The Present and the Future of Infringement Proceedings: Lessons learned from Kavala v Türkiye

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Abstract

The Council of Europe is headed to its 4th Summit under the shadow, most likely, of the unimplemented infringement proceedings judgment in the case of Kavala v Turkey . *The aim of this article is to investigate what this persistent non-implementation teaches us for the present as well as for the future reform of infringement proceedings monitoring. Strengthening this is of inestimable importance for the future credibility of the Council of Europe, as well as the authority of the European Court of Human Rights (ECtHR) in general. The lack of a clear strategy for handling non-implementation of infringement proceedings will have a dissuasive effect on the further use of such proceedings by the Committee of Ministers, it removes any teeth proceedings were ever intended to have. In this article I argue that the future of the effective monitoring of judgments resulting from infringement proceedings depends on: (a) the foreseeable proceduralisation of the mechanisms to exert pressure on non-implementing states; and (b) further judicialisation of the ECtHR's handling of the remedies required to implement judgments resulting from infringement proceedings. In conclusion, I reflect on possible objections to this double call of proceduralisation and judicialisation as the basis of reform.*

Introduction

The Council of Europe (CoE) is headed to its 4th Summit, most likely, under the shadow of the unimplemented infringement proceedings judgment in the case of *Kavala v Turkey*.[1] The aim of this article is to investigate what lessons can be learned from this ongoing, persistent non-implementation for the present as well as the future reform of the monitoring of infringement proceedings. The importance of strengthening the infringement proceedings procedure for the future credibility of the CoE and authority of the European Court of Human Rights (ECtHR) cannot be underestimated. Lack of a clear strategy for handling non-implementation of infringement proceedings is likely to have a dissuasive effect on the further use of such proceedings by the Committee of Ministers (CoM), even when they may be crucially needed. Furthermore, if the monitoring process and consequences of an infringement judgment is identical to those of any ECtHR judgment, the procedure risks being stripped of any teeth it was intended to have.

In what follows, I first review the procedures governing infringement proceedings and show that the monitoring of the infringement judgments as well as the possible consequences of non-execution were

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[1] *Kavala v Turkey* (App. No.28749/18), judgment of 11 July 2022; (2023) 76 E.H.R.R. 13. Also see the CoM decision at its 1451st meeting, 6–8 December 2022, (DH) CM/Del/Dec(2022)1451/H46-40. I was one of the legal representatives of Mr Kavala, together with Philip Leach, with respect to the infringement proceedings.

left unaddressed when they were first introduced in 2004. Instead, it was assumed that the threat of initiation, or the actual initiation, of infringement proceedings would create sufficient collective pressure and incentivisation for State Party compliance. I then consider how the process operated in *Mammadov v Azerbaijan*[2] and *Kavala*; while the initiation of infringement proceedings did partially operate to step up pressure and acted as a credible incentive to comply in the first case, it did not have the same effect in *Kavala*. I then turn to the key focus of this article: what lessons can be learned from *Kavala* to ensure that infringement proceedings are capable of exerting the pressure that they were intended to so as to effectively address refusals to comply with ECtHR judgments.

I present five proposals for reform, namely: (1) more guidance to the ECtHR as to what remedial outcomes are expected in judgments resulting from infringement proceedings; (2) concerted engagement with the monitoring of these judgments at the highest levels of the CoE; (3) the establishment of a special track for the monitoring of these judgments to reflect their systemic importance; (4) the establishment of mechanisms to engage with domestic institutions, who are in charge of implementing infringement judgments, be they parliaments, courts or the executive; and (5) the introduction of graduated sanctions to address persistent non-implementation of judgments resulting from infringement proceedings.

Taken together, these amendments show that the future of the effective monitoring of judgments resulting from infringement proceedings depends on the proceduralisation of the monitoring mechanisms to exert pressure on non-implementing states and further judicialisation[3] of the ECtHR's handling of the remedies required to implement judgments resulting from infringement proceedings. I conclude by reflecting on possible objections to this double call of proceduralisation of monitoring and judicialisation as the basis of reform. I show that whilst these reforms may not ultimately guarantee execution in all cases, given that execution is primarily a domestic process, the costs for not doing so are too high: infringement proceedings will become an ineffective means of responding to persistent non-compliance with ECtHR judgments and the Convention, undermining the authority of the Convention system as a whole.

