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STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH)

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CDDH report on the advisability and modalities of a "representative application procedure"

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A. INTRODUCTION

1. The Declaration adopted at the High-level Conference on the future of the European Court of Human Rights, organised by the United Kingdom Chairmanship of the Committee of Ministers (Brighton, 19-20 April 2012), "[b]uilding upon the pilot judgment procedure, invite[d] the Committee of Ministers to consider the advisability and modalities of a procedure by which the Court could register and determine a small number of representative applications from a group of applications that allege the same violation against the same respondent State, such determination being applicable to the whole group" (paragraph 20.d)) (henceforth described as a "representative application procedure"). At the Ministerial Session of 23 May 2012, the Committee of Ministers instructed the CDDH "to submit, by 15 October 2013, its conclusions and possible proposals for action to follow up" paragraph 20.d) of the Brighton Declaration. The present report constitutes the CDDH's response to this instruction.

2. The Brighton Declaration and preparatory work for the Brighton Conference provide no further indication of what might be meant by a 'representative application procedure'. Some guidance, however, comes from two circumstances.

3. First, the wording of paragraph 20.d) states that it must 'build upon the pilot judgment procedure'. There are in fact several possible variants of the "pilot judgment procedure", which deals with certain types of group of applications alleging against the same respondent State a violation arising from a structural or systemic problem or other similar dysfunction. The basic procedure involves the selection by the Court of a pilot case; judgment in this case will include identification of the nature of the underlying problem and indications to the respondent State on remedial measures to be taken in its execution. The first application of the pilot judgment procedure, in the case of *Broniowski v. Poland*,[1] involved adjournment of the question of just satisfaction in the pilot case pending adoption of the remedial measures; in more recent pilot judgments, however, this has not generally been the case. The procedure typically involves adjournment of other related applications pending adoption of the remedial measures. Recent pilot judgments have often involved direction to the respondent State to adopt the remedial measures within a specified time. In all cases, the goal of the procedure is to allow striking out of the related applications under Article 37 of the Convention following implementation of these remedial measures.[2]

4. Second, whilst the draft Brighton Declaration was being negotiated, the Court received a very large number of applications against Hungary relating to the pension rights of former law enforcement officers who benefited from early retirement. In response to this situation, the Court Registrar issued a press release stating as follows:

> "The Court will identify one or more applications which it will examine as a priority as leading cases and, pending the outcome of those cases, it will not take any procedural steps in relation to the other applications. In addition, applications which are not lodged through one of the trade unions concerned will not be registered for the time being… [F]or the time being the Court's Registry will not inform individual applicants that their applications have been registered. Moreover, it will not correspond with individual applicants or respond to any enquiries relating to these cases, but will publish information about the leading cases on its internet at appropriate intervals."[3]

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[1] App. no. 31433/96, Grand Chamber judgment of 22 June 2004.
[2] For further details on the pilot judgment procedure, see Rule 61 of the Rules of Court.
[3] See doc. GT-GDR-C(2012)007, "European Court Registrar calls for special measures to deal with influx of Hungarian pension cases".

5. In any event, introduction of a representative application procedure would be intended to provide the Court with an additional tool to respond to large inflows of what will, for the purposes of this report, be called 'similar' applications, i.e. applications that allege the same violation against the same respondent State, in each of which there is an identical legal issue, based on comparable factual situations, such that resolution of a single, common question would allow determination of all similar cases. The aim would be transparently to ensure adequacy and efficiency in dealing with such applications. Since the Brighton Declaration would require "building upon the pilot judgment procedure", a representative application procedure should be something new and different to the pilot judgment procedure; and if it is to have added value, also to other existing procedural tools. It should be recalled that, as with all action in response to 'similar' applications, there is a link to the issue of subsidiarity, including the willingness of a respondent State to take domestic remedial action. Such remedial action allows the Court to clear outstanding applications from its case-load and by preventing perpetuation of an underlying situation, avoids any accumulation of new applications.

6. In fulfilling the terms of reference, this report will seek to ascertain first, whether the Court's current range of relevant procedural responses, including *inter alia* the pilot judgment procedure, is sufficient to address the current problem of 'similar' applications; and second, whether there might be scope to instigate a distinctive, significant development in the Court's procedures in response to repetitive applications, with attention being given to the question of whether the Court's response to the Hungarian pension cases may already constitute such a development.

B. THE EXISTING PROCEDURAL TOOLS AVAILABLE TO THE COURT

7. As noted above, the Court already has at its disposal a variety of procedural tools capable of responding to 'similar' applications. This section will describe these tools, including by reference to examples of cases in which they have been used.

