Presentation to the PACE Committee on Legal Affairs and Human Rights: the role of civil society in the monitoring process for the implementation of judgments of the European Court of Human Rights

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CHECK AGAINST DELIVERY

1. My name is George Stafford and I am one of two Co-Directors or the European Implementation Network, or EIN. My colleague Nigel Warner here is a member of the organisation's board.

2. **The European Implementation Network advocates for the full and timely implementation of judgments of the European Court of Human Rights**. It does this mainly by supporting domestic NGOs engage in the implementation monitoring process before the Committee of Ministers ("**CM**"). As its name suggests, EIN is a network of NGOs. Currently it consists of over 30 member and partner NGOs in 20 different countries, with a small secretariat in Strasbourg. EIN was registered at the start of 2017 and became fully operational at the start of 2018.

3. **We have been asked here today to provide information about the difficulties faced by civil society when engaging with the monitoring process for the implementation of ECtHR judgments**. In order to explain these difficulties, I will first set out why it is so important for civil society to be able to actively engage in the supervision process, before then addressing the difficulties involved in this, and finally some ideas of how these could be addressed. While national human rights institutions (NHRIs) are not, strictly speaking, part of civil society, they similarly have an important role, and so we include references to this where relevant.

The importance of civil society's involvement in the supervision process

4. As everyone here will know, after a judgment is handed down by the European Court of Human Rights, it passes from the Court to the Committee of Ministers. The Committee of Ministers then supervises the

implementation of the judgment, to ensure not only that justice is done for the individual applicant, but also that the same violation does not happen again for others in the same country. The Department for the Execution of Judgments ("**DEJ**") plays a key role in assessing whether these steps have been carried out.

5. A key question for the Committee of Ministers and the DEJ is therefore the extent to which reforms to prevent similar future violations have successfully been completed. The main source of information about this is the governments of member states themselves. However, this can lead to problems (though of course not always). Governments may provide insufficient information, for example, because the authorities lack access to certain relevant facts, or because the relevant department is under-resourced, or lacks the necessary skills. But there is also the fact that governments have an incentive to try to establish that reforms have been carried out successfully in order to close the supervision process and bring international scrutiny to an end. **Unfortunately, this means that the Committee of Ministers can in some cases be presented with unrealistically positive information about the state of necessary reforms.**

6. This can happen in a number of ways. Governments can **exaggerate** the scope of reforms that have been taken. They can also **claim that the reforms have solved the problem**, when in fact evidence suggests that this is not the case: perhaps because the reform was always known to be insufficient; or perhaps because, though reforms have been taken which were thought to be effective, evidence indicates that the problem still remains. On occasion, governments provide information about **reforms that are irrelevant** in the context of the specific case, which can give a misleading impression that something is being done when in fact the required actions are not being taken. In other cases, governments can **omit key information** from Action Plans or Reports, such as the recurrence of the original violation which would indicate that further changes are still needed.

7. Whilst all of this can happen because a government is deliberately trying to mislead the CM, it can also occur for a variety of different reasons: **governments may simply lack access to certain relevant facts; they may be unwilling to obtain them; and/or different government departments might not co-operate to ensure that all the information at the government's disposal is transferred to the Council of Europe.**

8. To illustrate this, take the following example. In 2012 the European Court of Human Rights ruled that the authorities in Chișinău, Moldova had banned a 2005 march planned by an LGBTI organisation, to encourage the adoption of laws to protect sexual minorities from discrimination. The ban had been deliberately put in place to stop LGBTI rights from being promoted in public. The Strasbourg court ruled that it had breached the right to free assembly and had been unlawfully discriminatory.

9. According to the Moldovan government, the incident was essentially a one-off. It submitted an Action Plan to the Committee of Ministers saying that the LGBT organisation had been allowed to freely assemble ever since the events in question, that their rights had been successfully strengthened by subsequent legislation, and that the CM should end its supervision under the enhanced procedure.

