

Input for the High-Level Reflection Group of the Council of Europe by the CURE – Campaign to Uphold Rights in Europe

29 July 2022

Introduction

CURE – Campaign to Uphold Rights in Europe is an initiative of leading civil society organisations from across the European continent that was launched on 26 January 2022 in Strasbourg. The members of the campaign share a firm belief in the founding idea of the Council of Europe (CoE) and the value of the Council as a guardian and promoter of a pan-European legal framework in human rights, democracy and rule of law, and as a pioneer in developing international norms and standards. CURE's thinking and proposals are contained in its Campaign Manifesto¹ and in a number of other documents².

In this submission we discuss three areas covered in these documents; they relate to several points in the Terms of Reference of the High-Level Reflection Group:

1. Strengthening the ECHR system, including strengthening the implementation of ECtHR judgments.
2. Preventing democratic and rule of law backsliding in CoE member states.
3. Increasing engagement with European civil society.

We believe that civil society can and should play an important role in supporting the ideals of the Council of Europe. We aim to provide solid input for and feedback to the work of the High-Level Reflection Group. We hope that this short paper will mark the beginning of further contacts between the members of the High-Level Reflection Group and civil society organisations, including the CURE Campaign.

We hope that eventually, enough time will be reserved for the process of reflection. Changes that will make the CoE better fulfil its role of the guardian and promoter of human rights of all European citizens will require building of support among civil society in the broad sense of the word, beyond those with a focus on human rights. Political support for changes needs to be built up, and reforms should be designed to fundamentally increase the effectiveness of the Council. They should be presented as **unique, new and appealing initiatives** that make the Council of Europe stand out. In each of the three areas, such initiatives should be identified. This paper is to stimulate this process.

¹ Manifesto of the CURE Campaign: <https://cure-campaign.org/manifesto>

² Documents published by the CURE Campaign: <https://cure-campaign.org/documents>

1. Strengthening the ECHR system, including strengthening the implementation of ECtHR judgments

Proposals in this section relate to points (a), (b) and (c) in the terms of reference of the High-Level Reflection Group.

The European Convention of Human Rights is the cornerstone of the human rights protection system of the Council of Europe. Essential for its effectiveness is the implementation of judgments of the European Court of Human Rights. However, as of January 2022, **47%** of the leading judgments handed down by the Court in the last 10 years are still pending implementation. There are around **1,300** leading judgments pending overall.³ Reasons for lack of implementation appear to vary from lack of capacity to carry out reforms to lack of the will to follow up in politically sensitive cases, and both can be addressed by the CoE.

This non-implementation of ECtHR judgments presents a significant challenge which has been documented extensively by the European Implementation Network (EIN), a member organisation of the CURE Campaign.

Continuing to re-iterate government responsibility for implementation is important in the current reflection process, but merely repeating a call on governments of member states is not sufficient; **the Council itself must step up efforts to ensure implementation.**

EIN 2022 Conference on the implementation of ECtHR judgments yielded several key proposals in this regard:⁴⁵

Conclusions

1. Need for **increased transparency** of the implementation monitoring process and **engagement with NHRIs/NGOs**, with regard to:
 - The Frequency and Transparency of CM/DH Hearings
 - Handling of Information in the Implementation Monitoring Process
 - Forum for Exchange on the Implementation Process
 - Engagement with civil society on country visits
2. **Increased funding** for Council of Europe activities: both for technical cooperation projects and the DEJ
3. A **special representative** on the implementation of ECtHR judgments
4. **Annual country-by-country assessments** of the state of ECtHR implementation and national capacity in each state
5. A **new sanction** by the Committee of Ministers for continued non-implementation

Several of these proposals can qualify as new initiatives of the type mentioned before, showing determination to fundamentally improve the impact of the Council of Europe – for example, the creation at the highest level of a mandate of **a special representative on implementation**. This step should be accompanied by proper funding for implementation-related mechanisms, and the determination to step up the attention of the Committee of Ministers for implementation of judgments.

³ Data by European Implementation Network (EIN), see www.einnetwork.org.

EIN stimulates the provision by civil society organisations of information on the state of implementation of judgments (Rule 9.2 procedure), and many of its members engage in national-level activity to push for full implementation of judgments.

