# About the Execution Process of the European Court of Human Rights

**Pavlo PUSHKAR**

**Q1.**

**Please tell us about yourself and your current job.**

**Please let us hear about your story that led you to the current job.**

***Bonus vir semper tiro.***
(Lat. A noble man is always a student)

My name is Pavlo Pushkar[1] and I originally come from Kyiv, Ukraine. I dedicated more than 20 years of my professional experience to human rights practice. I think that it is essential, for the purposes of this rather brief publication to explain the main reasons for that choice. Possibly, and I do sincerely hope so, my choice could also inspire others to find motivation to join human rights discourse through academia or legal practice in human rights.

I was born at the time when Soviet Union was still in existence and I have witnessed, even not being an adult, some horrific historical events that surrounded its stagnation and eventual decay, notably the Chornobyl Nuclear Plant disaster in 1986. The way the Soviet and the Soviet Ukrainian authorities handled this accident, how silent they were on the dangerous impact on peoples' lives, their livelihood and the environment, how inefficient and criminally abusive they were in investigating the accident and dealing with its consequences, was a remarkable point of no return in my own and my family's deep distrust in the system based on autocratic and totalitarian ruling installed by the Soviet regime. In fact, the horrendous historical events of the Soviet past (*holodomors* of 1930s and 1940s), First and the Second World War events, the totalitarian regime that was brutally enforced in Ukraine, had deeply impacted my family, have influenced my thinking and deepest belief in that the liberal democracy, human rights and rule of law must be the core values for operation of the state and state system. I trust in democracy and the good it can bring to the societies in the world. I also trust in that the state and its machinery should remain at the service of its people and not vice versa. The state's action should be focused on each and every human being, ensuring environment in which person's life is safely developing and person's virtues and talents are fully realized. Enforcement of fundamental human rights is thus seen as having the highest social value in such a modern society. I truly consider that this is the only way forward in modern advancement for any state.

Human rights, the rule of law and values of democracy are not abstract categories for me. They are very concrete legal requirements stemming from international law. They are deeply embedded in the general principles of international law and state custom, which are *de facto* sources of law recognized, maintained and procreated by the international society of nations. In such a system of law an individual plays the central prominent role.

[1] All views presented in this publication are personal and given in individual academic capacity. The views of the author don't represent any official position of the institutions where the author works or exercises his duties. Mr. Pavlo Pushkar, PhD, is a lecturer in law and a dotsent (associate professor) at the Ukrainian Catholic University of L'viv (Ukraine), the National University of Kyiv Mohyla Academy (Ukraine) as well as at the University of Strasbourg (France). Some elements of this publication reappear in the courses taught by Professor Pushkar at the academic institutions above as well as in his academic research on the topics of relevance to this publication. Mr. Pushkar is currently serving as a head of division at the Department for the Execution of Judgments of the European Court of Human Rights, Directorate General of Human Rights and the Rule of Law Council of Europe. The mandate of the Department covers the advice to the Committee of Ministers of the Council of Europe and the member-states of the Council of Europe in the measures aimed at execution of judgments of the European Court of Human Rights.

I came to Strasbourg almost 20 years ago, after undertaking studies in Ukraine, the United States, the United Kingdom and France. I consider myself a long-term resident of Strasbourg, deeply in love with this very modern and at the same time European city full of tragic history, which is now also the placement of the Parliament of the European Union. It is also considered the capital of the European democracy and human rights due to the headquarters of the Council of Europe being situated here, with the Palace of Europe and the European Court of Human Rights being at the heart of this capital of democracy in Europe. After all of these years I can firmly say – *"je suis Strasbourgeois"*.

My academic studies have led me to the choice of international human rights law practice. I have started studying law already in high school in Ukraine and while studying in the United States I familiarized myself with the Declaration of Independence. I still remember its text by heart: "… We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. …" I think that these words have guided me through my studies at the Kyiv Taras Shevchenko University, its Faculty of Law and the Department of Justice, where I obtained BA and MA degrees in laws with honours, specializing in justice and criminal procedure. Notably, my MA degree dissertation focused on implementation of the European Court's case-law by the domestic courts. They have also led me to establish an interest in the European Convention on Human Rights and thus led me to studies at the Nottingham University School of Law, where I obtained an LLM in International Law, specializing mostly on the European human rights law, international public law and dispute settlement. Years after, I continued my studies, specifically focusing on international arbitration and obtaining a postgraduate degree from the Queens Mary College of the University of London in that domain. Studies in the United Kingdom allowed me to do a doctoral research for a PhD degree on a topic close to my heart – "Shorted and simplified procedures for settling criminal cases and their compatibility with the requirements of the European Convention on Human Rights". Thus, I obtained a PhD in Criminal Justice from the Kyiv Taras Shevchenko University Department of Justice and the National Academy of Advocacy of Ukraine. The academic work did not stop for me with this academic achievement and since several years I am still involved in teaching and academic research at the Max Planck Institute of International Procedural Law in Luxembourg. I am now also lecturing courses on the European Human Rights Law to MA degree students at the Ukrainian Catholic University of L'viv, the National University of Kyiv Mohyla Academy as well as the University of Strasbourg. I am deeply fascinated by teaching and academic work. I think it is a part of a longstanding family tradition as both my mother and my grandfather were professors – my mother was a professor of English and my father a higher school headmaster. My main academic interests still remain to be the European Human Rights Law, now with special emphasis on state liability for breaches of human rights obligations and the execution of judgments of the European Court of Human Rights. I also focus on issues of compliance with obligations in international law, international litigation and arbitration, procedural law, alternative dispute resolution. I am also deeply interested in domestic human rights practice covering a range of issues, especially procedural law and criminal procedure.