10. The document appears convincing without any further information. You can easily imagine a situation where, without any further submissions, the Committee of Ministers would have ended its enhanced supervision, on the grounds that the problem had been largely solved.

11. In fact, nothing could be further from the truth. In the years after the original ban, almost every event organised by the same group had been banned. Marches that did go ahead often had to be abandoned due to the threat of violence and an absence of adequate police protection. Although new legislation had been passed about freedom of assembly, this had failed to guarantee this right for LGBT groups in practice. In reality, the organisation was still unable to freely hold public demonstrations.

12. Fortunately, the CM was made aware of all of this because the NGO, assisted by an international LGBT group, made a written submission to the Committee of Ministers. The case remained under the CM's enhanced supervision, and further reforms have been made to protect free assembly by LGBT groups. In May 2018, for the first time in the 14 years since the events of the case, the NGO was able to fully complete a planned march in Chișinău without it being banned or violently disrupted. The case remains pending with the CM and the body remains actively engaged in protecting LGBT rights in Moldova.

13. It is worth taking a moment to think of what the serious consequences would have been if the NGO submission had not been made. The enhanced supervision of the case could have ended, and the case could have been closed before the necessary progress had taken place. That would have involved a huge waste of time, resources and – perhaps worst of all – the moral courage of those in the NGO bringing the case. The events had happened in 2005; they then fought a year of legal battles in Moldova, unsuccessfully; the case was brought to the Strasbourg Court in 2006; they had to wait six years for a judgment, which finally came in 2012. If the supervision of the case had been closed without systemic and

long-lasting reforms, then it would have brought a shame on the Convention System. Fortunately, that did not happen and that almost certainly owed much to the intervention of civil society in the supervision process.

14. **So that is just one example of a misleading or incomplete Action Plan, which could have had disastrous consequences if it had not been matched by a submission from civil society**. However, it should be stressed that this problem of incomplete Reports is not particular to the country or the issue involved in this example. It has arisen across a number of different states, concerning various different human rights issues.

15. **Examples such as this demonstrate why it is so important for there to be a different perspective provided by NGOs or NHRIs on the supervision process**, in addition to the one provided by governments. You could compare the issue to that of a criminal trial. Imagine a situation where defendants were routinely not being represented by lawyers, but there was always a prosecutor. You can imagine how many miscarriages of justice there would be. In the same way, in a supervision process where governments are making a submission, but civil society is not, there is a real risk that the truth about the all-important reforms is not coming to light.

16. Indeed, the statistics of civil society participation tell a worrying story.

17. Leading cases are those which have been identified as revealing new structural and / or systemic problems, that require changes to prevent similar violations in the future. **Of all the leading cases which have come under the Committee of Ministers' supervision in recent years, in only around 5% is there a submission from a civil society organisation giving their perspective on the situation**. We would not suggest that NGOs or NHRIs need to make submissions on every leading case – it's not comparable to a criminal trial in that sense. However, it should be much higher than 5%. The submission rate for NHRIs is even lower – indeed, it is negligible – by our calculations, about 0.5% of leading cases.

The barriers to the involvement of civil society in the supervision process

18. There are significant barriers to the involvement of civil society in the supervision process. Today I will identify **five.**

19. First, there is a lack of **openness** in the system. NGOs and NHRIs are able to participate, but their participation is not officially encouraged and facilitated. From the outside, the supervision process can be easily misunderstood as a process strictly between governments and the CM. Civil society is not invited to

provide contributions by the CM, the DEJ or (in the vast majority of cases) by member states. To a significant extent, civil society is simply not aware of the possibility to participate in this process. Even when NGOs do participate, in the majority of cases they are not provided with any recognition that their submissions have had any impact on the decision-making process: providing little justification or incentive for them to continue their participation. Very little is done to open up the system, so that civil society is aware that it can contribute, and that its contribution is valued.

