JOINT STATEMENT ON PROPOSALS FOR REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS

BY RUSSIAN HUMAN RIGHTS NGOS AND PRACTITIONERS REPRESENTING APPLICANTS TO THE EUROPEAN COURT FROM RUSSIA

MARCH 2012

1. We, the signatory organizations as well as individual members of the Russian human rights community who represent applicants before the European Court of Human Rights, welcome the efforts of Council of Europe Member States and the Committee of Ministers to secure the long-term effectiveness of the European Convention system for human rights protection.

2. We emphasize that for many residents of Russia appeal to the European Court of Human Rights has served and continues to serve as an indispensable form of redress for violations of fundamental Convention rights such as the right to life, the prohibition against torture and ill-treatment, and the right to liberty and security of person.

3. We also recall that Russia is one of the major contributors to pending cases before the Court. At the same time, many applications from Russia are repetitive in nature and stem from deficiencies within domestic legal mechanisms, which have not been adequately addressed at the national level.

4. The situation of Russia, as well as that of other Member States which have generated a similar pattern of repetitive complaints, highlights that the overall effectiveness of the European Convention system depends first and foremost upon domestic implementation of Convention standards and execution of the Court's judgments by the national authorities.

5. We call upon the Member States of the Committee of Ministers to examine with caution those reform proposals which may have an adverse impact on the right to individual petition. We also urge participants in the reform process to focus on the examination of proposed measures designed to increase the effectiveness of implementation of the Court's judgments.

1. Measures to support implementation of the Court's judgments

6. We welcome the emphasis placed in the draft Brighton declaration on the responsibility of Member States for securing the rights and freedoms guaranteed by the Convention. We also second the call for increased support from the Council of Europe for national implementation of the Convention and implementation of the Court's judgments.

7. At the same time we believe that effective supervision of the execution of the Court's judgments requires increased monitoring of concrete steps taken by Member States in this regard. Whilst we acknowledge the impact of changes introduced by Protocol 14 in this area as well as the significant efforts undertaken by the Committee of Ministers in regard to its working methods, existing supervisory mechanisms are in need of further strengthening. We observe in this connection that the agenda of the Committee of Ministers continues to expand at a fast pace, largely because of slow or ultimately ineffective implementation of cases at the national level.

8. For these reasons, we invite the members of the High Level Conference to consider strengthening the existing supervisory capacity of the Committee of Ministers by:

   - Creating an additional independent supervisory body to monitor Member States' progress in implementing the Court's judgments, to complement supervision by the Committee of Ministers in selected cases, as well as providing additional operational capacity to the Department for the Execution of Judgments;
   - Streamlining the mechanism envisaged by Article 46 (4) of the Convention;
   - Introducing the possibility of sanctions for failure to execute a judgment of the Court or for non-cooperation with the supervisory body.

A. *Complementing the capacity of the Committee of Ministers with an independent supervisory body, and increasing the capacity of the Department for the Execution of Judgments*

9. Whilst acknowledging the fundamental role played by the Committee of Ministers in monitoring compliance with the Court's judgments, we believe that the Committee's supervisory capacity would be enhanced if it had the ability to refer, in certain cases, the assessment of whether or not a Member State had effectively complied with a judgment to an independent advisory body composed of experts in law, policy or other relevant fields. The experts could be appointed by the Parliamentary Assembly from a list of candidates proposed by Member States, but the experts would act in their individual capacities in reviewing Member State implementation. Cases could be referred to this body via the Department for the Execution of Judgments, or upon a recommendation by members of the Committee of Ministers, PACE, or other Council of Europe organs. We believe such a body would be particularly effective in reviewing and assessing compliance in implementing certain judgments which may require extensive legislative or policy reforms at the national level, or which may touch on particularly sensitive social or political issues within Member States. We call on the members of the High Level Conference to consider the possibility to establish such a body and to elaborate upon its scope of review, powers and procedure.