My academic work had always been inspiring for the practical work I am involved in. I have started my work at the Council of Europe in the Registry of the European Court of Human Rights as a lawyer in 2002. I then continued my work at the Registry as a senior lawyer and non-judicial rapporteur (by appointment of the President of the European Court of Human Rights) dealing with mainly Ukrainian cases in 2011 – 2016. During my work at the Registry, I have been involved in drafting of a number of judgments concerning Ukraine that established foundations for the case-law of the Strasbourg Court on such key legal issues as protection of right to life, prohibition of torture, right to liberty and security of a person, right to a fair trial, freedom of expression and religion, right to privacy and property rights. In 2016 I have joined the Department for the Execution of Judgments of the European Court of Human Rights and became a head of the division at that Department. The main functions of the Department involve provision of advice to the Committee of Ministers and to the Member States in the

process of supervision over execution of judgments of the European Court of Human Rights. I manage a team of lawyers and am responsible for treatment of cases pending execution with regard to 17 member states of the Council of Europe[2]. In addition to the above, from 2007 to 2012, I have been a Secretary to the Council of Europe mediators, by appointment of the Secretary General of the Council of Europe, dealing with in-house work-related controversies. I also act as the Council of Europe expert for the cooperation activities envisaged for the member states as well as those organized by other institutions and bodies of the Council of Europe, which notably include, the Pompidou Group (Partial Agreement of the Council of Europe), the European Partial Agreement on Sports (arbitration and the right to a fair hearing), IPCAN (policing and human rights), etc. In 2021 I also became a member of the Secretary General's Task Force on Freedom of Expression.

My practical experience in Ukraine was essential for me before joining the Council of Europe. Thus, in Ukraine I worked as head of division at the Supreme Court of Ukraine, advising the Presidency of the Supreme Court on the matters of international legal cooperation and the European human rights law. Being at the Supreme Court, I have assisted in the work on elaboration of the European Charter on the Statute for Judges, the Council of Europe pioneer recommendation on matters of judicial independence, in 1998. For several years, I worked in Ukraine as an advocate and legal adviser, being successfully involved in various domestic and international litigation and arbitration proceedings, including those before international courts and arbitration tribunals. In my daily practice I referred and pioneered implementation of the Strasbourg Court's case-law, specifically on practice and methodology of protection of property rights. I have also been involved in teaching the European Human Rights Law at the Kyiv Taras Shevchenko University, developing several courses for the Law Faculty on human rights and criminal justice, working on academic publications in this respect. Before my work at the Supreme Court and as an advocate in Ukraine I was also the Vice-President of the Ukrainian Law Students Association, Chair of its publications committee and a President of the Kyiv Taras Shevchenko chapter. In addition to the above, I also worked in arts sector as a lawyer and as translator/interpreter of legal texts, for international assistance projects in Ukraine, specializing on English language legal terminology.

I am really passionate about my current work for the Council of Europe, greatly fascinated by the work we do and the impact the Council of Europe has on the society of the European states, its legal systems, judiciary and law enforcement in Europe, members states' policies on national implementation of human rights. For me, it is essential that the standards and advice elaborated within our organization, which is an omniscient pan-European human rights think tank, are being delivered to the domestic level through the work of the Department and execution of judgments' process. It is essential that they are firmly incorporated into the domestic daily reality. Eventually, what is paramount importance, the macro work at the international level we are involved in Strasbourg leads to and results in a real and tangible domestic change – positive transformation of the domestic legal systems with a view to their synchronization with unified European human rights standards. As a result, the Council of Europe standards, including the Convention and the Court's case-law are not only applied systemically at the domestic level, due to formal legal obligations of the member states, but they are also coherently shaping the content of the domestic processes and work of the national institutions, they are forming substance of the domestic policies being at the core of these. Thus, as a result of this work, human rights are essentially "brought home" and the subsidiarity is reinforced. With this systemic work the states are encouraged to act on a good faith basis, through adherence to binding requirements. Such action is based on carefully nurtured self-interest in ensuring compliance with the Council of Europe obligations, which is further encouraged by collective support from the member states and the work by the Secretariat of the Council of Europe. In this sense, for me, the Council of Europe remains a key defender and guardian of the human rights in Europe. The Council of Europe has an essential role in supporting the judicial action by the European Court of Human Rights and in facilitating domestic

[2] These largely include: Armenia, Azerbaijan, Georgia, Cyprus, Denmark, Estonia, Iceland, Ireland, Latvia, Lithuania, Malta, Moldova, Norway, Russian Federation, Switzerland, the United Kingdom and Ukraine.

implementation of human rights standards. It is the key "firewall" in maintaining peace and democratic development in Europe and also possibly the world.

