Responding to Seismic Change in Europe—The Road to Reykjavik and Beyond

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Abstract

The Council of Europe has convened a rarely-held summit of heads of state and government on 16–17 May 2023 in Reykjavik, in order to protect its "common heritage" of respect for human rights, democracy and the rule of law. This article outlines the journey taken by the Council of Europe to this point—the three earlier summits in 1993, 1997 and 2005, the Protocols that wrought major changes in the functioning of the European Court of Human Rights, and the Interlaken process of reforming the court. It previews the likely agenda of the Reykjavik summit, focusing in particular on proposals to: ensure accountability for Russia's aggression against Ukraine; improve states' often lamentable implementation of judgments of the Court; update the European Convention on Human Rights by recognising environmental rights; and address the ongoing scourge of human rights abuses in the context of armed conflict and "grey zones". The article also discusses a question that will determine the success or otherwise of the reform agenda—the resources that states provide to the Council of Europe. It concludes with discussion of the Council of Europe's aspiration to increase its visibility and impact, and broad recommendations for priorities for the summit and beyond.

The year 2022 will be remembered as one of "terrible violence and seismic change in Europe", in the words of the High-Level Reflection Group (HLRG) established by the Council of Europe to consider the organisation's future and how best to protect its "common heritage" of respect for human rights, democracy and the rule of law.[1] Will 2023 be the year that the Council of Europe reinvents itself to meet the challenges posed not only by Russia's barbarous invasion of Ukraine but also systemic, even existential, threats such as creeping authoritarianism and the climate emergency? This is the organisation's ambition in calling a rarely-convened summit of heads of state and government on 16–17 May 2023 in Reykjavik[2] which, according to the Parliamentary Assembly of the Council of Europe (PACE), must meet the daunting

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[1] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), p.9, *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023]. The High-level Reflection Group was set up by the Secretary General of the Council of Europe in June 2022, following an invitation by the Committee of Ministers at its 132nd Session in Turin (Italy) on 20 May 2022.

[2] See the summit website at *https://www.coe.int/en/web/portal/fourth-council-of-europe-summit* [Accessed 3 March 2023].

expectation of providing "a new strategic vision, a fresh political impetus and new responses in the face of the present extraordinary challenges".[3]

This article proceeds as follows.[4] First, we outline the journey taken by the Council of Europe to this point—the three earlier summits in 1993, 1997 and 2005, the Protocols that wrought major changes in the functioning of the European Court of Human Rights, and the Interlaken process of reforming the court. Secondly, we preview the likely agenda of the Reykjavik summit. In the absence at the time of writing of a formal agenda, our discussion is informed, inter alia, by the HLRG report, PACE recommendations,[5] and background briefings by current and former Council of Europe "insiders". We focus in particular on proposals to: ensure accountability for Russia's aggression against Ukraine; improve states' often lamentable implementation of judgments of the court; update the European Convention on Human Rights (ECHR) by recognising environmental rights; and address the ongoing scourge of human rights abuses in the context of armed conflict and "grey zones". The article then turns to discuss a question that will determine the success or otherwise of the reform agenda—the resources that states provide to the Council of Europe to fulfil its mandate. It concludes with discussion of the Council of Europe's aspiration to increase its visibility and impact, and our broad recommendations for priorities for the summit and beyond.

The path to Reykjavik

Summits of heads of state and government are not provided for in the Statute of the Council of Europe, which places foreign ministers of Member States in control of the organisation.[6] In the Council of Europe's 70-year history, only three have been held—in Vienna in 1993, Strasbourg in 1997, and Warsaw in 2005, as the organisation responded to the consequences of the dramatic eastwards expansion of its membership and created a plethora of new standards, instruments and institutions.

In Vienna, 32 heads of state and government hailed the end of the division of Europe, which offered "immense hope" and "an historic opportunity to consolidate peace and stability on the continent".[7] At the same time, they condemned "aberrations", such as the resurgence of aggressive nationalism which had plunged former Yugoslavia into war. The newly enlarged Council of Europe, they added, "is the pre-eminent European political institution capable of welcoming, on an equal footing and in permanent structures, the democracies of Europe freed from communist oppression".[8] Accession presupposed that applicant countries had brought their institutions and legal systems into line with the basic principles of democracy, the rule of law and respect for human rights, with free and fair elections based on universal suffrage, guaranteed freedom of expression and media freedom, protection of national minorities and observance of the principles of international law.[9] In addition, an undertaking to sign the ECHR and accept its supervisory machinery within a short period was fundamental—and became, de facto, obligatory with the entry into force of Protocol 11 to the ECHR in 1998. Palmer describes the Vienna Summit as "a watershed—almost a re-foundation"[10] of the Council of Europe: not only did it lend its authority to the drafting of what would become Protocol 11, but it also initiated the drafting of the Framework Convention for the Protection of National Minorities, and in an action plan focused on the rise of racism, xenophobia, anti-Semitism and

[3] Parliamentary Assembly of the Council of Europe, "The Reykjavik Summit of the Council of Europe: United around values in the face of extraordinary challenges", Recommendation 2245 (2023), para.7.

[4] A preliminary version of this article appeared as A. Donald and P. Leach, "Adapt or Die? The Council of Europe Seeks New Ideas to Address 'Seismic Change'" (31 January 2023), *Verfassungsblog*, *https://verfassungsblog.de/adapt-or-die/* [Accessed 3 March 2023].

[5] Parliamentary Assembly of the Council of Europe, "The Reykjavik Summit of the Council of Europe", Recommendation 2245 (2023).

[6] Statute of the Council of Europe, London, 5 May 1949, art.14. See also S. Palmer, "The Committee of Ministers" in S. Schmahl and M. Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017), pp.141–142, para.6.18.

[7] Council of Europe, Vienna Declaration, 9 October 1993, p.1, *https://wcd.coe.int/ViewDoc.jsp?id=621771* [Accessed 3 March 2023].

[8] Council of Europe, Vienna Declaration, 9 October 1993, p.1, *https://wcd.coe.int/ViewDoc.jsp?id=621771* [Accessed 3 March 2023].

[9] Council of Europe, Vienna Declaration, 9 October 1993, p.1, *https://wcd.coe.int/ViewDoc.jsp?id=621771* [Accessed 3 March 2023].

[10] Palmer, "The Committee of Ministers" in Schmahl and Breuer (eds), *The Council of Europe: Its Laws and Policies* (2017), p.142, para.6.21.

intolerance, it mandated the creation of a monitoring body, which would later be established as the European Commission against Racism and Intolerance (ECRI).

In Strasbourg in 1997, 40 heads of state and government continued the optimistic tone, hailing the further enlargement of the Council of Europe as the "basis for a wider area of democratic security in our continent".[11] They extolled achievements including the establishment of a full-time, permanent European Court of Human Rights (under Protocol 11) and instructed the Committee of Ministers to create the new office of Commissioner for Human Rights, which began work in 1999, as well as calling for the universal abolition of the death penalty, paving the way for the adoption in 2002 of Protocol 13 to the ECHR.

By the time the—by now, 46—heads of state and government met again in Warsaw in 2005, the mood had changed following the acts of terror in the US on 11 September 2001, as well as revolutions in Georgia in 2003 and Ukraine in 2004 in protest against continuing corruption and authoritarianism in these new Council of Europe Member States. The Council of Europe Convention on the Prevention of Terrorism opened for signature during the summit, whose action plan also called for instruments to be created to combat organised crime and trafficking in human beings.[12] The heads of state and government were also concerned about the court's rapidly increasing caseload, and called for the speedy ratification and entry into force of Protocol 14 to the ECHR, which from 2010 brought further changes to the court's management of applications, including the single judge formation and the significant disadvantage admissibility criterion.

The caseload crisis—with applications peaking in 2011 at more than 150,000[13]—dominated the next phase of reform. This began at Interlaken, where a high-level conference organised by the Committee of Ministers in 2010 launched a process spanning almost a decade, punctuated by further conferences in Izmir (2011), Brighton (2012), Brussels (2015) and Copenhagen (2018). The Interlaken process focused principally on reform of the court, and was preoccupied not only by its mountainous caseload but also, especially at Brighton and Copenhagen, by domestic discontent with the court in some states and largely spurious[14] questions about its legitimacy and authority. As Glas demonstrates, the impact of the Interlaken process was incremental rather than transformative: while the court's capacity to filter and process applications (in particular, repetitive applications) improved significantly during the Interlaken period, the majority of specific proposals concerning the court's functioning that emanated from the high-level conferences was not implemented.[15] Glas attributes this variously to opposition by the court or advice by the Committee of Ministers' Steering Committee for Human Rights that certain proposals would not add value or were overly complex.[16] Meanwhile, reforms that were designed to emphasise the subsidiary role of the court, notably the inclusion of a reference to subsidiarity and the margin of appreciation in the preamble to the ECHR, were of symbolic rather than tangible significance, and did not, Glas observes, "fundamentally alter the system's object and purpose".[17]

Unlike the Interlaken process, the agenda for the Reykjavik Summit focuses not on the European Court of Human Rights alone, but on the entire Council of Europe. It was a welcome development that in January 2023, the Council of Europe issued an "open call" for submissions and ideas from international organisations, national human rights institutions (NHRIs), civil society organisations, academics, human

[11] Council of Europe, Second Summit of Heads of State and Government: Final Declaration and Action Plan, p.1, *https://rm.coe.int/168063dced* [Accessed 3 March 2023].

