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Navalny's life – the choice in Strasbourg



Dear friends,

In August 2020 Russian opposition politician Alexey Navalny was fighting for his life in a hospital in the Siberian city of Omsk, following a chemical poison attack. In the end his life was saved by German doctors after an emergency evacuation to Berlin.

In April 2021 Alexey Navalny is again fighting for his life in the small city of Pokrov east of Moscow, following his transfer to an infamous penal colony after a rigged trial. Can he be saved again?

Navalny's fate matters, not just to his family and to Russian society, but to anyone who cares about human rights protections in Europe. Russia became a member of the Council of Europe in 1996. Since then, no one has turned to the Council of Europe and its court, the European Court of Human Rights in Strasbourg, as often as Navalny: no less than 20 times. No European has received less protection in return. In this way, Navalny's fate and the fate of the Council of Europe have become inextricably intertwined. On 16 February, the Strasbourg Court ordered his immediate release from his most recent imprisonment. The Russian government has, once again, dismissed it.

How will European leaders and the Council of Europe react? They have four options:

- *No strong response.* This is what Russian politicians demand. They have threatened the Council of Europe: even criticism would be too much, or Russia might turn its back and leave.
- *A slow response that takes years,* either by turning again to the Strasbourg Court or by using, without any urgency, a new mechanism agreed to in February 2020 for dealing with "the most serious violations of fundamental principles" (more on this [here](#)). Neither of these would save Navalny and both would send a signal of terrible weakness.
- *An accelerated use of the new mechanism triggered immediately with clear warnings of consequences: the suspension of Russia.* The Parliamentary Assembly or the Secretary General of the Council of Europe could and should trigger this mechanism as quickly as possible.
- *A strong and immediate response* by the Committee of Ministers, based on the Statute of the Council of Europe: other governments make clear that if Navalny is not released before the end of the month, the Committee of Ministers will vote on Russia's suspension. This would send a clear message: the continued imprisonment of Navalny is not compatible with Russian membership of the Council of Europe.

NEW: ESI Memo
Navalny and the Council of Europe
Urgent next steps

Only the last of these options stands a chance of saving Navalny, while preventing the Council of Europe from sliding into irrelevance.

Here the German government must play a key role. It once saved Navalny's life by bringing him to Germany last August. It holds the rotating chair in the Committee of Ministers until the end of May. This is where the 47 member states of the Council of Europe take the most important decisions. It must act now, together with other EU members and democracies, from the UK to Norway, from Switzerland to the Western Balkans, from Iceland to Georgia.

Why Navalny?

The emergence of Alexey Navalny as Vladimir Putin most feared critic began a decade ago. In 2011 he set up a foundation to focus on corruption, combining detailed investigations presented in snappy videos with slogans that went viral ("United Russia is the party of crooks and thieves").

In April 2011, independent polls already showed that more than two thirds of Russians considered Navalny's allegations against corruption reliable. Then, in December 2011, Navalny was detained when protesting rigged parliamentary elections. In March 2012 he was arrested again when protesting Vladimir Putin's return to the presidency (after Putin had ruled Russia as prime minister for four years). In October 2012 Navalny was elected to lead a coordination committee of the main Russian opposition groups. And in 2013, Navalny ran for mayor of Moscow, winning 27 percent of the vote, beating expectations, and further raising his profile.

Other prominent members of the opposition at the time were the former chess-master Garry Kasparov and former deputy-prime minister Boris Nemtsov. Kasparov is today in exile in New York City, from where he published a grim warning about Putin's Russia in his book [Winter is Coming](#). Nemtsov was assassinated near the Kremlin in 2015.

Navalny also felt the wrath of the state. In December 2013 he received a five-year suspended sentence, allegedly for stealing timber from a state-owned enterprise some years before. The Strasbourg Court found the trial completely flawed three years later. In December 2014, Navalny was sentenced a second time, now to 3.5 years in prison on probation, for allegedly defrauding the Russian representation of the French company Yves Rocher. Again the Strasbourg Court concluded later that this was a miscarriage of justice. But the sentence has remained in force.

In December 2016, Navalny announced his intention to run in the next presidential elections. His team set up regional campaigning headquarters and released a video with serious corruption accusations against Prime Minister Dmitry Medvedev. Then the Central Electoral Commission barred Navalny from running, referring to his corruption convictions. Protesting this decision, Navalny was again sentenced to several days in prison. He responded with further videos exposing high-level corruption, undeterred by arrests, defamation lawsuits, trials, and attacks in state media.

