



**Thomas Hammarberg**

# **Human Rights in Europe: no ground for complacency**

Viewpoints by the Council of Europe  
Commissioner for Human Rights



COMMISSIONER FOR HUMAN RIGHTS

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## No room for complacency about human rights in Europe

Human rights are not only about the law and its implementation. Human rights are also about ethics, they have a moral dimension. This is what makes the discussions about rights particularly interesting, as well as sensitive.

The norms of human rights have been agreed upon by international bodies like the United Nations and the Council Europe, thus making them part of international law. Moreover what gives them deeper legitimacy is the response they have received from the broader public in country after country.

All over the world, groups within civil society are working towards their implementation. The Universal Declaration adopted 60 years ago, the European Convention on Human Rights and other human rights treaties have created hope for many. They have made clear the distinction between right and wrong.

These norms have addressed concerns which are of paramount importance to many – and people have demonstrated that. The European Court of Human Rights in Strasbourg now receives more than forty thousand complaints per year. Such a popular response has given the human rights cause particular strength. It has become a moral imperative.

This is of course a great help for us who work towards the realisation of human rights but it places a daunting responsibility on our shoulders. Due to the strong impact of our reports – the ramifications potentially extending to the political arena – we must be extremely careful about facts and conclusions. Our intentions must be impartial and beyond suspicion. By and large I believe that the Council of Europe and other inter-governmental human rights mechanisms, as well as the major NGOs, do live up to these requirements.

\* \* \*

The key aspect in any analysis of the international human rights bodies has to be whether they have a real impact and genuinely protect and improve the concrete situation of individuals and groups. This is what it is all about. It requires a clear mandate, necessary resources and an approach which is strategic – again, recognising the enormous difficulty of the task and its political sensitivity.

A crucial point is how the international actors relate to actors at the national and local levels, including the authorities, but also the media and civil society, as well as representatives of the victims. On this I believe we must be self-critical.

The international community has not always been represented by people who have been up to the task – some of them have lacked the necessary experience to grasp the real problems and to give useful advice. Such shortcomings must not be cloaked behind an attitude of arrogance.

This is not only a question of good appointments and sending the right delegates, it also touches on basic approaches. It is essential that the international actors avoid being seen to “take over” the role of national forces and institutions. International monitoring should to a large extent focus on whether there are national capacities to spot problems and address them – to “monitor the monitors”. Our advisory services should focus on strategic points like the work of the ombudsmen and the functioning of the judiciary.

Advice may be given on, for instance, education and training but international bodies should avoid taking over such functions and thus risk marginalising domestic actors, who better know the local possibilities and problems as well as how best to address them. We must move from the notion that the international institutions are at the top of the hierarchy – instead we should see ourselves as at the service of the members and supporters of these bodies.

The role of the international actors should therefore include an ambition to share knowledge about successful approaches in other countries. For the moment I am trying to promote viable models of how independent and credible investigations should be conducted into alleged misconduct by the police – using models from both Northern Ireland and the Republic of Ireland.

\* \* \*

The major problem in both national and international human rights work is that too many governments are less than serious about human rights. The agreed standards often fail to be implemented in reality, at least not fully. It has therefore become necessary to focus much of the international efforts on the distance between pledges and reality – the implementation gap.

This has added to the moral dimension of human rights work and made critical reports particularly sensitive as they tend to reveal hypocrisy. In turn, this may create negative publicity and also be used by opposition forces.

Governments, of course, have to balance different interests and objectives. They, understandably, tend to focus on what they believe they must do in order to succeed in the next election. However they are also aware that human rights are a popular priority for many.

A true human rights policy must have an element of self-criticism. Monitoring is important and governments should welcome independent monitors – both internal and external – and listen carefully to their criticism.

Some governments in western Europe have tended to see human rights as a foreign policy issue. This has often placed the mandate under the Ministry for Foreign Affairs – implying problems in this field could only be found in other countries. They have ratified international treaties as an act of good will, rather than recognising that these norms are relevant and useful in their own country, too. They have reacted with surprise when criticised by European and international human rights mechanisms and sometimes in response even attempted to undermine these very mechanisms.

However, there have been improvements in this area. Governments in Europe now recognise that there may be human rights problems in our continent. There are now ombudsmen or similar structures for human rights monitoring in most European countries. However, very few European countries have yet to respond to the recommendation from the 1993 Vienna World Conference on Human Rights regarding a comprehensive national plan of action for the implementation of human rights.

