

## **Common declaration of organisations active in the judicial defence of prisoners' rights, in respect of the stakeholders' conference organised by the Belgium Presidency of the Committee of Ministers**

*Strategy to improve the operation of the processes concerning the execution of Strasbourg Court's judgments and to erase structural or systemic failures to the ECHR.*

1. The signatory organisations, active in the judicial defence of prisoners' rights, consider positively the initiative taken by Belgium authorities to organise a stakeholders' conference on the shared responsibility of member States and institutions of the Council of Europe regarding the implementation of the European Convention of Human Rights. The political declaration that should emerge out of the Conference represents indeed an opportune moment to conceive a universal strategy and concrete measures to improve both the execution frame of Strasbourg Court's decisions and the monitoring of actions taken by member States, while strengthening prevention mechanisms against new violations of the European Convention.<sup>1</sup>

2. The core challenge of the Conference focuses on solving structural or systemic forms of Convention violations that weaken the Convention's authority and conduct to repetitive applications that congest the Court.<sup>2</sup> Since an important part of these failures results from the malfunctioning of prison systems,<sup>3</sup> the signatory organisations consider it to be their own responsibility to transmit their common observations to the Belgium Presidency and the Committee of Ministers as to a reform of the execution system of the Court's decisions and, on a larger scale, as to the Convention's mechanism as it is currently discussed within the framework of the Interlaken Process.

### 1. On the role and the model of the Court: consolidate the right of individual application

3. Together with the Parliamentary Assembly, the present organisations are worried about the fact that the main debate *“still largely revolve[s] around the future of the European Court of Human Rights. Especially in light of the criticism currently facing the Court, this sends a dangerously misleading message that the prevailing problems can be attributed, first and foremost, to the Strasbourg Court”*.<sup>4</sup> The organisations consider that the current work should not be used as ground to weaken the Court, but rather to define the concrete actions that need to be taken in order to require the member States to conform to the Convention's standards, particularly to erase structural or systemic problems that they are aware of.

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<sup>1</sup> Within the frame of the Interlaken Process. See the contribution of the CDDH to the Conference, CDDH(2014)R82 Addendum II.

<sup>2</sup> See the Answer of the Court to the *«Response of the Court to the “CDDH report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court”*», 20 October 2014.

<sup>3</sup> See the 5<sup>th</sup> and 6<sup>th</sup> annual reports of the Committee of Ministries on the execution of the Court's decisions.

<sup>4</sup> 6. *The effectiveness of the European Convention on Human Rights: the Brighton declaration and beyond*, Report of Mr Pozzo di Borgo, adopted by the Committee on Legal Affairs and Human Rights the 10 of December 2014, AS/Jur(2014)33.

4. In the context of intensive discussions conducted on systemic reform, some declarations aim to move the Court's control mechanism towards other models.<sup>5</sup> The organisations consider that it is not permissible to question both the functions of the Court that are to take into consideration any mention of the violation of the rights guaranteed by the Convention and to implement common European norms on Human Rights' issues.

5. In the first place, it is essential that the individual application remains the "keystone" of the Convention system as described by the Declaration of Brighton. In reducing the role of the individual application, there is a risk that the function of protection of individuals - that constitutes its primary purpose - will be rendered theoretical and illusory. A good example of this is the increase of the prison-related jurisprudence since the new Court has started: the assessment by the judge of essential human rights' standards is also operated through the examination of ordinary (at first sight) litigation. The understanding of closed institutions is the most problematic since they are not under public scrutiny and therefore need a constant monitoring. Access to the Court represents a basic and fundamental guarantee for individuals in detention and the Court's intervention, potential or effective, undeniably contributes to the accomplishment of the protected rights.

6. According to the information provided by the Registrar of the Court,<sup>6</sup> the Court will be able to function efficiently for many years in a quite similar configuration as the present one, which undermines all of the initiatives aimed at reducing the scope of the right of individual application. For example, there is no ground to create mechanisms that would enable the Court to select its own cases, or to set a restrictive number of applications to examine. It is also unjustified to introduce a rule as a deterrent that will require "*those whose applications are declared manifestly ill-founded or to constitute an abuse of the right of application be required to pay legal costs and expenses, under certain conditions*".<sup>7</sup>

7. On a larger scale, any strategy that tries to solve the issue of repetitive applications by impeding access to the Court should be denounced. It is obvious that placing obstacle in the path of potential claimants will not remove the reasons why the Court has been inundated with applications. Notwithstanding the commitment of the Court's President to take into consideration the special difficulties faced by prisoners,<sup>8</sup> the conditions of the implementation of Article 47 (Court's rules) on the introduction of applications are a major concern since they stipulate more restrictive proceedings, particularly with the perspective of the reduced delay of referral to the Court, provided by Protocol No.15. In addition, the pressure exerted by the new procedures for the processing of cases, introduced specifically by Protocol No.14, is clearly discernible, in view of the nature of cases that are subject of an inadmissibility decision given by a single judge. Any further restriction would jeopardize the effectiveness of the right of individual petition.