A murderous government



In April 2017 Navalny was assaulted with a toxic green liquid and had to fly to a special clinic in Barcelona [to save his eye](#). Following another arrest in 2019 he was hospitalized with an acute allergic reaction. Doctors referred to an [unknown chemical substance](#).

Then, in August 2020, Navalny collapsed after boarding an airplane in Siberia. The plane made an emergency landing in Omsk. Navalny fell into a coma before being flown to Germany two days later.

Many attacks on prominent Russian critics of the government have proven hard to investigate. This attack was different. German military scientists discovered that Navalny was poisoned with Novichok, a chemical agent developed by the Soviet military. Swedish and French laboratories confirmed this. This was an agent that only the government had access to. An investigation by Bellingcat, Der Spiegel, CNN and Navalny's team presented further detailed evidence. Through analysis of data on flights and telephone use, which could be purchased, they revealed that Navalny had been followed by secret service (FSB) agents since 2017. They could also identify who had followed Navalny on his tragic last trip to Siberia, even presenting the names of the agents who were in town when he was poisoned. The investigation also revealed links to the continuing Novichok program, tied to Russian intelligence services and to previous assassinations. The evidence was overwhelming: state agents had tried to kill one of their citizens using a forbidden chemical weapon.

bellingcat.com, "Russia's Clandestine Chemical Weapons Programme and the GRU's Unit 29155", 23 October 2020

bellingcat.com, "FSB Team of Chemical Weapon Experts Implicated in Alexey Navalny Novichok Poisoning", 14 December 2020

And there was more. In December 2020 Navalny posted a video of a phone call he had made, tricking one of the agents involved in the operation to kill him into admitting to this on tape and offering more details. The agent explained on the phone that Navalny had only survived due to the unplanned interruption of the flight and his quick treatment in Omsk.

It is often and rightly stressed that the abolition of the death penalty is a non-negotiable principle of Council of Europe membership. But what if a member state government simply kills its critics?

Navalny and the Council of Europe



Between December 2011, when Navalny was first detained, and February 2021, when he was jailed, no Russian citizen has turned to the Strasbourg Court as often as Alexey Navalny.

When he was arrested in 2011 following protests and sentenced to 15 days detention for "failure to obey a lawful order of a police officer" he filed his first application to the Strasbourg Court from his police cell, relying on a right set out in Article 11 of the European Convention on Human Rights:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others ...

Navalny's application was accepted. It went to a chamber of seven judges, who found that his rights had been violated. The judges noted that the "administrative conviction of the applicants could not but have the effect of discouraging them from participating in protest rallies or indeed from engaging actively in opposition politics": the detention was political and his arrest had been arbitrary. His court hearing had been unfair and the conditions of his detention degrading. Russian institutions had thus violated a whole string of articles of the European Convention on Human Rights:

Article 3: "No one shall be subjected to *torture or to inhuman or degrading treatment or punishment.*"

Article 5: "*No one shall be deprived of his liberty* save in the following cases and in accordance with a procedure prescribed by law ..."

Article 6: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a *fair and public hearing* within a reasonable time by an independent and impartial tribunal established by law."

Article 13: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an *effective remedy before a national authority* notwithstanding that the violation has been committed by persons acting in an official capacity."

There was a problem with the judgement, however. It took 36 months for Navalny's case to work its way through the system. By the time the judgment was delivered on 4 December 2014 Navalny had experienced three more years of continuous harassment.

He had been arrested many more times for participating in protests. He had spent 22 days in administrative detention. He had been kept under house arrest for ten months pending trial in the case of alleged embezzlement, unable to leave his home or even to use the internet. He had lost six defamation cases, was fined twice, and was handed a five-year suspended prison sentence in a fraud case, all before the Strasbourg Court judgement on his detention in December 2011 was issued.

There was another problem: the 2014 judgement had no deterrent effect. Three weeks after this ruling Navalny received a second suspended sentence of three-and-a-half-years in jail in the trumped-up Yves Rocher case. This was the sentence that would land him in jail in 2021.

By 2014 a pattern was in place. Navalny kept being harassed. He was refused a passport (2016), was again twice arrested at protests (2017), was accused on public television of being the paid agent of an exiled banker, who was portrayed as a CIA agent (2017). His website was blocked. He was convicted again, during a retrial of his first sentence (2017), after the Strasbourg Court had ruled in his favour. And still, Navalny continued to lodge applications with the Strasbourg Court. And still, with many years delay, the Court continued to rule in his favour.

