen before. There have been by now more than 250 judgments on killings and disappearances. Many of them concerned multiple victims. Mostly from Chechnya, but also from other regions of the North Caucasus, and even beyond that. There have been less than ten inadmissibility decisions, mostly for six months time limit reasons. The pilot judgment of 2012, *Aslakhanova*, contained a number of general measures. I'm calling it a pilot judgment, but actually, in light of the discussion that we had today I should correct myself. This is not so much a pilot judgment, it is a leading judgment. It never stopped the consideration of other cases. It did not set a framework for the state to comply with. But it did conclude that the criminal investigation was systematically ineffective in these types of cases and that the most urgent thing to address was the suffering of the victim's families, and the creation of other mechanisms that could resolve the questions of pending abnormal situations.

Again, I will not go into the execution of this judgment. There is not much to say. There have been later cases that have been often plagued by the same problems (*Turluyeva*, disappearance in 2009). The Russian authorities unfortunately continue to challenge the



factual findings, both before the Court and in the Committee of Ministers. And in the past two and a half years most Chechen judgments have been appealed by the Russian Government to the Grand Chamber, but not a single case has been accepted by the panel.

These cases, except the Russian ones, can be seen as examples of the state discharging its obligations, vis a vis the victims' families by taking up general measures that are aimed at assisting numerous victims, and of the Court's realistic approach to the determination of the limits of these obligations in complex post war situations. And just as the Court regularly takes into account the general information about the conditions of detention of the country of origin, in order to evaluate the material aspects of the alleged violation of Articles 2 and 3, it extends the same approach to the evaluation of the procedural obligation, even in the most serious cases.

Let me turn now to ill-treatment cases. Again many of these cases are cases of so-called systemic violation. For Russia, for example, there is a group under the so-called *Mikheyev* Group, with about 70 cases pending in that group. For Turkey, there are more than 200 cases in the *Kasa and Erdogan* and *Aksoy* Groups. Individual measures, general measures discussed in the Committee of Ministers find their way into these cases, both into the Court's judgments, and into the Committee of Minister's resolutions.

Whether there is a reference to systemic problem or not, even in respect of the countries where there doesn't seem to be a systemic problem, the Committee of Ministers still refers to general measures and the possibility of re-opening investigations as conditions for closing the procedures.

As an example of the Court's approach, there is *Khlaifia and Others v Italy*, a Grand Chamber judgment of 2016 which concerned the conditions of migrants on the island of Lampedusa in 2011. The Court's judgment has interesting passages, talking about the general conditions in which the cases arose. The Court considered that there had been a humanitarian emergency. The underlying difficulties and inconveniences endured by the applicants stemmed from the situation of extreme difficulty confronting the Italian authorities at the relevant time. The Court also took note of the post event measures which had been taken by the state. The Court noted the government's statements that significant amounts had been invested to set up new reception facilities, and that the UNHCR had evaluated the improved situation positively. In the end, having gone through a detailed examination of the specific lengths and conditions of detention, the Court found no breach of Article 3 in that case.

Is there some sort of conclusion that we can make out of all of these cases? The Court's approach in its response to the complaints under Articles 2 and 3 involving state agents is based on two main principles: accountability for the perpetrators and prevention of impunity, and reparation for the victims. The Court accepts that there are numerous measures that can be taken by states in order to discharge these obligations. It is always a delicate balance, and the Court is mindful of the general picture, of the situation confronting respondent states. The Court follows up with solutions that the state could adopt that would be suitable for addressing the particular situation. I think that both the Court and the



Committee of Ministers are still looking for ways to deal with limits that are there objectively. I may be wrong but in Articles 2 and 3 cases the supervision of not so many of them has been finally closed by the Committee of Ministers, especially where there are systemic problems. But there are some relatively interesting interim resolutions, that then have become part of the Court's case law, showing that the Court's approach to individual cases definitely takes into account the systemic nature of the violations that constitute the majority of the complaints lodged, as well as the response of the respondent governments to the situation, without however, compromising the absolute nature of the rights that are guaranteed by Articles 2 and 3.

Pavlo Pushkar : The Role of the Committee of Ministers and the Department for the Execution of Judgments

I will first very briefly cover the role of the Committee of Ministers and the Execution Department in supervising the execution of judgments. I will also touch upon the process of execution of judgments as such. I will try to explain a little bit more about the difference between enhanced procedure and standard procedure, and the difference between taking cases for examination before the so called Human Rights meetings of the Committee of Ministers, and the normal supervision procedure outside the Human Rights meetings. I will briefly cover the scope and the content of individual and general measures, with specific focus on cases relating to Articles 2 and 3. And then I want to touch upon some cases with peculiarities. These are cases relating to safety of journalists, and specific crimes based on racist motives. These are cases which gave rise from several judgments concerning, unfortunately, Ukraine, Turkey, and other countries of Eastern Europe. And I will try to wrap up with some conclusions.

As to the role of the Committee of Ministers and the Execution Department, I think first and foremost it is important to explain the supervision process. Execution doesn't only take place in the forum of the Committee's Human Rights meetings. It's probably only in situations of, let's put it this way, some difficulties or public necessity that cases come to the attention of the Committee of Ministers during its regular Human Rights meetings. In parallel with the Human Rights meetings and the normal work on the execution of cases of the Committee of Ministers, there is the work of the Execution Department in actually advising States that are willing and interested: to assist them in identifying which measures are required by the judgment. This is one of the tasks of the Execution Department.

Another role of the Execution Department is to advise the Committee of Ministers itself as to whether the measures suggested to be taken, or already taken, by the state are compliant with the indications and suggestions. There are several kinds of leverage that the Committee of Minister, with the advice of the Execution Department, can use in this process, although I think it is also important to know that the leverage available is not extremely wide. We have already discussed the opportunity of lodging a request for interpretation, or a finding of a breach under Article 46(4). Some of you have mentioned that 46(4) is a nuclear bomb scenario, which is probably something to be avoided. But the



normal leverage used are the regular decisions of the Committee of Ministers during its meetings. These are produced in a very diplomatic form, and are sometimes not very understandable to the public probably, because of their content because these are diplomatic documents, produced for diplomats mainly, and by diplomats. They are not usually technical documents and you might find that interim resolutions, and final resolutions are more specific. Also there is another kind of document produced by the Execution Department for the attention of the Committee of Ministers, so called H/Exec documents. These are actually memoranda of the Committee of Ministers, which are designated to inform the Committee of Ministers on the progress in execution of a particular case, or group of cases.

Another element of the Execution Department's role is the production of the annual report on the execution of judgment of the European Court of Human Rights, which was cited by Professor Mowbray. Recently there was quite an interesting discussion of this report at a special meeting of the Committee of Ministers, with some references to pilot judgments and indications given to the state with regard to particular judgments.

As to the classification of cases, that's again one of the tasks of the Execution Department. When the case arrives in the Execution Department one of the first elements of assessment that we need to undertake is to consider under what kind of procedure the case should fall. Whether enhanced procedure is necessary. Enhanced supervision, which the Execution Department may suggest to the Committee of Ministers, is something that assists the state in identifying necessary measures to be taken to comply with the judgment, that provides assistance. It's not always the case that everyone would always agree with this view, but indeed that is the idea of enhanced supervision.

Under the rules on execution of judgments, we have a choice of standard, or simple, procedure, which is the norm in most of the cases, and enhanced procedure. As an enhanced procedure is usually based on four criteria, which are:

- Judgments requiring urgent individual measures
- Judgments which are pilot judgments
- Inter-state cases
- Judgments disclosing major structural and/or complex problems (and here sometimes there is confusion as to what is structure, what is complex, what is structural and systemic, and what is only systematic or complex. There is a big academic discussion over whether structural is always systemic, and systemic is always structural and vice versa).

Judgments with Article 46 indications are not included.

Sometimes, as a matter of principle, the Execution Department will propose specifying a case as one for enhanced proceedings on the basis of several indicators-- the case, for instance, raises structural issues, and also complex issues. This is because it is not necessarily the case that all of the states would agree on the classification of a case as falling under one of these criteria. Some of the states sometimes see that as a form of pressure, whereas I see the enhanced procedure rather as a form of assistance to the state in advising



them of the measures to be taken. Interstate cases obviously fall within the category of enhanced supervision. Usually, I think they will also fall into the category of major structural or complex issues. They would not fall into the category of pilot judgments, but that's something that one can still discuss in an academic setting.

As to the process of execution of judgments, the process itself is, just coming from last week's Committee of Ministers, let's put it this way, not an easy one! It is a process that has its complexities, and has certain obstacles that were mentioned by Fiona in her speech. There was, by the way, a very good recommendation of the Parliamentary Assembly of the Council of Europe of 2000 by the Rapporteur on Execution of Judgments (Mr Jurgens) who identified the list of obstacles that the execution process faces. He also clearly stated that the judgment of the Court is by itself normally declaratory, it is up to the state to decide what measures they should take in order to comply with the judgment.

The aim of the whole process is, I would say, to identify the root causes of the violation, and to address them, with the assistance of any indications in the judgment. And of course, for these purposes, one might argue whether the judgment should directly address the issues through Article 46 indications, or whether the judgments should permit more possibilities for the state, in cooperation with the Execution Department and the Committee of Ministers, to identify the root causes and then to decide how it would proceed with the execution of a judgment. It is understandable that states may have difficulties with the immediate execution of judgments, with the length of time necessary for their execution. In many of the states that have difficulties, the process of the execution of judgments may involve the transformation of legal systems. For instance, if one takes the judgment of *Oleksandr Volkov*, which we have discussed today, on the basis of this judgment the Ukrainian authorities adopted changes to the constitution of Ukraine in the area of the judiciary, and adopted amendments to the laws regulating the appointment of judges and disciplinary proceedings against them. So it was quite a major move on the part of the domestic authorities to comply with this judgment.

For many of these states that are facing difficulties, I think the process of execution is a very useful tool of transformation and, inevitably, for very complex legal problems, it takes time. In individual measures cases, we are aiming for, and I was mentioning this today, *restitutio in integrum* in situations where this is possible. But of course, in situations of Articles 1 and 2, and Article 3, we are not able to put back the acts which were committed, and make them right. So in a sense the aim of individual measures to be taken, other than those related to just satisfaction, is to a certain extent, if I might put it in simple words, is to put things right. Somehow, as it was mentioned by Olga, to end impunity and to give some form of redress to victims. Some form of reconciliation.

Coming to the most recent examination of cases by the Committee of Ministers [in September 2017], I wanted just to mention that we had several cases with complexities during the last meetings, specifically addressing the issues of Article 2 and Article 3 investigations. These were the Bulgarian cases, the *Velikova Group* of cases. The Committee of Ministers supervised the individual measures in these cases, and they basically said that in this group of cases in relation to individual measures it seemed necessary to provide an



assessment from the Prosecutor's Office of Bulgaria as to whether it was still possible to carry out new investigations in these particular cases about breaches under Article 2. So the requirements in these cases are actually not to come out with a fully-fledged investigation, but to be able to assess, in a proper sort of way, where the investigation is still possible, due to being outdated in time. In another case that was examined in a meeting last week, we had a very charged meeting in the case of *Tsintsabadze v Georgia*. The Committee said, in the first point of the decision in the case, that it knows with regret that no further individual measures are objectively possible in the case, due to being out of time. The Committee also discussed several more complicated cases from the point of view of Article 2, for instance the case of *Gongadze v Ukraine*, which involved the abduction of a journalist who was later found decapitated, and a lengthy investigation in that respect. The approach in this case was seen not really as a matter of individual measures, but of the general legal and institutional framework relating to them and what was necessary to be able to resist new events of the same kind as those that were decided upon in the judgment of the Court. *McKerr* from Northern Ireland was also discussed at this meeting, there is a decision in this case on the website of the Committee of Ministers.

So, on the basis of these decisions taken at the September meeting, new investigations are demanded, notwithstanding payments of just satisfaction. And to say again, it's a very strong opinion of the Committee that there is a necessity to end impunity and reach some sort of conclusions for the purpose of reconciliation with the victims. And to find, also, some sort of redress for the victims.

Legislative changes may also be needed, if the source of violation was a wrongful provision of the domestic law, or some sort of legislative lacuna not permitting investigations. That was something that was also analysed in the context of the case of *Gongadze* and I will hopefully cover that. The methodology of conducting investigations was also analysed by the Committee of Ministers and it became a part of the assessment. As to how, actually, these individual and general measures are being identified that's another complex task.

The process of execution is one of deconstruction of the text of a judgment. Obviously it's an inversed process. When the Court establishes a violation, I think the logical process is to come from a particular situation to a general legal rule. That's a normal sort of process for the Court to go through. In the context of execution this process is reversed, because you take the judgment apart. You find specific elements of the judgment based on the conclusions, and then you reach conclusions as to general and or individual measures to be taken. But one might be faced, in the context of Articles 2 and 3, with a finding of a substantive breach and a procedural breach, or a finding of only a procedural breach. The latter kind of finding presents a difficulty. The states aren't there clearly faced with what they need to do to comply with the judgment, because there is no clear finding of torture, no clear finding of liability of the state for the act of a particular person, only a finding of a breach of a procedural obligation to investigate. But there is a presumption that possibly torture or some form of ill-treatment occurred, because otherwise the procedural obligation would not be applicable. As to general measures, I think the approach is to re-assess the



legislative and constitutional framework. Normally if the institutional and legislative framework is in place, and the root causes are addressed by this framework, the Committee can come to the conclusion that it is an exceptional case, that the framework in place would normally address violations of this kind, so no change is needed. As to individual measures, one can say that the award of damages would not suffice for a violation of the procedural obligation.

Another element which the Committee would normally address is whether investigatory opportunities were realistic, taking into account time and evidentiary difficulties. The obligation that is incumbent upon the state is to try to elucidate the facts as far as possible within reasonable limits. The question is what could be required from the authorities--whether an investigation into the facts of the case is still possible or not, for practical and/or legal reasons and how it should be conducted? This is an element in many of the cases that we discuss before the Committee of Ministers. For example, in the September 2017 meeting there was a group of Ukrainian cases being discussed, the *Khaylo Group* of cases, which related to, let's put it this way, 'normal deaths' without the involvement of law enforcement officials. They involved relations between private parties leading to deaths which had not been investigated by the authorities. In most of these cases, the biggest problem, which is clearly identified in the judgments of the Court, is that the authorities had not taken the necessary investigative steps in the first months of investigation. They hadn't collected evidence correctly, they hadn't questioned witnesses correctly, etc. And therefore a procedural violation of Article 2 was found. Obviously, it may be impossible to recover the situation if mistakes have already happened in the initial stages of the investigation: evidence was not collected and this error is irredeemable. Other particular considerations that the Committee of Ministers takes into account, in a sort of checklist, are the following. Whether investigatory steps can still be taken because of the passage of time, the unavailability of witnesses or their failure to recall the events, statutory limitations on investigations and issues of *non bis in idem*. Explanations from the authorities are required as to what obstacles exist and what means may be deployed to objectively overcome them. Also information as to what concrete results are expected to be achieved, and within what time frame. Information on the time frame is something that the Committee would especially expect in the context of cases where the limitation period for investigation is an issue.

On statutory limitations for investigation, from the point of view of the Committee of Ministers there may be a requirement for an extended limitation period for possibilities to investigate for serious breaches of the rights under the Convention, for instance in cases of torture or other ill-treatment that occurs at the hands of law enforcement officials. And maybe, in some instances of serious breaches, no limitation period may be permitted. In the instance of torture this might be the approach of the Committee of Ministers.

The investigation should be undertaken notwithstanding the wishes of the applicant. This is one of the issues that is for discussion as well, because the investigation might take so many years before a judgment comes from Strasbourg and might affect the rights of the third parties. It might involve a person who is already acquitted but who had been convicted



of something and doesn't want the opening of these other proceedings to happen. It might involve issues arising under other Articles of the Convention, for instance, Article 6, concerning lack of evidence.

One of the important issues in these investigations is that the decisions with regard to the investigation should be taken by the competent bodies and there should be a safeguard of judicial review. That's something that the Committee of Ministers would also look into. And again, if nothing works, alternatives. Alternatives to reconcile the victim. There are a number of examples which have been mentioned: parliamentary public enquiry, disciplinary enquiry, compensation committees, expressions of regret and recognition, of a wrong done, *ex-gratia* payments. These are measures rather aimed at restoring as far as possible the situation before the Court.

Individual measures might also, as I was mentioning, require some form of *ex-gratia* recognition of fault by the state, which is also an important element to comply with the individual measures in a particular case. *Ex gratia* payments, apologies, recognition of an issue, etc. In the context of *Gongadze* a specific apology was given by the President of Ukraine to the widow of the deceased journalist. And he also granted her a medal for a long-standing suffering, etc.

Next I will mention three examples where the Committee is demanding very specific types of investigations. In the first place I will mention the case of *Gongadze* once again, and the cases of *Tepev Turkey*, *Adali v Turkey* and *Huseynova v Azerbaijan*. These are cases where the Court has a very specific indication as to the investigation needed because of the context. It requires the investigation of the motives of a crime against a journalist. It requires investigation as to whether the killing of a particular person, who was a journalist and who was involved in professional journalistic activity, was related to his journalistic activities. Other cases concern Ukraine as well: *Fedorchenko and Lozenko v Ukraine* and *Grigoryan and Sergeyeva v Ukraine*. These are Article 2 and Article 3 cases with a parallel finding of a violation of Article 14. In these cases crimes were based on racist motives, and it would be a requirement of the investigation from the point of view of the execution of individual measures to investigate the motives. There are very clear indications in the texts of the judgments that the motives were not addressed by the authorities. In fact, I have just looked up the case of *Fedorchenko and Lozenko* in the HUDOC database, and there is an action report or an action plan produced by Ukrainian authorities, in which they say basically that they have investigated fully the criminal acts concerning these persons Fedorchenko and Lozenko who were burned alive by law enforcement authorities for involvement in drug trafficking in the region. Basically they report that these investigations came to the conclusion that these crimes were not ethically and racially motivated. That's something that would need to be addressed through the execution process, because evidently the judgments themselves address the issues very clearly. The question would be whether these elements have been properly investigated.

Some concluding remarks. To avoid repetition, I'll just focus on one of the elements which I think is the most problematic, cases with only a finding of a procedural breach of Article 2 or Article 3. In such cases I think it's very difficult to understand what should be the



scope of the investigation. For example, in the event of the finding of only a procedural violation in Article 3, there is the presumption that ill-treatment occurred. But there is no direct proof in the judgment, and there is no direct statement in the judgment that ill-treatment had occurred. The same applies for Article 2 cases where there is only a procedural issue. What should be the beginning and what should be the end of such investigations? I think that is something that would be interesting to discuss due to the presumption of fact in the judgment that I have mentioned. Another issue concerns cases where we have no cooperation from the authorities in the proceedings, where there is a finding, for instance, of a breach of Article 38 of the Convention by the Court. Again the findings of violations are based on the presumption. So what does one do in the execution process? There is no single formula which would address all possible cases with difficult factual elements in these cases. These are open questions from the point of view of the Committee of Ministers and execution practice. The investigation has a beginning and should have an ending. But definitely there are criteria on the basis of which one can reassess the investigation, the establishment of the facts. And, if necessary, come to the conclusion of liability of very particular individuals.

Discussion of presentations

Dominick McGoldrick: Can I ask about the presumption point. Many cases say, ‘on the evidence, we just can’t make a finding of a violation on a substantive issue.’ But then they very commonly find a procedural violation. But I am not sure how a presumption applies in this situation?

Olga Chernishova: Well, you might have a presumption working in the material sense as well. For example, if somebody is taken into the custody of the state and he was okay from the moment he was taken into custody, but then he disappears, or he walks out with injuries, or he dies in custody, then there must be a convincing explanation as to what has happened, so that the state can prove that it’s not responsible for what has happened to him. If that factual presumption cannot be overturned by the state, then the presumption would be that it was the state’s agents that mistreated him and that would be a material violation. If you go back to the situations that actually give rise to these complaints, very often the reason why the victims come to Strasbourg is exactly because there has been no elucidation of the facts at the domestic level. So in the classic situation of police ill-treatment, the person is taken to police custody, and he walks out injured. Or he doesn’t walk out but he is diagnosed with injuries, or the person disappears, we don’t know where he is any more. So then the victims or their families try to get an investigation into the events, and this investigation is ineffective, it doesn’t produce any results. They either deny that these things have happened, or they give you an explanation which is highly implausible, which cannot be accepted as the result of the investigation. So if you limit the violation to the procedural aspect only, what has happened to the material complaint? In a way you will allow the state to say, okay we didn’t investigate, so it is allowed to get away from the material infringement of the Article of the Convention. This is the logic that the Court has applied in using these presumptions where the facts cannot be finally



resolved. And in disappearance cases, certainly where the whole point of the claim is that it is unknown what has happened to the person after he presumably (even that is something that can be denied) is taken into the custody of the state's agents. Then of course, you will need certain legal instruments to address the situation.

Paul Mahoney: The duty to investigate can be seen to have been developed in a more conscious fashion as a legal notion at the beginning of the life of the new Court. Previously the Commission had been carrying out fact-finding investigations in Turkey, in disappearance cases, in cases of killings and alleged ill-treatment and also in destruction-of-village cases. The fact-finding investigations carried out by the Commission often produced no definitive conclusion, one way or the other. The new Court soon realised that it was simply not equipped for carrying out the kind of fact-finding that the cases required and on the scale required. Something like two or three hundred cases of village destruction, each one with its own facts, were pending, for example; and there was no way, with the limited resources and staff the Court had at its disposal then, that one could envisage dealing with these cases within a reasonable time. On the other hand the Court, in view of its mission, could not leave these applicants without a remedy or without justice for the sole reason it was not in a position to establish the facts. Also, as an international court, it was not appropriate for the Strasbourg Court to in effect take over as the competent first-instance regional court in South East Turkey for all such cases. In the long run the resolution of the problem could only come from within the country concerned.

The conclusion arrived at was that the Court should find the means of facilitating that transfer of the problem back to Turkey, where its enduring solution was to be found. That is why the emphasis was shifted to the procedural side – with, for examples, findings that, while it might be that the Court did not know whether it was the PKK or the Turkish forces who had blown up a given village in the middle of winter, leaving 300 people stranded, the evidence in the case-file did establish beyond doubt that the Turkish authorities had neither sufficiently investigated the incident, nor done enough to help the people affected. Such a finding, the Court explained in these Turkish cases, entailed a violation of procedural obligations inherent in Article 3 and justified awarding the applicants financial compensation comparable to that which would have been awarded if a substantive violation had been found.

The object of this shift of focus on to the procedural obligations of the national authorities under Articles 2 and 3 was, on the one hand, to enable the Court to cope with the caseload but, on the other hand, to render justice as quickly as possible to as many of these applicants, justice that was their entitlement. You may criticise this approach; and some of the NGOs did at the time. Their argument was: *“Every applicant is entitled to know the truth; and the Strasbourg Court has to find the truth in these cases alleging violation of the core rights to life and to prohibition of torture and inhuman treatment because it was not found at national level.”* The Strasbourg Court's response in its judgments in many of these Turkish cases from this period was in effect to reject the requests to undertake investigations in order to establish the factual truth. So the Court can perhaps be said to have put aside the possibility of finding a substantive violation in instances where that



possibility might have been open to it, notably by undertaking fact-finding missions on the spot in Turkey.

Sometimes a substantive violation in Article 2 or 3 cases can be deduced or presumed because it is so obvious from the facts that are known. And the Court will evidently do that whenever possible. However, where cumbersome investigations on the spot are required, the policy now is likely to be that the Court will leave the substantive obligation aside because it is too difficult to establish the disputed facts and instead focus on the procedural obligation, with a view to placing the emphasis on subsidiarity and on bringing the level of protection in the national legal system up to standard. In sum, the aim is to put the responsibility back where it should be, namely on the responsible national authorities. This is also why increased emphasis on Article 13 can be found in the jurisprudence beginning in that period.

In conclusion, (a) there is an element of judicial policy behind the development of the case-law on the procedural obligations inherent in Articles 2 and 3; and (b) in practice, you should not always expect too much fresh fact-finding (in particular, by means of on-the-spot investigations) or conclusions about substantive breach in these kinds of cases where there has been inadequate fact-finding at national level.