⁴ Proposals for the work of the Council of Europe on the Implementation of Judgments of the European Court of Human Rights by EIN: <https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/62820f2bd8316c4d2f4f8e6e/1652690732420/EIN+Proposals+on+the+Implementation+of+Judgments.pdf>

⁵ Overview of the EIN June conference 2022: <https://www.einnetwork.org/blog-five/2022/7/9/overview-ein-june-conference-2022>

Violations in conflict

An issue of special concern is the applicability of the Convention system to acts committed by the Russian Federation.

Implementation of a large number of ECtHR judgments in respect of Russia are being monitored by the Committee of Ministers; thousands of cases are still pending before the Court, and possibly hundreds of new applications will be submitted before 16 September, especially in the context of repression for anti-war statements. We believe the CoE and its member states should make every effort possible to **secure the follow-up of Court judgments** in these cases. Several member states have raised the possibility of seizing assets of the Russian state to pay just satisfaction ordered by the Court.⁶

This applies even more strongly to violations committed by Russia (or Russia-led forces) in zones of conflict on the territory of CoE member states – Moldova, Georgia and – on a massive scale – in Ukraine. It is urgent that the Council of Europe defines its role in the overall spectrum of efforts to promote and ensure justice with respect to these violations.

There is a clear responsibility of the Council of Europe to do whatever is possible to contribute **to secure ECHR rights of persons living on the territory of member states, even if occupied by non-member state forces**. The CoE should discuss and further initiatives to continue holding Russia to account in these cases. Support should be continued and stepped up for the Ukrainian law enforcement system to prosecute crimes of aggression, crimes against humanity, war crimes and genocide. A role for the CoE in the creation of **novel initiatives beyond existing international judicial bodies** to prosecute international crimes committed in connection with the war in Ukraine, such as proposals of setting up an ad hoc international criminal tribunal⁷, should also be considered.

2. Preventing democratic and rule of law backsliding in CoE member states

Proposals in this section relate to point (a) and partially to point (e) in the terms of reference of the High-Level Reflection Group.

According to many measurements, the last ten to fifteen years have seen an overall deterioration of the state of democracy and rule of law in the world, including in Council of Europe member states. The ECHR complaint system, by design, is mostly reactive in nature, and by the time the Committee of Ministers has to conclude a serious lack of implementation of judgments in a particular state, authoritarianism may have become ingrained and democratic institutions critically deteriorated.⁸

Stronger preventive mechanisms and/or systems that react to ‘early warning’ signals are needed. A number of Council of Europe bodies or procedures that are considered less binding than the ECHR and ECtHR judgments serve as such early warning systems: CM recommendations, Venice Commission opinions, monitoring procedures by GRECO, ECRI reports, etc. They should be given more weight, and more emphasis be placed on implementing these recommendations as an essential element of the membership of the CoE.

While some **strengthening of the role of the Venice Commission** and of its interaction with the Committee of Ministers is already happening as a result of the evaluation published this year⁹, we believe further steps should be considered to place more emphasis on the importance of non-evasive follow-up of the Commission’s reports. Creating a tough **‘Constitution Watch’ or ‘Rule of Law Watch’** that is also recognised as such in the political and public sphere and in international diplomacy should be the aim of the CoE in this

⁶ Similarly to the PACE proposal on use of the assets of Russian citizens subject to targeted sanctions. See: Resolution 2436 (2022) The Russian Federation’s aggression against Ukraine: Ensuring accountability for serious violations of international humanitarian law and other international crimes, adopted by the PACE on 28 April 2022, para. 11.9, <https://pace.coe.int/en/files/30024/html>

⁷ Ibidem, para. 11.6.

⁸ It can be argued that faithful and full implementation of the ECHR, including by taking on board all relevant jurisprudence of the Court, will prevent states from backsliding on these standards, but that is to a large extent a circular argument: governments that are determined to embark on a road toward authoritarian governance will neglect or reject ECtHR judgments.

⁹ Evaluation report: Venice Commission: <https://venice.coe.int/webforms/events/?id=3339>

field. This could be done on the basis of the ‘Rule of Law Checklist’ developed by the Venice Commission and endorsed by the CM and the PACE.¹⁰

In addition to reducing the independence of the judiciary, studies on backsliding of democracy and rule of law often refer to government actions to limit free media, to shrink space of civil society, to loosen anti-corruption measures and to twitch the fairness of elections as (early) signs of backsliding. The CoE should explore how to strengthen its role in each of these fields. Using reporting by OSCE bodies on elections, freedom of the media, freedom of peaceful assembly, freedom of association, security of human rights defenders, and on hate crimes may be one option to investigate. **Stronger follow-up by the CM to reports by the Commissioner for Human Rights** should serve as another important tool to prevent backsliding.