8. As to the proposal of introducing an extinction clause which would lead, after a certain period, to strike out of the Court's list some cases that have not been communicated, it would mean (if accepted) a clear renouncement at the heart of the Court of the standards of the principle of law simply because of managerial reasons. The Registrar of the Court is willing to deal with the unprocessed load of repetitive cases.<sup>9</sup> A temporary exceptional budget of 30 Million euros,

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<sup>5</sup> Contained in the document of the Drafting group "F" on the Reform of the Court (GT-GDR-F) *Proposals made in the context of Council of Europe work and relating to possible alternative models for the Convention control mechanism*, 3 December 2014, GT-GDR-F(2014)026

<sup>6</sup> Presentation by the Registrar of the European Court of Human Rights, GT-GDR-F(2014)021

<sup>7</sup> Considered by the working group "F", see document of 19 May 2014, GT-GDR-F(2014)misc.

<sup>8</sup> D. Spielmann, *Le succès et les défis posés à la Cour, perçus de l'intérieur*, speech, Conference in Oslo, 7 April 2014.

<sup>9</sup> see document GT-GDR-F(2014)021

allocated from 2015-2016, could solve a substantial part of it.<sup>10</sup> As stated by the Parliamentary Assembly, member States have here the opportunity to reinforce the public interest in strengthening the efficiency of the Court.

9. There is the proposal to institute a 2-step-process<sup>11</sup>, one dedicated to the treatment of applications as they are currently managed and the other in charge of the constitutional issues where the *erga omnes* effect would be specifically recognized: it is necessary that the full capacity of the institution shall be preserved in order to contribute to the progressive dynamic interpretation of the Convention, a “living instrument”.

2. On the treatment of repetitive applications: conceive an integrated strategy of structural problem solving, including a reform of the monitoring system

10. The overall success of the reform process depends on its capacity to implement a clear reinforcement of the efficiency of the decisions’ monitoring system.<sup>12</sup> The Brussels’ Declaration must state, louder and clearer than the Brighton one, that the resolution of chronic violations of the Convention falls firstly to national authorities. Likewise, it falls under their responsibility to inform the general public as well as administrative and judicial organs about the sense and the impact of conventional rules. National authorities shall also guarantee these rules, but also protect the Court from any smear campaign as it is too often the case and which weaken the Court’s decisions.

*2.1. On the strategy of the Council of Europe centered on the reinforcement of an efficient remedy right*

11. The current discussions shall then lead to develop an integrated and coherent strategy for the proper execution of decisions that highlight the huge national discrepancies. As to prison issues, the signatory organisations note with satisfaction that the organs of the Council of Europe pursue co-ordinated action aimed at strengthening the internal remedies of prisoners. This concerns the development of procedural obligations in the Court’s jurisprudence and the efforts made by the Committee of Ministries or by the General Secretary<sup>12</sup> to bring member States to respect the standards of efficient remedy. The signatory organisations are determined to take their responsibility for aiming to shape article 13 of the Convention as a special resource in prison issues. There are two comments to make in relation to this issue.

12. In the first place, the mechanisms to achieve remedies in prison are only effective if they take into account the impoverished financial and legal resources of the prison population. Member States shall be required to ensure that judicial remedies are actually accessible to detainees that detainees have proper protection from victimisation and retaliation measures if they pursue a complaint. The content of formulated European standards in this area must reflect these practical facts.

13. Secondly, it is illusory to believe that the implementation of effective remedies for prisoners can alone lead to an eradication of serious violations of the Convention as observed in prison systems of several member States. The burden of solving structural problems shall not rest on prisoners’ back but rather must be taken on as a positive obligation by member States. In relation to the commitment to eradicate inhuman and degrading treatment or punishment, they must be obliged to modify their penal policies and practices as to the use of prison use, e.g. both

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<sup>10</sup> *ibid.*

<sup>11</sup> See Report of Mr Pozzo di Borgo, *prev.*, based on the Konstantin Dzehtsiarou’s response to the DH-GDR’s “open call for contributions”

<sup>12</sup> See the Report of the Committee on Legal Affairs AS/Jur(2014)33, par.49

imprisonment itself or its length. All concerned organs of the Council of Europe shall strongly be involved in this process.

## *2.2. Considerations on the supervision process of the execution of judgements and decisions*

14. As far as the supervision process of the execution of judgements and decisions is concerned, it seems that, taking into consideration its means and structure, it is not capable of tackling the challenges posed by the deterioration of the problem concerning repetitive applications. Organisations are aware of the fact that, in the framework of said monitoring process of the execution of judgements, the scope of cooperation and the exchange of experiences is of utmost importance. Nevertheless, this process does not pay proper attention to the effectiveness of the measures taken by States to address the violations that have been brought to light and by the Court.