[12] Council of Europe, Warsaw Summit: Action Plan, CM(2005)80 final 17 May 2005, *https://www.coe.int/t/dcr/summit/20050517_plan_action_en.asp* [Accessed 3 March 2023].

[13] European Court of Human Rights, *The ECHR in Facts and Figures 2011* (January 2012), p.5, *https://www.echr.coe.int/documents/facts_figures_2011_eng.pdf* [Accessed 3 March 2023].

[14] See, e.g. A. Donald and P. Leach, "A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten" (21 February 2018), *EJIL Talk!*, *https://www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten/* [Accessed 3 March 2023].

[15] L.R. Glas, "From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?" (2020) 20(1) *Human Rights Law Review* 121, 147.

[16] Glas, "From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?" (2020) 20(1) *Human Rights Law Review* 121, 148.

[17] Glas, "From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?" (2020) 20(1) *Human Rights Law Review* 121, 149.

rights defenders and others.[18] At the time of writing, it remains to be seen how far the open call will influence the outcome documents from the summit and whether or not submissions will be published. Regrettably, the potential influence of external submissions is likely to have been diminished by the short timeframe allowed—around four weeks from publication of the open call to its deadline. It is to be hoped that as the reform process from the summit ensues, guidance for civil society participation in decision-making is heeded. This includes the Council of Europe's own guidance to public authorities, which encourages them to allow "sufficient opportunity to properly prepare and submit constructive contributions"; provide "[a]dequate information … in a timely manner allowing for substantive input while decisions are still reversible"; and ensure inclusiveness and "equal participation of all groups including those with particular interests and needs", such as young people, the elderly, people with disabilities and minorities.[19]

Nevertheless, it is welcome that the consultation conveys a level of urgency and openness to new ideas not seen for many years. It emphasises that the Council of Europe has a critical role to play as the region's guardian of human rights, democracy, and the rule of law and avers that the aim of the summit is to ensure that it is "fit for purpose to meet current and future challenges as well as the expectations of future generations". The questions posed by the call were broadly framed, focusing on a common vision, current and future challenges and the appropriate role for the Council of Europe "in the evolving European multilateral architecture and global governance".

Accountability for Russia's invasion of Ukraine

Proposal for a compensation commission

High on the summit's agenda is ensuring accountability for Russia's aggression in Ukraine. Reporting in October 2022, the HLRG underlined the importance of ensuring a "comprehensive system of accountability for serious violations of international law".[20] The brutality of the Russian invasion and occupation of Ukraine has undoubtedly focused minds and galvanised wide political support for various efforts aimed at achieving accountability (involving both Russia and Belarus). The Ukrainian Deputy Justice Minister Iryna Mudra has called for the establishment of an international register of damage in Ukraine caused by Russia, and the subsequent creation of a compensation fund and a compensation commission to consider claims.[21] This followed the recognition by the UN General Assembly in November 2022 of the need for a reparations mechanism.[22] The Ukrainian authorities envisage an independent register of damage being

[18] Council of Europe, "Open Call for Input for the 4th Council of Europe Summit" (Reykjavik, 16–17 May 2023), *https://www.coe.int/en/web/presidency/open-call-4th-summit* [Accessed 3 March 2023].

[19] Committee of Ministers, *Guidelines for Civil Participation in Decision-Making*, CM(2017)83-final, 27 September 2017.

[20] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023], para.40.

[21] Parliamentary Assembly of the Council of Europe, "Compensation Mechanisms for Ukraine the Focus of a PACE Hearing in Paris" (13 December 2022), *https://pace.coe.int/en/news/8924/compensation-mechanisms-for-ukraine-the-focus-of-a-pace-hearing-in-paris* [Accessed 2 March 2023]. See also: Council of Europe, Committee of Ministers, Ministers' Deputies Decision, "Consequences of the aggression of the Russian Federation against Ukraine—Accountability for international crimes" (15 September 2022, CM/Del/Dec(2022)1442/2.3); Parliamentary Assembly of the Council of Europe, "The Reykjavik Summit of the Council of Europe: United around values in the face of extraordinary challenges", Report, Committee on Political Affairs and Democracy—Rapporteur: Ms Fiona O'Loughlin, Ireland, ALDE) Doc.15681 (9 January 2023); Parliamentary Assembly of the Council of Europe, "The Reykjavik Summit of the Council of Europe", Recommendation 2245 (2023)1.

[22] UN General Assembly, "Resolution adopted by the General Assembly on 14 November 2022—Furtherance of remedy and reparation for aggression against Ukraine" (15 November 2022, A/RES/ES-11/5). The resolution recognised "the need for the establishment, in cooperation with Ukraine, of an international mechanism for reparation for damage, loss or injury, and arising from the internationally wrongful acts of the Russian Federation in or against Ukraine" and recommended "the creation by Member States, in cooperation with Ukraine, of an international register of damage to serve as a record, in documentary form, of?evidence and claims information on damage, loss or injury to all natural and legal persons concerned, as well as the State of Ukraine, caused by internationally wrongful acts of the Russian Federation in or against Ukraine, as well as to promote and coordinate evidence-gathering". Comparable recent precedents for such a compensation mechanism include the United Nations Compensation Commission (UNCC) which was created in 1991 to process claims and pay compensation for losses and damage suffered as a result of Iraq's unlawful invasion and occupation of Kuwait in 1990–1991. Payments were financed by the United Nations Compensation Fund which received a percentage of the proceeds generated by the export sales of Iraqi petroleum and petroleum products. About 2.7 million claims were submitted to the UNCC (for a total

created by a multilateral international treaty (not under UN auspices as such) which will be able to organise, group and assess claims. It will assess admissibility criteria, as well as questions of territoriality, temporality and causality. It is proposed that it will be possible to submit claims through a digital platform. It is envisaged that the creation of the registry will be financed by voluntary contributions from states and international institutions and that it will be hosted by a European city. It will be open to any type of claim, including claims by displaced persons, claims related to war crimes (including sexual violence), personal injury or death, property claims and claims by other governments (in respect of damage to infrastructure and the environment). It is also proposed that it will be able to compensate claimants who have secured judgments from the International Court of Justice, and the European Court of Human Rights, and from investment tribunals.[23]

The question of how to fund payments of compensation will need to be very carefully considered, although it is clearly envisaged that this will be achieved in some way through the seizure of Russian assets. Addressing the PACE Committee on Legal Affairs and Human Rights, Professor Burkhard Hess has suggested that Russian assets which could be targeted amount to around US$660 billion, including assets held by the Russian Central Bank, Russian state property and individual assets.[24] However, Hess has acknowledged the difficult legal questions which arise as to whether it would be lawful to expropriate and transfer such assets, and notes that possible impediments include immunity claims for state bank accounts (as regards jurisdiction and/or enforcement), and that the expropriation of oligarchs' assets will usually require a criminal conviction (which might result, for example, from evading sanctions).

Russia's expulsion from the Council of Europe has meant that the European Court has jurisdiction to consider claims regarding alleged violations of the ECHR committed before 16 September 2022.[25] Strasbourg claimants against Russia accordingly face two particularly significant hurdles: not only this temporal restriction, but also the likelihood that the Russian Federation will refuse to pay awards of damages made by the European Court.[26] However, the proposed plans for a compensation mechanism, as outlined above, offer meaningful new prospects for securing redress, as it is envisaged that the commission will be able to pay out awards made by other bodies such as the court (funded by voluntary contributions) and its own jurisdiction to grant awards of compensation will not be subject to the time limit which applies to court proceedings.

The precise role for the Council of Europe is still to be confirmed, but the Secretary-General has thrown her weight behind it, emphasising that the Council of Europe "should play a leading role in the establishment

of $352.5 billion). The Commission made its final payment in January 2022—a total of $52.4 billion compensation was awarded to approximately 1.5 million claimants. See: *https://uncc.ch/home* [Accessed 3 March 2023]. A second precedent is the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD) which was established in 2006. UNRoD does not pay compensation; instead it assesses whether or not loss or damage claimed is to be included in the Register of Damage. By 15 November 2022, 73,235 claim forms for registration of damage and more than 1 million supporting documents had been collected by UNRoD. By 1 July 2020, 37,257 claims had been included in the Register. See: *https://www.unrod.org/* [Accessed 3 March 2023].

[23] Parliamentary Assembly of the Council of Europe, "Compensation mechanisms for Ukraine the focus of a PACE hearing in Paris" (13 December 2022), *https://pace.coe.int/en/news/8924/compensation-mechanisms-for-ukraine-the-focus-of-a-pace-hearing-in-paris* [Accessed 3 March 2023].