20. Second, there is the lack of **transparency** of the system. As mentioned, civil society can make a crucial contribution to the assessment of whether member states are carrying out the changes that the Council of Europe requires. However, in order to make this contribution on whether the required changes are really happening, it has to know what changes the Council of Europe is requesting – you cannot comment on whether something is happening if you do not know what the "something" is. However, this information is usually unavailable. For the vast majority of cases – all of those under the standard procedure, amounting to 75% of the total leading cases - there is often no public information about what information the DEJ has requested from a member state, when it was requested, and what deadline might have been set. The lack of information about what exactly is being debated makes it very difficult for NGOs and others to contribute to the debate, at the right time.

21. Third, there is almost no **guidance** for civil society about how it should engage with the supervision process. Member states have been provided with detailed guidance, in the form of a detailed document written by the DEJ on how to write Action Plans and Reports which are used in the supervision process. In contrast, there is no such guidance for civil society on how to write their submissions. The system remains distant and almost impossible to understand without expert advice.

22. Fourth, engagement with the supervision process is made difficult by the restrictions on what **languages** may be used. When an applicant conducts correspondence with the European Court of Human Rights, he or she may do so in any of the official languages of the member states. However, if an organisation wishes to make an observation to the CM or DEJ during the supervision process, they may do so in only two languages: English or French. For a very large number of human rights organisations, this presents a

massive problem. Imagine that you are a small NGO specialising in a particular issue, with less than half a dozen members of staff. There is a fair chance that your organisation might struggle to write technical submissions in one of two particular foreign languages.

23. Fifth and finally, all of these problems are compounded by a lack of **resources** on behalf of NGOs. As I have set out, the supervision system is very closed, lacks easy-to-access information, contains almost no official guidance, and can only be engaged with in two particular languages. These things mean that expertise and time is required to engage in it. These are things that NGOs are very short of. Only a small number of NGOs can engage in this kind of process – and within them, only a small number of individuals. In particular, it is worth noting that a very large number of cases pending before the CM relate to judgments involving Ukraine, Turkey, Russia and Moldova. The organisations that exist in these countries and the specialists within them already have a huge number of issues to deal with.

What EIN does to help Civil Society Organisations engage in the supervision process

24. **The European Implementation Network tries to support civil society organisations' efforts to overcome these problems, mainly by providing information and training.** We periodically organise workshops, where we provide training to NGOs and others about the system and how to make submissions. The first of these trainings was held in February – since then we have trained over 70 individuals from civil society organisations. In addition EIN has also recently published a handbook on the implementation process, which contains the key information about how organisations can participate in the supervision process.

25. We are very grateful to the Department for the Execution of Judgments for their assistance with these activities.

26. On the issue of EIN's contribution, it is important to note that there is a limit to what we can do because we ourselves are also quite small. The secretariat consists of only two positions, one of which is part time.

What can be done to help civil society engage in the process?

27. There have been some recent developments which have provided some assistance to those wishing to engage in the supervision process. The HUDOC-EXEC database about the supervision process, launched in early 2017, has helped enormously with the provision of public information about each case. In addition, the Council of Europe began publishing the indicative list of cases to be discussed at upcoming CM Human Rights meetings – which is also very helpful.

28. **However, more needs to be done to help NGOs and NHRIs engage. We would like to see comprehensive improvements under three broad headings: information, inclusion and training.**

29. **Information**: as already mentioned, information is crucial for participation in the supervision process. In order for it to work effectively, it must be clear what the CM and DEJ are requesting to be done; governments must provide clear information about the state of reforms; civil society must have access to those claims; and civil society must be empowered to make its own claims to the right actors, most notably in the DEJ. The following changes would help this to happen in practice:

30. Firstly, the implementation database HUDOC-EXEC should be expanded so that for standard cases it shows what information the DEJ has requested of a member state and when it was requested. This would provide invaluable information about what changes are being requested by the Council of Europe, so that civil society can comment on whether they are really happening.

31. Secondly, it would be beneficial if there were additional requirements on governments to provide full and complete information on all relevant issues. In particular, it would be helpful if governments had to make it clear whether there have been additional repeat violations since the incident in question; and, if they believe there have been no such incidents, for this to be stated clearly and explicitly.