The introduction of infringement proceedings into the European Convention system

The idea to have infringement proceedings within the ECHR system was one of many proposals to make the execution of human rights judgments more effective in the ECHR reform discussions between 2000 and 2004. Other proposals ranged from imposing fines on Member States for non-execution, asking for an advisory opinion from the court and suspension of voting rights in cases of continued refusal under art.8 of the Statute of the CoE.[4] Whilst the proposal to adopt fines was not followed through, the CoM was receptive to the introduction of advisory opinions and infringement proceedings. Both became part of the reform of the ECtHR via Protocol 14 to the ECHR of 2004, which entered into force in 2010.[5] An amended version of art.46 of the ECHR, on the binding force and execution of judgments, set up the "infringement procedure" as follows:

> "4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled

[2] *Mammadov v Azerbaijan* (App. No.15172/13), judgment of 29 May 2019; (2020) 70 E.H.R.R. 8.

[3] See H. Keller and C. Marti, "Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments" (2015) 26(4) E.J.I.L. 829.

[4] For these proposals, see also Parliamentary Assembly, Resolution 1226 (2000) adopted on 28 September 2000 (30th Sitting), available at: *https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16834&lang=en* [Accessed 25 February 2023] and Parliamentary Assembly, Recommendation 1477 (2000) adopted on 28 September 2000 (30th Sitting), available at: *http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16835&lang=en* [Accessed 25 February 2023].

[5] 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) CETS No.194, entered into force 1 June 2010.

to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."

Significantly, these provisions are silent as to how the CoM decides on the "refusal to comply" criterion and what happens either in terms of process or consequences when a state refuses to abide by an infringement proceedings judgment delivered by the ECtHR. How the use of infringement proceedings would address a state's refusal to comply with a judgment was explained in the Explanatory Report to Protocol 14 as follows:

> "This infringement procedure does not aim to reopen the question of violation, already decided in the Court's first judgment. Nor does it provide for payment of a financial penalty by a High Contracting Party found in violation of Article 46, paragraph 1. It is felt that the political pressure exerted by proceedings for noncompliance in the Grand Chamber and by the latter's judgment should suffice to secure execution of the Court's initial judgment by the state concerned."[6]

The key mechanism to ensure respect for an infringement judgment as per the Explanatory Report, therefore, is the "feeling of political pressure" by the Member State subject to such proceedings. The Explanatory Report does not detail how the mechanism of "feeling of political pressure" would be generated in concrete terms. It further omits any discussion of how infringement proceedings would be communicated to domestic courts, in cases when they are in charge of execution. The report also does not explain what procedural steps would follow when a state does not "feel" the political pressure to comply with a judgment resulting from infringement proceedings, but instead continuously resists execution. Formally speaking, suspension from the CoE, as contained in art.8 of the Statute of the CoE, would be the strongest sanction available in the case of persistent non-compliance with an infringement judgment. The Explanatory Report, however, holds that:

> "[t]his is an extreme measure, which would prove counter-productive in most cases; indeed the High Contracting Party which finds itself in the situation foreseen in paragraph 4 of Article 46 continues to need, far more than others, the discipline of the Council of Europe. The new Article 46 therefore adds further possibilities of bringing pressure to bear to the existing ones. The procedure's mere existence, and the threat of using it, should act as an effective new incentive to execute the Court's judgments."[7]

In an article written in 2017, prior to the inaugural infringement proceedings, in *Mammadov*, de Londras and Dzehtsiarou characterised the infringement procedure as "mission impossible".[8] According to the authors, infringement proceedings were not an adequate tool to address refusals to comply with ECtHR judgments for three reasons. First, they were not practical, as it would be almost impossible to initiate due to the need to secure two-thirds of the Member States' votes in the CoM to initiate them.[9] Second, they would be futile, as a mere "formal finding of non-execution does nothing to address the root causes of

[6] 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 (CoE, 13 May 2004), para.99, available at: *https://rm.coe.int/16800d380f* [Accessed 25 February 2023].

[7] Explanatory Report to Protocol No.14, para.100.

[8] F. De Londras and K. Dzehtsiarou, "Mission Impossible? Addressing Non-Execution through Infringement Proeedings in the European Court of Human Rights" (2017) 66(2) I.C.L.Q. 467.

[9] De Londras and Dzehtsiarou, "Mission Impossible? Addressing Non-Execution through Infringement Proeedings in the European Court of Human Rights" (2017) 66(2) I.C.L.Q. 467, 482.

non execution".[10] Third, they would invite further backlash from Member States as states who refuse to comply would have new reasons to challenge the legitimacy of the court.[11]

"Mission impossible" put to the test: A silent reform in the use of infringement proceedings in Mammadov

In the years that followed, the CoM has initiated infringement proceedings on two occasions, first in *Mammadov* in December 2017 and then in the case of *Kavala* in February 2022. The initiation in these two proceedings shows that the CoM has responded to the practicality challenge identified by de Londras and Dzehtsiarou by narrowing down the circumstances under which proceedings are initiated.