[24] Parliamentary Assembly of the Council of Europe, "Compensation mechanisms for Ukraine the focus of a PACE hearing in Paris" (13 December 2022), *https://pace.coe.int/en/news/8924/compensation-mechanisms-for-ukraine-the-focus-of-a-pace-hearing-in-paris* [Accessed 3 March 2023]. By 30 November 2022, EU Member States had frozen €19 billion of assets belonging to Russian oligarchs and about €300 billion of Russian Central Bank reserves had been blocked (in the EU and G7 states): European Commission, Press Release, "Ukraine: Commission Presents Options to Make Sure that Russia Pays for its Crimes" (30 November 2022). See also: O. Vodiannikov, "Compensation Mechanism for Ukraine: An Option for Multilateral Action" (13 May 2022), *Opinio Juris*, *https://opiniojuris.org/2022/05/13/compensation-mechanism-for-ukraine-an-option-for-multilateral-action/* [Accessed 3 March 2023]; C. Giorgetti, M. Kliuchkovskyi and W. Pearsall, "Launching an International Claims Commission for Ukraine" (20 May 2022), *EJIL Talk!*, *https://www.ejiltalk.org/launching-an-international-claims-commission-for-ukraine/* [Accessed 3 March 2023]; R. Crootof, "The Case for War Torts—for Ukraine and Beyond" (14 December 2022), *Lawfare*, *https://www.lawfareblog.com/case-war-torts%E2%80%94-ukraine-and-beyond* [Accessed 3 March 2023].

[25] Council of Europe, Committee of Ministers, "Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe" (16 March 2023); European Court of Human Rights, Press Release, "Latest rulings by the European Court set out the procedure for future processing of applications against Russia" (3 February 2023). See also P. Leach, "A Time of Reckoning? Russia and the Council of Europe" (2022) 3 E.H.R.L.R. 219.

[26] See, e.g. Council of Europe, Press Release, "Committee of Ministers again exhorts Russia to pay damages to Georgia following ECHR judgment on collective expulsions" (23 September 2022), *https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=0900001680a833f0* [Accessed 3 March 2023].

and the functioning of the Register of damage, as a first and necessary step for the operation of any future compensation mechanism".[27]

Criminal accountability

A second new mechanism of accountability in respect of the Russian invasion of Ukraine arises from the proposal to establish an ad hoc international tribunal to try crimes of aggression.[28] This would aim to plug a significant accountability gap which results from the limited remit of the International Criminal Court (ICC) in respect of Ukraine. The ICC cannot exercise jurisdiction in relation to the crime of aggression if the act of aggression is committed by a state that is not party to the Rome Statute (the ICC's founding treaty), unless the UN Security Council refers the matter to it (which in this case would be vetoed by the Russian Federation). Neither Russia nor Ukraine has ratified the Rome Statute, but the ICC does have jurisdiction in respect of Ukraine because it lodged declarations in 2014 and 2015 accepting the exercise of the ICC's jurisdiction (in the aftermath of the Russian occupation of Crimea and parts of eastern Ukraine).[29] However, its remit in respect of Ukraine is limited to investigating alleged war crimes, crimes against humanity and genocide—it does not have jurisdiction in respect of the crime of aggression (which would arise from the invasion itself). This is significant because the ICC cannot therefore investigate the roles and responsibility of the most senior political and military figures in Russia in the decision to launch the invasion of Ukraine through the use of armed force.

There has already been very considerable debate about *how* to establish such a tribunal,[30] and this is where the Council of Europe's role could be pivotal. It will not be created by a resolution of the UN Security Council, because of the likelihood of a veto by Russia (as a permanent member of the Security Council). However, a tribunal could be created by a new multilateral treaty, or under the auspices of an existing inter-state body such as the Council of Europe.[31] Another option would be to establish a hybrid tribunal with both international and domestic elements.[32] Commentators such as Heller have suggested that a tribunal could be created under the auspices of the Council of Europe[33] (or as a result of an agreement between Ukraine and the Council of Europe), which would have greater legitimacy than a purely ad hoc tribunal, given its role as an "explicitly regional organization that addresses regional issues". However, Komarov and Hathaway have questioned whether states such as Hungary and Serbia would be supportive.[34]

A critical factor in setting up any tribunal is the question of immunities.[35] The crime of aggression is targeted at those who are "in a position effectively to exercise control over or to direct the political or

[27] Council of Europe, Information Document, "Accountability for human rights violations as a result of the aggression of the Russian Federation against Ukraine: role of the international community, including the Council of Europe" (31 January 2023, SG/Inf(2023)7).

[28] The crime of aggression is defined by the Rome Statute of the International Criminal Court as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations" (art.8 bis). See further: *https://justice-for-ukraine.com/* [Accessed 3 March 2023].

[29] Pursuant to art.12(3) of the Rome Statute.

[30] See, in particular, O. Corten and V. Koutroulis, "Tribunal for the Crime of Aggression against Ukraine—A Legal Assessment" (European Parliament, December 2022) (with extensive references to a range of commentaries on the issue).

[31] Owisu has argued that, in accordance with its Statute, the Council of Europe does have the legal competence to enter into an agreement with Ukraine to establish such a tribunal: O. Owisu, "An Aggression Chamber for Ukraine Supported by the Council of Europe" (30 March 2022), *Opinio Juris*, *http://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/* [Accessed 3 March 2023].

[32] See, e.g. UK Government, Press Release, "UK joins core group dedicated to achieving accountability for Russia's aggression against Ukraine" (20 January 2023), *https://www.gov.uk/government/news/ukraine-uk-joins-core-group-dedicated-to-achieving-accountability-for-russias-aggression-against-ukraine* [Accessed 3 March 2023].

[33] K. Heller, "The Best Option: An Extraordinary Ukrainian Chamber for Aggression" (16 March 2022), *Opinio Juris*, *https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/* [Accessed 3 March 2023].

[34] A. Komarov and O. Hathaway, "The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law" (11 April 2022), *Just Security*, *https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/* [Accessed 3 March 2023].

[35] Corten and Koutroulis, "Tribunal for the Crime of Aggression against Ukraine—A Legal Assessment" (European Parliament, December 2022), pp.21–31.

military action of a State".[36] International law grants personal immunities to heads of state, heads of government and ministers of foreign affairs before foreign *domestic* criminal courts, but such personal immunities are not applicable before *international* criminal courts and tribunals acting "on behalf of the international community as a whole".[37] Goldston and Khalfaoui have argued that a special tribunal created with the backing of the UN General Assembly would be most likely to meet this criterion, and that endorsement by the Council of Europe (amongst other organisations) could also be pivotal.[38]

It would appear unlikely that a tribunal will be created under Council of Europe auspices, as such. In calling for the establishment of a tribunal in January 2023, the Parliamentary Assembly proposed that it should be "endorsed and supported by as many States and international organisations as possible, and in particular by the United Nations General Assembly", but it was not suggested that the Council of Europe should be directly responsible. In February 2023, the Secretary General of the Council of Europe rather lamely noted that its role "will depend on the political will of member states", referring to potential contributions including assistance in the selection and appointment of judges and establishing rules of evidence and procedure, the provision of technical or legal support in case management and the secondment of experts.[39] It is rare, but not unprecedented, for regional intergovernmental bodies to be involved in the establishment of ad hoc criminal tribunals: the African Union was directly involved in establishing the Extraordinary African Chambers and the Council of Europe and the European Union Rule of Law Mission in Kosovo (EULEX) supported the creation of the Kosovo Specialist Chambers. However, as Corten and Koutroulis have pointed out, both of these examples concerned the exercise of domestic criminal jurisdiction (within Senegal and Kosovo, respectively).[40]

In spite of concerns expressed in some quarters about establishing an ad hoc tribunal for this particular European conflict, including questions of legitimacy[41] and accusations of selectivity,[42] there is undoubted international political momentum behind this proposal.[43] The precise role in this of the Council of Europe is yet to be determined, but its position as the primary regional organisation in Europe concerned with human rights and the rule of law affords it substantial legitimacy to provide resolute direction and leadership, not only in support of Ukraine and its citizens, but also as an appropriate response to such a grave threat to the rules-based international order.

[36] Article 8 bis of the Rome Statute.

[37] *International Criminal Court, Prosecutor v Al-Bashir* (ICC-02/05-01/09 OA2), Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, para.115.

[38] J. Goldston and A. Khalfaoui, "In Evaluating Immunities before a Special Tribunal for Aggression Against Ukraine, the Type of Tribunal Matters" (1 February 2023), *Just Security*, *https://www.justsecurity.org/84959/in-evaluating-immunities-before-a-special-tribunal-for-aggression-against-ukraine-the-type-of-tribunal-matters/* [Accessed 3 March 2023]. See also M. Lemos, "The Law of Immunity and the Prosecution of the Head of State of the Russian Federation for International Crimes in the War against Ukraine" (16 January 2023), *EJIL Talk!*, *https://www.ejiltalk.org/the-law-of-immunity-and-the-prosecution-of-the-head-of-state-of-the-russian-federation-for-international-crimes-in-the-war-against-ukraine/* [Accessed 3 March 2023].