8. The broad outlines of the **pilot judgment procedure** have already been sketched in paragraph 3 above. As noted, and as reflected in Rule 61, the procedure allows for a number of variants. There may also be cases with many of the characteristic features of a pilot judgment procedure but which are adjudicated without reference to Rule 61 (see e.g. *Grudić v. Serbia*[4]). It had been suggested, particularly in the early days, that the pilot judgment procedure was not sufficiently clear, for instance in relation to how such a procedure could be initiated and in what circumstances. There is now greater familiarity with the procedure, however, it having been used some 20 times to date; and as noted, it has been codified in the Rules of Court, in response to paragraph 7.b) of the Interlaken Declaration.

9. One particular variant of the pilot judgment procedure would lead not to a judgment but to a decision of inadmissibility. For example, the Grand Chamber admissibility decision in the case of ***Demopoulos & otrs v. Turkey***,[5] concerning deprivation of access to property, found that there was an effective domestic remedy which the applicants directly concerned by the decision had failed to exhaust, on which basis the Court subsequently declared inadmissible other similar applications and closed its examination of the question that had been addressed in the earlier case of *Loizidou v. Turkey*.[6]

[4] App no. 31925/08, judgment of 17 April 2012.
[5] App. no. 46113/99 et al, decision of 01 March 2010.
[6] App. no. 15318/89, Grand Chamber judgment of 18 December 1996.

10. The Court may identify, from a group of similar cases, an individual case in which to give a judgment of principle, these principles being applicable to other cases in the group. In the case of ***M.S.S. v. Belgium & Greece***, for example, concerning removal from EU member States to Greece under the Dublin Regulation,[7] the principles in the judgment were relevant to the compatibility with the Convention of removals to Greece under the Dublin Regulation by other States; The Netherlands, for example, was asked by the Court how it intended to respond to the *M.S.S.* judgment. In a similar process, following judgment in the case of *Sufi & Elmi v. United Kingdom* (concerning returns to Somalia),[8] the UK made proposals on re-examination of asylum requests in similar cases, following which the Court was able to strike other applications out.[9]

11. The Court may also join many applications and then decide them by a single judgment. In ***Gaglione v. Italy***, for example, the Court addressed 475 applications concerning substantial delay in execution of domestic court judgments ordering compensation for excessive length of judicial proceedings.[10] There are many other examples of the Court determining up to 100 applications in a single judgment.

12. The Court's Registrar has recently written to the Italian Government Agent with a list of some 5,800 applications received concerning length of proceedings and the lack of an effective domestic remedy, in order that the Italian Government might contact those concerned with a view to reaching **friendly settlements on the basis of the Court's awards** to the successful applicants in *Gaglione*.[11]

13. The Court has developed, with the co-operation of the Ukrainian authorities, an **expedited Committee procedure** approach, so far used to deal with complaints against that country of non-execution of a final domestic judgment, the largest group of similar cases against that country. The *Ivanov* pilot judgment procedure,[12] which had dealt with this issue, was terminated on account of the failure to resolve the situation: 1000 new cases arrived in 2011. The new approach was instigated by a Committee judgment in the case of *Kharuk*, which used a simplified basis for calculating just satisfaction: where the domestic judgment had gone unenforced for three years or less, the award was €1500; where more than three years, €3000.[13] The Respondent State was invited to settle other cases on this basis.

14. In this procedure, the Registry process is greatly simplified: only key facts are entered in the case-management information system from the file, after which everything is computerised – a highly automated process. There is no summary of the individual facts; instead, a single line of data is presented as part of a table. The Ukrainian authorities do not receive the application form or any submitted documents unless they request them. There is no reference to friendly settlement, since this would prolong proceedings; the Government is invited to proceed directly to a unilateral declaration on the basis of the *Kharuk* judgment. The Court indicates that if no unilateral declaration is made allowing the case to be struck out, it will give judgment after six months. The Respondent State can always challenge the use of the procedure or the factual circumstances of a case. There is a working agreement between

[7] App. no. 30696/09, Grand Chamber judgment of 21 January 2011.
[8] App. nos. 8319/07 & 11449/07, judgment of 28 June 2011.
[9] See *Musa & otrs v. United Kingdom*, App. no. 8276/07 and 175 others, decision of 26 June 2012.
[10] App. no. 45867/07, judgment of 21 December 2010.
[11] See doc. GT-GDR-C(2013)004.
[12] App no. 40450/04, judgment of 15 October 2009.
[13] App. no. 703/05 and 115 others, judgment of 26 July 2012.

the authorities and the Registry that no more than 250 cases will be communicated per month; since summer 2012, over 1000 have been communicated. As a result of the new approach, newly arriving cases can be decided or disposed of within a year or less.