\* \* \*

There is still a need for governments to move from complacency to serious self-criticism on a number of issues. The following highlight some of the key human rights challenges in Europe today, the remaining problems in our own backyards:

- \* The need to protect human rights in the fight against terrorism. Terrorism must be condemned and fought, but we must not use the same methods as the terrorists themselves. The struggle against terrorism must be conducted with legal means and with full respect for human rights standards. Grave mistakes have been made in Europe over the past six years. It is time to correct these errors.
- \* The rights of migrants are not fully respected. In particular, many irregular migrants – some of them trafficked – are in a very vulnerable situation. It seems to be forgotten that irregular migrants have human rights too. The core human rights instruments are universal in their application and generally apply to both citizens and non-nationals, including those who have moved in an irregular manner. The widespread practice of detaining asylum seekers is also a concern.
- \* Xenophobia and racism is another real problem on our continent. Incidents of hate speech are frequent in several countries. More needs to be done to counter such tendencies, including in schools.
- \* Reforms are still necessary in some European countries to secure the independence of the judiciary and protect the justice system against corruption.
- \* Prisons in a number of countries are severely overcrowded and detention conditions clearly unacceptable. Much stronger action is needed in several countries to put an end to torture and police brutality.
- \* Roma people suffer severe discrimination on the housing and labour market and many of their children are still not in school. Roma communities live in deep destitution and face widespread anti-Ziganism. This is an embarrassing failure.
- \* People are also discriminated against because of their sexual orientation or gender identity and too few others stand up against homophobia.

- \* More needs to be done for the rights of children. The treatment of minors in conflict with the law needs to be revised and detention avoided. A new policy is needed to phase out the large institutions for orphaned or disabled children in the former communist countries. Child poverty should be tackled more effectively. An end has to be put to domestic violence against children.
- \* Violence against women is still a major problem. Women continue to be under-represented in politics and have lower salaries than men in similar jobs.
- \* The rights of people with disabilities need further strengthening. The conditions in the psychiatric hospitals in some countries remain unacceptable.

A more serious political response by European governments to these issues is needed. We know what the problems are, and yet there is an implementation deficit.

There is of course a link between the respect for human rights at home and our credibility when identifying problems in other parts of the world. Double standards are rightly seen as hypocritical.

I am not saying that Europeans should stop being active on human rights in international forums. On the contrary, there is a need for a more principled and unified European position in global human rights efforts. A united European voice is all the more important now that the United States have lost their moral authority as a result of their human rights violations in the so called “war on terror”.

I have been disappointed about the lack of a clear European governmental position on these violations. Detention for years without due process, enforced disappearances and torture are simply unacceptable. The near silence of Europe on these issues is embarrassing and undermines our credibility in other parts of the world.

It is important that human rights foreign policy is consistent and principled. Selectivity on political and economic grounds tends to undermine the moral currency of the cause. While there is still work to be done within Europe, we should not hesitate to support victims of violations in other parts of the world. After all, human rights are universal values – with global reach.

This volume is a compilation of articles I wrote as “Viewpoints” during my second year as the Council of Europe Commissioner for Human Rights. They reflect my response to the problems I faced during my visits to a large number of European countries where I met leading politicians, prosecutors, judges, ombudsmen, religious leaders, journalists, civil society representatives and citizens including staff and inmates in a great number of institutions. I wish to convey the lessons I learned. This is at least my attempt.

Thomas Hammarberg

Strasbourg, 1st April 2008

# Roma job seekers are discriminated against

2 April 2007

Roma do not get jobs, they are put in a “glass box”. This is the conclusion of a survey published by the European Roma Rights Centre (ERRC) in Budapest. In Central and South Eastern European countries, employment discrimination is still endemic and blatant. For Romani job-seekers the vacancies are not open – they bang their heads against invisible walls which prevent them from getting any jobs at all.

The ERRC study was carried out in Bulgaria, the Czech Republic, Hungary, Romania and Slovakia and there are similar problems in several other European countries. The unemployment rate is high all over the continent. When Roma have jobs, they tend to be limited to those providing services to the Roma community itself.

The study also showed that in cases where Roma are employed, they run the risk of discrimination. One in four employed Roma reported that their pay and conditions were less favourable than those of non-Roma doing the same job.

However, the key problem is that Roma are discriminated against when they try to enter the job market. The study shows that a great number of the applicants were rejected because they could be visibly identified as Roma. Indeed, many of them had openly been told that the reason for their not getting the job was their Romani identity.

Another worrying conclusion of the survey was that the governmental labour offices provided such limited help. In fact, the study exposes negative prejudices and even outright racism among officials in those public institutions.