[39] Council of Europe, Information Document, "Accountability for human rights violations as a result of the aggression of the Russian Federation against Ukraine: role of the international community, including the Council of Europe" (31 January 2023, SG/Inf(2023)7), para.29.

[40] Corten and Koutroulis, "Tribunal for the Crime of Aggression against Ukraine—A Legal Assessment" (European Parliament, December 2022), pp.11–13.

[41] See, e.g. Corten and Koutroulis, "Tribunal for the Crime of Aggression against Ukraine—A Legal Assessment" (December 2022, European Parliament), pp.35–37; A. Schüller, "What Can('t) International Criminal Justice Deliver for Ukraine?" (24 February 2023), *Verfassungsblog*, *https://verfassungsblog.de/justice-ukraine/* [Accessed 3 March 2023].

[42] For example, Trahan has argued that "given lingering questions of legality regarding the use of military force by the United States and UK in Iraq in 2003, having the UK spearhead a Nuremberg-style tribunal raises clear problems of optics" (J. Trahan, "Revisiting the History of the Crime of Aggression in Light of Russia's Invasion of Ukraine" (19 April 2022), *ASIL Insights*, *https://www.asil.org/insights/volume/26/issue/2#_ednref23* [Accessed 3 March 2023]). See also M. Kersten, "States that Neutered the Crime of Aggression have a Special Responsibility to Address War Crimes in Ukraine" (8 March 2022), *Justice in Conflict*, *https://justiceinconflict.org/2022/03/08/states-that-neutered-the-crime-of-aggression-have-a-special-responsibility-to-address-war-crimes-in-ukraine/* [Accessed 3 March 2023]; K. Heller, "The Best Option: An Extraordinary Ukrainian Chamber for Aggression" (16 March 2022), *Opinio Juris*, *https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/* [Accessed 3 March 2023].

[43] As regards European institutions, see e.g. European Parliament, Resolution of 19 May 2022 on the fight against impunity for war crimes in Ukraine, P9_TA(2022)0218, 19 May 2022; OSCE Parliamentary Assembly, Birmingham Declaration, AS(22)DE, Resolution on the Russian's Federation war of aggression against Ukraine and its People, and its threat to Security across the OSCE region (2–6 July 2022); European Commission, Press Release, "Ukraine: Commission presents options to make sure that Russia pays for its crimes" (30 November 2022).

Strengthening implementation of judgments of the European Court of Human Rights

One issue that has been a continual focus for the Council of Europe over recent decades, albeit without achieving significant improvement, has been, in many instances, the ineffective implementation of judgments of the court. Top of the list of the Council of Europe's four-year strategic framework (as agreed in 2020) was the implementation of the ECHR.[44] However, as outside observers, we have discerned an ingrained complacency within "the system" about the scale and importance of this problem. By the beginning of 2022, there were 1,300 leading judgments[45] pending implementation, for an average time of more than six years.[46] The European Implementation Network (EIN) has also underlined that 47% of the leading European Court judgments from the last 10 years are still pending implementation.[47] The HLRG noted, too, the steadily increasing number of judgments being issued by the court (for example, a 40% increase in 2021).[48] The latest annual report from the Committee of Ministers acknowledges "serious challenges" to the execution process, amidst an "extremely challenging background".[49] Moreover, this is not a problem confined to only a few states: the Committee of Ministers' report lists 27 states which had 10 or more leading judgments pending implementation.[50]

The worsening situation necessitates going beyond mere political declarations (which have been the primary outcome of the Interlaken process)—it requires meaningful improvements of existing procedures as well as the introduction of new tools, all of which should be endorsed and formalised at the Reykjavik Summit.

The need for a well-resourced implementation strategy

Ineffective implementation was rightly a priority for the HLRG, which made a number of specific recommendations, including formalising the practice of calling ministers or other senior government officials of states whose judgments are not implemented on a systematic basis to attend meetings of the Committee of Ministers, and graduated sanctions for persistent non-compliance.[51] EIN and the Campaign

[44] Council of Europe, "Strategic Framework of the Council of Europe" (23 November 2020, SG/Inf(2020)34), p.3. This document explicitly called for "further development of the working methods and means available … particularly to the Human Rights meetings of the Committee of Ministers' Deputies devoted to this matter" whose objective should be "to further enhance efficiency, effectiveness and tangible impact" (pp.3, 5).

[45] A "leading case" is defined by the Committee of Ministers as a "case which has been identified as revealing new structural and/or systemic problems, either by the Court directly in its judgment, or by the Committee of Ministers in the course of its supervision of execution". See Council of Europe, "Supervision of the Execution of the Judgments and Decisions on the European Court of Human Rights—15th Annual Report of the Committee of Ministers 2021" (March 2022), p.89.

[46] European Implementation Network, "EIN Board writes to the CoE Secretary General and Committee of Ministers to call for action on the implementation of ECtHR judgments" (16 May 2022), *https://www.einnetwork.org/blog-five/2022/5/16/open-letter-by-ein-calling-for-a-public-strategy-to-address-the-systemic-problem-of-non-implementation-of-ecthr-judgments* [Accessed 3 March 2023]. EIN is a Strasbourg-based network of 38 civil society organisations and individuals from 25 European states. See also the article in this issue by EIN Director, George Stafford: G. Stafford, "The Urgent Reforms Needed to Improve the Implementation of Judgments of the European Court of Human Rights" [2023] E.H.R.L.R. 101.

[47] European Implementation Network, "EIN Board writes to the CoE Secretary General and Committee of Ministers to call for action on the implementation of ECtHR judgments".

[48] European Implementation Network, "EIN Board writes to the CoE Secretary General and Committee of Ministers to call for action on the implementation of ECtHR judgments" (16 May 2022), para.19, *https://www.einnetwork.org/blog-five/2022/5/16/open-letter-by-ein-calling-for-a-public-strategy-to-address-the-systemic-problem-of-non-implementation-of-ecthr-judgments* [Accessed 3 March 2023].

[49] Council of Europe, "Supervision of the Execution of the Judgments and Decisions on the European Court of Human Rights—15th Annual Report of the Committee of Ministers 2021" (March 2022), pp.12, 32. The report notes, inter alia, a worsening problem of serious delays in states' submission of vital information, such as action plans and reports: 1,423 such cases in 2019; 1,602 in 2020; and 1,772 in 2021. See also, e.g. F. de Londras and K. Dzehtsiarou, "Mission Impossible? Addressing Non-Execution Through Infringement Proceedings of the European Court of Human Rights" (2017) 66 I.C.L.Q. 467 ("It is beyond question that non-execution is a serious problem for the Convention system, and that its persistence raises difficulties of effectiveness and legitimacy for the Court and the system as a whole" (p.489)). As well as problems related to the execution of judgments, there has increasingly been strong state pushback against interim measures orders. See, e.g. A. Allegretti, "Raab says court was wrong to block Rwanda deportation flight" (The Guardian, 16 June 2022); Council of Europe, Press Release, "Non-compliance with interim measure in Polish judiciary cases" (16 February 2023).

[50] Council of Europe, "Supervision of the Execution of the Judgments and Decisions on the European Court of Human Rights—15th Annual Report of the Committee of Ministers 2021" (March 2022), pp.51–53.

[51] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), pp.20–24, paras 17–32, *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023].

to Uphold Rights in Europe have championed calls for a special representative on the implementation of the court's judgments, amongst other proposals, which, we understand, has been increasingly gaining traction.[52]

Research into how and why states implement human rights judgments yields valuable insights into the dynamics of implementation at the domestic level, which may involve multiple actors, both pro- and anti-compliance, over long periods of time and in fluctuating political circumstances.[53] Certain types of judgment, such as those requiring investigation and punishment of state perpetrators or measures to tackle entrenched discrimination, have especially poor compliance rates.[54] These findings reveal the complexity of the challenge facing the Department for the Execution of Judgments of the European Court of Human Rights (DEJ), the secretariat body within the Committee of Ministers that provides technical support to Member States that lack the capacity to implement judgments and exerts continuing pressure on those that resist doing so. The Director General of the Directorate General of Human Rights and Rule of Law, Christos Giakoumopoulos, calls the DEJ the "lynchpin of the execution process", whose "resources, which are already extremely strained, need to be urgently strengthened".[55]

As a snapshot of these stretched resources, Stafford notes that the DEJ has around 25 permanent lawyers working on its caseload of (as of early 2022) 5,533 cases, of which 1,300 are leading cases.[56] Thus, each permanent lawyer was supervising on average around 220 cases, including more than 50 leading cases. The daunting scale of this caseload becomes apparent if one considers the complex and protracted nature of the supervision process in cases involving multiple domestic actors and wide-ranging reforms, requiring in-country visits by DEJ officials. The Council of Europe Programme and Budget for 2022–2025 indicates no increase in resources allocated to the execution of judgments and only one project to "[reduce] the backlog of outstanding unexecuted leading judgments of the European Court of Human Rights", in particular those concerning the effective investigation of allegations of ill-treatment and combating impunity (which, however, is reliant on voluntary contributions that may not materialise).[57]

Accordingly, in light of the evidence of the extent of the problem of implementation and the effective means of addressing such difficulties, as well as the principles set out above, we would advocate the following developments and initiatives:

(i) Greater transparency of the Committee of Ministers' quarterly human rights meetings (CM/DH meetings), including enabling NGOs, NHRIs and other interested third parties to be present, as well as holding some meetings fully in public, meaning that they could be reported by the media and on social media.