Pavlo Pushkar: I want to mention in this context *Gongadze*, decided in 2005. If you look at the text of the judgment, in the context of procedural obligations, there are paragraphs 175 to 177 establishing the main principles of investigation that must be followed to comply with the procedural obligation. There are only two little paragraphs, 178 and 179, containing two elements that actually led to the finding of a breach on the facts of the case. The first element was that the applicant maintained that the investigation into the disappearance of her husband in the year 2000 had suffered serious delays and deficiencies. Some of these deficiencies were acknowledged by the domestic authorities on several occasions. As to the second element, the Court stated that it considered that the facts of the present case showed that during the investigation, until December 2004, the state authorities were more preoccupied with proving the lack of involvement of high level state officials in the case. Then the next paragraph says that, in the light of the above, the Court concludes that there has been a procedural violation of Article 2. So basically you have to construct the execution of the judgment based on these two elements. That there were serious deficiencies in the investigation, and that the authorities were more preoccupied with proving that someone was not involved with the crimes than proving that this person was involved actually in the crime. Eventually, in 2005, after a new government took office, three police officers were convicted and sentenced for murder, and one police general for actually giving orders to murder the person.

Kanstantsin Dzehtsiarou: Can I act for a second as devil's advocate and say that may be the finding by the Court of a violation of the procedural obligation should not lead to any requirement of an investigation on the national level, with the Committee of Ministers asking the national authorities to investigate. First of all, we are talking about investigation into what happened after six, seven or eight years, so that it is very unlikely that there will be any real facts there. And second, we have an enormous quantity of unexecuted



judgments. I read recently there was like 10,000 pending applications. May be it's better to focus on material or substantive breaches than at looking in detail at procedural ones. The Court has already established lack of investigation. The just satisfaction was paid and maybe that would be enough for the enforcement of such a judgment. I don't necessarily agree with what I have just said, but I am wondering what you think about it.

Pavlo Pushkar: In a sense, one of the possible solutions might be that in the Article 46 indications part of the judgment, the Court might say, for instance, that, taking into account an assessment of this situation as it is, there has been no effective investigation and on the facts no effective investigation is possible, so that the solution is to increase redress. I think that can be one of the solutions. But maybe some others can be mentioned, such as measures of reconciliation. But I think it would be difficult for the Committee of Ministers to just say, no investigation should be performed. But this additional investigation, or new investigation, in the context of Article 2 and Article 3 is an obligation of means, not an obligation of result. That comes again from the practice of the European Court of Human Rights.

Paul Mahoney: It's never happened yet, but I'll address it later.

Olga Chernishova: But it happened the other way, as in the *Jeronovičs* judgment, where the government said that the investigation was not possible for purely formal reasons, just saying our legislation doesn't allow investigation in the circumstances, that's the end of the matter. The Court said no, whether it is possible or not possible under the law your obligation to conduct an investigation remains.

Paul Mahoney: A basic minimum, and expected by way of execution of the Strasbourg Court's judgment, is that the authorities should look at the feasibility of a new investigation. That is the bare minimum. The responsible national authorities cannot, as in *Jeronovičs v. Latvia*, simply decide that, for a formal reason, they are not going to do this. In the Latvian case the refusal to re-examine even the feasibility of restarting the investigation was because there had been a striking-out decision by the Strasbourg Court on the basis of a unilateral declaration by the respondent Government acknowledging both a substantive and a procedural violation of Article 3 in relation to the applicant. Nonetheless, the Court held that that was not enough. The responsible national authorities, so the Court ruled, had to look at the merits in order to determine whether the investigation should be reopened or not. That, however, is a different point. The question raised is whether the Court should ever give an indication that it is satisfied, at the time of delivering its judgment, that any further investigation at national level would be a non-starter. No such indication has yet been given in any case.

Sangeeta Shah: You could look at the colonial cases that are coming out of the UK courts, *KU* and those cases where they are talking about incidents that took place 60-70 years ago. What are we going to do now? Are we going to say there's an investigative obligation there after so many years because of the continuing nature of Article 2? Is it really realistic at that point?



Paul Mahoney: There are different kinds of situation. Sometimes there are enough facts to establish a substantive violation. But sometimes there may be enough facts to say it's too late to have an investigation. I always that the duty to investigate doesn't have an eternal life. It's not like a Holy Ghost. There may be an end to it. But the state has to look at the merits to check what facts there are.

Stuart Wallace: But at the same time I don't think the Court has been very clear on when the boundaries are there from *Šilih vs Slovenia*, the connections test, and so forth, it's completely muddled the water. It needs clarification, unless it turns into the Holy Ghost.

Chris Flatt: I'm responsible for the *Mckerr* Group that was before the Committee in Strasbourg last week and I can say that the problem of investigating old cases is definitely something that we are finding a real one in Northern Ireland, looking at cases that can be from up to 40 years ago. But it's very difficult to understand the difficulty in investigating these cases until you start to investigate, you need to look into the facts a bit, at least to find out what the potential is.

On a different tack, Pavlo mentioned reconciliation a couple of times, and one of the things we come up against time and again is, you look into these cases, families of victims learn of this and get very excited, and then it turns out that there's very little you can do. And actually, the idea of reconciliation can become very damaging--even in cases where you do find something the consequences can be quite damaging, if families learn things that they were not prepared for. The idea of reconciliation is quite a difficult thing to include in this because you can never know where these cases will go.

Pavlo Pushkar: It's difficult to disagree. It's something that is surely an issue, because a victim or victim's family might have pre-conceived an idea of the outcome. Especially in publicly known cases, like the *Gongadze*, case, in which there is a preconceived idea of who is guilty. This preconception doesn't necessarily mean that there is evidential proof that will come from a new investigation that this particular person can be found guilty. It doesn't mean that there would be evidence, and if this person were convicted on the basis of public opinion only then this person might come back to the European Court with an Article 6 complaint and say there was no basis for my conviction, and there would be a breach of that Article in favour of the convicted person. But you cannot change, sometimes, the attitude of victims and victims' families, that is something very difficult. But one of the elements of reconciliation for me is that of transparent procedure in an investigation, and informing victims' families. That's quite important.

Ayse Bingol Demir: I think that when the violator of human rights is the state agent or agents, as in cases of disappearances, the information is there, under state control, all the time, and I don't think that that information would disappear easily with passage of time. That is why having ongoing investigations into these incidents is really important. I believe that if there is a genuine and effective investigation, that information could be found. So the passage of time for those types of crimes or incidents would not necessarily be relevant. I have been working on a case coming from 1938. It concerns two missing girls who were forcibly taken away from their families and given into the custody of other families known only by the state following the 1938 Dersim massacre. It was a state policy adopted for a



number of children back then which resulted in the phenomenon of "Dersim's missing girls" in Turkey. Together with colleagues I worked with, we managed, without having the power of prosecutors or other state institutions, to find some information about two disappeared girls. Their case is still pending before the ECtHR but it is a case illustrating that the continuing nature of the state's duty to investigate is really important. It at least gives a basis for the families and their lawyers to find a way to access the information withheld by the states. This would not change even in cases where this information may be harmful or difficult to deal with for the families. I think we shouldn't ever give up pursuing this obligation.

Pavlo Pushkar: One example is *Jeronovičs vs Latvia*.

Olga Chernishova: I think that when we are talking about the Article 2 procedural obligation, we are talking about a relatively rigid framework. It is a procedural framework into which your case from 1938 simply would not fit, for many reasons. So what you are talking about could be more the sort of Article 13 case, although there has been a suggestion of using other Articles, like Article 10 (right to information). But this is not strictly speaking the obligation to investigate with the purpose to determine someone's liability. What you are talking about is more a truth finding instrument. And this has been slowly seeping into the Court's jurisprudence, but I think it must be seen as relatively distant from the procedural obligations to investigate which comes with a pretty heavy set of obligations on the respondent state. I completely understand what you are saying, but you simply cannot demand in a case like yours that someone be prosecuted and be held liable for what has happens. It's just not in the framework of objective possibilities.

Ayse Bingol Demir: But even if the persons responsible are not alive anymore, though still it's not certain, there must be some circumstances surrounding the case that will be found in the investigation, and there can be liability resulting on the part of someone. Each case is different in this sense.



Session 3: The Obligation to Investigate Violations of Articles 2 and 3 – I

Chair: Dominic McGoldrick, Professor of International Human Rights Law and Co-Director, Human Rights Law Centre, University of Nottingham

The Execution of Court Judgments Concerning the Procedural Obligation to Investigate Alleged Violations of Articles 2 and 3.

Presentation by: Paul Mahoney, Former Judge of the European Court of Human Rights

The Execution of Court Judgments in Russian Cases

Presentation by: Joanna Evans, Barrister, European Human Rights Advocacy Centre

Paul Mahoney: The Execution of Court Judgments Concerning the Procedural Obligation to Investigate Alleged violations of Articles 2 and 3

I am going to make some observations on the execution of judgments that concern the procedural obligation to investigate alleged violations of Articles 2 and 3. These observations are made primarily from the perspective of the Court rather than that of the Committee of Ministers.

I would like to begin with a few introductory remarks about the execution of the judgments of the Court in general. First and foremost, it should never be forgotten that the Strasbourg Court is an international court set up and functioning by virtue of a treaty that has been drafted and voluntarily acceded to by sovereign States. Seven years ago I wrote an Article on implementation and execution of the Court's judgments in which I said:

It is a truism that international courts cannot be assimilated to national courts in all respects, primarily because they operate in a fragmented and undeveloped context, namely the international legal order, which is far from being as stable and as structured as most national legal orders. ... The resultant institutional fragility of international courts, ... unsupported by the integrated structures which ensure the operation of the rule of law in a democratic legal order, is particularly apparent, in both legal and practical terms, in relation to the implementation and enforcement of their judgments.

Secondly, the possible effect of an international judicial decision and the corresponding implementation obligation of the States concerned largely depend on the terms of the particular treaty. For the enforcement system set up under the Convention, Article 46 is of



course the relevant clause. In its early case-law the Court adopted a very cautious and non-interventionist stance towards any involvement on its part in the execution of its judgments. Subsequently there has been an evolution in law and in practice towards diluting the political and the discretionary colouring of the judgment-execution scheme as it emerges from the wording of Article 46, but there is no need to go into that detail now thanks to Alastair Mowbray's contribution this morning.

The legal role of the Court now, as Alastair explained, is illustrated by something like 200 judgments delivered since 2004, in which year the ground-breaking judgment in *Broniowski v Poland* established the pilot-judgment procedure as well as the Court's practice, in appropriate cases, of taking a look at the future implications of Article 46 in the particular case. That practice has evolved to the point where the Court can be taken to be exercising what Linos-Alexander Sicilianos, the Greek judge on the Court, has called a "complementary", though not unlimited, competence to recommend or even, exceptionally, to prescribe both individual and general remedial measures.

As to the practice of the Committee of Ministers, it is to be noted that the Committee has over the years refined the manner in which it discharges its collective duty of supervision. In brief, the Committee of Ministers has developed an institutional framework of reporting. Nowadays, applicants are associated in the reporting procedure to a certain extent. The Committee's Rules on the supervision of execution of judgments specifically provide that applicants are able to submit observations about just satisfaction or individual measures. The procedure has also become accessible to NGOs, national human rights institutions and the general public. And the Committee of Ministers issues an annual report on its activities regarding the execution of the Court's judgments. None of this was done in earlier years. These developments mark a step towards adversarial proceedings to a certain extent, and more openness before the Committee of Ministers.

As a result, the Strasbourg Court is in a much stronger position than many other international courts and treaty bodies. But, to my mind, it would be a mistake to think that the stage has been reached where it can be said that under the Convention system there is, or can be, a purely judicial mechanism for the execution of the Court's judgments as found within national legal orders – well, properly functioning democratic legal orders anyway. In other words, Strasbourg judgments cannot yet be said to benefit from the *Hornsby v. Greece*-type of protection that the Court has interpreted Article 6 of the Convention as affording to judgments of national courts.

My introductory message therefore is one of qualified caution. The political and discretionary character of the judgment-execution process has been significantly reduced, compared with the position in the early days of the Convention system's operation. But, there is still some way to go. The role given to the Court by the Convention in the realm of judgment-execution is limited. It is, for instance, more limited than that given to the Inter-American Court of Human Rights under the American Convention. The Court remains an international court; it is neither a national court, nor even a supranational court like the Court of Justice of the European Union.



A second general point to be made is the increasing role of the national courts. The Convention does not make the Strasbourg Court's judgment immediately applicable and binding within the domestic legal order of the respondent State. Recent years have, however, witnessed an increasing willingness on the part of the national courts to serve as a conduit for the implementation of judgments finding a violation in respect of their country.

Thus, in a case from 2004 called *Görgülü v Germany* the German Constitutional Court set aside the ruling of a regional court on the ground that it had not properly taken into account the Strasbourg Court's earlier judgment finding a violation of the right to respect for family life (under Article 8 of the Convention) in the same matter - which was the applicant's unsuccessful attempts as a father to gain custody of and access to his child. In so doing, the German Constitutional Court, to use its own words, "[was] indirectly [acting] in the service of enforcing international law". The German Constitutional Court followed this up a few years later when it decided to reverse its own case-law on the constitutionality of the national legislation on the preventive detention of dangerous convicts after their sentence has expired, in order to ensure compliance with an intervening judgment by the Strasbourg Court (*M v Germany*, 2009) finding a violation of the Convention precisely on account of the legislation in question.

In the Spanish case of *Del Rio Prada* (2013) the Strasbourg Court, after holding that the applicant, a convicted Basque terrorist, had been the victim of violations of Articles 5 and 7 of the Convention by reason of a lengthily delayed date of release from prison, directed Spain to ensure that she was released at the earliest possible date – which was done almost immediately after delivery of the Strasbourg judgment by order of the Spanish courts, without any intervention on the part of the Government.

Nearer home and nearer to our subject-matter, in 2016 in a case called *Hutchinson* the English Court of Appeal was held by the Strasbourg Court to have eliminated the procedural violation of Article 3 – I think you can call it that – found by it in the earlier case of *Vinter and Others* (2013) by reason of the uncertainty in domestic law as to the "reducibility" of sentences to life imprisonment (by "reducibility" is meant, in ordinary language, the notion that the law must afford life-prisoners at least a faint hope of release). In a concurring opinion in *Vinter and Others* I had adverted to the possibility of legislative amendment or executive action in order to remove the uncertainty provoked by the apparent contradiction between the general wording of the two relevant Acts of Parliament as interpreted by the national courts and an internal practice instruction issued by the responsible Minister on the treatment of life-prisoners (the "Lifers' Manual"). The Court of Appeal spelt out in no uncertain terms that the law in England and Wales, and what the law obliges Ministers to do, is what the courts say it is, not what Ministers may choose to say in their internal documents. And that, for the Strasbourg Court, was enough to remove the uncertainty that had existed at the time *Vinter* was decided.

This building of bridges with the national courts is, I would suspect, a fruitful way forward for execution of Strasbourg judgments, including judgments finding a procedural violation of Article 2 or Article 3, since it avoids the problems sometimes encountered when



politics enter the picture in the form of national governments and parliaments. It makes it more judicial if you like.

Coming now to the procedural requirements under Articles 2 and 3. Some 30 years ago I wrote an Article for the *Liber Amicorum* of Héctor Fix-Zamudio, who was a judge of the Inter-American Court of Human Rights. In that Article, relying on the famous British “*Death-on-the-Rock*” case from 1995 (the case of *McCann and Others*, an IRA case that you will all be familiar with) and a series of Turkish cases decided by the old Court, I ventured that the legal notion of a positive duty on States to investigate possible human rights violations was a recent, but still piecemeal and incomplete, development in the few meagre, disparate strands of the case-law of the Strasbourg Court then existing. Today there is no need for me to recount the now abundant jurisprudence and learning on the procedural requirements inherent in both the right to life and the prohibition of torture and inhuman treatment.

That brings us to the specific topic of execution of Strasbourg judgments finding a violation of the procedural requirements of Article 2 and 3.

I propose to spotlight just a small handful of the multitude of relevant cases. They are mainly Russian cases, so there will be some overlap with the interventions of other speakers. The first point to make is that the Strasbourg Court’s judgment may say nothing whatsoever about the execution of the judgment in relation to the finding of a procedural violation of Article 2 or Article 3. One can take the example of a Turkish case called *Atıman* (decided in 2014) in which the applicant had been a passenger in a lorry that was suspected – wrongly, as it turned out – of smuggling fuel. He had been fired at and wounded by gendarmes at a roadblock, but had survived. Although indicating a legislative amendment susceptible of preventing similar substantive violations of the right to life in the future, that is reckless shooting by gendarmes, the Court did not offer any guidance at all as to the execution of judgment in relation to the second violation, namely the inadequate and deficient investigation of the particular incident.

In the instances of procedural violation of Articles 2 or Article 3 where the Court does say something on the subject, it will generally add a disclaimer along the following lines: “*It falls to the Committee of Ministers, acting under Article 46 of the Convention, to address what, in practical terms, may be required of the respondent State by way of compliance.*” In other words, judicial notice is taken of the fact that the nuts and bolts of what should go into compliance are really for the Committee of Ministers and the respondent Government.

Beginning with individual measures of execution, it might be asked whether, if there has been a finding of violation and an award of just satisfaction in respect of a procedural violation of Article 2 or Article 3 in the particular case, the duty to investigate nevertheless remains in existence and therefore still to be performed by the national authorities after the delivery of the Strasbourg judgment or, on the contrary, is compensated and extinguished by the finding and the award of just satisfaction at international level.

The Committee of Ministers itself seems to have had no doubt as to the continuing existence of the duty to investigate and as to the need for individual measures, in the form



of fresh, effective investigatory measures meeting the requirements of Article 2 or Article 3, on the part of the respondent Government in order to implement the Court's judgment. This can, for example, be seen from the Committee's treatment of six similar judgments delivered against the United Kingdom between 2001 and 2003 in connection with the so-called "legacy inquests", the legal vehicle employed for the investigation of historic killings by security forces in Northern Ireland. In interim measures and information documents issued between 2007 and 2009, the Committee of Ministers expressed concern that *"progress with regard to individual measures in these cases ha[d] been limited"* and called on the British Government to take without further delay all necessary investigative steps.

The Court's case-law also clearly takes for granted the continuing existence of the duty to investigate, although it took some time for explicit statements to come as to the need for fresh investigatory measures by way of execution of the judgment. Whilst there is perhaps no need to undertake a lengthy look at all the cases, because it is not really a controversial point, it may nonetheless be interesting to look at a few cases; in particular, the assumption of the ongoing character for the duty to investigate made in successive judgments between 2005 and 2015 in three cases against Russia is instructive. Those cases have been referred to by other speakers.

The three cases, each with different applicants, all concerned the same military operation, involving bombing and shelling conducted in 2000 against a village in Chechnya. In the second judgment from 2010, in the case of *Abuyeva and Others*, the Court noted with dismay that all the major flaws in the investigation identified five years earlier in 2005 in the first judgment, in the case of *Isayeva*, had persisted throughout the second set of proceedings instituted in Russia after that first Strasbourg judgment.

"As a result," the Court said, "[it] was bound to conclude that no effective investigation capable of leading to a determination of whether the force used had or had not been justified and to the identification and punishment of those responsible had occurred."

Although nothing was expressly said to this effect in 2005 in the *Isayeva* judgment (this was before the Court's practice of including in appropriate judgments sections on Article 46 had taken off), the Court can be read in *Abuyeva* as having expected that the carrying out of an effective investigation into the individual claims of Mrs Isayeva but also, more generally, into the military operation as a whole, would form part of the implementation of the *Isayeva* judgment by Russia. Coming to the question of the implementation of the *Abuyeva* judgment itself, the Court observed that:

"it ha[d] so far refused to give any specific indications to a government that they should, in response to a procedural breach of Article 2, hold a new investigation".

It explained why:

"In taking this approach, the Court has relied on the general principle that the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are



compatible with the conclusions set out in the Court's judgment. The Court has also noted the practical difficulties arising out of conducting investigations into events that have occurred many years ago which would almost certainly render such investigations unsatisfactory or inconclusive. It has based its approach on the fact that initial failings of an investigation to take essential measures often make it highly doubtful that the situation existing before the breach could ever be restored ..."

There were, however, two exceptional features in the instant case: firstly, the fact that the Russian Government had manifestly disregarded the specific findings of a binding judgment, the *Isayeva* judgment, as to the ineffectiveness of the investigation; and, secondly, there appeared to be no insurmountable practical obstacles in the way of restarting the investigation. The Court therefore concluded the section of the judgment on Article 46 with the statement that *"it consider[ed] it inevitable that a new, independent investigation should take place"*.

What was the result of this indication given to the Russian Government? As the third case, *Abakarova* (decided in 2015) shows, nothing happened. In *Abakarova*, the Court noted that since its 2010 judgment none of the previously identified defects of the investigation had been resolved. As a result, yet another violation of the procedural limb of Article 2 arose, albeit for a different applicant. On the evidence before it, the Court concluded that the adequacy of the investigation was not to be attributed to practical difficulties arising from the passage of time, or anything like that, but rather *"[was] the result of the investigating authorities' sheer unwillingness to establish the truth and punish those responsible"*.

As to the implementation of this third judgment concerning the same military operation, the Court first made the general point of principle that the obligation under Article 46§1 to abide by the Court's judgments meant that all previous directions concerning the investigation, its scope and its focus remained valid. Furthermore, in the Court's view, the *"great concerns"* that the conduct of the Russian investigating authorities raised about impunity with respect to a serious human rights violation demanded action over and above that set out in the 2010 *Abuyeva and Others* judgment. Thereafter the *Abakarova* judgment outlined what it described as

"a variety of both individual and general measures ..., aimed at drawing lessons from the past, raising awareness of the applicable legal and operational standards and deterring new violations of a similar nature"; it being specified that the individual measures *"should focus on the continued criminal investigation, ... [and ensure] adequate protection of the applicant's rights in any new proceedings, including access to measures for obtaining redress for the harm suffered"*.

Before this third judgment of the series in *Abakarova*, the example of *Abuyeva and Others*, with its exceptional indication of a measure of implementation of the judgment in the form of a fresh investigation, had been followed in 2012 and 2013 in a couple of Turkish cases (*Nihayet Arice and Others*, decided in 2012, and *Benzer and Others*, decided in 2013). The judgment in both these cases concluded with an indication to the respondent State that



there should be a new investigation. In the second case the Court even went into some of the details of what the investigation should do - it should, for example, consult the flight logs of the planes flying over the village that had been bombed.

I would now like to make a short detour, taking up some of the dicta from another case (from 2012, called *Aslakhanova*, which concerned forced disappearances in Chechnya), in order to make a rather speculative point under the head of the continuing character of the duty to undertake individual measures of investigation. What was said in the *Aslakhanova* judgment was that:

“The procedural obligation in the case of a disappearance will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation ...”

In this passage the Court is relying on the special nature of investigations into disappearances, but later on in that judgment it uses more expansive language to speak of *“the continuing obligation to investigate ... situations of known or presumed deaths of individuals, where there is at least prima facie evidence of State involvement”*. As shown by the cases on continuing unjustified deprivation of liberty, one implication of the notion of a continuing obligation and a continuing violation is that, quite apart from the supervisory review carried out by the Committee of Ministers, after a first “final” judgment in his or her favour the same applicant can return to the Strasbourg Court to file a fresh application in order to obtain a second finding of violation in respect of “new complaints” regarding the ensuing period - as for instance occurred in *Ivantoc and Others v. Moldova and Russia* (decided in 2011), when the arbitrary deprivation of liberty contrary to Article 5 found in the earlier judgment (from 2004) in *Ilascu and Others v. Moldova and Russia* had not been brought to an end despite the direction given to the respondent Governments in that earlier judgment to secure the immediate release of all the applicants still detained.

That an applicant would not be barred from returning to the Strasbourg Court to seek a second finding of a procedural violation of Article 2 or Article 3 after a first such finding would appear to be confirmed by the 2016 judgment of the Grand Chamber in *Jeronowics v. Latvia*. In that judgment the Court found a violation of Article 3 after holding that the obligation to pursue an investigation into a claim of police brutality remained in existence despite a decision in 2009 by the Strasbourg Court striking out the applicant’s initial application on the ground of a unilateral declaration in which the respondent Government had acknowledged a violation of both the substantive and the procedural limbs of Article 3 and had offered financial compensation by way of “final resolution of the case”.