**Q2.**

**The monitoring of judgments is a very unique system that no other international courts are equipped with. Could you briefly explain the procedure and its specificity to those who are new to the system?**

***"… the European Convention on Human Rights is an anchor … where politics stalls or falters, the Convention can move us forward… Not only does it provide a common ground between nations, based on agreed laws and shared values: by setting out the fundamental freedoms all in Europe must respect, the Convention is a source of cohesion in our increasingly diverse societies, too. …"***[3]

Indeed, the system of monitoring of execution of judgments of the European Court of Human Rights (ECtHR) is a unique system established by the European Convention of Human Rights (ECHR) in 1950s. It was established on the basis of an international treaty operating under the auspices of the Council of Europe. There are no systems equivalent in the world to the efficiency, agility and reactiveness of the European system of human rights protection. Both the Inter-American system of human rights protection and the African system, in existence today, arguably, do not produce the same tangible results and do not have the same practical impact on human rights protection in respective regions. To date, there are 47 member states of the Council of Europe that have signed and ratified this treaty and that are bound by the requirements of Article 46 of the Convention, i.e. by obligation to abide by final judgments of the ECtHR, in cases where they act as respondent parties. It is being frequently said that the obligation to comply with the judgments of the Court is an unconditional obligation. It is also an obligation based on the idea that the Court, through its review, identifies instances where the state failed in its primary obligation under the Convention – to protect human rights and to enforce them. The obligation to abide by the judgments of the ECtHR is not only an obligation under the Convention, it is also increasingly seen as an obligation under the Statute of the Council of Europe[4]. This is being notably said about the states that have adhered to the Council of Europe on the condition of ratification of the Convention of Human Rights and recognition of the right of individual petition to the ECtHR, thus also recognizing the binding outcomes of the proceedings before the Strasbourg Court. In addition to the above, the obligation to comply with the judgments of the Court is based on the principles of *pacta sunt servanda* and the obligation to act in *good faith* for states in complying with their international obligations, elements also referred to in the 1969 Vienna Convention on the Law of Treaties.[5] In turn this obligation stems from establishment of state's liability for breach of international law.[6] Thus, it is an obligation that derives from the general principles of international law, the state custom, treaty law as well as the supplementary sources of interpretation of international law – the academic doctrine and the jurisprudence of international courts and tribunals.[7] Even though the judgments of the ECtHR in this human rights system are inherently declaratory, they intend to pronounce on a breach only, without establishing direct reparation methods for the injury to the individual. The direct reparation is indicated only on rare occasions. The judgments could also reveal a systemic or structural problem, without addressing it directly, but through a larger set of legal arguments and recommendations. The only exception, as regards the directiveness of the reparation measures, could be said to relate to payments of just satisfaction, i.e. a form of reparation that is awarded for pecuniary and non-pecuniary damage suffered by the applicant and costs and expenses incurred in the course of

[3] The longer-term future of the European Convention on Human Rights. Report of the CDDH (2016). https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4.
[4] Both Articles 3 and 8 of the Statute are said to be of relevance for this discussion. https://rm.coe.int/16803060f2.
[5] Article 26 of the 1969 Vienna Convention on the Law of Treaties.
[6] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001. Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected.
[7] As based on the Article 38 of the Statute of the International Court of Justice.