(ii) Requiring ministers and senior officials from relevant states to be present and available for questioning at CM/DH meetings[58] and PACE committees[59] (which could relate to individual

[52] European Implementation Network, "EIN Board writes to the CoE Secretary General and Committee of Ministers to call for action on the implementation of ECtHR judgments" (16 May 2022), *https://www.einnetwork.org/blog-five/2022/5/16/open-letter-by-ein-calling-for-a-public-strategy-to-address-the-systemic-problem-of-non-implementation-of-ecthr-judgments* [Accessed 3 March 2023]; Campaign to Uphold Rights in Europe, "Input for the High-Level Reflection Group of the Council of Europe by the CURE—Campaign to Uphold Rights in Europe" (29 July 2022), *https://cure-campaign.org/wp-content/uploads/Input-for-the-High-Level-Reflection-Group-by-CURE-Campaign.pdf* [Accessed 3 March 2023].

[53] A. Donald and A-K. Speck, "The Dynamics of Domestic Human Rights Implementation: Lessons from Qualitative Research in Europe" (2020) 12 *Journal of Human Rights Practice* 48.

[54] Donald and Speck, "The Dynamics of Domestic Human Rights Implementation: Lessons from Qualitative Research in Europe" (2020) 12 *Journal of Human Rights Practice* 48, 49.

[55] Council of Europe, "Supervision of the Execution of the Judgments and Decisions on the European Court of Human Rights—15th Annual Report of the Committee of Ministers 2021" (March 2022), p.32.

[56] Stafford, "The Urgent Reforms Needed to Improve the Implementation of Judgments of the European Court of Human Rights" [2023] E.H.R.L.R. 101.

[57] Council of Europe, Programme and Budget 2022–2025, 1418th (Budget) Meeting, CM(2022)1 (10 December 2021), p.33.

[58] See also: *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023], para.27(i).

[59] See further P. Leach, "The Parliamentary Assembly of the Council of Europe" in S. Schmahl and M. Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017), pp.166–211, paras 7.75–7.79.

cases, systemic issues and/or the state's general record of implementation) as a means of increasing the political and reputational costs of non-compliance.

(iii) Consider holding "hearings" on intractable issues, primarily in-country, but occasionally in Strasbourg, involving the parties to a case, as well as other interested bodies. This would emulate the practice of the Inter-American Court (and Commission) of Human Rights, which are empowered to hold hearings both in public and private, with demonstrable benefits in terms of galvanising stalled implementation processes, facilitating dialogue between domestic actors, applying pressure to reluctant actors, and increasing the visibility and salience of implementation, especially where hearings are held in-country.[60]

(iv) The creation of a new, independent body—the Special Representative on Implementation, who would focus on facilitating the implementation of leading cases, and maintain a "permanent dialogue" with the national authorities, as the HLRG envisaged.[61] To do so the Special Representative would, inter alia, carry out in-country missions involving a full range of interlocutors from the state and civil society and, on especially troublesome issues, or "hearings" as recommended above. As EIN has proposed, it would also be an important part of the role to develop national capacities to ensure the implementation of European Court judgments (through establishing multi-agency working groups and suchlike).[62]

(v) Both the CM and the Special Representative on Implementation should maintain a clear focus on particular issues of priority, including violence against women[63] and the repression of human rights defenders,[64] holding regular thematic debates and meetings in Strasbourg and in-country, with the involvement of governments, a range of public bodies, civil society and NHRIs.

(vi) More concerted coordination by and between Council of Europe bodies to take steps to facilitate implementation, including high-level engagement with relevant ministers by the Secretary General, the Presidents of the Committee of Ministers and/or PACE, inter alia, in the course of in-country missions.[65]

[60] C. Sandoval, P. Leach and R. Murray, "Monitoring, Cajoling and Promoting Dialogue: What Role for Supranational Human Rights Bodies in the Implementation of Individual Decisions?" (2020) 12 *Journal of Human Rights Practice* 71, 81–83.

[61] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023], para.27(f).

[62] European Implementation Network, "EIN Board writes to the CoE Secretary General and Committee of Ministers to call for action on the implementation of ECtHR judgments" (16 May 2022), *https://www.einnetwork.org/blog-five/2022/5/16/open-letter-by-ein-calling-for-a-public-strategy-to-address-the-systemic-problem-of-non-implementation-of-ecthr-judgments* [Accessed 3 March 2023]. In this issue, George Stafford describes the effective impact of an inter-ministerial working group established in Slovenia: Stafford, "The Urgent Reforms Needed to Improve the Implementation of Judgments of the European Court of Human Rights" [2023] E.H.R.L.R. 101.

[63] It is recalled that the High Level Reflection Group advocated "a bold strategy to strengthen gender equality and prevent and combat all forms of violence against women": *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023], para.54.

[64] Nils Muižnieks and Rita Patrício propose that the CM should convene thematic debates on the implementation of judgments concerning human rights defenders, in line with Council of Europe, Ministers' Deputies, "Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe" (28 November 2018): N. Muižnieks and R. Patrício, "Using the Summit to Breathe New Life into the Council of Europe" [2023] E.H.R.L.R. 126. See also J. McBride, "Protecting and Engaging with Civil Society: A Challenge for the Council of Europe" [2023] E.H.R.L.R. 119.

[65] See *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023], paras 27(b), (c) and (j). See further below our discussion of infringement proceedings. It is recalled that in 2020 a new mechanism was introduced—the joint complementary procedure—which envisaged collaborative measures by the Parliamentary Assembly, the Committee of Ministers and the Secretary General where states are considered to be falling foul of their obligations as Member States. This mechanism has not yet been utilised and it is certainly not clear what it would involve or what exactly it would lead to, but its strategy would be one of "constructive dialogue and co-operation" and the avoidance of sanctions. It is envisaged as being exceptional and reserved for the most serious violations. See: Committee of Ministers, Decisions, CM/Del/Dec(2019)129/2 (17 May 2019); Parliamentary Assembly, "Complementary joint procedure between the Committee of Ministers and the Parliamentary Assembly in response to a serious violation by a member State of its statutory obligations", Resolution 2319 (2020) (29 January 2020); S. Steininger, "An Internal Safety Net for the Council of Europe?" (28 December 2019), *Verfassungsblog*, *https://verfassungsblog.de/tag/complementary-joint-procedure/* [Accessed 3 March 2023]; S. Steininger, "With or Without You: Suspension, Expulsion, and the Limits of Membership Sanctions in Regional Human Rights Regimes" (2021) 81 *ZaöRV* 533, 563 ("… the new procedure … still requires significant political will by a very high number of state parties. Hence, it is vulnerable to political blockade and diplomatic blackmail, and state parties will probably remain reluctant to initiate such a cost-intensive procedure").

(vii) More effective alignment and coordination with other inter-governmental organisations, including the UN[66] and the EU. The failure to implement judgments of the European Court of Human Rights is also a rule of law issue for the EU: Democracy Reporting International and EIN note that "38% of the leading judgments of the European Court of Human Rights … relating to EU states from the last ten years have not been implemented".[67]

(viii) The provision of increased resources by states to provide greater certainty and stability to the work of supervising the execution of judgments.

In our view, these developments could help lead to the "change in paradigm" envisaged by the HLRG, with judgments of the court not being seen as an endpoint, but the beginning of a process of change at the national level which is monitored closely and supported by a more politically-engaged Council of Europe.[68]

Infringement proceedings

In reforming and improving the operations of a complex and unwieldy inter-state organisation like the Council of Europe, it makes sense to look carefully at developments aimed at making the most of existing procedures. The one new mechanism that has been relatively recently introduced (in 2010) with the aim of improving implementation—infringement proceedings[69]—has had extremely limited effects (as is analysed further in this issue by Başak Çalı).[70] In the main, this is because of a marked reluctance to invoke it[71]—it has only ever been employed twice, in respect of the cases of jailed opposition politician Ilgar Mammadov (in Azerbaijan) and imprisoned human rights defender Osman Kavala (in Turkey). It is right to acknowledge that Mammadov was released by the Azerbaijani authorities,[72] but that is not currently the case for Osman Kavala, who has been in prison since 2017, in spite of a 2019 European Court judgment[73] and 2022 Grand Chamber infringement proceedings judgment[74] ordering his release.[75] This timidity may spring from an apparently widely-held misconception that the mechanism represented the "nuclear option" when faced with states' failure to implement judgments.[76] However, that is manifestly not the case, as it

[66] See *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023], paras.27(g), 30, 33–36, 37–38.