This question of the Court’s competence or not to entertain applications going to facts connected with allegedly defective execution of one of its judgments adds an added layer of complication, outside the purview of today’s topic and of which lack of time prevents any deeper discussion. I mention it as something that can possibly be seen as another instance, somewhat indirect, of judicialisation by the Court of the judgment-execution process and of incursion by the Court into the Committee of Ministers’ supervisory domain.



Coming to general measures, here the Court has on the whole found much less difficulty in giving guidance as to what might be required by way of execution of its judgments. We can see in the case brought against Romania concerning the long-lasting investigation of the violent repression of demonstrations against the Ceausescu régime in December 1989; the Court's judgment (from 2011) prefaced its section on Article 46 with the statement that the violation it had found of the procedural limb of Article 2 had originated in a widespread problem, with several hundred persons being involved as injured parties in the impugned national criminal proceedings. The Court called on the respondent State to attenuate the negative effects of the application of the statutory limitation of criminal liability on the enjoyment by the hundreds of people affected of their right to an effective investigation and to introduce an appropriate remedy for them.

The applicants in the Russian case of *Aslakhanova and Others*, mentioned earlier, were complaining about the forced disappearance of their relatives in Chechnya in the years 2002 to 2004. In its judgment of 2012 the Court found that:

"the situation in the present case must be characterised as resulting from systemic problems at the national level, for which there is no effective domestic remedy. It affects core human rights and requires the prompt implementation of comprehensive and complex measures".

The very lengthy section of the judgment on Article 46 gave considerable general guidance to the respondent State on the kind of measures to be expected from it by way of implementation of the judgment. The details were, however, left to the respondent State and the Committee of Ministers to work out. The Court concluded as follows:

"Given their wide-ranging scope, the nature of the violations concerned and the pressing need to remedy them, it would appear necessary that a comprehensive and time-bound strategy to assess the problems enumerated above ... is prepared by the respondent State without delay and submitted to the Committee of Ministers for the supervision of its implementation."

If I may say so, given the wording of Article 46, this seems to be a wise split between the judicial organ (the Court) exercising its essentially declaratory jurisdiction, on the one hand, and the political entities entrusted with the execution of the judgment (that is, the respondent Government and the Committee of Ministers), on the other. There is a similar more recent Turkish case called *Aydogdu* (decided in 2016) concerning the death of a newborn child in a public hospital where the Court took a similar approach.

That brings to a close our short trip through the case-law. One proviso to be borne in mind is that this case-law should not be read as attributing eternal life to the duty to investigate. It is true that the Court has on occasions stressed that the obligation to investigate may continue, or even arise for the first time, many years after the events *"since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity"* - that is a formula found many times in judgments. The Court has, on the other hand, made the incidental general observation that the continuation of an investigation may have become



impracticable with the passage of time, because of the death or unavailability of witnesses or alleged perpetrators or the loss of other evidence. I am not aware that, as yet, the Court has ever made a specific finding to this effect in a particular case. There is no reason in principle, though, why such a finding should not be made when circumstances so warrant.

In the latter connection, the recent 2015 case of *Bochan v. Ukraine (No. 2)* might provide some inspiration. In *Bochan (No. 2)* the Strasbourg Court found a second, distinct violation of the applicant's right (under Article 6§1) to a fair trial in civil proceedings brought following a first Strasbourg judgment finding unfairness in the first set of proceedings over the same dispute. The Court sometimes indicates in the context of Article 46 that, in principle, a retrial or a reopening of proceedings would constitute an appropriate, or even the most appropriate, means of affording an applicant reparation for violation of Article 6. However, in this second *Bochan* judgment the Court expressly stated that it did not judge it appropriate to examine whether any further consideration of the applicant's property claim at domestic level was feasible. Referring to "the reality" that the applicant had no practical opportunity to remedy the violation at domestic level, the Court instead awarded additional significant financial compensation on that account by way of just satisfaction under Article 41. Is there any reason why, if and when exceptional circumstances so justify, the Court might not adopt a comparable approach in cases of procedural violation of Article 2 or Article 3? Not to be forgotten either is the point that the duty to investigate is not an obligation of result in the sense that it must always result in prosecution or punishment of some individual; it is an obligation of means. This was illustrated by the British Grand Chamber case of *Armani Da Silva* (decided in 2016) about a negligent police operation that had resulted in the killing of an innocent bystander who had been mistakenly taken for a terrorist bomber.

To sum up, as it has been put in the case-law (in the 2012 Turkish case *Nihayet Arici and Others*, for example), the nature and the degree of the examination meeting the standard of an "effective" investigation, including one conducted after and as a follow-up to a Strasbourg judgment, will depend on all the circumstances of the particular case, having regard to the practical realities of investigatory work, and it is not possible to reduce the variety of situations capable of occurring to a simple list of investigatory steps or to other simplified criteria. The circumstances may not be so exceptional that the Court can say in its judgment, as in *Abuyeva and Others v. Russia* (and the 2013 case of *Benzer and Others v. Turkey*), that it is "inevitable" that the investigation should be continued or reopened. The general rule is that it is for the national authorities to assess all the relevant circumstances, including perhaps new circumstances occurring or discovered subsequent to the Strasbourg Court's judgment, in order to decide what measures to take to afford the successful applicant the hitherto lacking benefit of an "effective" investigation in his or her case.

Finally, in the light of the case-law, are there any practical conclusions that can be drawn?

To begin with, if I were the Agent of the respondent Government in a case where the Court has found a procedural violation of Article 2 or Article 3, I would be alert not only to the duty of having to report to the Committee of Ministers under Article 46 but also to the



risk of a fresh application on the basis of a continuing violation (on analogy with *Jeronowicz v. Latvia* and the right-to-liberty cases). Whether or not the judgment contains any specific guidance, indication or even direction to that effect, as Agent of the Government I would assume that the proper execution of the judgment entails that, at the very least, the feasibility of restarting the investigation found to be defective should be examined.

Promptness and expedition is another essential requirement – one which was evidently found both by the Committee of Ministers in the 2001-2003 cases and then, in 2013, by the Court in *McCaughey and Others* to be lacking on the part of the UK authorities in relation to the “legacy inquests” carried out in Northern Ireland in the wake of the Strasbourg judgments concerning killings by the security forces.

Generally speaking, unlike in the Russian Chechen cases, care should be taken by the responsible national authorities that the post-judgment investigatory measures are free of the defects identified by the Court in the judgment in question. The Agent of the Government and his or her colleagues in the responsible national authorities should therefore read the judgment for signals. The Strasbourg Court is not in the business of issuing injunctions as such to the respondent Governments. In those rare instances where there is only one possible way of properly executing the judgment, the Court will feel obliged to give a more or less specific indication to the respondent Government as to the manner of implementation of Article 46; but in all other cases it will go as far as it can with what one might call coded language.

If I were the Agent of the Government, these would be the basic things on my initial check-list after receiving the judgment. I would suspect that they would also be on the check-list of the Execution Department for inclusion in their initial presentation of the case to the respondent Government and the Committee of Ministers.

Coming to the Committee of Ministers’ supervision of the execution of the judgment in the light of the remedial measures taken by the respondent Government, the fact that the responsible national authorities decide at some stage along the line that pursuing any further the investigation or prosecuting perpetrators would not be justified on the merits of the material before them does not necessarily mean the Court’s judgment finding a procedural violation of Article 2 or Article 3 has not been complied with. This is because, as pointed out earlier, what is required, post-judgment, for the investigation to have become “effective” will vary in each case: it will depend on the circumstances, perhaps new circumstances, at the time any such decision is taken as well as on the nature of the finding of violation by the Court and on how the Court has worded any guidance or indications given in relation to Article 46. How much choice in relation to the post-judgment remedial measures, individual and/or general, to be taken in relation to the defective investigatory process has been left to the respondent Government?

This takes us back to the Court itself and to the point whether the drafting of the judgment finding the procedural violation of Article 2 or Article 3 provides clear enough guidance. Maybe, therefore, the message could be discreetly and diplomatically conveyed to the Court that it would help if judgments finding a procedural violation of Article 2 or



Article 3 could, without falling into the trap of being over-prescriptive, say something about the continuation of the duty to investigate in the instant case, including perhaps the nature and degree of any continued examination required; it being understood that, if circumstances so justify, in exceptional circumstances the Court might even go so far as to explicitly indicate either that the investigation should “inevitably” be recommenced and completed in an effective manner or, on the contrary, that, given the passage of time, further investigation would be probably impracticable (on analogy with *Bochan v. Ukraine*).

With a view to building direct bridges with the national courts so as to avoid the political filter of parliamentary or executive debate, it might also help if Strasbourg judgments finding a procedural violation of Article 2 or Article 3 offered, whenever appropriate, pointers – not instructions or injunctions – as to the possible ways in which the national courts could themselves directly ensure implementation, thereby short-circuiting the passage through the government and parliament.

There is one prescription, however, that I believe it would be wise, generally speaking, for the Court, as opposed to the Committee of Ministers, to avoid, and that is to set a fixed time-limit for the taking of remedial measures, whether individual or general. The sorry story of the wait for amended legislation on prisoners’ voting rights in the UK following the pilot judgment in 2011 in *Greens and MT*, where a time-limit was set, is to be compared with the solution adopted in the Russian case of *Aslakhanova*, where the Court did indeed specify that the strategy for remedying the defective investigatory practice condemned in the judgment should be time-bound, but left it to the respondent State and the Committee of Ministers to work out the details of the timing.

Discussion of presentation

Alistair Mowbray: I’d like to say that it was very clear to me from Judge Mahoney’s exposition that the Court very definitely does deliberate, very thoughtfully, about the types of indications it gives in its judgments about possible non-pecuniary measures, and it’s certainly not a whimsical decision. I thought that Judge Mahoney’s elaboration of the stages over those three Russian cases revealed very clearly how the Court was tailoring the indications it was giving in the light of what had happened in response to the earlier judgments.

Ed Bates: I’m just thinking about the short-circuiting that Judge Mahoney mentioned. This made me think about those cases where Strasbourg speaks and then the case comes back round again for a second go perhaps on the procedural deficiencies in the subsequent investigation. In terms of short circuiting, perhaps the best way of dealing with that would be to make sure that the domestic courts have the capacity themselves to find the subsequent violation that Strasbourg found. I’m envisaging a scenario where Strasbourg said there’s a violation of the right to life and the implication is that there’s got to be an effective investigation into that. Under the Human Rights Act, just speaking of the UK, it does occur to me that it would be possible for the domestic court, if there was a defective investigation,



perhaps not an independent and impartial one, to actually challenge that in the domestic arena rather than having to go to Strasbourg afterwards.

Brice Dickson: That's happened already in the Northern Irish cases. There were 2 or 3 decisions in the Belfast courts saying there's been a failure to comply with the judgments.

Ed Bates: I'm wondering if in other jurisdictions it's true in the same way, or is it the view that the first violation is considered an international ruling that the domestic courts are unable to enforce?

Paul Mahoney: Yes, the principle of subsidiarity would argue for the corrective intervention of the national courts at the earliest moment possible – indeed even without waiting for the catalyst of a finding of a violation in Strasbourg. One idea I expressed in the context of finding means for facilitating optimal execution of Strasbourg judgments was for national courts and national judicial authorities (prosecutors) to offer remedial action when they can in relation to a procedural violation of Article 2 or Article 3 that has been found on the international level, on the basis of the continuing character of the duty to investigate under Articles 2 and 3 even after a Strasbourg judgment. That is, ensuring the immediate and adequate execution of the judgment through the judicial branch of government as far as the finding of a procedural breach of Article 2 or Article 3 is concerned.

Ed Bates, if I understand correctly, has in mind the failure to carry out an effective investigation after a Strasbourg judgment and the idea of translating this failure into an illegality in national terms, to be dealt with by the national courts before any second application to Strasbourg as in the Russian cases referred to. This seems to be very similar thinking. In all the Contracting States the Convention is part of domestic law. The Human Rights Act is the way the United Kingdom did it, which is quite a good way. Other countries have done it in other ways. Most national courts have the possibility of invoking Convention case-law as a ground establishing illegality at the national level. In other words the duty to investigate under Articles 2 and 3 of the Convention should be a trigger for immediately reopening a case in the national context.

On this point, although I did not go through what the duty to investigate comprises, one thing not to forget is that the responsible national authorities have to take the initiative under Article 2 or under Article 3. Consequently, the necessary remedial action (to be taken by the national judicial authorities wherever possible) after a Strasbourg finding of a procedural violation of Article 2 or Article 3 does not depend upon an application or a request from the victim or the victim's family; the responsible national authorities are obliged of their own motion to initiate or reopen the hitherto lacking effective investigation, or at the very least to examine the feasibility of initiating or reopening.

Ed Bates: And if they don't, the issue is whether there could be a legal challenge in the domestic framework.

Paul Mahoney: In such circumstances of inaction on the part of the responsible national authorities, the victim or the victim's family should be able to go to the national courts to seek a remedy on their own behalf, yes.



Pavlo Puskar: There is this requirement of judicial review that is taken into account in assessing closure before the Committee of Ministers. The case that was mentioned today, is exactly based on this. It says that the investigation concluded by the authorities was not challenged by the applicants before the prosecutor or the domestic courts. This was one of the reasons for the Committee of Ministers to conclude that it's okay. But I mean, it's a practice that exists, but just to mention that I very much like comparison with the reopening of an investigation. Because I think there are parallels even though the process is not exactly the same. In the Ukrainian context there are these two follow up cases to *Bochan* in criminal proceeding cases which are in the same group, and there is a definite problem there of reopening as well. But that's something we need to tackle through the Committee of Ministers.

Joanna Evans: The Execution of Court Judgments in Russian Cases

As many of you will know, the European Human Rights Advocacy Centre (EHRAC) has litigated a large number of cases at the ECtHR arising out of the Chechen conflict. Those cases relate to violations (committed by Russian military actors) at the gravest end of the spectrum ranging from torture and enforced disappearance to extra judicial killings and aerial bombardment of civilians.

The first judgments in those cases were handed down in 2005 and since that date we have also been focused upon achieving full implementation of the Court's judgments for our applicants. Post judgment, the cases have been grouped together for the purposes of implementation into a group referred to as the *Khashiyev* and *Akayeva* Group and the number of cases within that group still continues to grow.

In light of our experience at EHRAC in respect of these cases, both pre and post judgment, I would like to share some reflections on the comparative roles of the Court and the Committee of Ministers in providing some measure of justice to the applicants in these cases.

I should stress at the outset that I will be talking from my standpoint in this particular role, as a lawyer and an advocate for individuals who have endured terrible suffering and my analysis obviously relates primarily to the interests of and justice for those individuals rather than budgetary constraints, diplomatic concerns or any other competing interests.

So to start with a few positives. First, in all of these cases, findings have been made in favour of the applicants. The very fact that these applications were brought successfully, that the Court recognised the fundamental rights of the applicants in these cases as well as the violations of those rights is in itself is hugely significant. The very last time I met Natalya Estemirova, the human rights activist who, many of you will know, was murdered in 2009, we discussed the issue of why we continue with this litigation when nothing is really changing. She stressed the significance of that very acknowledgement. The fact that people who have been told over and over, year after year, that they have no rights, that they're not civilians with the same standing as others in the country, receive a judgment from an international



court stating that they do have rights after all and that those rights have been violated by the Russian state cannot be overestimated in its significance. Now obviously that is just a starting point but it is nonetheless a phenomenally powerful starting point that is not always accorded the attention it deserves.

Secondly, a further point which it is worth reminding ourselves of, is that the Russian state has paid over damages awards in respect of these cases. For individuals who have been irrevocably damaged by the violations they have suffered and families who have lost breadwinners and are crippled financially as a result, the receipt of such awards have an important practical component in addition to the symbolic value of a damages award against the State. That said, it is worth emphasising the obvious on this point in terms of the inability of a monetary award to compensate for the loss of a child or the horror of watching your family killed and maimed in an aerial bombardment.

Finally, on the positive side before I move on to more substantive difficulties, my view is that there is also success to be acknowledged in the creation of an historical record which the Court's analysis of these cases represent, particularly when they are all viewed altogether. Again, this is something of enormous importance; that people who have suffered violations at the hands of the State (and for whom there has been no possibility of obtaining any answers at the domestic level in respect of the incidents which impacted upon them) are able to look at a text in black and white and see that their story have been recounted. Individuals who have been blocked at every turn within the Russian justice system can see in a judgment from the European Court of Human Rights that their account has been believed and that the actions and inactions of the Russian state have been challenged, forensically analysed and ultimately found wanting. The fact that these findings are and will remain available in the public domain is an important tool in ensuring that the suffering of these individuals and the community as a whole does not go unnoticed by the world community and that history recounts the grave abuses committed by the Russian state within Chechnya. All of these points which I've referred to thus far can be said both to represent a significant measure of justice for the individuals concerned and be seen as an indication that the Court has been doing its job.

Moving on to the post-litigation landscape, here there are fewer positive points to be made. The key challenge we have faced in terms of trying to pursue these cases from judgment onwards is the absence of any effective criminal investigation at the domestic level and the consistent failure by the Russian state to undertake basic investigative steps or to follow the guidance of the Court in order to achieve that end. This includes the failure to provide a clear factual account of events or attribute responsibility to those in command positions even in cases where there is a clear evidential chain available (as in, for example, cases where Russian military aircraft fired missiles on civilians). The result is a culture of impunity which affects not only individual cases, but, as many people have noted, continues to undermine the stability of the region as a whole. It also undermines the Court's authority.

Clearly this is highly relevant for the applicants. Not just in terms of the absence of prosecutions that I've spoken about, but the lack of humanitarian information. This is particularly stark in disappearance cases for instance where, more than a decade on, families



still don't even know if their loved one is dead or alive. Having engaged with the Committee of Ministers for several years with minimal results, we conducted a series of interviews with a number of our applicants in the summer of 2016. We asked applicants their views on what had happened so far in their cases (post judgment) and what their priorities were for the future. Up until that point we had been working on the basis, as I suspect most people would when they look at these historic cases (and indeed the Court did), that all the disappeared individuals must be presumed dead. We were humbled by the fact that the majority of people spoken to believed that their relatives could still be alive. And we have heart-breaking quotes from people such as:

"We envy people who have found and buried their sons. We do not know anything about our sons, their fate is undetermined, hangs in the air. We don't know whether they are dead or alive, if they are hungry or cold."

"If I could find my son and bury him (of course, I would prefer him to be alive), then I would stop suffering. Every night, I dream as if he is calling me, the suffering does not go away. Once you know that a person is dead, you bury him and continue your life, the suffering stops. What causes me pain today is not knowing whether my son is alive or dead. In my heart, I always feel that he needs my help. Crying does not help."

"All we want to know is what happened to our son, but we're prevented from achieving that."

So, in terms of investigation, aside from the criminal prosecution element, we are also talking about basic humanitarian information that allows people to get on with their lives, to have some closure and to at least alleviate one small part of their suffering. In both these regards the progress which can be measured since judgment in these cases is dismal.

Furthermore, there is little evidence of any recognition or sensitivity towards the suffering of the applicants by the domestic authorities. To the contrary, the attitude which most encounter in trying to pursue even the basics of what should be happening within the implementation process is a hostile one. For example, a group of applicants (who are the relatives of disappeared individuals) wrote a letter to their local investigative committee explaining their continued suffering in not knowing what had happened to their relatives and asking for steps to be taken. Two of the lead applicants were summoned to the Investigative committee of that region by a commander who shouted at them: *"You have your compensation, what else do you want from us?!"* Aside from the humiliation and distress this caused the applicants in question, it also shows how there's a double-edged element to the financial redress that is being provided.

So given that the applicants have little prospect of achieving any steps towards effective investigation by engagement with local authorities, the next question is whether they can engage with or rely upon the relevant mechanisms of the Council of Europe to achieve the necessary steps which should have followed from the Court's judgments. At the risk of stating the obvious, our applicants do not follow the workings of the Committee of Ministers (CM). Even if they had the logistical means of doing so, it must be said that the workings of the



Committee would be completely impenetrable to the victims of most of the judgments we are discussing here (as they are even to many specialist lawyers working in this area).

Furthermore, for logistical and security reasons, there is no easy way to have regular and meaningful contact with such a large number of applicants on all of the issues which arise before the CM. In this regard, it is worth noting that submissions from the State are rarely available in sufficient time for civil society to convey those submissions to the applicants they concern, or to provide by means of consultation with the individuals involved a reality check to some of the assertions which are put before the CM by the State (for instance in respect of assertions that victims have been provided with meaningful access to case files). As a result, it is possible to identify numerous instances when information before the CM on key issues and relied upon by delegates is gravely misleading (albeit more often by means of obfuscation and omission rather than outright lies). Even worse, there are instances where the comments of the CM are so removed from the reality on the ground as to call into question its credibility for people on the ground.

As I've mentioned, 12 years have now passed since the first Chechen cases were handed down and another important factor in these cases is that, during that period, time limits for many of the underlying claims have now expired in terms of criminal prosecution within the Russian Federation. In addition, as time moves on, it is increasingly difficult to gather or preserve critical evidence. Finally, family members and in particular, elderly relatives are coming to the end of their lives still not knowing what's happened to their family--their children, their husbands, and other relatives.

Ironically, the Court has been doing its job on this and if you analyse the progression of judgments over time you can see (in the face of often blatant disregard by the Russian state) the Court becoming increasingly robust and far more directive in terms of the actions it expects from the State. But this of course in turn presents a potential problem for the Court. Because, when that increasingly detailed guidance is wholly ignored, it cannot do otherwise than undermine the authority of the Court and its impact. When looking at the output of the Court and the CM over the years I would suggest that an objective bystander could only conclude that the CM has consistently failed to follow through on the Court's approach.

There have nonetheless been small wins along the way in the form of information gathering and limited access for families. For instance, some families have been successful in viewing case files which has made a certain amount of information available to them. But our instructions are that in general those case files are usually so heavily redacted as to make access less than meaningful in most cases. Some applicants have received the remains of their relatives but the circumstances in which that has occurred and the lack of regard for best practice in terms of the handling of those remains is of grave concern.

It must be acknowledged however that these are difficult cases, often referred to as 'intractable'. However, even in light of that challenging context, the record of the CM over more than 12 years is a disappointment. There are certainly a number of structural issues which contribute to this situation: the rotation of diplomats on a regular basis does not assist with the monitoring of these cases which require a strong grasp of very detailed information



and the ability to robustly cut through the repetitious and confusing nature of submissions by the Russian State. Furthermore, there seems to be a wariness of what are often labelled 'political cases' by diplomats, further complicated by the background of constant fear of the withdrawal of Russia from the Council of Europe. Finally, we have been given to believe that even in instances when delegates wish to take robust steps, there is often resistance from the Department for the Execution of Judgments (DEJ) itself, although I know that this is not accepted by those within the DEJ.

This leads directly to my final point and that is the lack of transparency within the process. It simply isn't possible to effectively monitor the monitoring apparatus of the Court while it is cloaked in so much secrecy. Lawyers who represent applicants in these cases, by the nature of their work, are used to open justice and clear legal principles as opposed to the opaque workings of the diplomatic realm. There is a clash of cultures and it seems to me a great shame, when in evaluating the justice which can be offered to an applicant before the European Court of Human Rights, that the achievements of the Court itself are being undermined by the institutional failings of the implementation process. That is certainly not what most applicants, lawyers or members of the public would expect to happen when reading a judgment of the European Court of Human Rights.

Discussion of presentation

Ed Bates: What struck me greatly listening to your account of actual cases was the situation where you as the applicant's lawyer are sure that factual claims that have been made are not correct. How can the applicant, or the applicant's lawyer, challenge such claims in the context of the Committee? What rights of audience or standing does the applicant, or his or her lawyer, have in this process and when can they come in? I understand that after judgment has been given, an action plan will be forthcoming, hopefully from the state within a certain amount of time. Is that when you would come in, after the plan has been prepared?