Article 3¹¹ and in particular its provision on ‘sincere and effective cooperation in the realisation of the aim of the Council’ has a central role in the Statute of the CoE. Little guidance exists on what this entails and how ‘collaborate sincerely and effectively’ could be measured. Presumably, severe disregard of this provision can trigger the application of the so-called ‘**Complementary Joint Procedure**’¹². Discussing the question of what kind of enhanced procedure could PACE and CM develop in this regard would be useful. This could include more use of **infringement procedure** for non-implementation of ECtHR judgments, special steps on ECHR Article 18 judgments, special steps on serious non-follow-up on other CoE treaties mechanisms, etc.

While less directly linked to the prevention of authoritarianism in the political domain, the Istanbul Convention can be seen as a largely preventive instrument in the realm of domestic violence and violence against women. This consideration should be a major part of the arguments to get additional ratifications for the convention. The long-term goal should be to make **ratification of the Istanbul Convention a condition for the CoE membership**.

Monitoring reports by GREVIO should be placed on the CM agenda and reports similar to the treaty-monitoring reports should be drawn up for states that have not ratified.

3. Increased engagement with civil society

Proposals in this section relate to point (d) of the terms of reference of the High-Level Reflection Group but address CoE engagement with civil society not only from Russia and Belarus, but also from across Europe.

Engagement with civil society from across Europe

Many of the most vibrant parts of the societies of Council of Europe member states are supportive of CoE values and can play an indispensable role in upholding and promoting them in their countries. Unfortunately, they do not currently have a say in developing and implementing CoE strategies and policies. Civil society groups can currently interact with the CoE system only through a specific lens of one of the CoE mechanisms (e.g. submission of complaints to the ECtHR, Rule 9.2 submission of information to CM on implementation of judgments¹³.) or are consulted by monitoring and advisory bodies in their respective

¹⁰ The Venice Commission rule of law checklist is available here:

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)

¹¹ “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council...”

¹² See <https://pace.coe.int/en/files/28568>; the procedure is also discussed in Strengthening the Ability of the Council of Europe to Pursue Its Mission and Restoring Its Credibility: Recommendations on Pertinent Reforms, <https://eu-russia-csf.org/wp-content/uploads/2021/03/PositionPaperCouncilofEuropeFinal.pdf> and in The Council of Europe must react to violations by members – starting with Russia, <https://www.opendemocracy.net/en/odr/the-council-of-europe-must-react-to-violations-by-members-starting-with-russia/>

¹³ For proposals on how to facilitate the engagement of civil society in the implementation of ECtHR judgments, see item 2 of the EIN Proposal Paper:

thematic fields. However, **engagement of national NGOs or other organs of society** in building up support and advocating for the CoE as a whole, its values and instruments, is not stimulated.

Participation in the official Council's body supposed to represent 'civil society', the Conference of International NGOs, is only possible for NGOs having membership in five or more countries. To stimulate bottom-up support for the CoE in member states, a fundamental review of the way the CoE engages those parts of society that support its values (or could potentially support them) is needed¹⁴.

Transparency and access

A critical issue with respect to enhancing the participation of civil society in the CoE's work is the lack of **transparency of deliberations and decision-making in the Committee of Ministers**, its main political body. Interested NGOs and other civil society actors should have timely access, at the minimum, to the meeting agendas of the CM's rapporteur groups and other subordinate bodies, and, ideally, also to drafts of documents that are being discussed to be able to provide relevant input before the meetings. Unfortunately, the follow-up to the Helsinki and Hamburg CM decisions on enhancing civil society participation in the CoE has not changed anything in this regard. Political decisions by the CM adjusting its rules of access to documents and meetings procedures are needed to solve this issue.

The official CoE **participatory status for international NGOs** should be strengthened by providing the NGOs holding it a better access to documents of the CoE bodies, CoE premises and meetings – similar to the modalities of NGO consultative status with the UN Economic and Social Council (ECOSOC). The existing CoE **partnership status for national NGOs**, which has barely ever been used, should be reviewed in order to grant national NGOs holding this status at least some of the rights that INGOs with participatory status currently enjoy (such as a regular access to the CoE premises). National NGOs should also be widely consulted in the process of developing and implementing CoE action plans for their respective countries and in planning the activities of the CoE field offices.