15. The organisations consider that the Department for the Execution of Judgments should have its resources and autonomy greatly increased. Its current situation, both from a material<sup>13</sup> and statutory perspective, does no longer reflect the importance that must be attached to the issue of what action is taken following the findings of violations. The Department's agents should be able to conduct genuine observation missions on site and to verify the practical impact of the measures taken at national level, at the very least, with regard to the cases before the instant proceedings. In general, the Department should have the material means to exercise its discretion autonomously and not be reliant on either the information provided by the governments or on the observations formulated by NGOs (where they submit such information). Furthermore, applicants should have an enhanced role in this process and should be allowed a formal mechanism to comment on the general measures taken by States. Finally, the CDDH in particular, should consider the possibility of converting the Department for the Execution of Judgments into a statutory body under the Convention.<sup>14</sup>

16. The Committee of Ministers contributes only very poorly to the collective implementation the Convention. The pressure exerted by this mechanism upon recalcitrant States is markedly inadequate, especially when it comes to long-standing malfunctions of the prison system. The Committee's position does not adequately address the need to control the concrete and effective consequences of the measures adopted at a national level. Indeed, it does not make an adequate and effective use of the series of initiatives that it has at its disposal. Furthermore, regarding the powers entrusted to it by Article 46-4 of the Convention (infringement proceedings before the Court), the doctrine that makes them a remedy of last resort, which is the current position, should be abandoned. If such prerogatives would be used in the ordinary course of action when addressing persistent infringements, that should help reduce the perceived importance of their use and remove the political stigma with which they are inherently associated.<sup>15</sup> The Parliamentary Assembly should also be granted such powers, as many have previously advocated.<sup>16</sup> Finally, in case of a finding of a violation, the Court should be able to impose upon

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<sup>13</sup> The Department for the Execution of Judgments had before it 11, 594 pending cases, handled by 33 staff at the 16 September 2014, see GT-GDR-F(2014)022

<sup>14</sup> See in this regard, the proposal made by the Registrar of the Court that the Department for the Execution of Judgments should be converted into a quasi-judicial body (Pilot judgments from the Court's Perspective, Conference of Stockholm, H/Inf(2008)/11)

<sup>15</sup> See the answer of Nuala Mole (AIRE Centre) to the open call for information, proposals and views on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Right, held by the DH-GDR (doc. DH-GDR(2013)R5); See also E. Lambert Abdelgawad, *op. cit.*

<sup>16</sup> See, for example the replies of Mrs Mr., Bultrini, de Graaf, Lambert Abdelgawad, Leach, Mamou, Mole, Patrick, Pettiti, Pillay, Salajewski, Wadham to the open call for information of the DH-GDR, *op. cit.*

the State that is failing to comply with its duties the obligation to make compensatory payments to the Trust Fund.

17. If the supervision process of the execution of judgements and decisions has become more transparent, the procedure before the Committee of Ministers remains very unbalanced, as far as the participation granted to the losing party is concerned. Although the advantages that may be drawn from experience sharing are not disputed, such a system can only undermine the effectiveness of the follow-up tasks assigned to the Committee, and the procedure should be reviewed in order to ensure the involvement of the applicants and NGOs. Hearings should be held whenever the adoption of general measures is at stake. Furthermore, actions taken by the Committee of Ministers should reflect the analysis of NGO communications that has been conducted. The Declaration should encourage the Committee of Ministers to amend the Rules accordingly for the supervision process of the execution of judgments and decisions.

### *2.3. Considerations on the contribution of the Court to the adequate execution of judgments and the elimination of structural problems*

18. The Court can certainly contribute more to ease the work of the various entities responsible for enforcing its judgements and decisions or follow-up their enforcement by grouping their cases and adapting its "stylus curiae".

19. Streamlining the litigation process can be achieved by grouping old and recent cases dealing with the same subject matter. This would allow for some factors that would help assess the latest developments in law and practice at a national level concerning the issue at hand, thereby boosting the execution process, at the internal level, at the Committee of Ministers level and at the Department for the Execution of Judgments, and particularly in relation to the large backlog that currently exists.

20. Consolidation of principles of a general nature concerning the drafting practice of the Court would greatly contribute to a better understanding of the Convention requirements. The indication of the general measures required by the operative paragraphs of decisions following the finding of a violation should be extended. The accuracy of the general measures should help guide the Department for the Execution of Judgments, the Committee of Ministers and the State parties responsible for the execution of judgments and decision and the drafting of Action plans. State parties should thus invite the Court to initiate an internal debate within the framework of the revision of the Rules of Procedure.