This practice of narrowing down has two related features. First, both cases concerned a finding of a violation of art.18 in conjunction with art.5. The violation of art.18, a rare finding by the ECtHR, indicates that states have restricted Convention rights for ulterior, illegitimate purposes. The CoM interpreted this finding as the ECtHR "ringing the alarm bells" for triggering collective responsibility on the side of the Member States to step up its monitoring efforts in art.18 violation cases.[12] Second, both cases concerned the politically motivated deprivation of liberty of the applicants and the national authorities' refusal to release the applicants and restore their Convention rights in full. These two conjunctive features convinced at least the two-thirds of the Member States that these cases merited the exceptional measure of the initiation of infringement proceedings with the aim of stepping up the political pressure on Azerbaijan and Türkiye to comply with the judgments concerning individual measures.

The initiation of infringement proceedings in *Mammadov* also shows that as a matter of practice, political pressure is coordinated. Former Secretary General Jagland used his powers under art.52 of the Convention to conduct an inquiry into the implementation of the ECHR in Azerbaijan in 2015.[13] He further asked the CoM to initiate the infringement procedure under art.46(4) against Azerbaijan with regard to the *Mammadov* case, emphasising the unacceptability of political prisoners in Europe.[14] Whilst we do not know the extent of bilateral diplomatic pressure exerted on Azerbaijan, the collective pressure exerted by the Secretary General and the CoM in the course of these proceedings succeeded as far as the individual measure to immediately release the applicant was concerned. As is well known, Mr Mammadov was released, following the initiation of infringement proceedings and before the delivery of the inaugural infringement judgment by the ECtHR.

In this first case, therefore, the two other risks identified by de Londras and Dzehtsiarou, those of futility, as far as individual measure to release the applicant, and backlash did not fully materialise. It is, however, worth noting that the restitution of all rights of Mr Mammadov was a much drawn-out process. The monitoring of individual measures in this case was closed only in 2020,[15] whilst the ongoing monitoring

[10] De Londras and Dzehtsiarou, "Mission Impossible? Addressing Non-Execution through Infringement Proeedings in the European Court of Human Rights" (2017) 66(2) I.C.L.Q. 467, 486.

[11] De Londras and Dzehtsiarou, "Mission Impossible? Addressing Non-Execution through Infringement Proeedings in the European Court of Human Rights" (2017) 66(2) I.C.L.Q. 467, 487.

[12] See B. Çalı, "How Loud Do the Alarm Bells Toll? Execution of 'Article 18 Judgments' of the European Court of Human Rights" (2021) 2(2) ECHR L. Rev. 274.

[13] T. Jagland, "Council of Europe Secretary General launches inquiry into respect for human rights in Azerbaijan", Press Release (16 December 2015), *https://rm.coe.int/168071dd88* [Accessed 25 February 2023].

[14] E. Demir-Gürsel, "The Former Secretary General of the Council of Europe Confronting Russia's Annexation of the Crimea and Turkey's State of Emergency" (2021) 2(2) ECHR L. Rev. 303, 315.

[15] The case was closed after the Supreme Court of Azerbaijan quashed the conviction of Ilgar Mammadov and awarded him compensation for non-pecuniary damage resulting from their unlawful arrest and imprisonment on 23 April 2020. See CoM decision at its 1377*bis* meeting, 1–3 September 2020, CM/Del/Dec(2020)1377*bis*/H46-3, available at: *https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000016809f5cfb* [Accessed 25 February 2023].

of many other art.18 cases in respect of Azerbaijan both in terms of individual and general measures, show that the infringement proceedings has still not addressed the root causes of such violations.[16]

Infringement proceedings in the case of Kavala

Kavala is a continuation of the silent reform of which cases trigger infringement proceedings. Mr Kavala was detained in 2017 and has been incarcerated ever since. The ECtHR found a violation of art.18 in conjunction with art.5 and held that the detention of Mr Kavala pursued the ulterior purpose of silencing him as a human rights defender.[17] The ECtHR called for his immediate release as a result.[18] Compared to *Mammadov*, however, neither the decision to initiate infringement proceedings, nor the formal finding of a violation of art.46, has made any difference to the refusal to comply with either the original judgment or the subsequent infringement proceedings judgment. Instead, both the futility and the further backlash concerns of de Londras and Dzehtsiarou can be observed in this case.