domestic and international proceedings, awards made under Article 41 of the ECHR. The judgments of the Court, in certain instances, could envisage a recommendation for the State or indication to the State concerned to adopt measures of individual or general nature to ensure *restitutio in integrum*, as well as measures aiming at cessation of a breach, if it is continuing, or providing assurances of non-repetition of any further similar breaches of the Convention. Such advice and legal suggestions could be established in pilot judgments of the Court, quasi pilot judgments or judgments with indications under Article 46 of the Convention as to the general and individual measures to be taken. Thus, in the system established by the Convention, under the principle of subsidiarity, it is for the respondent state to choose, under supervision of the Committee of Ministers and its guidance, and within the limits imposed by the requirements of the ECHR, case-law of the Court and the Committee of Ministers' practice, the measures of individual and general nature to implement the judgment. The states in many cases could also be inspired in their action by the larger normative system of the Council of Europe, consisting of extensive set of soft law recommendations as to human rights enforcement produced by various standard-setting and monitoring bodies – the Venice Commission, Consultative Councils of European Judges and Prosecutors, Committee on Prevention of Torture, etc. Thus, the division of duties within the system permits for the Court to declare a breach of the Convention, in a given case, and based on the particular factual circumstances of the case, for the Committee of Ministers to ensure guidance in the execution of a judgment to the member state concerned, based on the system of its collective supervision, specifying for instance on the basis of its previous practices in similar cases as to how the judgment should be enforced. In addition to the above, as mentioned before, in certain cases, where the problem examined by the Court reveals a systemic or structural problem under the Convention, a complex widescale legal issue that necessitates resolution or even an individual measure of complexity, the Court could through procedure of a pilot judgment, quasi-pilot judgment or judgment with indications under Article 46 of the Convention might specify or give guidance to the individual or general measures to be taken. In such cases, the Committee of Ministers of the Council of Europe, could decide to supervise the execution of such a case under "enhanced procedure of supervision", allowing frequent review of such cases at the quarterly meetings of the Committee of Ministers specially dedicated to the human rights issues (so-called CMDH meetings). During these meetings the Committee examines the most complex and sensitive legal issues, which are pending execution in "enhanced supervision", notably these are inter-state cases, cases requiring urgent individual measures, pilot judgments cases as well as judgments revealing systemic and structural or complex problems within the domestic legal systems that could require comprehensive, widespread and holistic domestic reforms. In addition to the work of the Committee of Ministers, regular bilateral work on supervision over execution of judgments, including on matters of payments of just satisfaction, supervision over re-opened domestic judicial procedures and new investigations launched on the basis of the judgments by the Court is followed up by the Department for the Execution of Judgments of the European Court of Human Rights of the Council of Europe. This Department is a part of the Directorate General of Human Rights and the Rule of Law. The Department follows domestic reforms in various areas of legal system of the state concerned, providing expert assistance to the authorities concerned upon their calls. Such reforms might concern notably the judiciary, civil, administrative or commercial matters, criminal justice areas, penitentiary establishments, media reforms, etc. The changes required by the judgments of the Court could lead to widescale legislative changes or adoption of new legislation, review of the domestic judicial and administrative practices, training of public servants, dissemination of information as to requirements of the judgments and publication measures, aimed at further use of the case-law notably by the national courts at the domestic level. Thus, enforcement measures could involve extensive work of various branches of power within the state concerned – the Parliaments, the highest judicial instances – the Supreme or the Constitutional Courts, the Cabinets of Ministers or even the Presidential offices. The role of domestic coordinators or Government Agents, who are usually placed at the Ministries of Justice or Foreign Affairs, in elaborating and following up on the domestic implementation of the enforcement measures, in facilitating action to be taken and then reporting back

to the Committee of Ministers (and back to the respective authorities) is thus extremely important and is at the core of this complex work.

The work of the Department for the Execution of Judgments is a technical and legal work, which does take into account various forms of implications that the judgments have on the respondent state and the international legal system. In this sense the assistance that the Department provides to the Committee of Ministers and member states[8], in their respective duties related to execution of the Strasbourg Court's judgments, is essential.

The work on the execution of judgments is also a complex diplomatic work in the area of international relations. This work requires deep knowledge of the states concerned, their legal past and traditions, their cultural identities, understanding of the domestic political processes and challenges they face externally. The enforcement mechanism under the Convention permits a great degree of flexibility for the states, within the limits identified in the execution process, to comply with the judgments of the Court. However, in some instances it also calls for readiness to facilitate domestic work on execution of judgments, identify and establish long-lasting working contacts with the decision-makers and key experts in the areas of relevance to ensure their involvement in perennial implementation of Strasbourg Court's judgments and the Convention itself. This work also necessitates cooperation and synchronization of activities as regards the measures in execution with other bodies and institutions of the Council of Europe, to ensure that the concurring obligations under respective human rights treaties and mechanisms are equally complied with, with the same degree of efficiency.

In some instances, the work of the Department in which I am involved, relates to negotiations as to the domestic reforms, aimed at concrete state action or change of state policy. In this sense, one needs to convince, on the basis of relevant legal arguments, the highest-level domestic authorities, public servants, judges or politicians that a particular way forward would ensure compliance with the European human rights standards and would result in sustainable implementation of the judgments of the Court. Such work requires holistic approach as it permits assisting the states in constructing a system prone to future human rights violations. This work is a macro strategic work, where existing legal architecture with respect to highly complex matters is carefully examined and reassessed. In evaluation and monitoring process, which are part of supervision over compliance, one has also to bear in mind potential systemic repercussions of the required change. In this sense, it is important to anticipate risks and negative outcomes, build sustainable and Council of Europe standards-compliant solutions, forecast development of practices. Overall, the work at the Department is a combination of legal, technical, political and diplomatic work. I enjoy this work enormously, not only from the point of view of results it brings – coherent domestic change, but also from the point of view of being a part of the Council of Europe staff – a dedicated team of the highest-level professionals, highly motivated by the aims and the ideas of pillars of work of the Council of Europe – human rights, democracy and the rule of law. I am proud of the work I do and the sense of belonging to the important structural change in European societies resulting from work of the Council of Europe and notably execution of judgments of the Court.

[8] Information as to the mandate of the Department for the Execution of Judgments of the European Court of Human Rights (as extracted on 5.12.2021). https://www.coe.int/hy/web/execution/presentation-of-the-department.