Joanna Evans: It's actually very difficult. There will be a certain amount of information as to the Committee procedure available on the website, and there's some you can gain by regularly talking to people. Your most formal way of intervening is by a Rule 9 submission, which will then be on the record. Initially we didn't make as much use of that as we should have done, instead trying to speak to people informally. But then a number of people said to us, actually can you put this in writing, and once it's in writing we can use it in meetings. Then we found that some of the things put in writing were quoted, for instance, at the Court and in their judgments, and so that's the most effective way of, on the record, having some information within the process. But it's so late. You get this limited information only a very short time before things are about to happen, and you need to make an oral submission with little time to look at it, and then act upon it. The time available is incredibly small, particularly when you're there, trying to deal with, perhaps, a partner lawyer, or with an applicant, who might be somewhere in Chechnya, in order to feedback on what the Russian



state has been saying, which you think is inaccurate, but you actually need to check in order to get back to them and then go to the Committee of Ministers.

Ed Bates: So there's a barrier to you finding out what is being said before the Committee of Ministers by way of justification for whether or not the proposed action was actually being taken. Is that right?

Joanna Evans: There's certainly a barrier as to what's being said in the meetings. You can see what is on the papers, but that, as I understand it, very rarely reflects what's being said.

Olga Chernishova: If I could just maybe contribute a little bit on what you said. Of course, the result of the execution of the so-called Chechen cases is not questionable, it's pretty clear. It's not that I want to defend the Committee of Ministers, but I think it is one of the worst violations or accumulation of violations of human rights that has happened in Europe, and has been happening for a long time. The political response to that human rights crisis has been quite muffled, if I may say so, especially since the early 2000s, which is after the end of the active phase of the counterterrorist operation. The Committee of Ministers reflects that generally limited reaction. We don't want to talk about the political context and the limits that it puts on effective investigations and, of course, the Court has clearly said it will not accept this in the absence of the other measures that it is prepared to look at. There have been serious violations, and there was been a period, in about 2010, 2011, when the Committee of Ministers was trying to do what you've just said. To bring together expert knowledge of this kind of soft reconciliation of things. There have been meetings with the Russian authorities, organised by the Committee of Ministers in the process of the execution of judgments.

I was, as an expert on the Court's jurisprudence, present in some of those meetings. It was actually quite impressive. There were representatives of the Russian investigative authorities, the Committee of Missing Persons from Bosnia, experts from the Argentine National Commission on the Disappearance of Persons, the Cyprus Commission on Missing Persons, talking about particular ways and measures as to how you investigate, how you identify, how you work with the victims, how you record the information, etc. So you had this space for a dialogue, and it was the Committee of Ministers that provided it in terms of the execution of the judgments. In 2010, and this something that I personally remember from following this case relatively closely, there was a PACE resolution, the June 2010 resolution about the situation in the Northern Caucasus. If you look at the proceedings leading to the adoption of that resolution, it was voted for by the Russian delegation. So there was at that certain moment a political will, and that opening provided a possibility for the Committee of Ministers to also build up some expert discussions, to make these sorts of advances, exchanges, etc. Very difficult now to raise this issue with anybody in Russia. Just to find somebody to talk to about this, to ensure that there are officials that would listen to your questions and answer them.

Pavlo Pushkar: In general in any execution process it takes two persons to dance. I'm not referring exactly to the case Joanna was speaking about, but the process is based on the good will of the state; the whole idea is that the state recognises the obligation to comply



and acts in good faith in the process of complying. That –and again I’m not speaking again about these cases—as a general mechanism, that’s the way it should function. So if you look at HUDOC, this wonderful database, I don’t think the Execution Department or Committee of Ministers has missed anything submitted by the applicants or NGOs. Maybe there has been not enough. Again Article 9 is the tool that should be used. The whole idea of Article 9 submissions is to receive information from the national human rights institutions, from the applicants and from the NGOs to assess the process in parallel. Now there is a new tool as well, international organisations have a possibility to submit rule 9 submissions. The only problem of course with Rule 9 is the problem of timing that you have referred to. Because now these submissions, on the basis of some form of adversarial procedure, are first submitted to the government, and then the government is allowed some time to assess them. And then they are submitted to the Committee of Ministers if they are NGO or international organisation submissions. As for the applicants, there are no such constraints and time limits for the submissions, so I think if you ever want to speak of some problems for a particular case, there is no obstacle.

Kanstantsin Dzehtsiarou: Pavlo said that there should be at least two people to dance. I think that there should be at least 47, members of the Soviet salsa, or tango. Because we have to remember that it’s a joint enterprise, and I’m not defending Russia but as soon as Michael Fallon said we are going to use Article 15 in every future action, Russia today was the first that said, ‘oh, they’re going to use Article 15, we’re also going to use Article 15’, and then shield our forces from any future litigation in the European Court of Human Rights. It’s not going to happen anyway, I think, but we should remember that it’s a joint enterprise where all 47 Member States should participate, and they’re not always participating equally.

Chris Flatt: The point Joanna made about the importance of Court rulings in themselves is really vital to remember. In Northern Ireland the Court judgments have had a really powerful impact. That is constantly being said to me. Also, rule 9 is important. As a recipient of rule 9’s from NGOs we pay very close attention to them. I was in Strasbourg last week, and saw the Committee of Ministers in action. I was observing it as a bureaucrat, rather than as a litigant, and I was actually quite impressed with what happened, because for the 47 states in that environment, a very political environment, to be making the progress they do, as a bureaucrat who assumes things to take years and years and years, the progress I saw in the room I was quietly impressed by. I can see that as a litigant it’s a very different perspective.

Alistair Mowbray: I enjoyed Joanna’s presentation tremendously, it was very informative. One point that occurs to me is that where there are protracted enforcement proceedings, with many deliberations at the execution stage, they must be very burdensome for the representatives and the victims themselves in terms of the cost of actually funding participation. As Joanna was saying, this is an enormously burdensome process if the complainant’s representatives are having to produce documentation and check what’s happening in countries around Europe. One knows that at the stage of litigation, prior to the Court judgment, if you’re successful you can make your claim for just satisfaction of your legal costs at that stage, but I’m not aware of any funding arrangements that allow the



successful victims and their representatives to get funding for work in what appears to be potentially an ongoing, years long process, involving lots of expenditure and lots of work helping at the supervision process. How on earth is this being funded? You can imagine that some cynical states might think 'we'll drag these processes out' because complainants are not going to be able to fund any effective further intervention in these cases.

Pavlo Pushkar: I think normally the judgment has to be complied with even without intervention, ideally, from the Committee of Ministers. So, in a sense, it's a tool of assistance when there are difficulties. Some academics see it as a tool of leverage. I don't think one can see it as another judicial instance that deals with execution from a theoretical point of view. It has some quasi-judicial function, that's true. But I don't think one can attribute to it more functions than the Committee of Ministers already has in the system of supporting the execution process.

Dominic McGoldrick: Can I just ask one last question? Would it be so terrible if, having found substantive or procedural violations of Articles 2 and 3, instead of the very demanding procedural obligations that it's imposing, it was much more accepting of commissions of enquiry, or truth commissions or something? I know the answer of both of our speakers would instinctively be no. But would that actually be more realistic? Lots of states don't like prosecuting their military and culturally won't do it, but they might accept the idea that things did go wrong, and were disproportionate and might look at the matter through such procedures.

Joanna Evans: I'm a big proponent of such procedures generally, but I am not sure what difference it would make. And I think that it's the person that's had the loss that should decide on bring offenders to justice. It's very easy to sit here and say, 'oh the decision is to go down this route'. But if you're not the person whose husband or father has been seized in the middle of the night, it's hard to make that call. And the people that we speak to have their own views on that.

Brice Dickson: We have that in Northern Ireland right now. We've had proposals for a statute of limitations or a form of amnesty. This was put forward by the Defence Committee in the House of Commons. And then a victim's group more aligned with the Unionist community and more aligned with police officers and soldiers said 'absolutely not. We knew it, we knew you were trying to get an amnesty. It's not acceptable. We want prosecutions.' For the individuals involved, the idea of drawing a line was just unacceptable.



Session 4: The Obligation to Investigate Violations of Articles 2 and 3 – II

Chair: Sir Nicolas Bratza, Former President of the European Court of Human Rights

The Execution of Court Judgments in Turkish Cases

Presentation by Ayse Bingol Demir, Legal Officer, Media Legal Defence Initiative

The Execution of Court Judgments in Northern Irish Cases

Presentation by Brice Dickson, Professor, School of Law, Queen's University, Belfast

David Harris: It's my great pleasure to welcome our chair for this session, Sir Nicholas Bratza, former President of the European Court of Human Rights. Sir Nicholas will be chairing the session on Turkish cases and Northern Irish cases.

Sir Nicolas Bratza: I feel very privileged to have been asked to chair this panel discussion on the obligation to investigate violations of Articles 2 and 3 of the European Convention. It is a particular pleasure for me to chair a session relating to the execution of Court judgments in Turkish cases and in Northern Irish cases.

Before being elected as a judge of the Strasbourg Court, I was for five years a member of the European Commission of Human Rights. Two major recurring problems confronted the Commission in those days. The first concerned the treatment of Kurds in the south-eastern part of Turkey, where allegations of the utmost gravity concerning torture, extrajudicial killings, enforced disappearances and destruction of villages became a major part of the Commission's diet of cases. The second concerned the violent deaths in Northern Ireland dating back to the 1970s, in which there were frequent allegations of collusion on the part of the police and security forces.

I had a direct involvement in both series of cases, taking part in fact finding missions in Ankara, and in the south east cities of Diyarbakir and Cizre, in over 50 cases and acting as the UK member of the European Commission and subsequently as the national judge in the Court.

While the facts and circumstances in the applications against the two countries were very different, they shared a common feature, relating to the adequacy of the investigation carried out at national level. In cases against Turkey, while it was often possible to conclude that the State was responsible for acts of torture or ill-treatment, it was frequently difficult to establish to the required standard of proof whether the police or security forces had been responsible for a killing or for the enforced disappearance of an individual. But in



nearly every case it was possible for the Commission, and later for the Court, to find that the investigation at national level into the death or disappearance or ill-treatment had been woefully inadequate and failed to comply with the procedural obligation under Article 2 of the Convention, the essential purpose of which is, as the Court has said, to secure the effective implementation of the domestic laws protecting the rights guaranteed and to ensure the accountability of those responsible.

The same is true in the Northern Irish cases, the Commission and subsequently the Strasbourg Court concluding, in a long line of cases, that there was a lack of independence in the police investigation, a lack of effective public scrutiny of decisions not to prosecute any police officer and serious shortcomings in the inquest procedures which were not effective, transparent, prompt or conducted with reasonable expedition.

My role in these cases ended with the Commission's Report or the Court's judgment and did not extend to the execution of the judgments. And it is this that will be the principal focus of this session of the workshop.

The two panel members present to discuss these issues could not be better qualified to do so, Ayse Bingol Demir is a legal officer at Media Legal Defence Initiative. She is a lawyer specialising in international human rights law and in domestic law and procedures in Turkey. Holding a Masters' degree in Human Rights Law at Queen Mary University, she practised law in Istanbul between 2003 and 2017 and was particularly involved in cases concerning violations of fundamental rights and freedoms. In 2016 she was given, with three other Turkish lawyers, the Human Rights Award of the Council of Bars and Law Societies of Europe.

Brice Dickson is Professor of Law at Queen's University of Belfast. His own recent research work has focused on two overarching themes: the development of international human rights law and the application of human rights principles by national supreme courts. He has written extensively on both themes, including a monograph on the European Convention on Human Rights and the Conflict in Northern Ireland. His latest monograph is a detailed study of Human Rights and the United Kingdom Supreme Court, which examines the attitude of current Supreme Court Justices to procedural aspects of the Human Rights Act and to each of the Convention rights guaranteed by that Act.

Ayse Bingol Demir: The Execution of Court Judgments in Turkish Cases

As a legal practitioner from Turkey who has been practicing there for a long time and personally and professionally having witnessed first hand human rights violations it is difficult for me to talk about the case of Turkey. But I will try to do my best as this event is a great opportunity for exchange of views on a highly important matter.

Turkey is an interesting example with regard to its relationship with external human rights mechanisms and instruments. It is a member state of the Council of Europe and a



state party to the European Convention on Human Rights and a number of other regional and international instruments, including the ICCPR. Because of that, Turkey has been under close scrutiny of human rights monitoring mechanisms. But that doesn't mean that Turkey has been a very good example of countries which comply with their human rights obligations. With regard to the European Court of Human Rights and the former Commission, there has been sustained litigation concerning Turkey, and a number of cases at Strasbourg leading to a substantial body of case-law concerning Turkey.

When we analyse the European Court's and the former Commission's decisions about Turkey, we can easily understand that when there is a political crisis in a country, the human rights situation may worsen. But when there exists a normalised situation, political stability and a peaceful environment, human rights obligations are likely to be complied with more. In Turkey there have been several political crises negatively affecting the human rights situation. During the 1980s, following the 12 September 1980 coup, for instance, there was a period of martial law over the country lasting for almost a decade. After that, there was the effect of worsening armed conflict between the PKK and Turkish security forces which was used as a reason for replacing the martial law with a state of emergency in the south-east Kurdish region. In the early 90s, Turkey submitted a notice of derogation to the Council of Europe, stating that because of the conflict, it derogated from several human rights obligations under the European Convention on Human Rights. The state of emergency lasted throughout 1990s. In the early 2000s, the intensity of the conflict between the PKK and the Turkish state decreased, there were peace talks between the parties, the PKK declared several cease-fires, the Government changed, and the EU membership process became a priority for the country. This led the country to go through substantial legislative changes, including but not limited to reform of the penal code, the criminal procedure code, anti-terrorism laws, civil law and trade law. There were also a number of structural changes in the judiciary, executive and parliament. All these areas where change was undertaken were identified with the help of the European Court judgments. The Court, in its extensive Turkish case-law, identified problematic areas in the country's legislation and practice resulting in violation of human rights. It can be said that the Court's case-law was a guiding light for the reforms that occurred.

Looking at what the European Court cases against Turkey were actually about, a great number of them were addressing serious and systemic violations of human rights by the state organs. As stated by one of the former Court judges, the cases concerning systematic and serious human rights violations during the 1990s, that is to say the cases concerning torture, disappearances, forced eviction of villages, prolonged police custody and pre-trial detention, and extraordinary penal court practices, were cases of a sort that the Court and the former Commission were seeing for the first time. Those cases were mostly related to Article 2, 3, 6, and Article 13. There was no effective remedy at the domestic level that the survivors of the violations could have exhausted. There were penal laws in place, offences prescribed, sentences set, and prosecutors and courts in position, but, for a number of reasons, including the state and state agents involvements in the crimes, there was no investigation and prosecution. There was also no prospect of obtaining compensation for people. This was because of fear of reprisals, and knowing that there



would be no effective investigation concerning the crimes committed, most people would not apply to the prosecutors or courts. Indeed there were examples of people applying to the courts being re-arrested, tortured and killed. This was the same for the applicants to the European Court as well: there were instances where the applicants were faced with similar reprisals because of their applications to the Court.

It was in these extraordinary circumstances that two inter-state applications, which have not often been seen in the European Court's history, were brought before the former Commission and the Court. The first case was an inter-state application made to the former Commission by France, Norway, Denmark, Sweden and Netherlands against Turkey in 1983. It concerned systemic torture practices after the September 1980 military coup. A number of people were killed, seriously injured and disappeared during this period. There were several reports from international NGOs confirming the facts. Following an admissibility decision from the Commission, the case was closed in 1985 with a friendly settlement. In the admissibility decision, the Commission acknowledged that there was a systemically applied state policy of torture contrary to Article 3 of the Convention. The friendly settlement reached in this case was a kind of breaking point for the military rule. Turkey guaranteed the taking of several steps to prevent and to investigate torture in the future. It also ratified the UN and Council of Europe torture conventions. Thus there were more grounds for the public to force the military to hand over the governance of the country to an elected government.

The second inter-state case against Turkey was *Denmark vs Turkey*, filed in 1997, which concerned the torture of an applicant having both Turkish and Danish citizenship. The applicant in the case, who had visited Turkey to attend a funeral, was arrested for his alleged connection with the PKK and tortured in police custody. Denmark brought an inter-state case arguing the existence of an administrative state practice of torture. The case resulted in a friendly settlement reached between Turkey and Denmark. According to the friendly settlement an action plan was adopted to combat torture, and relevant enabling practices. The steps identified to combat torture included training police officers, judges and prosecutors, receiving assistance from the Danish government for the training, and changing the penal code to properly define the act of torture and bringing torture legislation in line with international human rights standards.

Apart from these two inter-state cases, which had an almost immediate effect internally followed by at least partial execution, there were other cases that could be mentioned in relation to implementation. The well-known *Aksoy* case, for instance, was the first case in which a form of ill treatment shown to have occurred in a case brought to the Court was identified by it as torture. This ruling was a significant one in international human rights law as it contributed in the development of the case-law of the Court in Article 3 cases. The *Aydin* case concerned the torture of a woman in custody: in this case for the first time the Court found that rape amounted to an act of torture. The *Akkoc* case also concerned torture inflicted on a woman in custody, consisting of severe physical ill-treatment and threats concerning her children, leading to long term psychological distress. These three judgments are just a few examples from a number of cases clearly illustrating



that torture was a widely and systemically used state practice in Turkey seriously violating Articles 2 and 3 of the Convention. Cases such as *Cakici* show that the disappearance of opponents of the state was prevalent too.

What happened domestically after these cases were filed and judgments were delivered, that is whether Turkey executed these judgments, is an important question to ask. It is important to note that the three torture cases I have mentioned are still under enhanced supervision by the Committee of Ministers of the Council of Europe. The relevant groups of cases can be named as the *Erdogan and Others* Group, the *Bati and others* Group and the *Aksoy* Group. There have been a number of resolutions adopted by the Committee of Ministers inviting Turkey to execute the judgments in these groups of cases. The measures requested to be taken are not just related to the individual cases. They address more general structural problems enabling violations. Legislative changes for instance are defined by the Committee of Ministers in the resolutions. In the early 2000s there were a number of legislative changes in the country, and when we analyse them we can easily link them with the case law of the Court and resolutions adopted by the Committee of Ministers in relation to the executions of judgment.

With regard to torture, for instance, one of the major obstacle preventing criminal investigations was the requirement to receive the permission of the executive authorities to investigate. Prosecutors had to obtain this permission first to be able to start an investigation against a public official. In most cases, this permission was not granted. In some cases, there were instances where the permission request would be kept pending for years. At that time statute of limitations period was very short, and the aim of the delay was to time bar the investigations. This law was changed in line with the Court's judgments. For offences amounting to torture or killing, the permission request process was abolished.

To take another example, the maximum time for police custody was reduced to four days in normal times, again in line with the Court's case-law. During the state of emergency of 1990s, it was up to 30 days. This reduction was a very important development as shortening the custody term decreases the possibility of torture. Protection from torture also becomes possible if the arrested person or detainee can have access to a lawyer and/or a doctor. Legislation limiting this access was also amended in line with international standards.

There were also a number of constitutional amendments made as well. For example, by an amendment made in 2004 a paragraph was added to Article 90 of the Constitution by which international human rights obligations were given priority over domestic law. This amendment gave a very important tool to lawyers who could argue before the domestic judicial bodies that Article 90 obliged them to apply international obligations in cases of conflict with domestic legislation.

Another important result of the European Court judgments has been the providing of the Constitutional Court with an additional important role. The principle of subsidiarity requires the states' judicial authorities to consider human rights violation allegations directly. In Turkey, the domestic courts did not take up that role properly, in a way leaving



the European Court as almost the only venue for the consideration of human rights cases. Because of that, in 2012 a new remedy was introduced by which the Constitutional Court may hear applications brought by individuals. The Constitutional Court decides cases resulting from such individual applications mostly in light of the case law of the European Court. When it finds a violation of the human rights of an applicant, it is most likely that the case will not be heard by the European Court as the domestic law would be seen as recognising and remedying the violations.

The facts I have mentioned so far mostly address the execution of judgments in relation to general structural problems. The journey of individual cases is also worth mentioning. Have new investigations been carried out or cases re-opened when the Court delivered its judgments on violations? This has not been the most successful outcome of the judgments unfortunately. A few examples can be given here. *Benzer and others v Turkey* was a very serious case. In 1994, the Turkish military carried out an air strike targeting two villages in the Kurdish region that resulted in 38 deaths, a number of persons wounded and property damage. Although this was a case in which 38 civilians were killed, the criminal investigations carried out domestically led nowhere. According to the investigating authorities, it was a PKK attack despite the fact that PKK does not have planes. In 2013, the European Court decided that there were violations of Articles 2 and 3. The Court also asked Turkey to carry out an effective investigation in relation to the incidents under Article 46 of the Convention. But, despite the European Court decision, the military prosecutor decided to close the file in 2014 on the ground that it was time barred. The applicants' lawyer applied to the Constitutional Court. It is likely that if the Constitutional Court is of the view that the case was time barred, the case will go before the European Court for the second time.

In another case, a domestic court acquitted two suspects who were military officials being accused of killing Nezir Tekci, a civilian, during a military operation. The trial was concluded in 2015, after the European Court judgment delivered its judgment in 2013. In the case of Hrant Dink, concerning the killing of an Armenian journalist in 2007, the European Court found a violation of Article 2 of the Convention and several other rights in 2010. Follow up investigations on the case are still on going today.

The re-opening of cases domestically after European Court judgments became possible because of Article 311 of the Criminal Procedural Code, which was adopted in 2004. Accordingly, if there is a decision from the European Court in a case finding a violation and creating a sufficient basis for a retrial, that case can be reopened. After this law came into force, there were quite a few numbers of cases re-opened but their final outcomes have not been in accordance with the European Court judgments. There exists a pattern of practice in Turkey showing that, even after the European Court finds violations in cases, the domestic judicial authorities do not properly execute the judgments; they close the cases on different grounds or keep them pending for a prolonged time.

On the question of compensation, Turkey has always complies with Court judgments, except in a very few cases. But when the case is related to and addresses the political context, or structural problems and involves a direct violation by the state and its



agents, implementation of European Court judgments is always problematic. Even when there is a legislative change following the judgments on the matter concerned, execution and implementation of the legislation in practice remains problematic.

Despite the negative facts I have just indicated, the European Court judgments have always had an effect on the functioning of the judicial system. The courts domestically often appear to address the European Court's standards in their judgments. Lawyers always rely on the European Court's judgments in their submissions concerning rights and freedoms of their clients, and ask the domestic courts to apply these principles and judgments. There is a possibility that the courts will be influenced by them. For instance, in the case of Engin Ceber the domestic courts widely referred the European Court case-law and practice with regard to torture and deaths in detention. The case concerned the torture and killing of a young political activist who was arrested and detained for a protest in which he took part in 2008. It was a significant case because there had been a number of prison officers, including high-ranking officers, who were sentenced to life imprisonment. Because of the exceptional efforts of lawyers participated in the proceedings for the victim's family, the evidence was secured and the domestic court could not avoid finding the state agents guilty. Applying several principles that the European Court had adopted, the domestic court properly implemented the law and convicted those responsible with the necessary sentence. To give another example, in the Ugur Kantar case, concerning the torture and killing of a conscript who was serving his military service in Cyprus, the military officers were found guilty and sentenced to life imprisonment. Although this judgment is not final yet, it is important as showing the impact of the European Court judgments in practice in the domestic courts. But it is also important to underline the fact that these cases are very few and impunity concerning offences committed by state officials remains a persisting problem in the country.

It must be noted that all of the comments I have made with regard to the execution of European Court judgments and the question of implementation were made in relation to the situation before 2015. Since 2015, the country has been going through a serious political crisis negatively affecting fundamental rights and freedoms. Around mid-2015, the peace process between the PKK and Turkey collapsed, and armed conflict re-emerged in the Kurdish region. In contrast with the 1990s, the conflict did not take place in the mountains or around the villages this time. It was in the cities, provinces having thousands of inhabitants. The conflict has resulted in the forced displacement of thousands of people, killings and serious wounding of civilians and destruction of properties, as was the case in the 1990s. The security operations carried out included measures such as curfews lasting round-the-clock introduced by the state. The lack of judicial remedies has resulted in a number of monitoring mechanisms adopting heavily critical reports against Turkey.