32. Thirdly, it would be very beneficial for civil society to be able to discuss the claims of governments, by having direct access to the relevant members of the DEJ. For that reason, a public organigram of that department would be very useful, to make it easier to contact the right people. It would give NGOs direct access to the crucial information about the timetable of particular cases and the current state of discussions.

33. **Inclusion**: As I mentioned before, the figure of 5% of participation in leading cases is too low and we believe the consequent lack of information leads to weaker implementation and cases being closed when they should not be. There would be a hugely positive impact on implementation if CSOs and NHRIs were included at every stage of the process:

- Within member states, governments could be expected or required to consult CSOs and NHRIs when developing action plans; and to set out their involvement/consultation in the action plan text.

- During the supervision process itself, at the moment the Committee of Ministers and DEJ do not actively encourage civil society to participate in the supervision of particular cases. Though it might require a change to the rules, it would be of huge benefit to the system if the Council of Europe actively sought out the participation of these groups. Part of this could involve electronic communications to invite participation, and/or the DEJ meeting with NGOs during country visits to member states.

- We can also see a greater role for civil society to work with PACE to scrutinise implementation and hold governments to account. This could be done through PACE hearings in relation to particular countries, during which a government minister should appear to answer questions about the State's implementation, and civil society is present to inform the debate.

- In addition, the Committee of Ministers could strengthen the role of civil society in the process by holding a biennial meeting with NGOs on the subject of implementation. The European Court already does this with NGOs and others engaged in making applications to the court. A biennial meeting would allow the Committee of Ministers to have feedback from a wide range of NGOs on their experiences with the implementation process. It would also be a public symbolic statement of the CM's support for and recognition of the importance of society involvement.

34. Finally, **training**. The lack of NGO capacity in this area could be partially addressed by training being provided by the Council of Europe, or by the Council making funds available for such training to take place. If providing training resources itself, the Council could do this through the creation of a module in the existing HELP online training portal. If the Council were to outsource the training, resources could be made available from a number of places: such as the Human Right Trust Fund.

Conclusion

35. I would like to end by stressing the importance of effective implementation to the wider Convention system. **In order for the European Convention system to work, it is crucial that the judgments of the European Court of Human Rights are implemented.** For well over a decade, the Strasbourg Court has had a backlog of over 50,000 cases. That figure has come down from a much higher number, but today it is on the rise again and is over 60,000. Such a significant backlog entails many problems, not least of which is a wait for justice that can last many years and risk undermining the effectiveness of the Convention System.

36. It is likely that a significant part of that arises from the implementation problem. Many of the cases coming to the court are repetitive in nature: the system is being slowed down due to a failure to implement at the national level – leading to the same issues coming back over and over again.

37. **The European Court of Human Rights cannot effectively protect human rights on its own. The vast majority of such protection needs to be carried out by national governments, legislatures and courts. For this to happen, existing judgments need to be effectively implemented. As we have demonstrated, this requires the effective participation of NGOs and National Human Rights Institutions.**

38. The last resolution on this issue by the Parliamentary Assembly called upon the Committee of Ministers to give NGOs a greater role in the judgment execution process. We are not aware of any proposals for this greater role, or indeed any plans to develop proposals, for this greater involvement.

39. We would very much like to see such proposals come forward, in addition to wider reforms to improve implementation. That is because, **in our view the implementation of judgments in numerous member states is worrying**. We are more sceptical than others about the degree to which states are effectively implementing judgments from the Court. In particular, we believe that the Annual Report from the Committee of Ministers is far too positive about the levels of implementation. We would very much welcome the opportunity to address this committee again on why this is the case. This is particularly important at the current time, because in 2019 the Interlaken process of reforms to the Convention system is coming to an end. This means there will be a stock-taking exercise next year on the functioning of the Convention system, including implementation of judgments. We would welcome the opportunity to further contribute to that debate.

40. The European Implementation Network is willing to further assist this committee in any way possible. My colleague Nigel Warner and I are happy to answer any of your questions.