10. In addition, we invite members of the High Level Conference to undertake relevant measures to enhance the operational capacity of the Department for the Execution of Judgments, in particular by adding personnel with expertise in the national legal systems of those Member States which have the greatest number of cases pending on the agenda of the Committee of Ministers.

B. *Streamlining the application of the supervisory mechanism envisaged by Article 46(4) ECHR*

11. According to Article 46(4) of the Convention as recently amended by Protocol 14, a case may be referred back to the Court by a 2/3 majority of the Committee of Ministers in order to obtain a ruling on whether or not the respondent Member State has failed to comply with the Court's judgment. We believe that resort to this mechanism should be reserved for cases in which non-compliance by a Member State with a judgment has been particularly flagrant or striking. However, we express concern that almost two years after the entry into force of Protocol 14, the application and operation of this mechanism remains unclear. Moreover, it appears extremely unlikely that the 2/3 majority required to refer a case back to the Court could ever be attained in practice, which defeats the mechanism's potential to address particularly difficult or entrenched cases of non-implementation.

12. In order to render the Article 46(4) procedure feasible in practice, we call upon the Committee to articulate public guidelines as to the envisaged operation of the procedure. We also recommend that the process for initiating the procedure be simplified in order to render the mechanism accessible in practice, by permitting referral to the Court by a simple majority of Committee Members, or by transferring the competence to make such referrals to the independent supervisory body proposed above.

C. *Introducing sanctions for failure to execute Court judgments or for impeding supervisory procedures*

13. One of the reform proposals currently under discussion involves introducing sanctions on Member States that fail to execute the Court's judgments in repetitive cases. We call upon the members of the High Level Conference to elaborate on the potential of introducing sanctions.

14. We consider that sanctions could be appropriate in the context of a finding by the European Court under the Article 46(4) procedure of a failure to abide by a judgment, or in the context of a pilot judgment in which the Court could specify financial penalties to be imposed if the state did not execute the judgment within a specified time period.

15. Whilst acknowledging recent changes to the Committee of Ministers' supervision system following Interlaken, we also invite members of the High Level Conference to consider the possibility of introducing sanctions as an additional measure for impeding the Committee's ability to carry out its supervisory functions, for example, a failure to provide action plans, reports and other information relevant to the Committee's assessment of states' compliance with the Court's judgments.

2. Measures concerning access to the Court

16. A number of proposals made in the context of the reform process have the potential to substantially limit the right of individual petition before the Court, in particular: compulsory legal representation of applicants before the Court, introduction of fees for applicants to the Court, sanctioning applicants who repeatedly submit clearly inadmissible applications, and reducing the time limits for lodging an application under Article 35(1) of the Convention.

17. In general, we submit that these proposals should be further discussed (let alone adopted) only upon the availability of compelling evidence that their adoption would achieve a reduction in the Court's backlog of cases or the number of clearly inadmissible cases incoming to the Court. Such evidence should result from a thorough cost-benefit analysis of the proposed measures, which to our knowledge has not yet been conducted. At this stage we elaborate our concerns and position on some of the proposed measures below.

18. As regards the *introduction of fees*, we are particularly concerned about the potential discriminatory effect of this measure, as explained in the *CDDH Final Report*[1]. For example, in Russia, some of the proposed modalities such as online payment would be inaccessible in practice for a large number of residents of remote areas. Therefore we call on the Committee of Ministers' experts to further study the potential modalities of fee collection. We also urge the experts to carefully consider the question of whether the introduction of a fees system might create a heightened administrative burden for the Court, such as would outweigh its potential positive effects.

19. As regards the *time limit for lodging an application under Article 35(1) of the Convention*, we predict that shortening the time limit will likely lead to a drop in the quality of applications submitted to the Court. We also oppose any shortening of the time limit to less than four months, as a shorter time limit may be impossible to observe in practice. In Russia, for instance, applicants' representatives may wait months just to receive copies of court decisions. At the same time, we welcome the Court's intention to adopt a stricter approach to the formal requirements for submitting applications to the Court, for example, the abolishment of preliminary letters. In the interests of transparency and of promoting adherence to formal criteria, we call upon the Court to make public its "Rule 47 Project" and any other relevant information in this respect as soon as possible.