The Government has made several legislative changes during this period of conflict reversing the positive changes made in early 2000s. For example, the requirement of permission of an administrative authority to investigate crimes committed by the state security forces during anti-terrorism operations has been brought back. At the moment, if someone is killed or tortured during a security operation, the prosecutors have to obtain an



administrative permission to be able to start an investigation. And the permission is not given in most of the cases.

The European Court has been involved in cases resulting from the curfew practices. A number of such cases were submitted to the European Court. The most significant group concerned hundreds of people trapped in basements in the Cizre district, some of whom were wounded and needed medical care. Because of the curfew and the heavy arms fire used against people by the security forces, people were not able to leave the basements and nobody was able to access them from outside. The European Court initially issued interim measures decisions under Rule 39 asking Turkey to allow the wounded to leave the basements and receive medical treatment. Turkey complied with only one of these decisions. All of the other applicants were killed during the final operations carried out by the state security forces. The real number of deaths in the basements is not known as the basements were completely destroyed and the bodies of the persons trapped in them were burned leaving no chance of identification. But it is argued that there were hundreds.

Similar to the 1990s, there existed no effective investigation or remedy for people who were affected by curfew practices, especially for those who were killed during the security operations, trapped and killed in the basements. It would therefore be fair to say that, from certain aspects, what happened during the curfews between mid-2015 and mid-2016 was more serious than what happened in 1990s. We, human rights lawyers and activists, shockingly witnessed that we were not that equipped to develop urgent and effective strategies against such major violations and that it was very easy to go backwards in relation to state policies on human rights.

Finally, as another reason for the recent human rights crisis, I want to talk briefly about the situation after the coup attempt which took place on 15 July 2016. The coup attempt led the government to declare a state of emergency in the whole country. It has been in place for more than one year and is still continuing, although no legitimate ground exists for its continuance. Turkey has submitted notices of derogation to the Council of Europe and the UN, stating that it derogated from its obligations under the European Convention and the ICCPR because of the coup attempt. What has happened after declaration of the state of emergency is that the Government has started to adopt state of emergency decree laws bypassing the parliament's power to legislate. The Government has become both the legislative and executive power in the country since the declaration of the state of emergency in July 2016. The Government has adopted more than 20 decree laws. The decree laws are not just about situations relating to the coup attempt which was made the basis for the state of emergency, but about anything. The Government amended the criminal procedure code, the penal code, the civil code, and other legislation through decree laws. Thousands of people have been arrested, detained, investigated and tried for terrorism related offences including academics, lawyers, politicians, and journalists. More than 100,000 public servants have been dismissed from their offices. The situation is so serious that one quarter of judges and prosecutors have been dismissed during the state of emergency. Thousands of them are in prison at the moment. Almost all opposition media outlets, NGOs, universities, companies have been closed. Their activities were stopped. The



current situation is a situation where the rule of law and human rights do not exist in the country anymore.

Therefore what I discussed about the execution of the European Court judgments in the beginning of my presentation is not applicable to the current situation. But these judgments are and will be important tools for the human rights community in setting the standards that need to be complied with and to pursue the country's normalisation again.

Brice Dickson: The Execution of Court Judgments in Northern Irish Cases

I will start by going over the factual context of the Northern Irish cases in which the Committee of Ministers has been called upon to consider the investigation obligation in Articles 2 and 3. Then I will give an overview of the way in which the Committee of Ministers has, quite successfully, been able to oversee a series of relevant cases from Northern Ireland. Finally, I will look briefly at where we are at the moment in dealing with these issues and then at what the up-and-coming challenges might be.

So, first of all, the context. The conflict in Northern Ireland led to about 3,400 people being killed, though that is one of the more conservative estimates; the figure could be 3,600 or 3,700. By any calculation, a lot of people died. The groups responsible for the killings were (a) republican paramilitaries, roughly 59%, (b) loyalist paramilitaries, roughly 29%, and (c) British security forces, including the police in Northern Ireland, roughly 10%. A few killings are un-attributable. The Good Friday Agreement of April 1998 brought an end to most of the violence in Northern Ireland by producing a power-sharing arrangement between unionists and nationalists and by adopting a human rights approach to the governance of Northern Ireland. The agreement coincided with the UK Human Rights Act being enacted for the whole of the UK in the same year, which was a happy coincidence.

But the Agreement did not put a complete end to the violence. Since 1998, something like 150 people have been killed in conflict-related incidents in Northern Ireland, including the 29 who died in the bomb explosion in Omagh in August 1998, just four months after the Good Friday Agreement was reached. We are talking in this workshop about Article 3 as well as Article 2 issues, so the figure for injuries in Northern Ireland is also relevant. Roughly 47,500 people were injured during the troubles. I do not know how many of them are still alive, but if you look at the article by Marie Breen Smyth which I have cited on my slides you will see that the needs of the survivors are still very significant.

A subset of the injured, and sometimes the dead, are the victims of so-called 'punishment attacks'. These have been carried out by both republican and loyalist paramilitaries from the 1970s onwards. Over 6,000 have been recorded, and the astonishing thing is that approximately half of that number have occurred since the Good Friday Agreement. In fact, in the immediate aftermath of the Agreement there was a hike in number of the punishment attacks. Such attacks are predominantly on young men because of their alleged anti-social behaviour. They are an attempt by the paramilitaries to control their areas. Even today the rate of such incidents is going up: in 2016-17 there were 28



shootings, usually in knees or elbows. The figure was 25% higher than in the previous year. The number of beatings was also higher. They can be just as serious as shootings, as they often lead to long-lasting injuries. There have been very few prosecutions in relation to these shootings and beatings. There are sometimes suggestions that the police are not doing all that they should to investigate these cases and bring files to the Public Prosecution Service. At times this is allegedly because the perpetrators involved are important community representatives who are otherwise contributing significantly to the overall peacefulness of Northern Ireland by exerting their influence over other hard-line factions.

I should declare an interest at this point in that in a non-academic capacity I am an independent member of the Northern Ireland Policing Board, which holds the police to account in Northern Ireland. The Board has nine independent members and ten political representatives. At the moment it is not fully functioning because the political representatives from the Assembly are not sitting as the Assembly has been suspended since March 2017. But after sitting on the Board for the past five years, I can see that there are lots of questions which need to be asked of the police on an ongoing basis as to how they are dealing with this kind of incident.

The Good Friday Agreement was very successful, but it left out of account some issues such as policing reform, criminal justice reform, and dealing with stockpiles of weapons. However policing reform and criminal justice reform took place within two or three years of the Agreement. For example, the former Royal Ulster Constabulary became the Police Service of Northern Ireland (PSNI) in 2001. A huge amount has been achieved since 1998, but I will finish this first section by saying that one of the big on-going challenges is how to deal with the past more generally so that it does not continue to infect the present and poison the future. So much for context.

As to the work of the Committee of Ministers, the *McKerr* Group of cases, as they are now known, is a group that comes back to the Committee of Ministers regularly for new consideration. There are eight cases, which began with the 2001 decision of the European Court in *McKerr v UK*, along with *Shanaghan, Jordan and Kelly*. Those four cases were added to by four subsequent cases. All together the cases involve 17 deaths which occurred between 1982 and 1998. They are so-called 'shoot to kill' cases, where the police in Northern Ireland allegedly ambushed members of illegal paramilitary organisations and killed them rather than arrest them - the kind of *McCann* situation which we are familiar with from the killings in Gibraltar in March 1988. But they involved other sorts of cases as well. The *Finucane* is one of the most infamous, involving a solicitor in 1989 who acted mainly for nationalist clients. He was murdered by a loyalist group and it was alleged that, although the killing was committed by illegal paramilitaries, state forces were in some way involved too; there was some kind of collusion between the loyalists and state forces and there is a suggestion that the killing could have been avoided had the authorities intervened to protect Mr Finucane.

I liked very much Olga Chernishova's description of the *McKerr* cases yesterday as comparable to an additional protocol to the European Convention, because the judgments in those cases did set out quite systematically the sorts of features which a proper



investigation has to have in order to comply with Article 2. There has to be a completely *independent* investigation, both at a structural level and a practical level. It has to be an *effective* investigation, that is, one which is capable of having people brought before the courts and punished if found guilty. The investigation has to be *expeditious*, there has to be an element of *public scrutiny*, and there must be *involvement of the next-of-kin*. Those are the main five features of the *McKerr* 'protocol'.

I think I am right in saying that to date the European Court has never found a violation of the substantive right to life against the UK in relation to State use of force in Northern Ireland; in other words, there has never been a decision that the force used was disproportionate. But there have been findings that the operation was not properly planned and controlled, as in *McCann* for example, and there have been lots of findings that the investigation was not in compliance with the procedural requirements of Article 2.

One of the cases which is not part of the *McKerr* Group but is important in this context is *Brecknell v UK*, in 2007, where there was a finding by the European Court that the investigation of Mr Becknell's death, another killing by loyalists with the alleged involvement of security agents, was not thoroughly independent because it started off being conducted by the Royal Ulster Constabulary before being taken over by the reformed Police Service of Northern Ireland. The decision was that the investigation by the RUC did not meet the independence requirement, as laid down in *McKerr* etc, but that when the Police Service of Northern Ireland took it over in 2001, even though the Service was composed of people who were previously members of the RUC, the investigation became independent. It is a case which is often cited by the current PSNI Chief Constable. I have sat at Policing Board meetings where he has said that his legal advisers tell him that the PSNI is a completely independent organisation from the RUC and therefore can conduct investigations into pre-2001 incidents. The human rights advisor to the Board and the Board itself take a different view. They think that the PSNI is not a sufficiently independent organisation for that purpose.

The *McKerr* Group of cases have come before the Committee of Ministers on many occasions. The Committee has issued three interim resolutions - in 2005, 2007, and 2009. 2005 was the occasion when the range of issues to be looked at by the Committee was settled, and the Committee welcomed the government's agreement to implement the Court's judgments. The Committee noted that a special team had been set up within the PSNI - the Serious Crime Review Team - to examine more than 2,000 unresolved killings, that is, killings for which nobody had yet been brought before the courts, including *McKerr*, *Shanaghan* and *Kelly*. The *Jordan* case was not included at that time because there still had to be an inquest into that death.

The 2005 resolution also noted that in relation to *Finucane* there had been a separate set of investigations conducted by a British police officer (John Stevens). As a result of his reports, 59 people were reported or charged. One person was convicted of conspiracy to murder victims other than Mr Finucane, but in incidents involving the same loyalists who were responsible for Mr Finucane's murder. As well, one individual, Ken Barrett, was convicted of the actual murder of Mr Finucane. He benefited, as did many other prisoners,



from the Good Friday Agreement's provision that the period a person has to serve in jail for a 'troubles' related murder is now just two years. Hundreds of prisoners were released just after the Good Friday Agreement, many of whom had already served more than two years. Under the Good Friday Agreement provision, anyone convicted today of a 'troubles'-related killing has to serve only two years, unless the person was a member of the State security forces and the killing occurred prior to 1973, when the Emergency Provisions Act came into force and special courts were set up: in such cases the sentence imposed on the State security force member may be longer. As you will know, some of the investigations which are ongoing relate to killings from the early 1970s. In Bloody Sunday for example, which happened in 1972, 14 civilians were killed by the British Army in Londonderry/Derry. There are currently files with the Public Prosecution Service of Northern Ireland on which a decision will soon be taken as to whether to prosecute former British soldiers for what they did on that day more than 45 years ago. If there are convictions, the soldiers will not benefit from the two-year provision and are likely to be sentenced to much longer terms. In Northern Ireland, as elsewhere in the United Kingdom, murder carries a mandatory life sentence, but the court has discretion to stipulate the minimum time which the convicted person must serve (the 'tariff'). He or she can be released thereafter provided that the Parole Commissioners do not believe that he or she would be a danger to the public.

In its interim resolution of 2007 the Committee of Ministers noted that the Serious Crime Review Team set up by the PSNI in 2003 had been replaced by another unit called the Historical Enquiries Team (HET). This was welcomed by the Committee, even though the unit was not so much an investigative unit as a review body. Its function was to look at unresolved killings, to review the investigations that had already taken place, and to work out whether there were further lines of inquiry which needed to be followed up and which might lead to the prosecution of suspects. I know of at least four cases reviewed by the HET which did lead to the prosecution and conviction of people for murders committed prior to 1998. They were all paramilitary killings and the people who were convicted had to serve two years in jail as a result.

In 2007 the Committee closed its examination of a number of issues that had been raised in the *McKerr* set of cases, such as the issue of public scrutiny of the investigations, the involvement of next-of-kin, the need for the Director of Public Prosecutions to give reasons for not prosecuting suspects, and the need for there to be police officers from outside Northern Ireland conducting the investigations. Those issues were signed off by the Committee of Ministers as having been dealt with. But the Committee expressed regret that progress had been limited as regards individual measures relating to the *McKerr* cases. There are still 12 killings falling within the *McKerr* cases in relation to which there has still not been an Article 2 compliant investigation.

In 2009 the Committee looked again at the work of the HET and was satisfied that it was operating properly. It therefore closed its examination of that aspect of the *McKerr* Group of cases. It was also satisfied with the work of the Police Ombudsman - an office that was set up in 2001 to conduct completely independent investigations of all complaints against the police. The investigators are people who have never been serving police officers



in Northern Ireland. The Committee said that the HET had the structural capacity to allow it to finalise its work, but it repeated its wish that-- in fact it strongly 'urged' (which is about as tough as the Committee gets in its language)-- the British state to complete the investigations into *McKerr*, *Shanaghan*, *Jordan* and *Kelly*. It closed its examination in relation to the *McShane* and *Finucane* cases, although with regard to the *Finucane* case it encouraged the British government to involve itself in discussions concerning the terms of a public inquiry into the case. This was because, even though somebody had already been convicted of the murder, suspicion remained that there were British agents involved who could have prevented the murder.

Since 2009 I think it is fair to say that the Committee's focus on the remaining cases has been reduced. They have been very briefly considered once or twice a year. They were meant to have been examined in June 2017, but this did not happen because the meeting coincided with the British general election. But as we heard yesterday it eventually happened last week (September 2017) and I will come back to that in a minute.

Let me just sum up where things had got to by last week in terms of the reforms that had been presented to the Committee for its approval. Firstly, there was a set of reforms dealing with inquests. Those of you who are not from these islands, or from a Commonwealth jurisdiction, may not even know what an inquest is. Basically, it is an inquiry into how somebody died, but it does not establish either civil or criminal liability. Inquests are a longstanding tradition in the common law system, but under the European Convention inquests are not themselves enough to satisfy Article 2, or even necessary at all as there are other forms of investigation that can lead to the possible identification of people suspected of involvement in the death. But, given that England, Wales and Northern Ireland do have inquests (Scotland has comparable 'fatal accident inquiries'), they must not be allowed to breach Article 2 - they must not introduce a lack of independence, for example. Anyway, a lot of reforms have taken place relating to inquests. For instance, suspects can now be compelled to testify at an inquest, though of course they can refuse to answer questions if they think that doing so might be self-incriminating.

Also, the police have accepted that they must disclose all the information they have to the Coroner (the person who conducts the inquest, sometimes with a jury). And witness statements made by witnesses must be exchanged prior to the inquest to allow the other participants in the inquest to examine them and consider what questions to ask about them. The scope of inquests has also been broadened to enable them to look not just at how somebody died, but in what circumstances they died. This enables the inquest to consider the broader context, such as alleged collusive activity by State security forces. Legal aid is now available for inquests, but only in exceptional cases. Some of those reforms are UK-wide, but others are specific to Northern Ireland because inquests are a 'devolved' matter. A new Coroners Service was set up there in 2006, and the presidency of it was recently transferred to the Lord Chief Justice.

There have been a range of other reforms not to do with inquests. Under the Police Act 1996 the PSNI are now permitted to request police officers from elsewhere in the UK to investigate killings in Northern Ireland. That has already been done and still occurs today.



The HET, which was charged with looking at 3,268 killings, managed to complete a review of 2,051 of them. In 2013 a report was issued by Her Majesty's Inspectorate of Constabulary showing that the HET was breaching Article 2 in the way that it was handling cases where British soldiers were allegedly involved in the killings. It was not dealing with them in the same way as it was dealing with paramilitary killings: it was giving preferential treatment to suspected soldiers in the way it interviewed them. The result was that the HET was dissolved at the end of 2014, and all remaining cases, something like 1,118, were transferred back to the PSNI itself, into what is called its Legacy Investigations Branch (LIB). Since 2015 it has been the LIB that has been dealing with these 'historic' cases. The Police Ombudsman's office also has the power to deal with historical complaints against the police going back to the 1970s. If the Public Prosecution Service decides not to initiate a prosecution in a case where the killing seems to have been brought about by State security forces, it now publishes its reasons for that decision and the decision can be judicially reviewed in the traditional fashion.

The law relating to public interest immunity has been altered so that information must now be disclosed unless the State can convince the court that disclosure would be contrary to national security interests. As regards information provided for inquests, the Coroner gets to see everything, but if the government or the police claim that particular details which the Coroner has received should not be disclosed at the inquest they can apply for those details to be clothed with public interest immunity and kept secret. If this is challenged in an application for judicial review it will be a judge who makes the final decision on whether the information should be disclosed or not. The usual argument made by the State for not disclosing information is that disclosing it may itself breach Article 2 because the information was supplied by informants. In Northern Ireland, if you are an informant who betrays a paramilitary organisation you are very likely to be on a death list: the IRA in particular had a policy of killing informants. Loyalist paramilitaries were not quite as systematic, but were still brutal.

That completes the story of where we had got to by last week, when the Committee of Ministers last met. As time has gone on, the Committee has had to take more of a back seat. It is now merely an onlooker as regards the broader issue of how to deal with the past in Northern Ireland. In saying this I do not intend any disrespect, it is simply that the focus has moved to the bigger question of how we should deal with the past more generally. Yes, Article 2 has not always been complied with, but are there other steps that could be taken, while not upsetting the peace process in Northern Ireland and prompting further violence to occur?

Finally, the up and coming challenges. One of the remaining challenges is how to deal with the number of inquests from the past which are still incomplete. By the end of 2017 there will be approximately 45 legacy inquests still due to be held. Each one could take months and cost a lot of money. There is also a sizeable backlog of investigations into more than 1,000 deaths resting with the PSNI's Legacy Investigations Branch. The Police Ombudsman has still to investigate alleged misconduct by police officers in about 400



historic cases. There are issues yet to be resolved concerning the breadth of information which requires to be protected under the heading of 'national security'.

Unfortunately, none of the 2014 Stormont House Agreement [which adds to the Good Friday Agreement] has yet been implemented in this field. A crucial part of that Agreement was that an Historical Investigations Unit (HIU) should be established, which in effect would be a completely separate investigative police force in Northern Ireland. It would take over the investigations currently residing with the PSNI's Legacy Investigations Branch cases as well as the Police Ombudsman's cases. It would employ investigators who had never served as police officers in Northern Ireland. This would mean that the PSNI and the Police Ombudsman could get on with policing the present and not have to waste resources on the past.

The British government has issued a position paper and a plan for implementing the 2014 Agreement but for entirely separate reasons the Assembly in Northern Ireland has since been suspended (since March 2017) and the two largest parties, *Sinn Féin and the Democratic Unionist Party*, have been unable to reach an agreement that would allow the Assembly to be re-established. The dispute has centred on whether the Irish language should be given better protection in Northern Ireland, a matter which has never before been a deal-breaker in Northern Ireland.

On top of those remaining challenges, the Bloody Sunday cases are still being looked at by the Public Prosecution Service and there are over 200 cases of so called 'on the runs' still being examined. These are people who benefited from a scheme set up secretly by the Labour Government in 2005 to allow republican paramilitaries, who, fearing arrest and prosecution, had fled Northern Ireland, to apply for a certificate which would permit them to return to Northern Ireland with impunity. There was a huge kerfuffle in 2014 when an individual who had received one of these certificates, John Downey, was later arrested and prosecuted in London. His trial was soon abandoned because the judge thought it would be an abuse of process to go ahead with it. Downey should never have been given one of the certificates because he was in fact still wanted by the police in England. All of the other on-the-run cases are now being re-examined by the PSNI. Some of the individuals who received certificates may still have to face arrest and prosecution if further evidence against them comes to light.

On top of all of this, an attempt has recently been made to re-open the interstate case of *Ireland v UK* (1978), because it has been discovered that at the very moment when the British government was arguing that there was no torture in Northern Ireland and the European Court was holding that there was 'only' inhuman and degrading treatment, there were memos circulating within government in London referring to what was happening in Northern Ireland as torture, and some evidence that the government knew that the five interrogation techniques in question could indeed have long-term effects. [Note: on 20 March 2018 the European Court of Human Rights decided *not* to re-open the case, but the judge from Ireland dissented. An application is now being made to have the matter examined by the Grand Chamber.]



In my slides I have given you a list of recent court decisions in Northern Ireland which are relevant to the duty to investigate under Article 2. I am not going to go through all of them but I just wanted to alert you to the fact that in Belfast there is a huge amount of judicial activity going on as regards dealing with the past. The activity includes cases dealing with *Jordan*, *Finucane*, and *McCaughey*, all part of the *McKerr* group. So, for example, in the *Jordan* case there has been a long inquest, completed in 2016. The judge who was acting as the Coroner came to a very courageous decision, namely that he could not be sure where the truth lay: there was so much conflicting evidence that he could not say whether or not disproportionate force had been used in the killing of Mr Jordan. That decision has not satisfied members of Mr Jordan's family, so they are judicially reviewing the decision. They are also bringing civil proceedings for compensation, which have been delayed because of the ongoing challenge to the inquest. The family are trying to appeal to the Supreme Court to have their civil claim upheld. By 2014 the *Jordan* case had already involved 24 High Court judicial reviews, 14 visits to the Court of Appeal, 2 visits to the House of Lords, and one visit to the European Court of Human Rights.

The *Finucane* case, which was signed off by the Committee of Ministers in 2009, is still alive in Northern Ireland. In the early 2000s the Labour Government promised the Finucane family that there would be a public inquiry into alleged State collusion in Mr Finucane's death, but when the Conservative/Liberal-Democrat Government came to power in 2010 they refused to hold a public inquiry and established instead an independent review of the case. The *De Silva* review, when published, disclosed that there were still further questions to be answered in relation to the killing. In July 2017 the family was granted permission to appeal to the Supreme Court to challenge the Court of Appeal's decision that they had no legal right to the public inquiry which was originally promised.

Another of the recent court decisions, in the *Gribben* case, involved the *McCaughey* killing - Sally Gribben is the sister of Martin McCaughey. She is also trying to appeal to the Supreme Court because she is unhappy with the findings of the inquest in 2012, where the jury held that there had been no disproportionate use of force in her brother's death. The family want the Supreme Court to rule that the inquest should have heard evidence that some of the soldiers involved in the case had also been involved in other so-called 'shoot to kill' cases, which perhaps casts some doubt on the credibility of their statements relating to Mr McCaughey's murder. We are waiting to hear whether the Supreme Court will look at the case.

Other cases listed in my slide, such as *Re Deery's Inquest* and *Re Watt's Inquest*, were about killings in the early 1970s. In both of them the judges held that the force used by the State was disproportionate, in effect a breach of Article 2. In the most recent case, *Barnard*, in July 2017, the judge held that the Legacy Investigations Branch is not sufficiently independent for the purposes of Article 2 to allow investigations to take place. Another judge had come to the same conclusion in a case called *McQuillan*.

Last week, when the Committee of Ministers met, it welcomed the information supplied by the British the government. It also heard from two NGOs in Northern Ireland. It then said that progress on individual issues, like the investigation of the *Jordan* killing, was



very much tied to whether the more general measures on dealing with the past were being implemented. The Committee sent a signal that the *Finucane* case would be reopened, or at least the Committee would consider reopening it, once the Supreme Court has heard the appeal. But they expressed deep concern that the HIU had not been established and that the legacy inquest system had not yet been properly reformed. They will review everything in 2018. Chris Flatt, who is here from the Northern Ireland Office, a department of the British Government, can perhaps explain more fully what occurred at last week's meeting.