**Q3.**

**Unlike normal courts, it is indeed a unique system that the whole procedure will not be completed only by judiciary, but supervised by ambassadors of the member states (representatives of the ministries of justice or foreign affairs). Why is the power balance of countries needed to ensure the execution? How would you explain about the relationship of politics and law in this context, which is often said that the distinction is important?**

***Inde datae leges, ne fortior omnia posset.***
Publius Ovidius Naso
(Lat. The laws are established for the powerful not to act arbitrarily)

First of all, the supervision over execution of judgments lies with the Committee of Ministers of the Council of Europe, in its collective joint responsibility. The Committee through its concerted action supports the execution process, through peer pressure, bilateral exchanges and high-level political support to give guidance to the execution process. The Committee also guides the process that is deeply entrenched legally, both procedurally and substantively, based on several decades of practices of the member states on execution measures. In essence, the collective action by the member states to support execution processes reinforces the role not only of the Council of Europe, but also strengthens legitimacy of the judicial action undertaken by the European Court of Human Rights and its judges. Thus, the judicial findings are reinforced by collective international political support at the European level. Such support allows states to collectively counteract instances of democratic, human rights and rule of law backsliding within the states. Moreover, in substance, the practices of the Committee of Ministers, the jurisprudence that it *de facto* elaborates, can be said to witness and represent formation of the customary international law, based on consistent state practices, fixed in domestic legal change in various institutional forms, i.e. through notably laws and domestic jurisprudence. They are a form of fixation of legal reactions of the states, produced domestically, towards the Court's judgments. The decisions of the Committee of Ministers note and reflect such practices, fixing them in their decisions. Such consistent practices generate legal expectations, if not requirements, for future similar undertakings by the respondent states in similar situations of a finding by the Strasbourg Court.

Secondly, the composition of representatives of the states for the special CMDH meetings varies from the Government Agents who attend the special quarterly debates, to the level of Deputy Permanent Representatives to the Council of Europe, in some instances to the Ambassadors or the Permanent Representatives of the member states to the Council of Europe, who closely follow the conduct of such meetings. The result of such participation is bilateral contacts of member states as regards the execution of judgments, exchanges of constructive criticism, but also of best practices related to execution of general and individual measures. The idea of compliance with requirements of the judgments is rather based on the idea of belonging to the "club" of like-minded states, this is not only a definition stemming from the preamble to the European Convention itself, but also from the Statute of the Council of Europe, with common values and common stances with regard to democracy, human rights and the rule of law. Judgments in this system are seen as indicators of "internal/domestic incompatibilities" for membership in that club. Thus, the collectively expressed will of the Committee members, in essence, is a form of permitted or consensual interference into the domain of the state's sovereignty. The Committee may express a collective opinion on the requirements of compliance, in most instances by collective expression of opinions, on the basis of consensus generated within the Committee of Ministers, based on the legal and technical analysis by the Secretariat and findings of the Court. Its functions and role are essentially limited by the statutory functions of the Committee of Ministers, mostly related to demands to obtain information from the state or various forms of encouragements to act, expressed in diplomatic terms or

through diplomatic action expressed in the decisions of the Committee, action of the Chair, actions of the Secretariat or the Department for the Execution of Judgments. It is being said that the execution process is non-coercive in this sense, formed as voluntary action, being based on the principle of subsidiarity and margin of appreciation in certain cases. It is largely based on the generated and carefully maintained, in view of notably potential reputational damage to the international image of the state in the event of non-compliance, self-interest of the state in undertaking execution measures and losses it might incur if not complying. Otherwise, in case of non-execution, such non-compliance would have a negative bearing on the state's international standing, its reputation, could have negative influence on economy, budgetary allocations, institutional setting within the state, internal or external political debate, may cause damage to bilateral relations with other states or negatively influence dialogue within the Council of Europe.

Thirdly, obviously the judgments of the Court could have strong political connotations, both domestically and internationally. They might concern controversial societal issues or debates. They might also concern international and foreign policy perspectives. For instance, non-compliance could negatively affect the European Union accession process for some member states of the Council of Europe that are not yet part of the European Union or lead to problems with obtaining the World Bank or International Monetary Fund credits, for some states. Nevertheless, the execution process is inherently, by its nature, legal and technical. It is based on meticulous root cause analysis of the nature and origin of findings of a breach of the Convention. It should remain so in order to be successful, even though the "naming and shaming" at international level, rise in reputational costs stemming from an unresolved breach established by the Strasbourg Court, could assist in overcoming resistance to the execution of a judgment of the Court in some cases. This especially relates to problems identified by the Strasbourg Court depicting systemic and structural incompatibilities within the domestic legal systems. Such problems could be deeply entrenched domestically and difficult to resolve, without political pressure both imposed externally or in some instances by means of internal domestic pressure that could be synchronized with the domestic political or civil society debate. It is interesting in this sense that not only the Committee of Ministers of the Council of Europe, but also the Secretary General of the Council of Europe, the Parliamentary Assembly of the Council of Europe, composed of delegations from the member states of the Council of Europe, could play respective roles in facilitating execution of judgments. In some instances, even other international organisations or non-member states could raise execution issues with the respondent state concerned and, in some cases, these are the demands of the decisions of the Committee of Ministers. This could positively lead to important actions taken domestically and could result in the "blockages" to execution lifted or domestic "pockets of resistance" to execution being resolved.