In its February 2016 ruling on Navalny's first conviction for fraud in the timber case, the Court noted that "it is obvious for the Court, as it must also have been for the domestic courts, that there had been a link between the first applicant's public activities and the Investigative Committee's decision to press charges against him". Therefore "the real reason for the applicants' prosecution and conviction *was a political one.*" In October 2017, the Court found that the second corruption trial involving the Yes Rocher company had been so "flawed with arbitrariness" that it "undermined the fairness of the criminal proceedings in ... a fundamental way."

But what was the result of Navalny turning, again and again, to the Strasbourg Court?

The court has so far delivered 7 judgments concerning Navalny, all in his favour (covering 11 applications – some of which were joined). The Russian state was ordered to pay a total of 125,525 euros in damages. In the 3 defamation cases Navalny filed before 2014 there is still no judgment. The same is true for 5 of the 6 cases he filed between 2014 and 2020. In the meantime, the Russian state has only increased its pressure, culminating in an attempt by the FSB to kill him with a chemical nerve agent.

On 20 January 2021, Navalny filed his 20th application before the Court, requesting an order for his release following his arrest upon returning to Moscow.

On 2 February 2021, a Moscow court revoked the suspension of his present sentence and ordered him to serve 2 years and 8 months (in the Yves Rocher case) in a penal colony for the very fraud case that had already been thrown out as politically motivated by the Strasbourg Court in earlier judgements and for violating the terms of his parole by failing to register with the police while was in a coma in Germany.

On 16 February, the Strasbourg Court issued an injunction: given "the nature and extent of risk to the applicant's life" it ordered Navalny's immediate release, pending a final judgment in a new application contesting his current imprisonment. The Russian Justice Minister then dismissed this out of hand as "baseless and unlawful, because it does not contain any reference to any fact or any norm of the law, which would have allowed the court to take this decision" The ministry released a statement rejecting the Strasbourg Court: "the ECtHR cannot substitute a national court or cancel its verdict."

Alas, there is nothing new in all this. Russia has ignored most judgments which the Court has delivered, other than paying financial damages or ordering retrials which led to nothing. Violating rights and paying modest sums as a *human-rights-violation-tax* is perfectly compatible with the political goals of the Kremlin.

Mythology in Strasbourg



There is a myth that has developed in Strasbourg in recent years: that important progress has been made concerning the implementation of the judgements of the Strasbourg Court in member states. What are the facts?

The Council of Europe secretariat regularly publishes country factsheets on its website. These provide an overview of the implementation of judgements in all 47 member states. The most prominent fact, highlighted at the very top of each factsheet is the total number of all judgements and settlements (together these two are referred to as *cases*) ever issued by the

court, as well as the total number of cases closed. Take a closer look at these numbers and you see two member states, Russia and Azerbaijan, standing out, having implemented *less than half* of all cases.

Selected countries – cases closed by the Committee of Ministers (till 19 April 2021)

	All cases	Cases closed	Percent closed
UK	451	440	98
France	1050	1015	97
Italy	4265	4077	96
Poland	1741	1647	95
Germany	233	218	94
Serbia	540	492	91
...
Turkey	4153	3526	85
Romania	1824	1475	81
Hungary	1071	783	73
Bosnia	128	86	67
Ukraine	1702	1115	66
Moldova	505	335	66
...
Russia	3093	1266	41
Azerbaijan	289	43	15

Or look at the record of member states *closing* those cases which the Committee of Ministers has considered particularly important: priority cases under so-called enhanced supervision. These include judgments requiring urgent individual measures and judgments disclosing major structural problems, as identified by the Court or the Committee of Ministers.

One would expect that all countries would make an honest effort to implement/close priority cases as quickly as possible. Many do: 15 countries have no priority cases open; 36 countries have five or less. *This is how it should be*. 6 countries, however, have 20 or more priority cases open. The worst culprit is Russia with 58.

What efforts are countries putting into closing open priority cases? Again, some countries stand out for having *closed less than half* of all their priority cases, ever. Azerbaijan has closed just one (!) priority case since it joined the Council of Europe in 2001. Russia has closed 21, less than one quarter. And a closer look at the *type* of priority cases that Russia has ever closed reveals why any sense of progress is spurious: most cases that have been closed involved paying money, without addressing any underlying problems.

This also means that all the key cases covering abuses that the Kremlin's grip on power depends on, and that Navalny has himself fallen foul of remain unimplemented: the banning of protests, unfair trials, arbitrary detention, appalling prison conditions and unlawful killings. With such a record the Soviet Union might have been a proud member of the Council of Europe as well.