I want, by way of conclusion, to finish by raising a few more general questions. I think the European Court and the Committee of Ministers have contributed significantly to the protection of Article 2 rights in Northern Ireland. But there comes a point when their contribution will diminish over time, and we may already have passed that point. We are witnessing some High Court judges in Northern Ireland referring with approval to statements made by the Committee of Ministers on the UK's 'package of measures', accepting the Committee's view on whether Article 2 has been complied with or not. So, although the Committee's decisions are not technically binding, they are very influential on courts. I agree with what Judge Mahoney was saying yesterday, that national courts have a lot to contribute to the implementation of the European Court's judgments and the Committee's findings in these sorts of cases. At the same time, national judges have to work within the context of their own legal systems. There may be local political sensitivities which make the Committee of Ministers' views less important than in other situations.

Is there something special about Northern Ireland which makes it more difficult for the Committee to address the problems? I think that the short answer is yes, because the issue of how to deal with the past in Northern Ireland is so much more than a legal problem. There might be a case for saying that the past could be dealt with by providing for some kind of amnesty or by setting up a truth and reconciliation commission. There is a case for saying that legacy inquests should be abolished altogether because they are not necessary. The Lord Chief Justice of Northern Ireland, in the *Jordan* case in 2014, suggested that all the remaining legacy inquests could perhaps be dealt with together in a single public inquiry along the lines of a recent inquiry into historic institutional child abuse in Northern Ireland. All of this relates to Article 2 but in fact there are many victims out there who are still suffering from their injuries or their grief, so Article 3 issues arise too. Are we going to demand the same level of investigation in those cases as we have in relation to the actual killings? If so, we could well be meeting here again in 10 years' time having exactly the same discussion.

Discussion of presentations

Sir Nicholas Bratza: I'd like to give the floor to Chris Flatt who is Deputy Director of the Northern Ireland Office of the UK Government.

Chris Flatt: Just to say, Brice, that as a UK Government official tasked with sorting them out, I can confirm the complexities of the situation in Northern Ireland which your presentation has clearly shown. I just wanted to respond to a couple of things you said. First of all, on the



Finucane case, which is now before the Supreme Court, pressing that a public inquiry be ordered. You were saying about the *alleged* collusion on the back of the *De Silva* report. It is important to mention that the Government came out and said there was collusion [between police officers/soldiers and the loyalists responsible for the killing] and the Prime Minister apologised for it.

I'm obliged to say this on the 'on the run' letters whenever they come up. They were just letters confirming whether or not the police wanted someone, they were not supposed to have another value. The case that collapsed was one where the police issued a letter in error, which *was* relied on in that case, and that was the reason for the case collapsing. Interestingly, in Bloody Sunday cases, the Director of Public Prosecutions has said today that, as well as the soldiers is looking at prosecuting, he's also considering prosecuting two Official IRA members in relation to events on Bloody Sunday. So the issue in Bloody Sunday cases about what would happen about cases pre-1973, actually relates not only to soldiers but also to paramilitaries, and, because they're historical investigations we're looking at, we'll look at cases from 1968. The issue of how you would give fair treatment to people convicted of offences in that period of 68-73 so that they weren't treated differently to people convicted in cases post 73 is something that is actually worth considering.

I also wanted to say that we are trying to set up new institutions to address the past. Olga mentioned yesterday about the difficulties that are in the background. She talked about practical, legal, and political issues. We face all of those, and I'd expand political to include societal as well. Because what we are looking at in Northern Ireland is to do something that addresses the Article 2 issues, but does so in the wider context of the societal situation. So, as Brice said, a number of deaths were a direct result of force by the state. There were also a whole series of cases of alleged collusion. But, however you cut it, the majority of cases were not the result of force by the state.

Politically and societally it's very difficult for us to say that we will investigate cases involving the state and not investigate the other cases, which is why the Historical Investigations Unit [HIU] was set up to look at all unresolved deaths. But that immediately increases the volume of what we're doing. So as the need to deal with one set of cases leads to the need to deal with others, the problem becomes larger. We must also face the issue that it is really important in the peace process that we transferred responsibility for police and justice matters to the Northern Ireland Executive, which was a huge step forwards in the peace process. Policing and criminal justice is no longer the responsibility of the UK government, so we have much less control over how these actions are actually resolved. It's sort of a constant issue that we are talking about in the Committee of Ministers, in that, yes, as the state we are responsible for this, but the decision has been taken by the state to transfer this responsibility to a devolved form of government, which as Brice said, has been unable to form itself since the beginning of the year. So we're in this difficult political context.

We do have legal issues as well and we are having this push for amnesties, particularly from some members of the UK Parliament, as opposed to persons in Northern Ireland. To say that an amnesty for everyone in Northern Ireland would be a better way of dealing with



what happened is not a view that is widely supported in Northern Ireland, but it is there in the background. And then we have the practical issues, and this is where some of the points about what's required for Article 2 compliance come in as to how we structure the institutions. So the independence point comes down to the question where do we find all of the investigators to investigate these cases. If we say they can't include people with a policing background in Northern Ireland, we face a massive difficulty because it involves bringing in hundreds of investigators from England, Wales, and Scotland, which is not easy to do unless you set up an office in London, which is not the best way to investigate cases in Northern Ireland. So we're looking to find ways that we can recruit people locally to deal with some cases, but making sure that we recruit people from elsewhere to avoid conflict of interest. But this is very sensitive with the political parties. Some parties say that you shouldn't have people with a policing background, others say you must have people with a policing background.

There's then the question of effectiveness. We were having an interesting discussion here yesterday as to whether it's possible to investigate these cases. There is a strong feeling from some people that if a case involves the state then you have to treat it as if it was a state case being investigated in the way that cases are investigated now. But there is a question of whether actually you could take a more proportionate approach to investigating something, testing whether an investigation in the past was effective, but not trying to repeat everything that you would do now, in a case relating to 1973, because doing fingertip searches and going to ask for witnesses for something that happened in 1973 is just not going to lead anywhere. Particularly as if you're going to do it for state cases you then have to do it for all the other cases as well.

Now, actually it won't be down to the UK government how investigations are conducted, because the idea is that the Director of the Historical Investigations Unit will be fully independent, but decisions that the Director takes will have a huge impact, and there are practical limits to what can be achieved. If you investigate all of the 1500 cases that the Unit will have in its remit, following a maximalist approach, then it really conflicts with the Article 2 obligation in terms of timeliness, which is to achieve this in something like five to seven years. You have a real clash if you investigate in a way that means you can't also complete timely investigations.

The last challenge that we're facing is the issue of next of kin. And this is what caused us really to fail to get an agreement by the end of 2015, the giving of information to families. What we have committed to do as the UK government is to give everything to the HIU. So we say that we will commit in legislation to the Historical Investigations Unit getting full access to any information, including national security information. But we have said, for the reasons Brice set out, that after the HIU has investigated and considered prosecutions, and after any prosecutions have been completed, the HIU will then write a report to the family, but it should not include in that report information that would put national security at risk. Families, particularly families of these relatives that have died as a result of security force action, are very suspicious of the UK government's motives, and believe that we will use this as a method to remove information that is embarrassing. We have said we won't,



but how do you convince someone of your motivations? We've established that there will be an appeals process, so that if the Director said they want to release this information, but the UK Government said no, there'd be an appeal to the High Court. Now we've been arguing about the detail of that for some time, whether there is a clash with the information required to go to the next of kin to meet Article 2 compliance.

Now we have gotten quite far with this. We have drafted the legislation. We want, as the next step, to launch a public consultation. We have said that we've been waiting for the NI Executive to be formed before we set this up, and I would hope that the Executive will be formed next month. But the Secretary of State has indicated recently that we cannot keep waiting because victims have already waited too long for the public consultation. So we are hopeful that we will be able to get the consultation launched soon and, following that, introduce legislation, and the legislation will lead to the establishment of the HIU. I think that's where I come back to the societal context. We want to deal with the Article 2 issues, but there's a wider issue about trying to get Northern Ireland as a society to be better reconciled with its past. And it's quite possible that the five-year period of re-investigating old cases could lead to quite a lot of anger, distress, upset, which during that period might not look like reconciliation. But it feels that we have to get through this phase of exposing and revealing and coming to terms with what happened if we can, before, as a society, Northern Ireland can address the past. And I talk there about society because I think it's very important that we do not put this burden on individuals as each individual reacts differently. Some people will have been reconciled with what's happened, but for some what comes up from the investigations will not match their ideas, we talked about this yesterday; some people have their own ideas of what happened. So an investigation may not match those ideas, which may not be nice, and they won't have got what they hoped from the investigation. And for some people you may tell them what happened but they won't accept it. So you can't expect or require people to be reconciled, but we do want to try and find a way to help society as a whole to better come to terms with the past. But we've been trying this for a long time, so we will keep at it.

Ed Bates: Just a couple of comments if I may. The first comment is about the first paper. The Article 15 derogation recently in respect of Turkey was very worrying. Indeed, the situation there makes me think of the inter-state cases, which you mentioned earlier in your presentation. This is a matter, I think, that classically under the Convention should be the responsibility of the states to address, this type of serious human rights crisis in Turkey. I would suggest this just as a comment. Whether that would happen politically is doubtful. The second comment I would make is in relation to the second paper. One of many points that struck me when listening to it, was what a difficult position it must place the Execution Department in, just to try to grasp for themselves the nature of what's being done on the ground in Northern Ireland. How reliant I assume you must be on information coming from national sources. I can only assume it's a great challenge to feel sufficiently informed in these matters to be able to draft your documentation.

Pavlo Pushkar: Generally there is a very good exchange of information with the authorities, and there is a lot of infill from the NGOs as well and from applicants. If you look at the



HUDOC site there is an enormous amount of information. For some cases we receive written submissions from NGOs, and altogether there's a lot of information available.

Chris Flatt: I would recall what we were saying yesterday about the value of Rule 9 contributions. They are a testament to the work of established and effective NGOs.

Murray Hunt: If I could just ask Professor Dickson to express an opinion, what's your overall impression of how the case law from the European Court of Human Rights has been implemented at a domestic level in Northern Ireland over the years? Are you happy with the outcomes you've achieved now or do you still think there's a lot more work to do?

Brice Dickson: Well I wrote a book about that! Somewhere in the book I said, the European Court has contributed a great deal, but it had done so a bit late in the day. (*inaudible*) after the ceasefires in 1994. Certainly *Brogan* and other cases have been influential. The interstate case was very important, undoubtedly it contributed very significantly, but it's almost gotten to the stage now where the problems we face with the past are too difficult for the European Court and the Committee of Ministers.

Chris Flatt: Article 2 is referred to in every conversation I have with the victims' community in Northern Ireland. Language around human rights is entirely embedded in the debate as a result of the European Court's action. *McKerr* is referred to constantly. Some of the direct effect is less now less, but it has seeped into every part of the way we deal with the past in Northern Ireland.

Murray Hunt: What Chris was just saying is very interesting. I've got a quick question for Brice, which is to what extent is the Assembly engaged with these issues in the Article 2 framework? There is obviously engagement with the issue, but has the debate in the Assembly been framed by Article 2 and the implementation questions raised by the judgments?

Brice Dickson: There hasn't really been much debate in the Assembly because we haven't had an Assembly since February, and even before that. There have been debates on particular issues, but not more generally on Article 2 and dealing with the past.

Ayse Bingol Demir: I do agree that the curfews of 2015 in Turkey and the current situation are most serious cases of systemic and grave violations that have taken place in a member state of the Council of Europe. Council of Europe states are under obligation to take steps in such circumstances. There are several ways that they could do that. Inter-state applications are one of them for instance, as when in the early 1980s a group of states litigated against the post-coup September 1980 situation in Turkey, or in late 1990s when Denmark lodged a case against Turkey on systemic problem of torture in custody. But this hasn't been considered in the current situation. There have been discussions of the matter, but I think that the Council as an institution does not welcome that possibility. There is believed to be a risk that an inter-state application might have further implications for relationships with the country and for politics. But what I need to say is that the situation in Turkey now is well documented by the Office of the UN Human Rights Commissioner, the Venice Commission, and the CoE Human Rights Commissioner. There are a number of people who have been



affected by these systemic violations who are citizens of Germany and other CoE countries. Maybe that will lead to further legal action concerning the current situation in the future.

In relation to the curfew practices, the European Court has communicated 34 applications to the Government. The CoE Commissioner for Human Rights intervened in them. For the current situation in relation to the on-going state of emergency, there have been thousands of applications to Strasbourg, but the only ones communicated by the Court so far are the ones which related to detained journalists and politicians. All other cases, unfortunately, have been found inadmissible by the Court on the ground that domestic remedies were not exhausted. The remedies referred by the Court are not just the general remedies such as those in the administrative courts and the Constitutional Court. The Council of Europe bodies has negotiated with Turkey on the problem of failure to provide remedies to the persons whose rights have been violated by the state of emergency measures. The Venice Commission highlighted this in one of its report. Turkey then agreed to establish a State of Emergency Measures Inquiry Commission. The Court has requested that the applicants exhaust this remedy. But, from my perspective, because of the on-going situation in Turkey, it should not be expected that the Commission or the judicial institutions will function normally. There have been thousands of dismissals, arrests and detentions from the judiciary, including judges and prosecutors. Under these circumstances, it is hard to expect the judges and prosecutors to act without fear of reprisal. The Court needs to recognise that fact. In its earlier interpretation of similar situations, as in *Akdivar and Others v Turkey*, the Court did that. But it is a fact that the Court is very firm on the Article 35 domestic remedies condition. At the moment the Court seems to be an avenue open to the applicants in relation to some Article 5 related cases concerning the state of emergency but, apart from that, people are pushed back to ineffective domestic remedies. It should, however, be taken into account that this practice of inadmissibility by the Court means for the applicants that there actually exists no judicial avenue for them both domestically and internationally. Which is not a desirable picture.



Session 5: Panel: Improving Compliance: The Way Forward

Chair: David Harris, Professor Emeritus and Co-Director, Human Rights Law Centre, University of Nottingham

Panel Members:

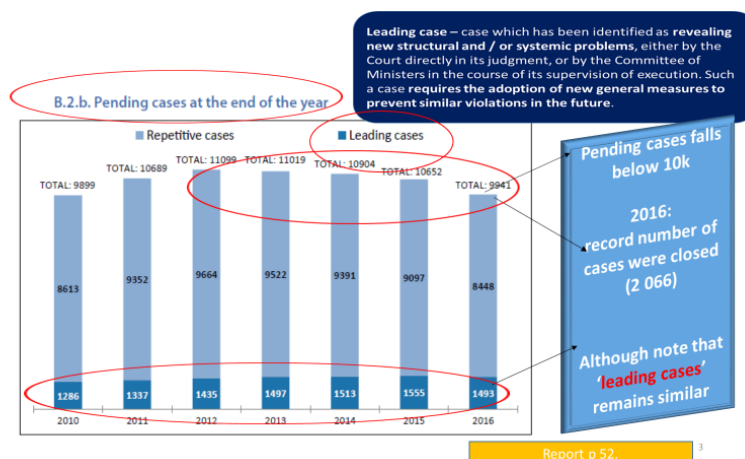
Ed Bates, Associate Professor, School of Law, University of Leicester

Kanstantsin Dzehtsiarou, Senior Lecturer in Law, University of Liverpool

Murray Hunt, Director of the Bingham Centre for the Rule of Law, British Institute for International and Comparative Law; formerly Legal Adviser, Joint Committee on Human Rights, UK Parliament

Ed Bates: My presentation is entitled 'An Outsider's View on Implementation of Judgments of the European Court of Human Rights.' My presentation will be based on slides that I have prepared. This first slide refers to the *2016 Annual Report of the Committee of Ministers on the Supervision of the Execution of Judgments*, available online. The graphs that follow all derive from that Report, a very extensive document, and I've added some of my own highlights and comments to the individual slides.

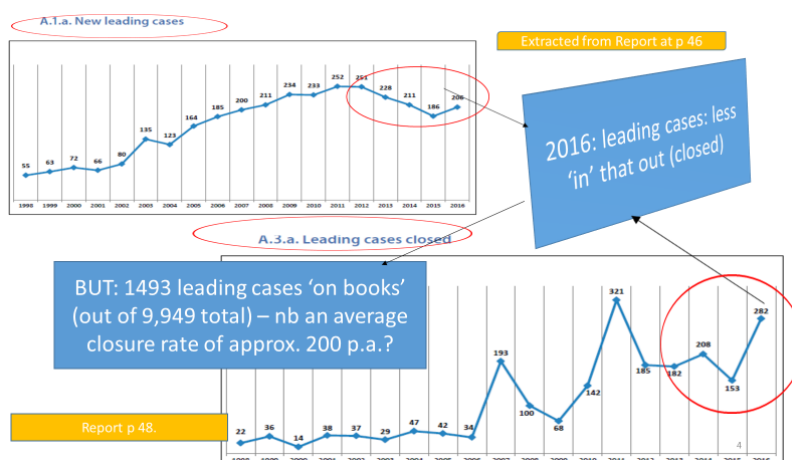
So, reflections on the 2016 Annual Report. What I want to consider are the following three matters: grounds for optimism, based on the Report; grounds for serious concern; and, finally, challenges, even a crisis, for the system of execution generally.



The first slide [slide 3] has a graph of pending cases at the end of the year that has been extracted from the Report. The figures reveal good news, with grounds for optimism. We note that the number of pending cases has dropped; and that a number of such cases were closed for the relevant year. So this is positive. But if we look at the bottom of the graph,

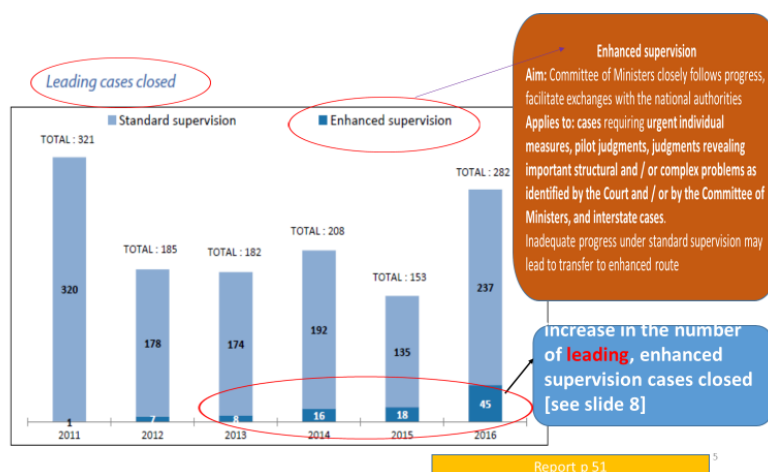


the number of leading cases overall (for the meaning of leading cases, see the slide) remains around the same I would say, hovering around 1500.



The next slide [slide 4] again is positive. In the top left-hand corner of the slide is a graph of new leading cases, cases coming into the system over the period 1998 to 2016. It's to be compared to the bottom part of the graph which is a graph of leading cases which were closed, and there's positive news here too. In essence we're seeing that, in terms of leading cases, less came in than were closed in the relevant year, which is positive. It shows that there's an average closure rate of 200 per annum. But, as I mentioned, there's 1500 leading cases still on the books so the speak.

Thinking about the closure rate, if when I was a student I heard that the Convention system was closing 200 cases per annum that would be astounding. And it is very impressive, certainly a sign that the system is working. It is of course to be seen in the context of the overall picture, which starts to raise concerns about the magnitude of the task.



The numbers of leading cases closed within the overall annual number figure of 200 are leading cases under enhanced supervision (the definition for which is on the slide). And again, we see a positive sign here too. 45, that's now the 2016 figure, leading cases under enhanced supervision that were closed in 2016. That is a rise on previous years, as we can see. By the way, looking at the dark blue part of the chart at the bottom, we note that we

are here identifying *leading* enhanced supervision cases; so this is not addressing all enhanced supervision cases. I'll come back to that in a minute.

Positives... and challenges

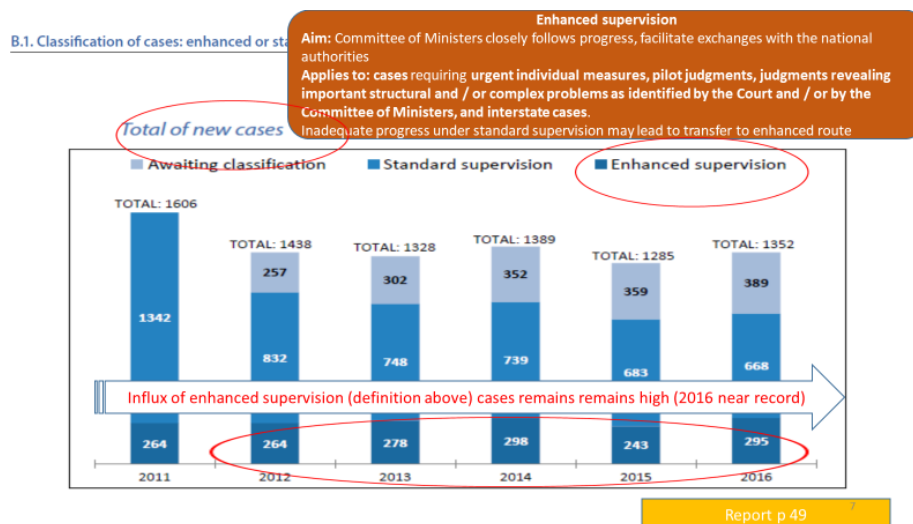
- Introduction to Report: "2016 statistics continue to confirm ... positive trends ... and suggest that a number of long-standing and highly complex problems are on the way to being resolved and that the execution of the judgments of the European Court of Human Rights is today functioning well in the large majority of cases"
- Report lists some 250 examples of legal reforms secured (or close to) since around 2010: illustrations that the convention system can work.
- However, Report also refers to 'challenges' (p 14) – will come back to this (slide 14)
- Now some figures pointing to the challenges [noting, of course, that the sheer number itself is a challenge]

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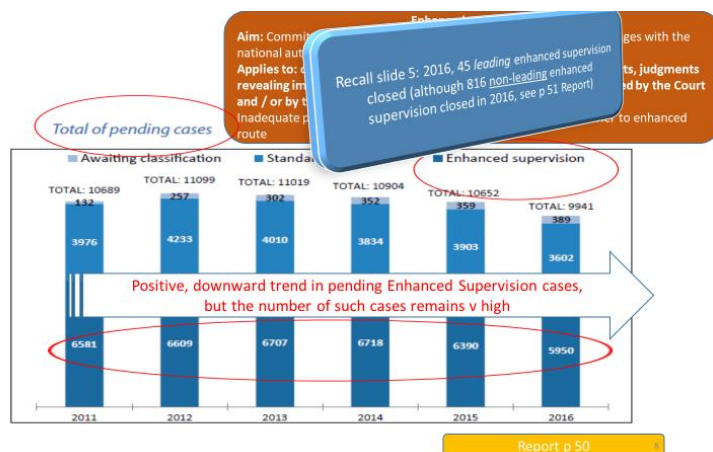
The introduction to the 2016 Report above includes this quotation:

"2016 continued to confirm positive trends and suggest that a number of long standing and highly complex problems are on the way to being resolved and that the execution, Strasbourg is today functioning well in the large majority of cases".

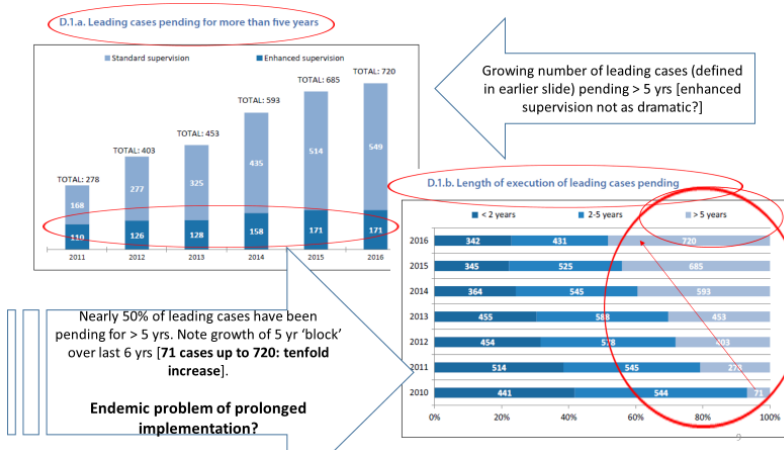
And I think that we can see that backed up. The Report also lists in its early part some 250 examples of legal reforms secured, or close to being secured, since 2010, evidence that the system is indeed working, and can work.