[67] See Democracy Reporting International and European Implementation Network, *Justice Delayed and Justice Denied: Non-Implementation of European Courts' Judgments and the Rule of Law* (April 2022), p.5, *https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/625ebfc1e6ed036bcd0dfbdb/1650376644973/dri-ein-publication-final-webpdf-625e8cb9c19e5.pdf* [Accessed 3 March 2023] ("France, Germany, the Netherlands and Sweden all have leading judgments pending implementation for over five years. Over 50% of leading judgments against Italy and Spain are yet to be implemented. Romania and Bulgaria have each failed to implement over 90 leading judgments. Hungary also has a very serious non-implementation problem, with 71% of the leading ECtHR rulings from the last ten years awaiting implementation", p.5). In 2022, the European Commission's Rule of Law Report for the first time included information about implementation of European Court judgments in each of the 27 country chapters. See European Commission, *2022 Rule of Law Report*, Communication and country chapters (13 July 2022), *https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en* [Accessed 3 March 2023].

[68] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023], para.23.

[69] Pursuant to art.46(4) of the European Convention on Human Rights (as amended by Protocol No.14 to the European Convention on Human Rights).

[70] B. Çalı, "The Present and the Future of Infringement Proceedings: Lessons learned from Kavala v Türkiye" [2023] E.H.R.L.R. 156.

[71] See further: F. de Londras and K. Dzehtsiarou, "Mission Impossible? Addressing Non-Execution Through Infringement Proceedings of the European Court of Human Rights" (2017) 66 I.C.L.Q. 467.

[72] *Mammadov v Azerbaijan* [GC] (App. No.15172/13), judgment of 29 May 2019; (2020) 70 E.H.R.R. 8. In addition to the European Court proceedings, in 2015 the Secretary General of the Council of Europe (then Thorbjørn Jagland) had initiated an inquiry under art.52 of the European Convention on Human Rights into the *Mammadov* case. See Council of Europe, Press Release, "Council of Europe Secretary General launches inquiry into respect for human rights in Azerbaijan" (16 December 2015), *https://rm.coe.int/16807ldd88* [Accessed 3 March 2023].

[73] *Kavala v Turkey* (App. No.28749/18), judgment of 10 December 2019; (2021) 72 E.H.R.R. 23.

[74] *Kavala v Turkey* [GC] (App. No.28749/18), judgment of 11 July 2022; (2023) 76 E.H.R.R. 13.

[75] B. Çalı and P. Leach, "The fate of Osman Kavala matters" (20 October 2022), *Politico*, *https://www.politico.eu/article/human-rights-the-fate-of-osman-kavala-matters-europen-court-echr-turkey/* [Accessed 3 March 2023].

[76] See, e.g. L. Moxham, "Implementation of ECHR judgments—Have We Reached a Crisis Point?" (7 July 2017), *UK Human Rights Blog*, *https://ukhumanrightsblog.com/2017/07/07/implementation-of-echr-judgments-have-we-reached-a-crisis-point-lucy-moxham/* [Accessed 3 March 2023]; L. Glas, "The Committee of Ministers Goes Nuclear: Infringement Proceedings against Azerbaijan in the Case of Ilgar Mammadov" (20 December 2017), *Strasbourg Observers*, *https://strasbourgobservers.com/2017/12/20/the-committee-of-ministers-goes-nuclear-infringement-proceedings-against-azerbaijan-in-the-case-of-ilgar-mammadov/* [Accessed 3 March 2023]; A. Komanovics, "Infringement proceedings against Azerbaijan: Judicialisation of the Execution of the Judgments of the European Court of Human Rights" (2018) 22 *Anuario da Facultade de Dereito da Universidade da Coruña*

was introduced in order to provide an alternative procedure short of expulsion (under art.8 of the Statute of the Council of Europe)[77] and also because it has no direct consequences for the state in question, such as any form of sanction.

The court has also taken a very narrow and restrictive approach to its adjudication of infringement proceedings, deciding to limit itself to a finding concerning the respondent state's obligation to comply with a judgment under art.46(1) of the ECHR. In the *Kavala* case, the court declined to make additional orders or directions which were requested by the applicant, including finding continuing violations of the ECHR since the 2019 judgment and issuing a further order for his release, notwithstanding his criminal conviction in the domestic proceedings (which had occurred after the previous Strasbourg judgment).[78] The court's diffidence in that respect leaves Mr Kavala in the same position as he was in after the 2019 judgment, and has also arguably emboldened the Turkish authorities in seeking to argue that Mr Kavala's conviction in 2020 is one of the reasons justifying his continued imprisonment.[79] Thus, the state of "futility", which de Londras and Dzehtsiarou presciently foresaw arising from infringement proceedings, may have been reached.[80]

It is clear that the "official line" on infringement proceedings when it was being introduced (as expressed in the Explanatory Report to Protocol 14) was hopelessly naive and optimistic: "[t]he procedure's mere existence, and the threat of using it, should act as an effective new incentive to execute the Court's judgments".[81] The time is ripe, then, to strengthen this mechanism by adopting the measures of enhancement which Çalı proposes in this issue, including the specification of remedial measures by the court; monitoring of infringement judgments at the highest levels of the Council of Europe, including the Secretary-General; more frequent and intensive monitoring by the Committee of Ministers; mechanisms to directly engage with the domestic authorities in charge of implementing infringement judgments; and devising graduated sanctions for non-compliance.[82]

The question of sanctions

Is it time, as Çalı proposes, to return to the possibility of imposing more concrete measures on recalcitrant states (and their officers or agents)—specific sanctions—in exceptional situations, such as following fruitless infringement proceedings? As noted above, the HLRG advocated consideration of "graduated sanctions in cases of persistent noncompliance with a judgment by a member state".[83] Certain sanctions can of course already be imposed on Council of Europe Member States for breaches of the Statute of the Council of Europe—suspension of the rights of representation and termination of membership.[84] The Parliamentary Assembly has the power to refuse to ratify a state delegation's credentials, and to suspend

138; A-E. Zastrow and A. Zimmerman, "Council of Europe's Committee of Ministers Starts Infringement Proceedings in Mammadov v. Azerbaijan: A Victory for the International Rule of Law?" (5 February 2018), *EJIL Talk!*, *https://www.ejiltalk.org/council-of-europes-committee-of-ministers-starts-infringement-proceedings-in-mammadov-v-azerbaijan-a-victory-for-the-international-rule-of-law/* [Accessed 3 March 2023]; A. Buyse, "First Infringement Proceedings Judgment of the European Court : Ilgar Mammadov v Azerbaijan" (31 May 2019), *ECHR Blog*, *https://www.echrblog.com/2019/05/first-infringement-proceedings-judgment.html* [Accessed 3 March 2023].

[77] Council of Europe, Explanatory Report to Protocol No.14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 13 May 2004, para.100.

[78] *Kavala v Turkey* [GC] (App. No.28749/18), judgment of 11 July 2022 at [124] and [175]. NB: Philip Leach is representing Mr Kavala in respect of the infringement proceedings, together with Başak Çalı.

[79] See, e.g. 1443rd meeting (September 2022) (DH), Rule 8.2a Communication from the authorities (02/09/2022) concerning the case of *Kavala v Turkey* (App. No.28749/18), DH-DD (2022)926 (5 September 2022), available at: *https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2022)926E%22]}* [Accessed 3 March 2023].

[80] F. de Londras and K. Dzehtsiarou, "Mission Impossible? Addressing Non-Execution Through Infringement Proceedings of the European Court of Human Rights" (2017) 66 I.C.L.Q. 467.

[81] Council of Europe, Explanatory Report to Protocol No.14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 13 May 2004, para.100.

[82] Çalı, "The Present and the Future of Infringement Proceedings: Lessons Learned from Kavala v Türkiye" [2023] E.H.R.L.R. 156.

[83] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023], paras 26–27.

[84] Articles 3 and 8 of the Statute of the Council of Europe. Decisions are taken by the Committee of Ministers, in consultation with the Parliamentary Assembly.

a delegation's voting rights at the Assembly.[85] Steininger has argued that such membership sanctions "can be used to punish backlashing state parties, deter like-minded states, and safeguard institutional functioning".[86] The Parliamentary Assembly has notably invoked these powers in relation to Russia, in 2000 in respect of serious human rights violations in Chechnya, and in 2014 following the Russian military occupation of Ukraine and its annexation of Crimea,[87] but they have not been used, as such, as a response to the non-implementation of European Court judgments. We suggest that it should not be viewed as inconceivable for the Parliamentary Assembly to use its internal sanctions in the face of persistent or egregious non-implementation of judgments alongside other manifestations of backsliding on the rule of law and human rights, as has been seen in states such as Turkey, Azerbaijan, Hungary and Poland.[88] Moreover, financial penalties for non-implementation could be contemplated by the Committee of Ministers: in 2000, the Parliamentary Assembly proposed the introduction of daily fines (*astreintes*) for persistent non-implementation of judgments,[89] but this proposal did not receive states' backing and is unlikely to do so at Reykjavik.