15. Finally, as noted at paragraph 4 above, there is the approach being taken by the Registry in the **Hungarian pension cases**. These concern so far 11,500 individuals, whose applications the Registry has collected into 37 groups. What is so unusual about this situation is the exceptionally large number of co-ordinated applications made in such a short period and the high degree of interaction between the Registry and those co-ordinating the applicants' actions at national level. At this relatively early stage of proceedings, it is unclear whether any particular innovations will be introduced, or whether the Registry is merely taking a pragmatic approach to case-management in an exceptional situation.

16. The above descriptions illustrate how the Court may combine various procedural steps in an effort to respond as effectively and efficiently as possible to a particular situation. The range of procedural tools includes:

- The pilot judgment procedure (including its variants);
- Judgment of principle in an individual case from a group, that principle being of general application to the group;
- Joinder of applications to be decided in a single judgment;
- An invitation to the respondent State to settle a list of cases on the basis of the levels of compensation awarded in a previous judgment;
- The expedited Committee procedure;
- Grouping of applications at the very outset.

17. Although not strictly speaking a procedural tool available at the discretion of the Court, Article 33 of the Convention, which allows for inter-State cases, does represent a further means of addressing situations that may give rise to 'similar' (as well as other numerous) applications. Whilst inter-State cases have not been numerous, they tend to involve situations affecting large numbers of individuals.

C. IN WHAT CIRCUMSTANCES DOES THE COURT USE WHICH PROCEDURE?

18. The Court values the flexibility to select from amongst its different procedural tools and their variants that which is most appropriate to the specificities of a particular situation. These tools have been developed – and, indeed, continue to be developed – by the Court within the current legal framework of the Convention and in response both to the exigencies of particular situations and, notably in the case of the pilot judgment procedure, in close co-operation with States Parties.

19. In the Registry's experience, where there is no prospect of domestic resolution of their root causes, it may be counter-productive to let 'similar' applications constantly accumulate or to defer their processing. As noted above, for example, introduction of the expedited Committee procedure followed closely on the failure of the *Ivanov* pilot judgment procedure.

20. The Court does not seem yet to have been confronted with any situation of 'similar' applications to which it has found itself without any procedural response. This is not to say that the Court has never met with difficult situations, much less that it has been able to resolve every situation which it has faced. There may be issues of sufficiency of resources or the sheer scale of the problem; the Court's case-management in the Hungarian pension cases, however, shows how an innovative and flexible response can make a difficult situation more

manageable. As regards resolution of the underlying problem, where this is not achieved, the Ukrainian situation described above shows the Court's ability to respond in various, appropriate ways.

21. As regards the Hungarian pension cases, there has been little in the way of substantial development since the Registrar's press release in early 2012. It is understood that the situation before the Court is considered now to be under control and no longer critical; as to further processing of the applications, they are not considered to be of high priority under the Court's published policy. At the time of writing, there have been no further developments to report.

D. THE ADVISABILITY OF A 'REPRESENTATIVE APPLICATION PROCEDURE'

22. Is there any need for a representative application procedure in addition to the Court's existing procedural tools and their variants? As noted, very numerous 'similar' applications are a problem for the Court, but in terms of resources rather than the availability of procedural responses: 'similar' applications can be dealt with in various ways within the current framework.

23. Alternatively, one could ask what useful, new distinguishing features or advantages might there be? The Brighton Declaration merely indicates that it would involve the Court registering and determining [only] a small number of representative applications from the group.

i. The possibility of **grouping many applications into one case** already exists. Article 34 of the Convention allows applications from a "group of individuals claiming to be the victim of a violation"; in the case of *Chagos Islanders v. United Kingdom*, the group consisted of 1,786 individuals.[14] In addition, the Court itself may group similar applications together, as, for example, in *Gaglione* (see para. 11 above).
ii. Equally, in certain circumstances, the Court has decided **not to register all 'similar' applications**, or at least not to continue their treatment. In the *Greens & M.T. v. United Kingdom* pilot judgment, the Court stated that it would "suspend the treatment of any applications not yet registered at the date of delivery of this judgment, as well as future applications".[15]
iii. The representative application procedure would **not require transmission of all the case files** to the respondent State but only that in the lead case; but neither is this required in the expedited Committee procedure (unless requested) nor, one can assume, will it be in connection with the Hungarian pension cases. There would be no need for individual assessment of just satisfaction by the Court in every similar case; but nor is there in the pilot judgment procedure.

24. Finally, it should be noted that the Court has applied the above-mentioned existing procedural tools in relation to only relatively few States Parties and in a relatively small number of cases; it has nevertheless always been able to find procedural tools when the need has arisen and has tended to use these tools with greater frequency in recent years. It is too early to come to any general conclusion that they are insufficient to respond to the various challenges facing the Court arising from 'similar' applications.