Engagement with Russian and Belarusian civil society

Possible ways to pursue and enhance CoE's co-operation with the Russian and Belarusian civil societies, indeed, merit special attention, as reflected in the High-Level Reflection Group's Terms of Reference. As all the countries in Europe, including Belarus and Russia, are potential member states of the CoE, the organisation should be making every effort possible to bring them closer to becoming its members, by actively cooperating with all the potential allies in these countries.

While in the past engagement with independent non-state actors of Russia and Belarus was mostly perceived as secondary to CoE's cooperation with the official authorities of these countries, now it has to be recognised that democracy actors in society remain the only channel for reaching out to the people of both countries.

Independent pro-democracy civil and political actors of Russia and Belarus should be seen as full-fledged partners for dialogue in three thematic areas:

- (1) developments in the situation of human rights and democracy in these two countries, possible CoE reactions to these and necessary future reforms;

<https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/62820f2bd8316c4d2f4f8e6e/1652690732420/EIN+Proposals+on+the+Implementation+of+Judgments.pdf>

¹⁴ For detailed proposals on stronger CoE engagement with civil society, please see recommendations in Strengthening the Ability of the Council of Europe to Pursue Its Mission and Restoring Its Credibility: Recommendations on Pertinent Reforms. By Konstantin Baranov and Yuri Dzhibladze. EU-Russia Civil Society Forum, January 2021, pp. 11-12. <https://eu-russia-csf.org/wp-content/uploads/2021/03/PositionPaperCouncilofEuropeFinal.pdf>

(2) further development and strengthening of European standards and mechanisms in the field of human rights, democracy and rule of law (along with civil societies of the CoE member states), and

(3) termination of the Russian aggression against Ukraine, including ensuring proper legal assessment and accountability for violations of international law, as well as solving key humanitarian issues, and post-conflict reconstruction, peace-building, and reconciliation (all these points should be subject to consent by Ukrainian civil society).

While the opportunities for CoE action with regard to Belarus and Russia are fundamentally different from that of the CoE member states, there should be **special programs and schemes developed for engagement** with those who are or could become interested, in supporting and holding up CoE values. However, as these programs and schemes require a large degree of innovation, they could to a certain extent serve as models for developing approaches to engagement with national civil societies of the CoE member states as well.

A new framework for CoE's cooperation with the Russian and Belarusian civil society should:

- address both Russian and Belarusian civil society actors that continue staying and working on the ground in their countries and those who were forced to relocate to other CoE member states;
- expand target groups for respective programmes and initiatives (e.g. new unregistered civic initiatives, diaspora groups, independent academic community and educators, political opposition structures, pro-democratic bloggers, etc.),
- aim at building systemic cooperation with these groups as allies and intermediaries with an ability to reach out to wider parts of the population and influence public opinion in their respective countries.

This framework should also seek innovative, more effective approaches and formats of interaction, such as:

- internships for young human rights defenders, journalists, lawyers in the CoE structures;
- cooperation with independent polling agencies to define and better understand potential target groups for information and awareness-raising campaigns;
- special partnership projects with independent Russian- and Belarusian-language media outlets;
- targeted information campaigns to promote European values using modern and attractive means and forms of communication;
- granting some form of official associative status to organised civil society and pro-democracy political opposition structures of these countries with the CoE bodies and institutions for a more systemic engagement with them.

These formats of engagement should be developed and further adapted in close cooperation with civil society actors of the two countries and take into account their security concerns.

Conclusion

Ongoing discussion on the value and the effectiveness of the Council of Europe and changes needed to enable the organisation to respond to the new challenges should become subject of political and public debate in the member states. The reflection process should involve not only discussions among the representatives of governments and parliamentarians of member states, but also consultations with other stakeholders: local and regional authorities, NHRIs, legal community, relevant professional associations, NGOs, academia, active youth, etc. Experience of the Conference for the Future of Europe could be studied and taken into account in this regard.

Political leadership is needed for not just re-affirming CoE values but also to strengthen its approaches and procedures. Civil society that is supportive of the key values of the Council should be mobilised.

These processes, both the reflection and exploration process itself, and the generation of wider support and debate in the member states, take time. Planning for the work of the High-Level Reflection Group and the preparations for a potential Summit should take this into account. We are strongly convinced that, should a **new CoE Summit** be held, it should be well-prepared and **preceded by proper consultations with a wide range of stakeholders**.

CURE Campaign is open and eager to contribute to this process and to be in touch with your Group on these matters.