**Q4.**

**By the nature of the system, it can be assumed that the politics may cut in, or rather hinder, the execution of judgments. How do you ensure that the monitoring will not be turned into a play yard of diplomacy, or in another word, the system will not become a bargaining chip in diplomacy?**

***"… The … European Convention on Human Rights … offers a unique mechanism for the protection of human rights and contributes substantially to maintaining democratic security and to the principle of the rule of law throughout the European continent. In order to maintain this standard of protection, it is essential that states fully comply with their formal undertaking to abide by the final judgments of the European Court of Human Rights … in cases to which they are parties."***[9]

Essentially, the execution process, as a legal and technical process, has its own yardsticks. Firstly, it is based on the Convention itself. Secondly, it is based on the case-law of the Court and the Committee of Ministers previous practices, which generate expectations from the new execution process and streamline the required action to be taken. Measures for cases that are being suggested are largely based on those that were already "applied and tested", previously accepted and approved by the CMDH. Thirdly, the process of execution is based on clear rules of procedure. In addition to the above, the substantive elements of the execution process are based on the Council of Europe normative system. The Council of Europe through execution process "speaks in one voice" – its monitoring and standard-setting bodies – such as the Venice Commission, the Committee on Prevention of Torture, the Consultative Councils of European Judges and Prosecutors, GRECO (Group of States Against Corruption), CEPEJ (European Commission for Efficiency of Justice) and many others, produce numerous "soft law" expert recommendations, either of a general nature or pertaining to specific factual situations within the states concerned or more generally as regards specific themes or issues. Thus, the execution process is used as a platform for bringing into effect the normative system of the Council of Europe domestically, especially for execution of judgments where significant domestic change is required, for instance with a view to introduction of a remedy or establishment of a new domestic process or institution, which is shaped by the requirements of the execution process. In this sense, once again, it is important to underline that the requirements of the ECHR, judgments of the Court, Court's case-law and the execution process form the content of operation of the domestic institutions, requiring readjustments to their functioning that was found to be at fault with the Convention in the concrete judgment of the Court.

Indeed, the domestic political blockages might impede execution, however, the execution process is well-entrenched in legal rules and requirements and this is its strength that allows to overcome political hurdles.[10] It is built not only on subsidiarity, but also on the principle of solidarity, both at the domestic level and international level. The main argument is that the execution process and Convention implementation process are equally important for domestic state development and thus it serves as a platform for consensual action of domestic political forces as well as for unified foreign policy action by the states concerned.

[9] Execution of judgments of the European Court of Human Rights. PACE Resolution 1226(2000). https://pace.coe.int/en/files/16834/html.

[10] The Parliamentary Assembly of the Council of Europe in 2017 report on implementation of the Court's judgments, for instance, noted that "… some cases involving other States Parties to the Convention also reveal "pockets of resistance", in particular concerning deeply ingrained political issues. The difficulties in implementing these judgments relate to the adoption not only of general measures (aimed at preventing fresh violations) but also of individual measures (aimed at restitutio in integrum for applicants) or payment of just satisfaction. Moreover, the Assembly observes that in some States parties the execution of the Court's judgments is surrounded by bitter political debate as certain political leaders seek to discredit the Court and undermine its authority. (Point 7) …" https://pace.coe.int/en/files/23987/html.