21. Above all, the possibility of lodging an application on behalf of the collective interest, allowing organisations to bring before the Court a dispute involving the social purpose for which they were established, would constitute an expedient way of handling contentious cases concerning serious malfunctions. Such a system would enable cases to be quickly brought before the Court, before the situations concerned have given rise to significant litigation, and based upon grounds that will in general be more accurate than the ones put forward by individual applicants. Prominent members of the Court have voted in this direction.<sup>17</sup> The case law of the Court itself has recently experienced developments<sup>18</sup> The gap between the leading role of NGOs

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<sup>17</sup> See Tulkens, F. « Droits de l'homme et prison, jurisprudence de la nouvelle Cour européenne des droits de l'homme », in O. De SCHÜTTER et D. KAMINSKI (dir.), *L'institution du droit pénitentiaire, enjeux de la reconnaissance de droits aux détenus*, op. cit., pp. 249-285.

<sup>18</sup> See the case *Center of legal resources on behalf of Valentin Câmpeanu v. Romania*, 17/07/2014, n°47848/08 ; on the important role non-governmental organisations played in a democratic society, see, for instance, *Vides Aizsardzības Klubs v. Latvia*, 27/05/2004, no 57829/00, § 42 ; *Collectif Stop Melox et Mox v. France* (dec), 28/03/2006, no 75218/01.

recognized by many national legal systems and the denial of legal standing to them by the European Court decisions will become apparent when national courts will refer a question directly to the Court, on the basis of Protocol No. 16 concerning applications for an opinion in the context of proceedings brought by NGOs.<sup>19</sup> It appears that the CDDH examined the hypothesis of a transposition of the collective complaint under the European Social Charter<sup>20</sup>. The CDDH rejected it, considering, in particular, that such a scheme, which is not subject to the exhaustion of remedies, would carry too deep modifications in the existing system. It is important that the merits of a mechanism that would be designed in accordance with the principle of subsidiarity, be seriously analysed.

### 3- On the execution of Court's judgments at the national level: integrating civil society into the definition process of an internal oversight system

22. The Brighton Declaration recalls the importance of implementing the subsidiarity principle in order to achieve the execution of Court's judgments. It stresses the necessity to strengthen, at the national level, the role of Parliaments and internal jurisdictions in the monitoring of execution. Recommendation 2008(2) by the Committee of Ministers delimits a framework designed to improve Member States' involvement in the process of execution monitoring. Yet, this framework remains overly broad. It requires some precision in order to achieve adequate institutionalization of execution monitoring.

23. Recommendation 2008(2) invite States to set up, at the national level, a specific authority in charge of circulating and monitoring the Court's decisions. It could allow for some States to meet the Brighton Declaration objective, provided that this authority is bestowed genuine competence in relation to implementation, monitoring and guidance on national administrations, in close collaboration with Parliaments. This authority would need to have the obligation to account for its activities. The failure to implement the Court's judgments often stems from lack of knowledge on the part of the relevant bodies and from the disparate and unregulated nature of the monitoring of the execution by the competent authorities. Nonetheless – and this needs to be stressed beyond the complexities of the technical aspects – the execution of judgments, and more broadly compliance with the Convention, first and foremost requires a drastic change in the mindset of concerned administrations.

24. Thus, in addition to a strictly technical, legal approach, professional cultures and social representations of the role of the Convention need to evolve. As such, success is dependent on many factors related to the political situation in member States, their respective administrative tradition, etc. A most positive outcome of the Brussels Declaration would be to invite member States to promptly organise, under the auspices of their respective NHRI, a General Conference on national-level implementation of the Convention. Such a conference would allow for the identification of avenues for the definition of an organisation and a methodology for effective monitoring of the Court's judgments. Moreover, feed-back from this General Conference would provide material for rewriting Recommendation 2008(2). Admittedly, time is scarce. Member States must take immediate measures to remedy dysfunctional situations identified by the Court. Nonetheless, if the Interlaken Process has induced and accompanied significant evolution in the functioning of the Court, it has shown the limits of an essentially technical approach initiated at

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<sup>19</sup> See in this regard the criticism concerning the lack of coherence by O. de Schutter, « L'accès des personnes morales à la Cour européenne des droits de l'homme », *Avancées et confins actuels des droits de l'homme aux niveaux international, européen et national. Mélanges offerts à Silvio Marcus Helmons*, Bruxelles, Bruylant, 2003, pp. 83-108., and in particular, the commentary on the decision *Agrotexim et a. c. Grèce*, 24 October 1995.

<sup>20</sup> *Draft CDDH Report on the advisability and modalities of a "representative application procedure"*, (GT-GDR-C(2013)R2).

the intergovernmental level. Member States must create the conditions to create a deeper dynamic of compliance with the objectives of the Convention.