As to how to develop its approaches, important lessons can of course be learned from the application of sanctions elsewhere. The EU's global human rights sanctions regime (EU HRSR), introduced in 2020, can lead to travel bans and the freezing of assets, and is designed to target both organisations and individuals (state and non-state). Its proponents point to the speed and flexibility of such measures, although commentators such as Eckes underline its status as a foreign policy tool: "[w]e should not expect sanctions under the EU HRSR to be applied neutrally or impartially".[90] Nevertheless, its remit covers issues which are frequently the subject of judgments of the European Court, namely serious human rights violations or abuses (torture and other cruel, inhuman or degrading treatment or punishment, slavery, extrajudicial, summary or arbitrary executions and killings, enforced disappearance of persons, and arbitrary arrests or detentions) as well as other violations or abuses which are "widespread, systematic or are otherwise of serious concern".[91] Eckes notes how sanctions regimes can complement each other, citing the case of Alexei Navalny and the fact that, in February 2021, the European Council blacklisted Russian officials who had been involved in Mr Navalny's wrongful imprisonment.[92] We would observe, in addition, that the frequent, abusive detention of Mr Navalny has been repeatedly condemned by the European Court. In the 2018 Grand Chamber judgment, which concerned Mr Navalny's arrest at public meetings on seven occasions, the court explicitly found a sequence and pattern of events which constituted the suppression of political pluralism (in violation, inter alia, of art.18 of the ECHR).[93] Therefore, one might well ask whether there is a means of "joining up" such mechanisms, so that impactful sanctions follow European

[85] Under Rules 7–10 of the Assembly's Rules of Procedure: Rules of Procedure of the Assembly (January 2023), *https://assembly.coe.int/nw/xml/RoP/RoP-XML2HTML-EN.asp* [Accessed 3 March 2023]. See further E. Klein, "Membership and Observer Status" in S. Schmahl and M. Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017), pp.40–92; Leach, "The Parliamentary Assembly of the Council of Europe" in Schmahl and Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017), pp.166–211.

[86] Steininger, "With or Without You: Suspension, Expulsion, and the Limits of Membership Sanctions in Regional Human Rights Regimes" (2021) 81 *ZaöRV* 533, 565.

[87] Leach, "The Parliamentary Assembly of the Council of Europe" in Schmahl and Breuer (eds), *The Council of Europe: Its Laws and Policie*s (Oxford: Oxford University Press, 2017), pp.166–211, paras 7.53–7.61.

[88] A. Donald and A-K. Speck, "Time for the Gloves to Come Off?: The Response by the Parliamentary Assembly of the Council of Europe to Rule of Law Backsliding" (2021) 2(2) *European Convention on Human Rights Law Review* 241.

[89] Parliamentary Assembly, Execution of judgments of the European Court of Human Rights, Recommendation 1477 (2000) (28 September 2000).

[90] C. Eckes, "EU Global Human Rights Sanctions Regime: Is the Genie out of the Bottle?" (2022) 30(2) *Journal of Contemporary European Studies* 255, 262.

[91] See Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses ([2020] OJ L410I, pp.13–19). The widespread or systematic violations may relate to trafficking in human beings, sexual and gender-based violence, violations or abuses of freedom of peaceful assembly and of association, violations or abuses of freedom of opinion and expression, violations or abuses of freedom of religion or belief.

[92] See also A. Rettman, "EU Makes First Use of Magnitsky Act, on Russia" (23 February 2021), *EUObserver*, *https://euobserver.com/world/151019* [Accessed 2 March 2023].

[93] *Navalnyy v Russia* [GC] (App. No.29580/12), judgment of 15 November 2018; (2019) 68 E.H.R.R. 25 at [175] (violations of arts 5(1), 6(1), 11 and 18 (with arts 5 and 11)).

Court judgments in especially serious or systemic cases—which should include art.18 cases.[94] This could represent the sort of "complementarity and coherence of action" between the Council of Europe and the EU that was envisaged by the HLRG.[95]

New rights? Addressing the climate emergency

Another issue before the summit is whether the ECHR itself is "fit for the future" in terms of whether its broadly framed rights are capable of being interpreted so as to address new and emerging threats to human rights. One such threat, the climate emergency, is centre stage in advance of the Reykjavik Summit and is specifically mentioned in the open call. Momentum towards explicit legal recognition of environmental rights has been building, with the Committee of Ministers' September 2022 recommendation[96] on recognising a clean, healthy and sustainable environment as a human right (reflecting the historic United Nations General Assembly Resolution in July 2022).[97] Moreover, the question of how far ECHR rights can be invoked to address the causes and consequences of greenhouse gas emissions is of mounting interest given the climate cases which are pending before the court at the time of writing (three of which have been relinquished to the Grand Chamber).[98]

What might this mean in more concrete terms at the Reykjavik Summit? We understand that the creation of a new post of Commissioner for the protection of the environment (or a similar title) is a possibility. As Muižnieks and Patrício note, such an institution could work in a similar way to ECRI in harnessing expertise, developing policy recommendations to Member States, and monitoring national implementation.[99]

We understand, however, that the summit is unlikely to recommend the creation of a legally binding and enforceable instrument, such as an additional protocol to the ECHR on the right to a healthy environment, as has been recommended by the Parliamentary Assembly in order to "finally give the Court a non-disputable basis for rulings concerning human rights violations arising from adverse environment-related impacts on human health, dignity and life".[100] Indeed, the Parliamentary Assembly has gone further to recommend the creation of a parallel additional protocol to the European Social Charter.[101] While the Assembly's more ambitious recommendations do not appear likely to be endorsed by heads of state and government, it is to be hoped that the Reykjavik Summit will—at least—keep the door open to such developments in future phases of reform.

Armed conflicts and "grey zones"

For several years the Council of Europe has been grappling with how to respond to armed conflicts on the European continent, and their aftermath, which have often resulted in the long-standing existence of "grey zones" or "frozen conflicts"—areas where the concept of the rule of law has lost much, or all,

[94] In this issue, Robert Spano describes art.18 findings as indicators of the "retrogression of inclusive liberal democracy": R. Spano, "Inclusive Democracy and the European Convention on Human Rights" [2023] E.H.R.L.R. 112; Nils Muižnieks and Rita Patrício argue in this issue that "article 18 violations require a coordinated response at the highest political level of the Council of Europe to ensure an end to political persecution, respect for the ECHR system and the authority of the Strasbourg Court": Muižnieks and Patrício, "Using the Summit to Breathe New Life into the Council of Europe" [2023] E.H.R.L.R. 126.

[95] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), para.27(g), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023].

[96] Recommendation CM/Rec(2022)20 of the Committee of Ministers to member States on human rights and the protection of the environment (27 September 2022).

[97] Resolution adopted by the General Assembly on 28 July 2022, A/RES/76/300, on the human right to a clean, healthy and sustainable environment.

[98] European Court of Human Rights, "Factsheet: Environment and the European Court of Human Rights", October 2022, *https://echr.coe.int/Documents/FS_Environment_ENG.pdf* [Accessed 2 March 2023].

[99] Muižnieks and Patrício, "Using the Summit to Breathe New Life into the Council of Europe" [2023] E.H.R.L.R. 126.

[100] Parliamentary Assembly of the Council of Europe, "Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe", Resolution 2396 (2021)1 (29 September 2021), para.7.

[101] Parliamentary Assembly of the Council of Europe, Resolution 2396 (2021)1, para.10.

traction and over which it bears little or no influence. Home to an estimated 10 million people,[102] they include Transnistria, the Karabakh region/Nagorno-Karabakh, Abkhazia, northern Cyprus and currently occupied areas of Ukraine. For the HLRG, such regions represent "black holes that shut out the light of accountability".[103] A significant aspect of this quandary is how the European Court should handle inter-state cases, as well as the thousands of individual applications that can arise during and after situations of conflict.[104] The Council of Europe's indecision and inaction in this field is arguably well illustrated by the Nagorno-Karabakh cases—two Grand Chamber judgments issued in 2015, in respect of both protagonist states, Armenia and Azerbaijan.[105] In its judgments, the European Court acknowledged the primacy of a political resolution to the conflict, but also proposed that both states establish a property claims mechanism as a means of providing redress to internally displaced people and refugees who had lost their homes or land during the conflict. Thus, after more than 20 years of fruitless efforts through the OSCE Minsk process, the Council of Europe (through the Committee of Ministers) had an opportunity to make some headway, as a result of its obligation to supervise the implementation of these Grand Chamber judgments. However, nearly eight years later nothing of note has been achieved.[106]

The HLRG proposed that a new office be established within the Council of Europe to gather and disseminate information about these regions.[107] However, we would go further and endorse the conclusions of an expert conference held at the University of Galway in 2022. This group lamented the lack of focus on these contested territories and called for renewed prioritisation by the Council of Europe, through a complementary, system-wide approach which should lead to greater political engagement, the development of confidence-building measures and cooperation programmes, the enhancement of the role of civil society and ensuring that monitoring mechanisms are granted full access to the territories.[108]

The need for adequate resources

As noted above in respect of the resourcing of work to monitor implementation of the court's judgments, any programme of reform must be matched by sufficient resources. As Steininger observes, financial budgets constitute an "Achilles heel" for regional human rights regimes, since they typically depend on various voluntary and obligatory financial contributions from state parties and other international donors.[109]

The HLRG—echoed by the President of the Court, Judge Siofra O'Leary[110]—laments that the resources provided by states to the Council of Europe are "unquestionably insufficient" to fulfil its current mandate,

[102] A. Forde, "Conclusions on the Effectiveness of the European Convention on Human Rights in Areas of Conflict and Contestation" (1 September 2022), Irish Centre for Human Rights, University of Galway, *https://www.universityofgalway.ie/media/irishcentreforhumanrights/files/ICHR-ECHR-Conference-Conclusions-2022.pdf* [Accessed 3 March 2023], p.4.