## Q5.

**Why and how did CoE and ECtHR come up with this unprecedented system of executing judicial judgments?**

The system of execution of judgments in the present form, with slight modifications, in view of the changes introduced by Protocols Nos. 11 and 14 to the Convention, exists from the very beginning of the operation of the Convention machinery, i.e. from 1950s. The obligation to comply with the Court's judgments was originally not seen as problematic. For instance, Sir Winston Churchill, the Prime Minister of the United Kingdom, at the stage of elaboration of the text of the Convention and its respective provisions on the execution of judgments, did not foresee that European states would "block execution" or "refuse to comply" with the judgments of the Court. It is still not the case now as "blocked execution", "refusal to comply" or inertia in implementation are exceptions to the general rule of compliance. Even though, at this stage, there are still some judgments of the Court pending execution, with a view to general measures enforcement, for more than 5, 10 and 20 years, in many instances the complexity of the domestic change, its widescale nature and the resources required as well as the capacity of the domestic authorities to deal with the issue lead to slowness of institutional reaction to the judgments of the Court and are objective factors that impede fast and full compliance with the judgments of the Court. The idea of collective supervision over enforcement was and remains to be a bright idea of engaging not only the state concerned in execution measures, but also engaging the Council of Europe member states, in their collective responsibility to ensure and to enforce rights under the Convention. The Convention, in essence, gave a role to the Council of Europe itself, as an international organization, and its extensive cooperation and states' support machinery, to give solid assistance to the execution of judgments to the states concerned and to ensure efficiency in larger process of implementation of the Convention. Such work of the Council of Europe results in elaboration of more precise and focused "soft law" standards and recommendations through cycles of standard setting, monitoring and cooperation practices that interact with one another. Originally, the Committee had more quasi-judicial powers with a view to ruling on the breaches of the Convention[11]. With a view to the changes in the operation of the Convention system, under Protocol No. 11, it transformed its operation to purely supervisory functions, still engaged in development of its supervisory practices, which are forming a part of regional customary law on implementation of judgments, based on best practices of the states. The Court nowadays is also participating more in the execution process, through indications and guidance it gives in the texts of the judgments themselves, separate rulings under Article 41 of the Convention and in the operative parts of its judgments, but also specifically in those elements of the judicial discussions under Article 46 of the Convention, i.e. through pilot judgments, quasi-pilots and judgments with specific indications as to the general and individual measures. Nevertheless, its judgments remain largely declaratory. The high contracting parties to the Convention must abide by these final judgments of the Court focusing on the need for structural change. It was originally being suggested that the success of the European Court of Human Rights, as the original drafters of the Convention's Article 53 thought, would rely on the legitimacy and prestige the Court enjoys, as in most cases the public opinion would be so strong that the governments would be obliged to comply with the judgments of the Court, without any reservations or persistently fail to execute. Also, the idea of the drafters of the Convention heavily relied on the political weight the Council of Europe would have to ensure a political push for such compliance.[12] It appears, though, that notwithstanding these original ideas and the high level of support to the judgments of the Court in the European states as well as the robust action undertaken by the Council of Europe that the number of cases

[11] The Committee of Ministers decided itself whether or not there had been a violation under former Article 32 of the Convention (while this competence in principle disappeared in connection the entry into force of Protocol No. 11 in 1998, a number of such cases remain pending under former Article 32).

[12] See for more details *travaux préparatoires* to the Convention, Article 53, execution of judgments: https://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf.

pending execution still remains relatively high, especially for some states, mostly those which have joined the Convention system in mid-90s. However, the situation does not only concern those states. Now, the highest number of cases pending execution concerns several states: Russian Federation, Ukraine, Turkey, Romania, Italy, Azerbaijan, Bulgaria, Hungary and Poland. These states jointly had more than 75% of "leading cases" in "enhanced procedure" pending execution before the Committee of Ministers in 2020 (meaning cases of complex nature). This number remained similar to the situation in 2019.[13]

[13] See for more detail the Annual Reports on implementation of judgments of the European Court of Human Rights. https://www.coe.int/en/web/execution/annual-reports.

**Q6.**

**How well is this system actually working? In your opinion, what are the biggest challenges or deficiencies of this system?**

The system is very successful in its operation, with large majority of judgments being fully and timely enforced by the states concerned, both from the point of view of individual and general measures required. The biggest challenge lies now with the most complex cases, i.e. cases relating to inter-state disputes and with inherent inter-state elements, such as the issues of jurisdiction, stemming from regions of "frozen conflicts", but also, most importantly, from cases relating to systemic and structural problems identified in the judgments of the Court. In these rather difficult situations, the Committee's choice of action could be rather limited and the Council of Europe might not have sufficient "physical" capacity and resources to assist the states and the Committee itself in the expertise provided to the states and the supervisory process. Unfortunately, the secretarial capacity, its staffing and resources, specifically of the Department for the Execution of Judgments is rather limited. In addition to the above, it might happen that the domestic capacity of the state to ensure execution through the offices of the coordinator are rather limited. The Agent's office might not have sufficient resources or hierarchy to address a complex execution problem, facilitate the process domestically or to ensure high level political support or response to the judgment of the Court, especially as to the issues raising systemic and structural problems. As mentioned before, the blockages or delays in execution could also relate to the difficulties in changing domestic public opinions, budgetary funding for the reforms required, concurring international obligations, large scale and difficult reforms necessary, also could stem from the timing of examination of cases by the Court itself and the complex construction of the judgments, etc. In some instances the complexity of the judgments of the Court in Strasbourg stems from the progressive development of the case-law of the Court based on the doctrine of living instrument. Such an approach to case-law development and jurisprudential change based on teleological and dynamic interpretation of rights under the Convention could also result in situations of legal complexity, requiring synchronization of the domestic legal systems with the developments in the European jurisprudence. However, if one would speak about the future developments, it appears that the execution process could benefit from more transparency and should be open to the participation of the victims of breaches themselves. It should be more open to further involvement of national human rights institutions, non-governmental organisations and professional organisations dealing with specific human rights issues, civil society and general public. It would be useful if knowledge of the operation of the Committee of Ministers, the Department for the Execution, work of the key actors in the system of implementation of the Convention, should be better disseminated and publicized, with more support given to this work by the states. The Department's role and the role of the Secretariat of the Council of Europe is crucial in supporting the implementation of judgments process. These entities perform important analytical tasks, suggesting well-researched and structured legal positions as to the execution issues and being involved in many instances in expert advice to the member states. Such advice is highly valued and is frequently taken into account in the construction of the execution measures by the states concerned. The role of the Department is an extremely valuable role of a neutral legal expert and advisor. It is aimed at explaining and disseminating information about the Committee of Ministers decisions, requirements of the execution process and expectations that arise from it. The Department for the Execution of Judgments' role is recognized in both the high-level declarations made by the representatives of the Council of Europe member states in Brussels and in Copenhagen. Specifically, its primary role lies in its advisory functions as well as its involvement in co-operation and bilateral dialogue with the States Parties.[14] In addition to that, the Brussels declaration suggests that the Department, acting with full respect of the principle of subsidiarity, should focus on developing a common