However, the Report also refers to challenges on page 14, and I'll come back to that towards the end of my presentation. But we may note some figures pointing to the extent of the challenges, noting of course that the sheer number is a challenge. So we come to enhanced supervision cases on page 49 of the Report, in particular a graph for 2011-2016, addressing new cases under enhanced supervision. I've added the arrow you can see going across to make the point that the influx of such new enhanced supervision cases remains high, and at a fairly constant rate.



Looking to the total number of pending cases overall, we may look closely again at cases of enhanced supervision, for which the numbers remain high, around 6000 or so in 2016. And this is where I go back to that previous slide where I indicated that 45 *leading* enhanced supervision cases were closed in 2016. So this is the larger number - 800 or so - *non-leading* enhanced supervision cases for 2016, if I've got that correctly from my understanding of it.



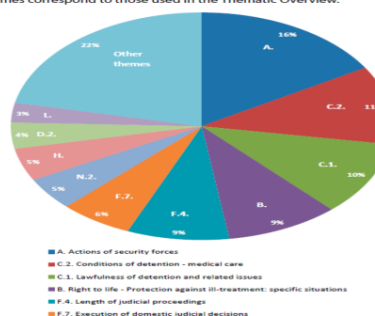
For our next slide, the top left-hand part is identifying leading cases pending for more than five years. So now we are talking about leading cases, and these are broken down by categories of standard supervision and enhanced supervision-- my point here being that there is a growing number of leading cases pending for more than five years, albeit the enhanced supervision ones haven't gone up so much. As to the bottom half of the slide, we see here that nearly 50% of leading cases have been pending for more than five years. Here what is striking is the light blue section and what the red arrow indicates, i.e. the growth of the '5 yrs' 'block' over the last 6 yrs [71 cases up to 720: a tenfold increase].



C.1. Main themes under enhanced supervision

(based on leading cases)

The presentation below relates to the main themes under enhanced supervision. The themes correspond to those used in the Thematic Overview.



5950 enhanced supervision cases pending

Main themes raise concern too

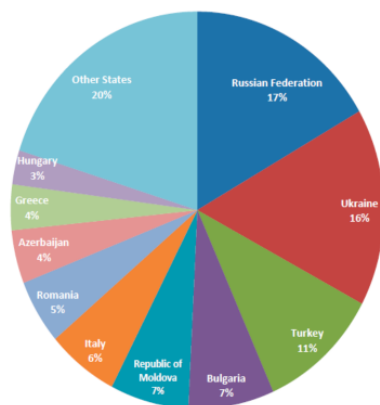
- 16% actions of security forces
- 10% conditions of detention – medical care
- 10% lawfulness of detention/ related
 - 9% right to life
- 9% length of judicial proceedings
- 6% execution of domestic judicial decisions

The Convention and the 'rule of law'?

Lastly we have a couple of slides on the types of cases that are relevant here, so we have the main themes on enhanced supervision, a pie chart, and on the right-hand side I've added enhanced supervision cases and the main areas they concern. In this respect the Report is a fantastic resource, breaking down the cases to be seen here. I've highlighted two areas in red: 16% of cases concern action of security forces, 10% concerning lawfulness of detention and also the right to life (9%). I am wondering what these and the other figures may indicate about the rule of law in some Convention States, and the health of the rule of law across the Convention space overall.

C.2. Main States with cases under enhanced supervision

(based on leading cases)



Report p 64

5950 enhanced supervision cases pending

Main States under Enhanced Supervision

- 17% - Russia
- 16% - Ukraine
- 11% - Turkey
- 7% - Bulgaria
- 7% Moldova
- 6% - Italy

[top 3 states = 44%]

[these 6 states = 64%]

The next slide identifies the main states subject to enhanced supervision cases by percentage. Of course the figures correspond largely to the cases going to Strasbourg in the first place, and we should keep in mind here that some states are considerably bigger than others, so there will be a larger population in respect of them, etc.



Other signs for concern: ECHR and ‘the rule of law’

Particular States with long ‘average implementation’ times

Transfers from one supervision procedure to another (p 64, extract)

Transfers to enhanced supervision: ‘In 2016, 18 cases concerning 4 States (Bulgaria, Georgia, Romania, Turkey), were transferred **from standard to enhanced supervision**. In 2015, 6 cases concerning 3 States (Albania, Hungary and Turkey) had been transferred from standard to enhanced supervision’. [There were transfers the other way too: 24 cases concerning 3 States (Greece, Ireland, Turkey)].

‘Reminder Letters’ (p 65, extract)

‘In 2016, 69 reminder letters (56 in 2015) have been addressed to 27 States concerning 93 cases (103 in 2015). For 76 of these cases (90 in 2015), an action plan/report has been sent to the CM before the end of the year’. [i.e. **17 when no Action Plan/ Report sent in that timescale**]

Just satisfaction payment within deadline (p 10, extract)

‘... decrease in the payment of just satisfaction within the deadlines (the percentage has gone from 71 % in 2015 to 65 % in 2016)’. [**third of payments not w/i deadline?**]

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There is a very helpful guide within the Report on the average length of implementation time of particular states. There are some states, such as, I think I’m right in saying, Russia, when the average implementation time is really starting to stand out compared to other states.

Other signs of concern from an outsider’s perspective are transfers to enhanced supervision. In 2016, 18 cases from all states were transferred from standard supervision, which I understand to be a relatively hands-off approach that allows the national authorities to get on with matters subject to Committee of Ministers’ monitoring. But if standard supervision is not working these cases can be upgraded/transferred to enhanced supervision. There were examples of transferrals in 2016, which suggests evidence of problems at the standard supervision level. I also note from the Report that reminder letters were sent in the number of the cases identified on the slide. To explain this: as I understand it, within six months of a judgment the state is required to produce an Action Plan, and the failure to do so will require or prompt the Department to send a reminder letter, ‘where’s your action plan?’ The numbers indicate that not a small number of letters were sent. I’m wondering what that says about the nature of the commitment of some of the respondent states. I may be wrong, and there may be other explanations for these numbers.

As to payment of just satisfaction, the Report refers to the decrease in payment of just satisfaction within the set deadline. This is something that is presumably within the control of the state. It’s a bit of a concern to see that the percentages of prompt payment have changed in this way. It appears to be that a third of payments are not within the deadline.

So, is there a broader problem to be found in the state of implementation of judgments across the Council of Europe? Are there grounds for optimism or pessimism? As I was pointing out with the first slide, clearly there are grounds for optimism; the relevant statistics there show that that system can function effectively. The grounds for pessimism come with some of the points I’ve made later. Moreover, if we go back to the Committee of Ministers’ 2016 Report, it itself refers to ‘challenges’ to the supervision process. These challenges are linked to a number of areas of concern identified in the 2016 Report, as follows:



Reflections – ‘challenges’ (2016 Annual Report p 13, extract)



“... The challenges presented by the processes presently under supervision by the Committee of Ministers are notably linked to:

►► Important and complex structural problems causing difficulties to identify necessary reforms, including those required to stop the stream of repetitive cases, and to find the means and resources for the implementation of the reforms;

►► The absence of a common understanding as to the scope of the execution measures required following developments of the Court’s case law, thus, for example, that flowing from an interpretation of the concept of “jurisdiction”

►► **Slow or blocked execution** as a result of disagreement between national institutions, or amongst political parties, as regards the substance of the reforms required and/or the procedure to be followed;

►► A refusal to adopt, notwithstanding strong insistence from the Committee of Ministers, the individual measures required or to pay just satisfaction – **situations which frequently hide more fundamental disagreements with the Court’s conclusions or the requirements of execution**”.

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“Important and complex structural problems causing difficulties to identify necessary reforms, including those required to stop the stream of repetitive cases, and to find the means and resources for the implementation of the reforms.”

“The absence of a common understanding as to the scope of the execution measures required following developments of the Court’s case law, thus, for example, that flowing from an interpretation of the concept of ‘jurisdiction.’” (The example given goes to the interpretation of ‘jurisdiction’ under Article 1; one would need to read the relevant cases concerned to know precisely what the problems are).

“Slow or blocked execution as a result of disagreement between national institutions, or amongst political parties, as regards the substance of reforms required and/or the procedures to be followed.”

As an outsider, it would be very useful if the Report could offer a few examples here, although I can understand why there might be a reluctance to offer such information. I’m wondering, for example, is some of the material we were hearing about earlier today being referred to here?

“A refusal to adopt, notwithstanding strong insistence from the Committee of Ministers, the individual measures required or to pay just satisfaction—situations which frequently hide more fundamental disagreements with the Court’s conclusions the requirements of execution.”

Again, as an outsider, this really intrigues me, because I think that the prisoner voting saga, with particular reference to the UK, is an example of what this refers to, albeit I cannot be sure. I note precisely the last words used—‘situations which frequently hide more fundamental disagreements with the Court’s conclusions’. This is intriguing.

So, I’ve looked generally at the Report, the positives and negatives of it. I’ve also referred to areas of concern and given you examples of those. And I then highlighted the challenges the Committee itself has identified. I now step out from the context of the Committee’s Annual Report and look at attention given to the issue of implementation of Court judgments from



other actors within the Council of Europe: from the Parliamentary Assembly, the Secretary General and the Commissioner for Human Rights. Some of these strike more pessimistic notes, suggesting that the regime as a whole may not be quite as rosy as some would like to paint it.

‘state of implementation across the Council of Europe’ - optimism or pessimism?

[PACE Report](#) (and Resolution): Implementation of judgments of the European Court of Human Rights/ 09 September 2015/ Doc. 13864 (Committee on Legal Affairs and Human Rights): Mr Klaas de VRIES

- far less upbeat, more penetrating, and searching critique of [2014] figures – directly critical of nine States (Italy/ Turkey/ Russia/ Ukraine/ Romania/ Greece/ Poland/ Hungary/ Bulgaria), and also UK.

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Referring first to the Parliamentary Assembly Report, which covers the year 2014, this was far less upbeat, more penetrating and providing a searching critique of the year’s figures.

So... today = prolonged implementation crisis:
tomorrow (now?) ‘challenges’... to the authority of the ECtHR?

Council of Europe’s Secretary General, Mr Thorbjørn Jagland

- [Speech](#) (St Petersburg), 23 October 2015
- [Communication to PACE](#), 26 January 2016 (section entitled ‘The Convention under threat’: ‘[forces] who challenge the authority of international institutions... have slipped into the mainstream – and they are gaining traction... When we join the dots, the danger to our ECHR is very real indeed. [Examples]. [such challenges] ‘pull at the very fabric of the Convention, and if it begins to unravel, it will be very difficult to stop’)
- [Speech](#) to Committee of Ministers, 18 May 2016 - ‘we now see [ECtHR] openly challenged... with some invoking supremacy of national constitutions, or Parlt, or public opinion’ – [fear] ‘system beings to unravel’

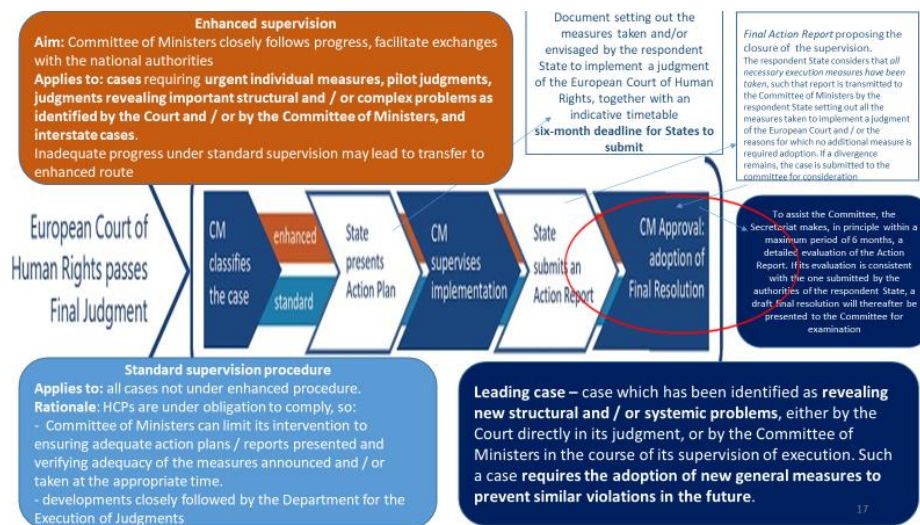
Commissioner for HR (CoE), Nils Muižnieks, ‘[Non-implementation of the Court’s judgments: our shared responsibility](#)’, 23 August 2016 [section entitled ‘Pitting sovereignty against the ECHR system’]

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Next, one notes that in 2016, the Secretary General expressed a concern about the Convention being under threat: “*[Forces] who challenge the authority of international institutions...have slipped into the mainstream... and they are gaining traction....When we join the dots the dangers to our ECHR are very real indeed.*” He gives some examples of this referring to the *Hirst* case, the *Mammadov* case, and other cases we may come to, whilst there is also the Russian situation as regards the prisoner voting judgment. In the Secretary General’s words, “*such challenges pull at the very fabric of the Convention*”; and he fears that “*if it begins to unravel, it will be very difficult to stop.*”

There is the same tone of message in certain other speeches which I’ll gloss over now, but there are the references for them on the slide. I will just note, however, that the Commissioner’s comments included a section entitled “*Pitting Sovereignty Against the ECHR System*”. Indeed, when we look at the *Hirst* case, and perhaps the Russian prisoner voting

case, what strikes me is how it seems that the national system has used its own sovereign body of law-- parliamentary sovereignty (an Act of Parliament in the UK) or the national constitution (Russia)-- as a foil, as a way to push back the 'sovereignty' of the Convention. This is quite a skilful technique to adopt, if it's a deliberate strategy. It allows the government to say that this is a problem that they themselves are in the middle of (they are caught between the sovereignty of national law, and that of the Convention) and they can't actually fix (it being, potentially, a matter they are not equipped to alter). Whether that's true or not in the case of prisoner voting in the UK is open to debate.



I come now to the last slide, which is really an overview of the whole implementation process, and to my concluding words. I just wanted to make four points by way of conclusion.

Firstly, by looking at the annual Report (2016), there are some positive things to say. Suggestions that the system is no longer working are clearly wide of the mark. I make that point because before the Brexit vote in April 2016 Theresa May advocated that if the UK was going to withdraw from any agreement it should be the Convention rather than the European Union, and she made a speech in which she said that the Convention is not working, that it doesn't do anything to change the law in Russia, and yet we (she said) have this nuisance law from Strasbourg which we are expected to comply with. What we're seeing from the Report is that it cannot be said that the Convention system is not working, and that is a very important point to make. I hope that politicians will take on board the first section of the Report that sets out those 250 examples of reforms that have been secured in recent years.

At the same time, I have highlighted areas of concern. The sheer number of cases in prolonged execution is worrying, and it does allow irresponsible politicians and the press to argue that the Convention is hardly working. The Convention is a review system that relies on pressure being kept up by the states in order for respondent states to comply. So the system relies on what's been described in the past as a virtuous circle of compliance in that if that circle gets stopped, or is seen to be slowing down, it may give more latitude to the



States themselves to slow down. There may be inertia in that circle of compliance. I hope that circle of compliance doesn't, in effect, become a circle of inertia. That was my second point.

The third point concerns the worries of officials such as the Secretary General and the Commissioner of Human Rights. They talk of the growing threat of resistance to the Court, which is of course very concerning.

The fourth point, my last point, is to ask how should the Convention system and the Committee of Ministers handle the threat that this represents. Here let me refer back to the last category of concern identified in the Committee's Report—that of 'fundamental disagreement with the Court's conclusions.' How can any system deal with the problem identified there? To be provocative, against this overall background, are there situations which frequently hide fundamental disagreements, and to what extent, if there are, does the overall situation as regards the execution of judgments today help or hinder the state's ability to so hide, or cover up such fundamental disagreements? For some States, I wonder, are they going through a bit of a charade (giving the impression that they are on the way to compliance, when they are not really doing so), and does the Strasbourg system allow for too much latitude to allow them to hide or cover up these fundamental disagreements? That is completely an outsider's perspective, but it's one that I look at and think about when I look at the prisoner voting system in the UK.

If I could just conclude by reiterating that this was an outsider's perspective. We have insiders here, and I'm sure they will correct me where necessary. I have made my comments with the luxury of being an academic, without the responsibility of actually having to effect any decisions. I think it goes without saying that we all hold those members of the community in Strasbourg, including those who have come today, in the highest regard, and very much pay tribute to the work that they do.

Kanstantsin Dzehtsiarou: First of all I want to say that from a legal point of view there is no problem with execution. Article 46 of the European Convention on Human Rights is crystal clear. It states: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.' That's it. However, as Fiona very eloquently put it yesterday, Article 46 is not the end of the story. Some countries, some member states, do not really execute judgments all the time. On some occasions there are significant delays. As Ed rightly said, some of the delays can be longer than five years, so we need to look at the bigger picture. Three main actors within this bigger picture are equally responsible for execution. These are the Court, the Committee of Ministers and the respondent state.

I think that each of these three actors can actually improve their performance when it comes to execution: they all need to do more of what they can do and less of what they should not do. I will come back to this idea a little later in my presentation. But first I would like to briefly describe what the roles of these three actors are. First of all the Court. When I did my research on European consensus I interviewed quite a large number of sitting and former judges of the European Court of Human Rights. It was an extremely interesting experience. I was asking them about consensus obviously, but the discussion often touched



upon the issue of execution. And some of the judges, I have to say the minority of them, but some judges told me in the interviews that execution is not what they should care about. They would argue that execution is something for the Committee of Ministers to deal with, the only aim that they have in the Court is to decide cases according to the Convention. And that is the end of their mandate.

I think that this approach is problematic. In support of my opinion here, I want to quote something that Professor Madsen from the University of Copenhagen wrote, comparing the old Court with the new Court. He said that “[w]hile the old Court was fundamentally marked by elitist law professors with significant connections to both politics and legal practice, the new post-Protocol No 11 Court is increasingly losing its connectedness to politics and diplomacy. Not only are the judges generally significantly younger, and correspondingly less experienced when appointed; they are also generally far more specialized in human rights. While, at first glance, this mere ‘legalization’ and technicalization of the ECtHR would seem a positive development of the Court, I will argue that it has in practice weakened the Court’s interfaces with both politics and society, which are inevitably part of its operation.”

So his point is that the Court is actually less linked to society, further from the reality, and one of the consequences is that it does not pay much attention to executability. This assumption can be also discussed in light of Ed’s argument in his wonderful book on the history of the Convention that the success of the Convention was due to its incremental, slow changes in interpretation of the Convention rather than revolutionary changes. It also reflects the mindfulness of the judges of the potential executability for execution of judgments of the Court.

The next actor is the Committee of Ministers which is a political body that should nevertheless be seen as impartial by the other stakeholders. Together with the Committee of Ministers’ Department of Execution which assists the contracting parties in executing of the judgment, the Committee of Ministers legally speaking has a somewhat limited toolkit to force the respondent states to execute judgments. Of course, the Committee of Ministers does not have an army, or a battalion of bailiffs that could go to for example Russia, and seize a couple of buildings to pay two billion euros to inforce the just satisfaction judgment in *Yukos v Russia*.

The final angle of the triangle of actors is the respondent states. And obviously, as I said, quoting Article 46, the respondent states are under a legal obligation to exercise, execute or enforce the judgment, but they might not be so willing to do so. Again Fiona talked yesterday about two types of reasons for this. Some reasons are very pragmatic. A state’s inability or unwillingness to share power, its lack of infrastructure, or lack of willingness to share resources. But there are also other reasons which might seem more respectable, like a genuine disagreement with the European Court of Human Rights. However, there is the problem in identifying genuine motives, namely whether the reasons for disagreement are indeed “respectable”. Nowadays more and more the respondent states are trying to cover their pragmatic reasons with principled reasons, creating a sort of a smokescreen of very decent ideas, such as a genuine disagreement on how they interpret the Convention. But in fact it is just inability or unwillingness to invest resources, share



power or create infrastructure. So that is the bigger picture, the environment in which execution must take place. And bearing this environment in mind I would like to offer a couple of suggestions as to how the approach of the different actors in this triangle can be improved and maybe it can change something.

The first actor that I have mentioned is the Court. What can it actually do to improve the process of execution of judgments? Generally speaking, I think the key idea here is that the judgment of the Court needs to be seen as legitimate as possible in order to be executed. But I also think that the Court needs to discuss the executability of the judgment in their deliberations. When judges deliver judgments, they need to think of what can be really done in the given context in order to implement the judgment. There is, as we discussed yesterday, a very fine line between doing too much, meaning interfering with the state's sovereignty to decide how they implement judgments, and doing too little, not giving any instructions of what should be done. The judges need to discuss practical steps for execution and have them in mind while delivering a judgment. The Court needs to streamline its policy in relation to what matters are mentioned in the judgments and what instructions are actually omitted from them. Executability of a particular judgment should be a consideration during the process of delivering the judgment, so my argument is that the Court's role in execution does not only begin after the judgment is delivered and a state fails to execute it (Article 46(4)). The main role of the Court is before the judgment is even delivered and becomes final.

Another thing that actually has not yet been mentioned today, is the issue of just satisfaction. Monetary satisfaction for the victims of violations. In the beginning of the history of the Court, when the Convention was just starting its operation, just satisfaction was decided on a case by case basis. There were cases when just satisfaction was not given even when the Court would find a violation. Although this can happen nowadays, the practice of awarding just satisfaction became a normal routine in almost every single case. Now my question is what is the purpose of the European Court of Human Rights? Is it to change the fundamental attitude or fundamentals of human rights protection in Europe? Or is it to give money to applicants in each individual case? I do not say that it is not necessary to offer just satisfaction for a grieved party is needed, but is that the main purpose of the Court?

Now let's discuss what the Committee of Ministers can do to improve executability of the Court's judgments. The Committee of Ministers for a very long time was almost non-existent in the legal literature. Very few papers on the topic were published. The European Court of Human Rights was much more in the spotlight. But it is now becoming more and more popular among academics to analyse the Committee of Ministers. There are obvious limitations to what the Committee of Ministers can do. As it actually consists of the states that are supposed to execute the judgments, they have to execute judgments against themselves. And almost all states have issues or sensitivities about some Court's judgments that are directed against them. Therefore the amount of pressure that they can impose is limited. For example, when Russia is asked to implement the prisoner voting judgment, the



Russian authorities can say, 'well okay, we will implement when the UK implements *Hirst No 2*'. This claim of reciprocity is problematic as it can lead to non-execution deadlock.

There were many different suggestions about how to improve the impact of the Committee of Ministers. One of them was to introduce punitive sanctions, which means that the authorities would have to pay, shall we say, a million euros a month for non-execution. But this is problematic because the authorities might not be willing to execute the decision imposing punitive sanctions as well. Why would they pay punitive sanctions if they do not pay just satisfaction or budgetary contributions to the Council of Europe? So introduction of such sanctions is problematic and might not be so effective. Introduction of these sanctions would also require an agreement of all of the contracting parties to the Convention, which is very unlikely.

It has also been suggested by some commentators that execution should be completely taken from the Committee of Ministers and given to some external expert body, whatever its form could be etc. These proposals are also problematic and they are very unlikely to be adopted.

I would suggest some possible improvements that could improve the perception of the general public of the Committee of Ministers without going for such fundamental changes. For example, a simple thing, a couple of weeks ago I read an article about the number of non-executed judgments. It said that there were 10,000 judgments that are not executed, giving a clear sign of a major crisis in the Strasbourg system. That is not completely objective. The Committee of Ministers, by not saying how they count their non-executed judgments, ends up exposed to those who do not realise the real nature of the problem. There are quite a few challenges that the Committee of Ministers is facing at the moment in relation to execution, but the situation is much more complex than just to say that 10,000 judgments are not executed. The Committee of Ministers needs to streamline the process of closing supervision. It needs to make it easier to show the success stories. The Committee of Ministers also can rethink the way they use enhanced supervision and whether all those 1,500 or so enhanced supervision cases need to be there under it.