[14] App. no. 35622/04, decision of 11 December 2012.
[15] App. nos. 60041/08 & 60054/08, judgment of 23 November 2010.

25. In examining the advisability of introducing a representative application procedure, the CDDH has also assessed its possible effects on the Convention system.

i. Such a procedure would undoubtedly have an effect on the right of individual petition, as judgment in the selected case(s) would have *res judicata* effect on other applications in the group. This would require being able to identify all other individuals to whom the Court's determination of the representative application should be applicable and may have consequences for Article 46(1) of the Convention on execution of judgments.

ii. The procedure might be said to strengthen the practical effect of the right of individual petition, since all applications in the group would be judicially determined at the same time; under the Court's priority policy, a similar application not taken as a "lead" case faces a potentially lengthy wait.[16] Much the same could be said, however, of a successful pilot judgment procedure or, to a lesser extent, the expedited Committee procedure.

iii. The greater case-processing efficiency one could expect from a representative application procedure may have some impact on the amount of time the Court subsequently devotes to other cases. As noted above, however, once a "lead" case has been identified, similar cases are given low priority by the Court, unless given high priority on account of their individual substance. Any advantage would be due to the introduction by the respondent State of a remedy allowing resolution of similar cases at domestic level, and could apply equally to other procedural tools.

26. In conclusion, therefore, the CDDH is of the view that there would be no significant added value to designing and introducing a 'representative application procedure' in the current circumstances. It should be borne in mind, however, that future developments may require a reassessment of the matter.

E. MODALITIES OF A 'REPRESENTATIVE APPLICATION PROCEDURE'

27. The CDDH's terms of reference require it to consider the possible modalities of a representative application procedure, regardless of its conclusions on the advisability of such a procedure.

28. Paragraph 20.d. of the Brighton Declaration describes the following basic characteristics of the procedure:

i. It should 'build upon' the pilot judgment procedure (see para. 3 above).

ii. It would apply where there is a group of 'similar applications' (see para. 5 above).

iii. The Court would register and determine only a small number of representative applications from that group.

iv. The Court's determination of those applications would be applicable to the whole group.

29. As noted in paragraph 5 above, any 'representative application procedure' for dealing with 'similar' applications should be something new and different not only to the pilot judgment procedure, but also to other existing procedural tools available to the Court. Paragraph 22 above, however, shows that the basic characteristics suggested for a representative application procedure can, in fact, already be found amongst existing procedural tools.

[16] The Court's position on this is that once a lead case has identified the problem underlying the group of applications and has given indications on how to address it, resolution of similar cases is a matter for the respondent State.

30. On the basis of the outline given in the Brighton Declaration, the CDDH concludes that the procedure would be none of the following.

i. **Class actions**. In a class action, the applications of all members of the group are determined; this would not be the case for a representative application procedure.

ii. **Collective complaints**. In a collective complaints procedure (such as that under the European Social Charter [17]), applications may be presented by a party who is not a member of the group or a victim of the alleged violation, and there may be no requirement of exhaustion of domestic remedies; both of these would require significant changes to certain fundamental principles of the Convention system (see Articles 34 and 35(1) respectively), which in the view of the CDDH go beyond what could be envisaged in the present context.

iii. **Default judgment**. A default judgment, such as the Court indicated prior to the Brighton Conference that it envisaged introducing,[18] would apply only to the instant application or applications; judgment on a representative application would apply also to other members of the group.

31. The CDDH is thus unable to identify modalities for a 'representative application procedure' that would satisfy the outline given in the Brighton Declaration and show distinct advantages not already available to the Court.

F. FINAL CONCLUSIONS AND POSSIBLE PROPOSALS FOR ACTION

32. The CDDH considers not only that it would be inadvisable to introduce a 'representative application procedure' but that it is in fact difficult to see what specific characteristics such a procedure could have that would usefully distinguish it from existing procedural tools. The CDDH therefore recommends that in the current circumstances, no further action be taken at inter-governmental level.

[17] The CDDH, through the GT-GDR-C drafting group, had the benefit of a detailed presentation on the collective complaints procedure under the European Social Charter given by its Secretariat.

[18] "The Court envisages a practice whereby in relation to clearly repetitive cases the Registry would simply refer a list of cases directly to the Government to be settled in an appropriate way. In the absence of any justified objections from the Government, failure to provide redress within a fixed period of time would lead to a "default judgment" awarding compensation to the applicant." See the Preliminary Opinion of the Court in preparation for the Brighton Conference, doc. GT-GDR-C(2012)001, para. 21.