[14] Reform of the Court and the Convention system. Brussels Declaration (2015): https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf.

approach to similar judgments concerning respondent states with regard to the measures required to secure compliance. Similarly, the Copenhagen declaration, reiterated the previous conclusions as to the role of the Department, but also encouraged the Committee of Ministers to consider the need to further strengthen the capacity for offering rapid and flexible technical assistance to States Parties facing the challenge of implementing Court judgments, in particular pilot judgments.[15] Such call refers in the first place to the action on behalf of the Department.

[15] Reform of the Court and the Convention system (Copenhagen declaration (2018): https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf.

**Q7.**

**Like the cases of Osman Kavala or Alexei Navalny, no matter how hard the system urges a government to execute a judgment, it is eventually at the discretion of the State to decide whether or not to execute. What will happen if a country keeps disregarding the judgment? And has there been such cases so far?**

It is not discretionary for the state to decide whether to execute the judgment of the Court or not. There is an obligation to comply under Article 46 of the Convention. Also, the system as its established does not permit the states to expressly state before the Committee that they object to the judgment of the Court and are not willing to comply with it. Most of such states refer to the objective difficulties they experience with execution or limitations inherent in domestic legal structures, mostly relating to their domestic constitutional setting, which could limit the scope of potential execution measures.[16] Indeed the states that raise those difficulties are in a position to manifest these before the Committee of Ministers, without rearguing the case that was already decided by the Court. Moreover, the obligation to abide by the judgments of the Court is unconditional. It specifically relates to cases requiring individual measures, notably payments of just satisfaction. There is no discretion as to decision to execution, but there is discretion, based on the principle of subsidiary, as to how a specific judgment should be enforced. There is, on the other hand, discretion as to how to overcome a blockage or to deal with resistance to execution. The Council of Europe though has the capacity and sometimes is called to provide assistance in resolving complex execution issues, for instance through the offices of its Secretariat and the Secretary General of the Council of Europe.[17] In some instances, this discretion is very narrow, for instance, the obligation to ensure immediate release is a clearly defined obligation. This issue been examined in the case of *Ilgar Mammadov* (No. 2) from the point of view of compliance with the requirements of the Article 46(4) of the Convention and as to whether the state undertook respective individual measures. Ultimately, in case of persistent refusal to comply with a judgment of the Court, the Committee might decide, as in the case referred to above, to request the Grand Chamber of the Court to decide on whether the state has complied with the obligation to abide by the final judgment of the Court.[18] Such a finding would lead to a higher degree of political responsibility and higher level of political debate within the Council of Europe and between the member states as to the compliance with the Convention obligations of the state concerned. Eventually, the potential sanctions as discussed in academic literature could relate to exclusion of the State from the Council of Europe or various sanctions limiting the state's participation in the functioning of the organization or its constituent statutory bodies. Such suggestions are made also in accordance with various recommendation of the Parliamentary Assembly of the Council of Europe.

[16] In 2021 the Parliamentary Assembly of the Council of Europe condemned "the delays in implementing the Court's judgments and recalls that the legal obligation for the States Parties to the Convention to implement the Court's judgments is binding on all branches of State authority and cannot be avoided through the invocation of technical problems or obstacles which are due, in particular, to the lack of political will, lack of resources or changes in national legislation, including the constitution" (point 7 of the decisions). https://pace.coe.int/en/files/28996/html.

[17] This can be seen from the cases of Navalnyy and Ofitserov where, in response to the Committee's invitation the Secretary General of the Council of Europe sent a letter to the Minister of Foreign Affairs of the Russian Federation, outlining in particular the invitation to the Russian authorities to engage in consultations with the Secretariat and to provide a detailed analysis of the avenues available under the Russian legislation to implement fully the judgment of the European Court, and assuring that the Secretariat stands ready to explore, as soon as possible and in close co-operation with the Russian authorities, all avenues for the speedy and full execution of this judgment. https://hudoc.exec.coe.int/eng?i=004-13537.

[18] This has recently happened in the case of Kavala v. Turkey, where the Committee of Ministers decided in December 2021 (point 4 of the decisions) that "… in the light of their previous decisions … that it is necessary, in order to ensure the implementation of the judgment, to make use of proceedings under with Article 46 § 4 of the Convention, and expressed their resolve to serve formal notice on Turkey of their intention to commence these proceedings in accordance with Article 46 § 4 of the Convention … in the event that the applicant is not released before then…" https://hudoc.exec.coe.int/eng?i=004-55161.