This is all the more unfortunate as economic development in recent years has worked against the Roma. Their traditional occupations are no longer in demand and many of them suffer from low levels of education. This is precisely the type of problem for which we need competent and unprejudiced labour offices.

These social and socio-economic factors are real and serious, but must not be seen as an excuse for passivity about the problems caused by prejudices. Indeed, educated Roma also meet discriminatory “glass walls” when they seek employment.

The seriousness of antiziganism demonstrates that we cannot eradicate it through measures aiming at formal equality alone. Roma must reach effective equality of opportunity with everyone else and this clearly requires positive measures to compensate for long-term discrimination and prejudice. Otherwise, the situation of many Roma will get worse rather than better.

Special measures are justified when they pursue a legitimate aim and are proportionate to the objective. Governments should draw up dedicated strategies which can effectively bring about equality of opportunity for Roma in employment, education, housing and health care.

There is a shameful “implementation deficit” on Roma rights. The issue has been put on the agenda of all major international organisations and national governments in Europe – through national action plans, for example – but this has not had much impact. Policies have lacked adequate resources, co-ordination and involvement of local authorities.

Another problem has been that, all too often, Roma themselves have been excluded from discussions on how their situation might



“Every European state should join together and state loud and clear that they have had enough of prejudice towards Roma.”

be improved – instead “experts” from the Global Alliance of Justice (GAJE) have dominated. This is not a human rights approach. Roma must be seen as key partners in implementing the agenda for securing their own rights.

There are now a number of Roma organisations at local, national and international levels and they should be respected by the authorities. The Council of Europe’s Roma and Travellers Forum has the potential to be a crucial consultative and standard-setting body for Roma rights all over Europe.

Inside the non-governmental Roma organisations, important discussions are ongoing about their own responsibilities and how they can make themselves truly representative of the diversity of Roma communities, including women and young Roma. Activists are warning against allowing Roma vulnerability to result in attitudes of victimisation and dependency. The challenge is to transform this vulnerability into an opportunity for equality – human rights.

There are about ten million Roma in Europe, living in virtually every country on the continent. There is no single type of Roma, but a rich variety of cultures, traditions and other characteristics. They speak different languages and practise a number of religions.

Sadly, antiziganism has made many Roma afraid to display their Roma identity openly. This is one reason why the number of Roma in national censuses is usually much lower than the real figure. We must break all stereotypes which seek to reduce Roma identities and voices. The time has come to recognise the contribution Roma have already made to European societies.

This is also the aim of the Council of Europe campaign Dosta! (Enough! in Romani) currently underway in Albania, Bosnia and Herzegovina, Montenegro, Serbia and the former Yugoslav Republic of Macedonia. The next step should be to extend the campaign to all European countries. Every European state should join together and state loud and clear that they have had enough of prejudice towards Roma.

# The Greek case became a defining lesson for human rights policies in Europe

18 April 2007

Forty years have now passed since the military takeover in Athens. The coup, in the early morning of 21 April 1967, was a shock for democrats all over Europe: how was it possible that a simple group of colonels could wipe out democracy in one of the oldest member states of the Council of Europe? The shock deepened when it became known that the Greek parliament was closed and the political parties dissolved, that strict media censorship had been introduced and that about 6 000 people, including politicians and journalists, had been taken prisoner, many of whom were tortured during interrogation.

A coup of this kind could not, of course, happen in today's Greece and probably not in any other Council of Europe member state. This is partly due to the lessons learnt from the Greek tragedy during 1967-74. The anniversary this month offers another opportunity to reflect on what went wrong and the good examples that were subsequently set in the struggle for a return to democracy.

Though the colonels were political novices and made naïve – even ridiculous – statements, they were well prepared in military terms,



“The fact that some governments had the courage to submit a serious, non-partisan complaint against the junta was crucial for the Greeks and a boost to the European human rights system.”

got to grips quickly with the state machinery and launched their systematic terror skillfully. Obviously, the Greek army and security forces had not been kept under sufficient democratic control.

As a young member of Amnesty International, I went to Athens soon after the coup in order to collect evidence about the torture. I was immediately struck by the widespread fear in the community. To testify to a foreign human rights organisation involved a serious risk.

However, testimonies did come out and an interstate complaint was submitted at the end of 1967 by governments in Scandinavia and the Netherlands to the Commission of Human Rights within the Council of Europe. The Commission concluded that the European Convention had been violated and the Greek junta decided in 1969 to leave the organisation in order to avoid suspension.

However, torture continued and the colonels managed to stay in power for another five years, until July 1974. There were several reasons for this, but a major one was that the outside solidarity with the Greek democrats – though strong in several countries – was not shared by everyone. Not even the Parliamentary Assembly of the Council of Europe was unanimous in its condemnation.