[103] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), para.32, *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023].

[104] See further P. Leach, "On Inter-State Litigation and Armed Conflict Cases in Strasbourg" (2021) 2 *European Convention on Human Rights Law Review* 27.

[105] *Chiragov v Armenia* [GC] (App. No.13216/05), judgment of 16 June 2015; (2016) 63 E.H.R.R. 9; *Sargsyan v Azerbaijan* [GC] (App. No.40167/06), judgment of 16 June 2015; (2018) 67 E.H.R.R. 4.

[106] See, e.g. Committee of Ministers, *Sargsyan v Azerbaijan*, 1451st meeting, 6–8 December 2022 (DH), available at: *https://hudoc.exec.coe.int/eng#{%22EXECDocumentTypeCollection%22:[%22CEC%22],%22EXECTitle%22:[%22sargsyan%22],%22EXECIdentifier%22:[%22004-1717%22]}* [Accessed 3 March 2023] ("… more than seven years have passed since the European Court rendered its judgment on the merits in the present case and almost five years since it rendered its judgment on the just satisfaction, but that nonetheless no tangible progress has so far been achieved in the execution of the individual and general measures required in this case").

[107] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), para.32, *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023].

[108] Forde, "Conclusions on the Effectiveness of the European Convention on Human Rights in Areas of Conflict and Contestation" (1 September 2022), Irish Centre for Human Rights, University of Galway, *https://www.universityofgalway.ie/media/irishcentreforhumanrights/files/ICHR-ECHR-Conference-Conclusions-2022.pdf* [Accessed 3 March 2023]. The conference also set out 20 possible action areas, including establishing a "structured Quadrilateral Human Rights Dialogue" on the issue of human rights protection in areas of conflict between the CoE, OSCE (inc. ODIHR), UN (inc. OHCHR) and the EU (inc. FRA) (pp.10–12).

[109] Steininger, "With or Without You: Suspension, Expulsion, and the Limits of Membership Sanctions in Regional Human Rights Regimes" (2021) 81 *ZaöRV* 533, 549.

[110] Council of Europe, "ECHR President: Reykjavik summit should 'translate the discourse of values into material support'" (27 January 2023), *https://www.coe.int/en/web/portal/-/echr-president-reykjavik-summit-should-translate-the-discourse-of-values-into-material-support-* [Accessed 3

amounting to less than half a euro per year per person protected by the system.[111] Contributions have lagged behind inflation for the past decade and the real-terms decrease in the organisation's ordinary budget makes it reliant for around 25% of its staff budget on top-up voluntary contributions by states, which fluctuate year by year.[112] The HLRG observes that this trend "appears to reflect a lack of political will by member states to commit financially to the Organisation".[113] The HLRG welcomed the Council of Europe's move towards a four-year programming cycle, coupled with a biennial budget, and encouraged states to consider a "fully integrated programming and budgeting process", in which the mandate and objectives of the organisation drive the budget, not the other way around. It is to be hoped that at the Reykjavik Summit, states will put their weight behind the Council of Europe's aim—agreed by the Committee of Ministers—to provide "greater certainty, stability and coherence" to its work, since "[its] success will … depend on member States providing the Organisation with the necessary budgetary resources to be able to fulfil its role meaningfully".[114]

Towards a more "political" Council of Europe?

More broadly, the open call speaks of the need to make the Council of Europe a more "political" organisation, which begs the question as to what exactly that may mean. The Parliamentary Assembly has underlined the need to strengthen the Council's work on democracy, proposing a new "democracy checklist" for states and establishing a post of Commissioner for Democracy and the Rule of Law.[115] States reportedly also want an organisation that is seen as being more modern, visible and relevant, especially among young people. We understand, for example, that even a change of name is being considered, to include terms such as "rights" and "democracy". This could indicate a move towards rebranding and relaunching the Council of Europe for its seventy-fifth anniversary in 2024.

There are also more fundamental questions as to how the organisation should position itself within Europe, given the dominance of the EU, and the emergence in 2022 of the European Political Community (an intergovernmental grouping of 44 states, including the 27 EU Member States, European Free Trade Association members, EU candidate countries, the UK, Azerbaijan and Armenia). There will surely be strong support now for a final resolution of the long-standing problems which, to date, have prevented EU accession[116] to the ECHR—and, as signalled by the HLRG, for stronger political dialogue between the EU and the Council of Europe and more coordinated action to put pressure on recalcitrant states that are EU members (as has begun to happen with the inclusion of non-implementation of European Court judgments in the EU's annual *Rule of Law Reports*).[117]

March 2023]; N. O'Leary, "Irish President of European Court of Human Rights Warns of Budget Shortage" (26 January 2023), *Irish Times*, *https://www.irishtimes.com/world/europe/2023/01/26/irish-president-of-european-court-of-human-rights-warns-of-budget-shortage/* [Accessed 3 March 2023].

[111] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023], para.11.

[112] O'Leary, "Irish President of European Court of Human Rights Warns of Budget Shortage" (26 January 2023), *Irish Times*, *https://www.irishtimes.com/world/europe/2023/01/26/irish-president-of-european-court-of-human-rights-warns-of-budget-shortage/* [Accessed 3 March 2023].

[113] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), para.9, *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023].

[114] Council of Europe, Programme and Budget 2022–2025, 1418th (Budget) Meeting, CM(2022)1 (10 December 2021), p.9.

[115] Parliamentary Assembly of the Council of Europe, "The Reykjavik Summit of the Council of Europe: United around values in the face of extraordinary challenges", Report (Committee on Political Affairs and Democracy—Rapporteur: Ms Fiona O'Loughlin, Ireland, ALDE), Doc.15681 (9 January 2023), paras 20.1–20.2.

[116] See the Council of Europe website on EU accession: *https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights#%7B%2230166137%22:%5B0%5D%7D* [Accessed 3 March 2023].

[117] European Commission, *2022 Rule of Law Report*, Communication and country chapters" (13 July 2022), *https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en* [Accessed 3 March 2023].

Conclusion

The Reykjavik Summit comes at a pivotal moment and represents a significant opportunity for Member States to respond commensurately to the urgent, existential threats posed by climate change, international armed conflict and states' backsliding on democracy, human rights and the rule of law. As Spano posits in this issue, they must "chart a path forward towards the resurgence of inclusive democracy".[118]

The reinvention of the Council of Europe will undoubtedly require the full financial backing of Member States. Careful thought also needs to be given to the process of reform itself, which will be kickstarted in Reykjavik, but which will require a substantial period of implementation after the summit. Important principles underpinning such a process should include meaningful victim and civil society participation and influence. Moreover, the HLRG called for such summits of heads of state and government to be put on a "regular and institutionalised footing", which could imply the need for a revision to the Council of Europe statute.[119]

As the conflict in Ukraine shows no sign of abating, and amid multiplying threats to the Council of Europe's core values, the stakes could not be higher. As Drzemczewski and Lawson have argued, the Council of Europe "cannot remain passive when … member States abandon its core values by refusing to execute the Strasbourg Court's judgments, deliberately attack independent judges, the media and civil society and undermine checks and balances that are inherent in a democratic society governed by the rule of law".[120] International resolve in the here and now to strive to achieve accountability for the Russian invasion of Ukraine seems well-established, but it is far less clear how Member States will respond to the climate emergency, or indeed to the enduring, intractable scar of unimplemented judgments of the European Court of Human Rights. Time now to rise to these challenges.

[118] Spano, "Inclusive Democracy and the European Convention on Human Rights" [2023] E.H.R.L.R. 112.

[119] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), p.5, *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023].

[120] A. Drzemczewski and R. Lawson, "Exclusion of the Russian Federation from the Council of Europe and the ECHR: An Overview", forthcoming in the *Baltic Yearbook of International Law*, Vol.21, for the year 2022 (I. Ziemele, L. Mälksoo, D. Žalimas (eds), Brill/Nijhoff Publishers, 2023).