With regard to futility, instead of releasing Mr Kavala from pretrial detention to address the root causes of politically motivated prosecution and detention, the first instance domestic court convicted Mr Kavala and sentenced him to aggravated life imprisonment for alleged crimes even though, according to the ECtHR, there was an absence of reasonable suspicion.[19] A regional appeal court rubber stamped this conviction in January 2023 without a single reference to the two ECtHR judgments. Mr Kavala's appeal against this conviction is currently pending before the Court of Cassation. With regard to backlash, the use of infringement proceedings has been framed as the CoM acting ultra vires, and interfering with the independence of domestic judiciary.[20] Similarly, following the delivery of the infringement judgment, the national authorities contested the authority of the judgment.[21]

In response to non-execution of the infringement proceedings judgment, the CoM did adopt a range of measures to escalate political pressure. These measures, however, were not foreseeable, did not follow a clear strategy and were not coordinated at the highest levels.

Lessons for reform of the monitoring of infringement proceedings

Five key lessons can be drawn from the continuing non-execution of *Kavala*, and the monitoring process of the infringement procedure to date.

The need for asking the ECtHR to specify remedial outcomes in infringement proceedings

In *Kavala*, the ECtHR unequivocally found a violation of art.46(1) as regards the continuing detention and conviction of Mr Kavala. It did not, however, specify the measures required to remedy this violation, perhaps because it had done so in its first judgment. The ECtHR further underlined in clear terms that the monitoring of the execution of this judgment rests with the CoM.[22]

If the CoM continues to utilise the infringement procedure in the context of politically motivated prosecutions, detentions and convictions, it is important for the CoM to request that the ECtHR be more

[16] See the Status of Execution Report in the Mammadli Group of Cases, available at: *https://hudoc.exec.coe.int/ENG?i=004-50875* and CoM decision at its 1451st meeting, 6–8 December 2022 (DH) CM/Del/Dec(2022)1451/H46-4, available at: *https://hudoc.exec.coe.int/ENG?i=004-50875* [Accessed 25 February 2023].

[17] *Kavala* (2020) 70 E.H.R.R. 8 at [231]–[232].

[18] *Kavala* (2020) 70 E.H.R.R. 8 at [240].

[19] *Kavala* (2020) 70 E.H.R.R. 8 at [172].

[20] See Appendix: Views of the Republic of *Türkiye* to the Interim Resolution CM/ResDH(2022)21 of 2 February 2022 referring the *Kavala* case to the European Court of Human Rights, para.57.

[21] Statement of the Spokesperson of the Ministry of Foreign Affairs, Ambassador Tanju Bilgiç, in Response to a Question Regarding the Decision by the ECtHR on the Execution of the Kavala Judgment, 11 July 2022, available at: *https://www.mfa.gov.tr/sc_-19_-aihm-in-kavala-kararinin-icrasina-iliskin-aldigi-karar-hk-sc.en.mfa* [Accessed 25 February 2023].

[22] *Kavala* (2020) 70 E.H.R.R. 8 at [175].

specific about the remedial measures required by its infringement judgments. This is because, as the case of *Kavala* shows, recalcitrant domestic authorities employ the lack of remedial specification in the operative paragraphs of the judgment (even if it is clear as a matter of substance) as a means to contest the authority of the infringement judgment. In this case, the authorities used the unlawful conviction of Mr Kavala to argue that the infringement proceedings were limited to his pre-trial detention which, following conviction, was a non-issue.[23] Clear and unambiguous remedies reduce the scope for such excuses seeking to justify non-execution.

The need for concerted engagement with monitoring of judgments resulting from infringement proceedings at the highest levels of the CoE

The practice of the CoM to date shows that whilst the chair of the CoM at a ministerial level was engaged in the earlier stages of monitoring,[24] this was later delegated to the level of a "liaison group" of ambassadors.[25] In contrast to the former, the latter are not able to have high-level meetings with the national authorities: a key component in exerting political pressure. The CoM would benefit from ensuring that the highest levels of pressure are exerted consistently throughout the monitoring process of infringement proceedings. In addition, the Secretary General should be involved from the beginning as part of the collective pressure. Whilst the Secretary General was involved in the case of *Mammadov* even prior to the infringement proceedings, no such engagement is evidenced in the case of *Kavala*.

The need for establishing a clear timeline and more frequent of monitoring of the execution of infringement proceedings

The infringement judgments are monitored primarily via the same procedure for all human rights judgments: through quarterly meetings of the CoM and by way of receiving information from the government agent, the applicant's representatives and civil society in writing. Subjecting infringement judgments to this ordinary process strips the infringement proceedings of any particular urgency and systemic significance. Instead, the procedures for monitoring the infringement proceedings should be differentiated to reflect their systemic importance. They should, in particular, be more frequent and the national authorities at the highest levels should be required to explain, through attending the meetings of the CoM in person, what steps are being taken to execute infringement judgments.