20. We oppose the introduction of a requirement for *compulsory legal representation* before the Court. The adoption of this proposal will make access to the Court difficult for many applicants (especially those with limited means). Furthermore, it is not likely to result in an increase in the quality of applications submitted to the Court. As the experts have underlined, "the Court's statistics […] do not show that the applications made through legal representatives result in fewer decisions of clear inadmissibility than those presented by an individual alone".[2] We also note that the Court itself does not support the introduction of compulsory legal representation, and we fully second the Court's position in this respect.

3. Measures concerning the reform of the Court's procedures

21. A number of proposals aim to change the Court's procedures to enable the Court to deal more efficiently and swiftly with both its backlog as well as with incoming applications. Such proposals include, *inter alia,* the introduction of a new filtering mechanism, the introduction of a sunset clause, and conferring upon the Court the discretion to decide which cases to consider.

22. We strongly object to the introduction of a *sunset clause* and to *discretionary consideration of cases by the Court.* These measures drastically change the design of the Convention system and encroach on the right to individual petition, which, as is commonly accepted, is its cornerstone.[3]

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[1] CDDH(2012)R74 Addendum I, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, Steering Committee for Human Rights, adopted at 74th meeting, 7-10 February 2012, p.p. 28-29.

[2] DH-GDR(2011)026, "Note on compulsory legal representation of applicants", European Court of Human Rights (doc. 3709276), 21 October 2011, cited in CDDH(2012)R74 Addendum I, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, Steering Committee for Human Rights, adopted at 74th meeting, 7-10 February 2012, p. 32.

[3] Action Plan adopted at the High Level Ministerial Conference on the Future of the European Court of Human Rights, Interlaken, Switzerland, 19 February 2010, paragraph A1.

23. The draft Brighton declaration proposes to add the *principles of subsidiarity and margin of appreciation* into the text of the Convention. We do not consider such an amendment to the Convention necessary. The above-mentioned principles have been clearly developed within the jurisprudence of the Court, and the task of their further evolution and interpretation shall remain with the Court, regardless of whether or not they are codified in the text of the Convention. Any attempted re-definition of these principles by Member States would constitute an unacceptable interference with the Court's judicial independence.

24. Regarding the *introduction of a new filtering mechanism*, we welcome the post-Protocol 14 developments in the Court's structure and working methods, which have already led to tangible progress in disposing of inadmissible applications more quickly. In this regard we support the proposal to confer upon experienced Registry lawyers or non-judicial rapporteurs the competence to examine and deliver decisions on clearly inadmissible cases, as described by the Committee of Minister's experts.[4] However, the adoption of this measure should be accompanied by an increase in the operational transparency of the Registry. In particular, we recommend that the following information should be made public regarding the work of the Registry: the modes of selection of Registry lawyers; the "chain of command" within the Registry; supervisory and quality-control systems in place; and the mechanisms in place to ensure the independence and impartiality of Registry lawyers.

25. Moreover, we recommend that the standard letter used to inform applicants of a finding of inadmissibility include a mention of the particular admissibility criterion which served as the basis for the inadmissibility decision. This practice would raise awareness among applicants about the Court's admissibility criteria, increase the perception of the Court's transparency, and moreover would not require significant additional time or resources on the part of the Court.

26. Another and potentially even more important issue facing the Court is the *backlog of repetitive applications* stemming from systemic problems within certain member States. In this regard we recommend that the Court resort more actively to its pilot judgment procedure. In addition, we believe that the Court should resort more frequently to joint examination of large numbers of similar cases stemming from the same Member State as an efficient way to dispose of repetitive cases more swiftly.

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Memorial Human Rights Center - Tatiana Kasatkina, Executive Director

Perm Regional Human Rights Center

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[4] CDDH(2012)R74 Addendum I, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, Steering Committee for Human Rights, adopted at 74th meeting, 7-10 February 2012, p. 48.

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