Another suggestion reflects the effectiveness of communication between the Committee of Ministers and applicants, commentators and civil society. Maybe the Committee of Ministers could make the process of submitting documents easier. As an individual who has no locus standi in a particular case, one cannot submit anything even if in possession of relevant information. If that was not the case some commentators could intervene and this expert's support could be used by the Committee of Ministers.

And finally, the last, very important aspect of execution, the last angle of the triangle is the contracting party, the respondent state. When the Convention was drafted it was drafted as a treaty of the likeminded states. And it can only work when all 47 contracting parties really commit to human rights. Really commit to what is necessary to implement the judgments of the European Court of Human Rights. In reality some contracting parties do everything, or almost everything, to undermine the reputation of the European Court of Human Rights. I think this needs to be met with appropriate reaction. Both from other



contracting parties by showing an example of how to implement all the judgments of the European Court of Human Rights, and also by the Council of Europe itself. The Council has been increasingly passive in reacting to non-execution of the European Court of Human Rights. So these are my ideas. I think that the situation is not as bad as it could have been but it needs to be improved.

Murray Hunt: The execution of the Court's judgments is a subject very close to my heart. I spent 13 years as a legal adviser to the Joint Committee on Human Rights and throughout that time we were very concerned with the question of execution. So it's something that I care very deeply about and carry through to the work at the Centre for the Rule of Law.

We've been asked in this panel to talk about the way forward. It's not going to surprise any of you to hear that, for me, national level implementation is one of the most important things we need to think about. There are lots of things which can be done to assist implementation by institutional actors at the Council of Europe: by the Court, by the Committee of Ministers, by the Parliamentary Assembly. All these institutions of the Council of Europe have been doing a great deal, in particular in recent years, to focus on the problem of execution of judgments.

But for me the really crucial thing is national implementation. For me, the most helpful way to think about it is through the lens of subsidiarity. It may seem a little bit strange to talk about subsidiarity after a judgment: by that stage the state has been found to have failed in its responsibility to give effect to Convention rights. The interesting thing about the Convention system is that subsidiarity kicks back in post judgment. That's the whole structure of the system. And that gives rise to a really interesting question for me that we've been trying to grapple in Parliament now for several years-- which is, once a judgment has been delivered by the Strasbourg Court, what is Parliament's role at the national level. It's a crucial question to answer, I think, because lots of the problems that we've got in relation to the Convention system generally are questions of effectiveness. Obviously, the role of Parliament goes to effectiveness, and the related question of the legitimacy of the Convention system.

So what exactly is Parliament's role following a Court judgment? I am often surprised to find that Parliament is absent quite a lot of the time from the debate as to what happens after the Court judgment. For me there are some really important questions for Parliament, as soon as the Court pronounces the judgment. The first question is, 'Is changing the law necessary?' If so, what should that change in the law be? Then, the question is 'Is the government's response to these questions correct?'

Which brings in parliamentary scrutiny. Parliament has to be geared up to proactively scrutinise the government's response. And the important part about that is that if parliament performs its role of scrutiny correctly it can go a long way to addressing a lot of legitimacy concerns. Because of course the fact is that a large number of judgments--not all, but a large number of judgments-- leave a huge amount of space and discretion and area within which the state can respond to give effect to the judgment. And that's the starting point. When I first started in parliament I found politicians, or parliamentarians, were quite



challenged by this idea that following a Court judgment, it wasn't just a matter of signing the dotted line and just rolling over or something like that. They had a job to do, and that's a really empowering thing for parliamentarians to find out. They actually have to grapple with the judgment and what it's decided, and then decide what should happen now. And very often, of course, there's a very wide range of things that they can do in response. Obviously less so in cases such as *Mammadov* for example, about individuals in detention. But where, as with prisoner voting for example, you're talking about the legal framework there's a huge role for parliament to play.

The important thing about this is that this is a way of countering this democratic criticism of the legal protection of human rights. Parliament should be a part of this discussion about what happens after a judgment, and what law is necessary to bring forward—we must engage the democratically elected decision makers, the democratically elected legislators, in the discussion about what should happen now. And not just the legislators, the public. Because parliament has this great ability to draw in the public and civil society organisations. So I'll try and explain a little bit about how the Joint Committee has tried to develop this over the years, to draw in increasingly civil society groups and the public into this discussion about what should happen following the Court judgment.

So I'll just say a few words about how the JCHR, the Joint Committee on Human Rights tried to grapple with this issue over the last few years. It's now 17 years old, I think, the Committee. And its approach to these questions has evolved over time, partly in response to improvements in the way that government has come to respond to the Committee's reports. The Committee started by issuing periodic reports, not quite once a year, but once every 18 months or so, on human rights judgments. And in those reports it has published and made available to Parliament, the correspondence on Court judgments, and its analysis of whether or not the government was doing a good enough job in its response to Court judgments. So there were reports every 18 months or so looking at judgments.

Getting parliamentarians to engage with these reports was extremely difficult. Any report from the Parliamentary Committee that doesn't hang on something that's happened yesterday, or was in the post bag at the weekend, just gets forced through the cracks. So actually that way of reporting, through periodic reports, though effective in terms of galvanising government responses, didn't really engage parliamentarians. One of the benefits of this earlier approach was that it did build up a practice whereby the Committee explored how best to do this by corresponding with departments about particular judgments, asking what's going to happen now, engaging with ongoing judgments about what that correspondence was. Probing why they weren't doing certain things, probing why certain things were thought to be adequate.

Since 2010 the approach of the Committee evolved somewhat, and it has tried to integrate its work on responding to judgments more into the other work which it was carrying out. Partly because of the difficulty to engage with parliamentarians in debates about human rights judgments. There was the occasional debate in the House of Lords about responding to human rights judgments, or a debate on the report of the Committee,



but these were very low profile, very lowly attended, very limited parliamentary engagement.

So we shifted into a more integrative approach, we try to integrate it into things that the Committee were doing anyway, in particular scrutinising legislation. So waiting for opportunity, carrying on with the correspondence of the departments according to the established practice, but then looking for opportunities in bills coming before Parliament to possibility get some amendments to the bill. To actually proactively suggest to the Government, well here's an opportunity for you to fix this problem that the Strasbourg Court has now given you, and making actual concrete amendments, proposals in legislative scrutiny reports, drawing on its correspondence about the response to a particular judgment. And that did help integrate the profile of the engagement in the Commons in particular, where it was inactive in relation to particular judgments.

The Committee also, of course, scrutinises remedial orders [under the Human Rights Act] which are responses to either Strasbourg judgments or declarations of incompatibility by UK Courts, trying to fix the problem. There it has a very established role which again it has developed over time of scrutinising very precisely whether that response to the judgment is adequate. And actually that scrutiny is very incredibly detailed and responsive. There was anxiety at the time of the Human Rights Act being introduced that remedial orders would be a way of bypassing Parliament, but actually quite the contrary. Remedial orders get subjected to a degree of scrutiny which is more than the scrutiny that the primary legislation receives.

There are two stages of reporting on a draft remedial order, and then on a later order, and there are some good examples for example on the stop and search remedial order, following the *Gillan* case, where the government responded to criticisms made by the JCHR in its first report on the draft order in the subsequent order when it brought it forward. So that's another point to engage with, remedial orders, but there the Committee is largely in reactive mode rather than sort of trying to proactively force the pace, which it may often want to do, where the government may be dragging its feet. It's just not sure what to do, or paralysed by the fact that maybe there are so many departments involved in a complex case.

Another way in which the Committee has tried to increase its role in addressing the legitimacy problem is by trying to increase civil society participation and public input. So it issues calls for evidence at the beginning of each Parliament about human rights judgments, trying to identify the issues on which it is interested in hearing from the public and from the interested parties and groups, about issues that have been raised by Strasbourg Court judgments. So it sort of flags up issues which it wants to hear from public and civil society groups about. The correspondence with departments is extremely important, asking the right questions in terms of scrutiny is the most important thing of all. To do that parliamentary committees need legal advisers, politicians are often just too busy to identify the questions. The questions are often defined by the media, the tabloids define a certain set of questions. Committees need the proper questions to be identified for them, and draft correspondence to be prepared for them which ask those questions of government



departments. And of course, all this is considered by the Committee, so the Committee has complete ownership over it.

So there are lots of examples during the period from 2010. For example, the decision *A v UK* in relation to core fair hearing requirements. The Joint Committee of Human Rights raised in a number of different contexts control orders and terrorist asset freezing, contexts in which closed material procedures were being used where the UK government was extremely slow in responding to the *A v UK* case judgment. There were lots of legislative opportunities for the Committee to make clear that actually *A v UK* does require a certain minimum procedural content in your closed material procedures. And it was very rigorous in spotting opportunities to make sure that that was properly understood in Parliament.

One point to make briefly about the way that the Government approaches the execution of Court judgments is that, over time, because of the practice of the Joint Committee, the Government has produced an annual report to Parliament--and to the Joint Committee in fact which many of you may be familiar with-- on human rights judgments. This started life as quite a small publication, what was really internal notes about the judgments which were being circulated between departments. It was really the Committee, I think, that slightly cajoled them into turning it into a more substantial publication.. Again this showed the value of working collaboratively with the departments to help them do their job. That's now grown into what I think is really quite a useful annual report to Parliament which says 'these are the judgments, this is what we are doing in response to them', and puts that information out there for Parliament to scrutinise. That really massively helps the Committee to do its scrutiny job, and parliamentarians to engage in scrutinising what government is doing. And we have now also persuaded the government to begin to include in that report not just cases of violation, but accounts of cases which the UK has won in Strasbourg. Because I think that's an important part of the legitimacy picture. When the press report that 75% or 60% of cases are lost in Strasbourg it's necessary at every level to counter the distortion, frankly, that's being peddled on the front pages of newspapers. An important part of that is that the Government itself should be telling the story about the number of cases that it actually wins. It should be telling Parliament about the issues in cases that have been taken unsuccessfully to Strasbourg, and the reports are beginning to do that, not as systematically as they could, but they are beginning to do that.

I'm sorry I wasn't here yesterday, particularly for Fiona and Kanstantsin's paper, because I read that with great interest, and it will be apparent from what I have said but I agree with a huge amount of what you say in that Article. I think you're absolutely right that politics is incredibly important, we have to look at the political process and see how that's responding to the judgments. I agree entirely with you that we need to understand the dynamics of non-implementation and why it is that states are slow or even fail to implement judgments. More attention needs to be paid to the politics behind execution. But, and this is a big 'but', I have one area of disagreement that is fairly fundamental. That is with your argument—which I quote-- in your piece, which I think is an absolutely brilliant piece, that '*non-execution properly understood is a political rather than a legal problem.*' I have a fundamental disagreement with that, because it's both for me. It's absolutely crucial that



we understand that it's both. We can't say that non-execution is a political problem that the Court has created by its judgment, and it's a legal problem until that point. And to me this goes to the heart of addressing the legitimacy problem. We must not lose sight of the fact that Article 46(1) creates a legal obligation that we voluntarily signed up to as the UK to comply with Court judgments. That is a legal obligation, it's not a political aspiration. At the end of the day international compliance with obligations is a matter of the rule of law. I think Tom Bingham's account explaining why compliance with international obligations is a rule of law matter is actually compelling and beautifully written. There's a chapter in his Rule of Law book from his lectures in 2008 where he explains why we have to have sections in the rule of law which include the fact that the state must respect and comply with its international obligations.

So we have to see it through the rule of law framework, it seems to me. Prisoner voting demonstrates why it's so important that we see this through a rule of law lens. Behind the prisoner voting question is this uncomfortable position that the UK is in breach of the rule of law in failing to do anything to respond to the judgment. Increasingly it's becoming, I think, politically attractive, certainly in the House of Lords, and I think probably it will increasingly in the Commons, that we can't as a country proclaim being champions of the global legal order at the same time as we ignore a judgment, we don't do anything in relation to a judgment. And that has traction. Politically it has traction, and in the context of Brexit it has traction, we're negotiating our international agreements. We want to be seen as being capable of holding to our word. And international agreements are binding on us.

We can't consistently do that whilst we ignore a judgment. And *Hirst* is really the main problem in relation to the UK's credibility internationally. So for me, what you describe as principled opposition is incoherent. Not your position, but the position of the UK is incoherent, because you've got to see that opposition in the context of its other international commitments, and you can't say that we're bound by Article 46(1), or that we are champions of the rule of law in our international relations, as we do, and simply do nothing about that judgment. So for me, it's an absolutely fundamental rule of law issue. And it's more important now than ever before, that we see it in that way. I was in New York last week shortly after President Trump gave his speech to the UN General Assembly. And I don't know if you've all read it, but it's worth reading, because there are some phrases in there which really are quite chilling. The great re-awakening of nations that he calls for. There are lots and lots of references to calling to nations to put their people first. And what we're seeing, really, worldwide, of course Brexit is the manifestation of this as well, is the return to a mind set of isolationism, nationalism, quite authoritative nationalism, supported in many countries by populism, a withdrawal from international obligations and international agreements, a retreat from international law. I think it's no exaggeration to say that the legal order, the international legal order, faces an existential threat today. I don't think that we really are exaggerating when we say that, when we look around the world at the number of examples. Some of the leaders for the Global Legal Rule of Law are now in difficult positions, let's say. And other countries, that haven't necessarily been leaders, also know that there are very many serious challenges to the rule of law.



So for me, it's time for the rule of law to fight back. We have to keep the rule of law in there as part of the framework. Which, if we say it's more political than legal, we forfeit, it seems to me. But the important thing about advocating the rule of law is that it's got to be smart rule of law, and that is why the first part of what I had to say is so important, because we've got to address the legitimacy problem. We've got to get democratically elected decision makers involved, and have them understanding the rule of law. We've got to get them to debate what the rule of law is. They all agree that the rule of law is a good thing, they all agree that human rights is a good thing, but we need to get them to understand and debate in practical, every day terms, the issues that they're facing and what they actually means for them.

So that I think is the big challenge. On prisoner voting, if we frame the issue in that way, there's actually going to be an opportunity sooner or later. The matter would come back for an amendment to be moved in the Lords that would give effect to the minimal recommendation of the Joint Committee that looked at the draft bill. A very simple amendment of the law. The Lords would have a good debate about why the UK is not doing anything in its response to international standards, and then I think the Lords will pass the amendment. And then the ball is in the Government's Court to decide whether or not to reverse that. To go back to the Committee of Ministers after reversing a vote in the Lords is a very different position from saying we can't pass this through Parliament. But in Parliament we can only get to that point if we've raised the level of awareness within Parliament about what the rule of law means in practice.

So that's why, in terms of fundamental principle, I completely agree with your premise. We've got to understand the complexity of the dynamics, we've got to look at the political process, do all those things. But in doing so we've also got to say that this is a rule of law issue.

Discussion of panel presentations

Fiona De Londras: On Murray's point, I think in fact we completely agree. My view is that the solution to the execution problem is political. And to frame this as a rule of law issue I think helps us to get what, as Ed pointed out, are cited in the Committee of Ministers' reports as fundamental disagreements. What strikes me is that at the heart of all of this is how do we actually get to address and overcome what clearly are fundamental disagreements about the authority of international law. About the idea that this really is law. That these really are judgments that need to be executed, with decisions to go ahead with execution being decisions of politics.

Now I do have a question, which is about the approach to decisions that are made to implement judgments of the Court that are not binding on the UK. Of course we have the direct issue of non-execution, as in *Hirst*, but the system will work best if every state is attentive to all of the jurisprudence, whether in cases from the UK or other countries. Do you think, in a situation where the level of fundamental political disagreement about the nature of the Convention and the judgments from Strasbourg is now so deep, there is space



to get to questions of implementing judgments that you're not bound to implement, and not waiting for a dispute to arise?

Murray Hunt: That's a really good question. I think that there is a way of doing that. The language of discourse is quite important in Parliament, not triggering as the starting point that they're being told what to do. I stopped using the language of execution in Parliament after about a week. Even the language of compliance, because it implies that there is no space for them to discuss what to do. Implementation, we use implementation more comfortably, but again, it still doesn't quite fit with parliamentarians' view of their role. So eventually we ended up talking about the scrutiny of government responses. To make parliamentarians start from the position that their role is to decide whether or not the way the government has responded to judgments is good enough. I do think there is space to make them think about what the implications of non UK judgments are for our legal system. But the trigger I tried unsuccessfully to use to make that space was to get the Government's annual report, as do the Dutch and the German annual reports, to report on other relevant cases of interest to the national legal system because it may have implications for their own legal framework. Now I understand why the Ministry of Justice thought we were just pushing them too far on that. They did over quite a long time come quite a long way in producing what I think is a really good and useful report. There are certain additional steps they wouldn't take and that was one of them because I think they weren't doing the work themselves, looking at all judgments. It's slightly concerning, but I don't think they felt that they were systematically looking across the Convention output and all the Court's judgments and identifying things. They were identifying certain things. Obviously, if there was a jury trial case from elsewhere that would hit their radar; they would think about that because juries are important to us. But they weren't looking at all Court cases systematically. And I think they won't commit to putting things in reports until they've got a system for doing that. But it's still worth pushing on that because their report has gradually improved over time. And if we get the Government to do that themselves, and it's reported to Parliament, that is good because cases from other countries may show that the UK system is perfectly okay. I think that Parliament needs to know about that, and the public need to know about that. But there are certain issues. Big issues, which are going to come up in the UK which have been raised in another case. And there it's obviously in everyone's interest for that to be flagged up to Parliament.

The other reason that I'm more optimistic that there may be space is that governments are realising increasingly that because of subsidiarity and its inclusion in Protocol 15, and the Court's role in responding to that, there is now positive benefit for the government potentially in stimulating parliamentary debate about the compatibility of laws with the Convention. And this goes to something we haven't talked about, the preventative side of all of this. As to this, I think that the government has gradually moved on from their starting point a few years ago of just asserting to Parliament: 'it's compatible, we've done all the work, you don't need to worry about it. There may be other lawyers with pesky views, but we've got a lot of lawyers who look into these things.' They now realise that it's actually good for them to have debates in Parliament, not just because it might improve a statute a little bit around the edges. But also because it means that later on they can make the



argument that Parliament has thought about it, and not in a purely procedural way either -- that's another debate that I disagree with, the view of the proceduralist position. But because it's clearly relevant, for obvious reasons, to the decision of the Court, the quality of the consideration it's been given in the democratic process. The Government, I think, has shifted and is now occasionally facilitating more parliamentary debates on Convention compatibility. And it's obviously in its best interest to do that in relation to Convention case law generally, not just cases that it's lost.

Pavlo Pushkar: I have a question for Kanstantsin. With the model you were analysing, the three part model of the Court, the Committee of Ministers, and the states. What are the practical improvements that could be made by them in relation to the issue of effectiveness of investigations that we are discussing as to action regarding the execution of Court judgments calling for investigations under Article 2 and 3? In what ways could better interaction between the three bodies you mention improve the outcome of the execution of judgments in these types of cases?

Kanstantsin Dzehtsiarou: I would go back to the point that was made yesterday. The Court could say that a ruling of a violation is enough. Depending on the facts, the Court could say, if it is a very historical violation of Article 2 or 3 and nobody is alive any longer, there is absolutely no prospect that anything tangible will come from any further investigation. I think that it is totally realistic for the Court to say 'look, there is no need to reopen the investigation' in appropriate cases on the facts. The Committee of Ministers could then follow this approach.

Dirk Van Zyl Smit: A lot has been said about the *Hirst* case, but when the judgment came out I had the impression that the Court was actually trying--and it has been said that the Court should play a positive role--to encourage Parliament to do something, and it backfired very spectacularly, it was seen as an insult to Parliament. I'd really be interested in thoughts, particularly judicial thoughts, as to whether there was a way, with the wisdom of hindsight, that the Court could have done that better?

Sir Nicolas Bratza: There is a certain irony in the repeated claim by the Government that the Court violated the sovereignty of Parliament by directing it as to what it must do to give effect to its judgment in the *Hirst* case. It is ironic since, in the proceedings before the Court, the Government urged the Court to give detailed guidance in its judgment as to what restrictions on the right of convicted prisoners to vote would be compatible with Article 3 of the Protocol. The Court refused to do so, noting that Contracting States had adopted a number of different ways of addressing the question of the right of prisoners to vote and holding, as it had traditionally done, including in cases against the United Kingdom, that it was left to the legislature to decide on the choice of measures for securing the rights guaranteed by the Convention.

Murray Hunt: And can I add there's a further irony that they also tried to keep the Court from looking at what consideration Parliament had actually given to the question.



Kanstantsin Dzehtsiarou: About the recent problems with *Hirst*, I would like to say that the comparative law situation was very problematic. The Court has never explained in *Hirst No 2* why lack of consensus was not a material factor. The second point I would like to make is about this question of parliamentary debates. It's very interesting what impact parliamentary debates can in general have on the judgments of the Court, especially in terms of execution. There were UK parliamentary debates after *Hirst*, in which it was said that we don't want to execute the judgments. But when the judgment was delivered, lack of parliamentary debate was considered as a reason for finding a violation in the reasoning of the judgments. The last point that I want to make was this. Yes, in *Hirst No2* the Court said 'blanket ban is incompatible with the Convention'. But what actually is the Convention requirement?' In the long list of case law of the Court after *Hirst No2*--*Anchugov and Gladkov v Russia*, Italian and Austrian cases, the Turkish case--the Court was not quite consistent in what actually is required to comply with the Convention in this area. And more generally there is a problem of a more fundamental basis--the legal basis for this judgment. I think that it was mentioned in a couple of submissions that actually Article 3 of Protocol 1 doesn't give a direct right to prisoners to vote. It's structured in a very different fashion, so that was a sign that there might be problems in relation to *Hirst No 2*.

Stuart Wallace: I just wanted to ask about the role of parliamentarians. I'm curious about the level of knowledge among parliamentarians and the actual interaction between the Strasbourg system and UK law generally. Parliamentarians don't seem to have an appreciation of the actual consequences of things like 'declarations of Incompatibility' and the options there are for Parliament in practice. I'm wondering how much of this is down to lack of basic knowledge about the Human Rights Act and the Strasbourg system. And how much of it is actually just political, to kind of say, oh well you know the Europeans are telling us to do this, we don't really want to do it but we have to do it.

Murray Hunt: There's a considerable element of the latter, there is a certain amount of that that goes on, and that's irreducible in politics, you can't expect that to go away. But I think that the former is a really serious problem. The degree of ignorance and lack of understanding of the framework is huge. That again is something that takes a very long slow process to remedy. It needs different agencies to work proactively on breaking down that ignorance and building up the education and the literacy levels. The JCHR went to visit the Strasbourg institutions, so those 12 members, well the 6 or 7 who came on the visit, came back with a real understanding and insight into what they had been dealing with on an everyday basis. These visits are absolutely invaluable, but they were a tiny proportion of the parliamentarians as a whole. Nick Bratza gave evidence to the JCHR in a public hearing, and that was incredibly valuable in getting members round the table in the JCHR to actually have a proper engagement with the President of the Court and think about the Court not as being some kind of interfering outside body. The opportunities for that sort of engagement are quite limited. It's the Human Rights Commissioner's role, it's civil society's role. And Parliament itself needs to be much more proactive. It doesn't have a parliamentary legal service for example, which is a big negative. It has a few pockets of legal advice attached to different Committees. At the Bingham Centre, we've set up an All-Party Parliamentary Group on the Rule of Law in an attempt to try and get a more proactive approach to



educate members, particularly in the Commons, on what the rule of law means, but it is a very long and slow process. If you compare it to levels of understanding in a number of European countries, in the Netherlands, in Germany, in Denmark, in a lot of parliaments, their level is just far, far superior about the European Human Rights legal framework. We need to double our efforts on this.

David Harris: This brings us to the end of the workshop. I would like to thank you all very much for coming and for your very valuable contributions. It's good to have academics and NGOs taking part in discussions on the Convention and how its judgments are executed in practice. But it's particularly good and helpful to have persons who are engaged to the system more directly, particularly judges and key members of the secretariat at Strasbourg, doing so. We are very pleased indeed that two former judges were able to come and take part, and that Olga and Pavlo were able to do so too. I do hope that the views that have been expressed on how the supervision system works and how it might be improved will be of value. But, as has been said more than once during this workshop, everything depends ultimately upon the goodwill of states.

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