Moment of truth: all in or all out?



*Pierre-Henri Teitgen,
spiritual father of the Strasbourg Court*

The Council of Europe was set up in 1949 to sound an alarm bell about the erosion of human rights in democracies. It was based on the idea that governments violating the rights of their own citizens were also more likely to be aggressive towards neighbours: to protect human rights was also an issue of collective security. This was the philosophy of one of the spiritual fathers of the European Convention on Human Rights, French resistant fighter, later minister of justice, Pierre-Henri Teitgen.

Teitgen played a key role drafting proposals for the European Convention on Human Rights. At the first ever session of the Council of Europe's assembly of parliamentarians in 1949 Teitgen, who was a member, explained why a Court was needed to protect fundamental rights, following the tragic experiences of the first half of the 20th century:

"Europe should in fact be, first and foremost, the land of freedom. The history of our countries tells on every page the price she has had to pay for freedom in the past: nearly 20 centuries of suffering, of struggle, wars, revolutions: tears and blood shed without end ... Finally, we won our freedom and our countries became as used to it as to the air they breathed - with the result that they did not perhaps esteem it highly enough.

When the scourges of the modern world descended - Fascism, Hitlerism, Communism - they found us relaxed, sceptical and unarmed. We needed war, and for some of us, enemy occupation, to make us realise afresh the value of humanism."

Teitgen saw a Convention on Human rights as a bulwark against any renewed descent into fascism and against the looming danger of communism, a "conscience of which we all have need":

„Why is it necessary to build such a system? Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were to remove the levers of control. One by one, freedoms are suppressed, in one sphere after another. It is necessary to intervene before it is too late. A conscience must exist somewhere which will

sound the alarm in the minds of a nation menaced by this progressive corruption, to warn them of the peril."

However, such a system only works if it is taken seriously by its members: if the Statute of the institution and the judgements of its court mean something.

Article 3 of the Statute of the Council of Europe refers to the fundamental freedoms and the key notion of sincere collaboration in their realisation:

"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 as specified in Chapter I."

Article 8 of the Statute spells out the consequences of continuous serious violation of these principles:

"Any member of the Council of Europe which has seriously violated Article 3 may be *suspended from its rights of representation* and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine."

In its implementation of judgements, as well as in its current treatment of Alexey Navalny, the Russian state has continuously violated Article 3. Its leaders have clearly shown that they do not *collaborate sincerely and effectively* to change this.

The German presidency of the Council of Europe should therefore propose a clear choice. The Committee of Ministers should warn Russia that unless it releases Alexey Navalny within days, it will face a vote on suspending its rights of representation based on Article 8.

In a speech to the Parliamentary Assembly of the Council of Europe (PACE) in October 2019, the French President, Emmanuel Macron, stressed the importance of membership of the Council of Europe to ordinary Russians, pointing in particular to "the possibility for Russian citizens to defend their rights before the European Court of Human Rights against their own government." In January 2021 German Social Democrat and a prominent member of PACE, Frank Schwabe, made a similar point about the importance of the Court for Russian citizens. He then added:

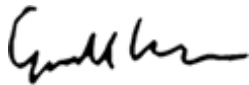
"the litmus test is whether the Russian Federation will allow the European Convention on Human Rights to protect its citizens accordingly. I want to say it again and I will keep emphasising it and everyone needs to understand that as well: this is our red line ... And if, at the end of the day, you are of the opinion that Russia is not cooperating there, then *there can only be the possibility of saying: all in or all out*. Then it cannot be the case that Russia stays on the Committee of Ministers and does not cooperate here."

The Council of Europe has bent over backwards to accommodate Russia in recent years. It is now at a crossroads. The Russian state has occupied part of the territory of one fellow member of the Council of Europe (Georgia) and annexed part of another (Ukraine). It tolerates neither protest, nor criticism, nor any real political opposition. It locks up its critics. It kills perceived enemies, both abroad and at home.

Alexey Navalny's case is not just another serious violation. The Court's order for his release is not just another judgment. It must be a red line for the respect of the Strasbourg Court. The Russian government must face a clear choice: release Navalny and respect the judgements of the Court or face suspension.

This is a dangerous moment for the Council of Europe. If the Russian state is allowed to ignore the Court, again, and to kill another critic of the government, it will have shown that the Council is a club of states for whom the respect for fundamental rights is wholly optional. This makes a mockery of any pretence that the European Court of Human Rights can protect Russian citizens. And it undermines the protection the Convention offers to everyone else in Europe.

Best regards,



Gerald Knaus

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