Establishing mechanisms to engage with domestic institutions, who are in charge of implementing the infringement judgment, be they parliaments, courts or the executive

In *Kavala* (similar to *Mammadov*), key compliance actors are domestic courts, as they have the formal authority to put an end to Mr Kavala's rights violations. The CoM has underlined this in its resolutions both in September 2022 and December 2022. Yet, there is no channel of formal communication between the CoM and domestic courts about the infringement proceedings and the significance and importance of their swift execution in the Convention system. If the CoM continues its practice of initiating infringement

[23] See the CoM decision at its 1436th meeting, 8–10 June 2022 (DH) CM/Del/Dec(2022)1436/H46-31 refusing the withdrawal request of the infringement proceedings by national authorities on grounds that Mr Kavala had been convicted and therefore was no longer in pre-trial detention, available at: *https://hudoc.exec.coe.int/ENG#{%22fulltext%22:[%22\%22Dec(2022)1436/H46-31%20\%22%22],%22EXECDocumentTypeCollection%22:[%22CEC%22,%22CMDEC%22],%22EXECIdentifier%22:[%22CM/Del/Dec(2022)1436/H46-31E%22]}* [Accessed 25 February 2023].

[24] CoM decision at its 1443rd meeting, 20–22 September 2022 (DH) CM/Del/Dec(2022)1443/H46-30, available at: *https://hudoc.exec.coe.int/ENG#{%22fulltext%22:[%22\%22CM/Del/Dec(2022)1443/H46-30\%22%22],%22EXECDocumentTypeCollection%22:[%22CEC%22,%22CMDEC%22],%22EXECIdentifier%22:[%22CM/Del/Dec(2022)1443/H46-30E%22]}* [Accessed 25 February 2023].

[25] CoM decision at its 1446th meeting, 19–20 October 2022 CM/Del/Dec(2022)1446/H46-1, available at: *https://hudoc.exec.coe.int/ENG#{%22fulltext%22:[%22\%2219-20%20October%202022%20\%22%22],%22EXECDocumentTypeCollection%22:[%22CEC%22,%22CMDEC%22],%22EXECIdentifier%22:[%22CM/Del/Dec(2022)1446/H46-1E%22]}* [Accessed 25 February 2023].

proceedings in cases of urgent individual measures, it is crucial that it identifies modalities of information sharing with domestic courts. This should include providing swift information to domestic courts in their own language about the judgment, the analysis of the CoM's Secretariat, as well as the decisions and resolutions of the CoM. If possible, the CoM should also seek ways to appear as a third party in the domestic proceedings.

Introduction of graduated sanctions to address persistent non-implementation of infringement proceedings judgments

When infringement proceedings were first introduced into the Convention in 2004, it was envisaged that their threat or initiation alone would generate sufficient political pressure to foster compliance. The case of *Kavala* shows that this can no longer be assumed. In this case, as things stand, the domestic courts have imposed an aggravated life imprisonment sentence on the applicant, instead of giving him his freedom and reinstitution of his rights despite an infringement proceedings judgment. In such hard cases, the CoE must foreseeably establish what happens following the non-execution of an infringement judgment. This requires, above all, calling the Ministry of Justice or other senior government officials to regularly attend CM/DH meetings to explain the progress with the execution of the infringement judgment. Following an assessment of either undue delays or retrogressive measures by the national authorities, the CoM should impose graduated sanctions. These can encompass diplomatic measures with respect to curtailing the participation of the Member State in regular CoE activities and monetary measures, such as fines, to be held by the Human Rights Trust Fund of the CoE with the view to supporting execution-related activities in the Member State.

Conclusion

This article asked what we can learn from the current non-execution of the *Kavala* infringement judgment. It argued that there are many lessons, both for strengthening the monitoring of the *Kavala* infringement judgment and for the future reform of the infringement proceedings mechanism. These lessons require, above all, clear remedial orders in infringement judgments, persistent application of high-level pressure, mechanisms to directly engage with domestic institutions who are in charge of implementing the infringement judgments and devising graduated sanctions for non-compliance. Whilst none of these measures may ultimately succeed in securing execution, the costs of not creating a special track of procedures for the monitoring of infringement proceedings is simply too high, if this exceptional measure is to be used credibly. Such procedures must not only ensure that the pressure is "felt" by those in charge of execution, but also ensure that domestic authorities do not have any informational gaps as to their obligations to implement judgments resulting from infringement proceedings.