The US government gave the junta political protection and the colonels' Greece could therefore remain a member of NATO. The Greek democrats at the time appealed to European governments to try to convince Washington to stop supporting the junta, or at least demand an end to torture, but their requests were generally met with silence.

The succeeding democratic regime in Greece reined in the military and security forces and put the colonels and some of the most notorious torturers to trial. However, there was little discussion about the external factor: the failure of the international community to use its influence to stop the junta.

In retrospect, the position of the Council of Europe Commission is a proud exception. Though the impact on the situation in Greece itself – for political reasons – was delayed, it did have an influence and a great moral significance for many Greeks. The case was the first significant interstate application and was not tainted by a partisan political intent – the motive was clearly a genuine concern for human rights.

The “Greek case” also encouraged a discussion on better international mechanisms to protect people from torture. An agreement was reached in 1984 to set up a UN Convention with a special monitoring committee. The Convention for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment was adopted by the Council of Europe in 1987. This monitoring committee is authorised to make *in situ* inspections and is still the most effective mechanism of its kind.

Such norms and monitoring procedures have a preventive influence and give protection against a breakdown of democracy, human rights and the rule of law. However, in the future there will also be a need for political action from outside, when the domestic remedies no longer function adequately in a country. This is what many people in such countries expect and hope for.

The fact that some governments had the courage to submit a serious, non-partisan complaint against the junta was crucial for the Greeks and a boost to the European human rights system. However, it may be sobering during this anniversary to reflect on the fact that there have been few such interstate applications since the "Greek case".<sup>1</sup>

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1. Since it was set up in 1959, the Strasbourg Court has delivered judgment in only three interstate cases: *Ireland v. the United Kingdom* (1978); *Denmark v. Turkey* (2000) and *Cyprus v. Turkey* (2001). A further 17 interstate applications were dealt with by the former European Commission of Human Rights, which ceased to exist in 1999.

# Judges must be independent and protected from both political and economic pressure

30 April 2007

Former communist countries in Central and Eastern Europe have experienced the challenge of moving from a system in which judges served the political interests of the regime, to an order based on the rule of law. While progress has been made in many areas, I have observed that the independence of judges is still not fully protected in some of the countries I have visited. Political and economic pressures still sometimes appear to influence the courts.

This problem is serious and must be addressed. Persons seeking to influence judges in any manner should be subject to sanctions by law. The corruption of one judge may tarnish the system as a whole – corrupt judges must be prosecuted.

Political interventions and corruption undermine the credibility of the whole justice system and threaten the right to a fair trial, as defined in the European Convention on Human Rights: “...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal” (Article 6 § 1). Tackling these flaws in a systematic manner should be a priority.

The independence and integrity of the judiciary needs to be protected by law. Indeed, most European countries have the principle of the separation of powers between the executive, the legislature and the judiciary inscribed in their Constitution.

This principle needs to be underpinned through a number of measures, for example:

- There should be a system for the appointment of the judiciary which is protected from party politics. Neither the government nor its administration should recruit judges.
- Judges should not have to fear dismissal after inopportune decisions and therefore need security of tenure, until a mandatory retirement age or the expiry of a fixed term of office. Disciplinary actions against judges should be regulated by precise rules and managed through procedures inside the court system.
- Judges should receive appropriate remuneration, commensurate with their responsibilities, and have adequate pension provision. This may also serve to reduce the risk of corruption.

Undoubtedly, the credibility of the judiciary also depends on the conduct of the judges themselves. They have to decide the cases before them impartially, on the basis of the facts and in accordance with the law. Judges need to have the trust of the entire society and this presupposes a strong sense of impartiality when adjudicating between parties.

There must therefore be no actual prejudice on the part of the judge or tribunal. And where a party has a legitimate doubt as to the impartiality of the judge, this should be taken seriously. Justice must not only be done, but be seen to be done:

- The distribution of cases should not be influenced by the wishes of any party.
- Cases should not be withdrawn from a judge without very good reason.
- Decisions of judges should not be subject to any revision outside the appeals procedure.



“Member states need to take appropriate action to ensure that public confidence in the judiciary is high.”

To protect the reputation of the judiciary, it is also necessary to safeguard genuine competence. Judges should be individuals with integrity, ability and appropriate qualifications. Naturally, the transition countries face some problems in this regard. However, even other countries need to ensure the continuing training of judges.

Other factors which are essential to ensure competence:

- Appointments or promotions must be based on objective criteria such as merit, qualification, integrity and efficiency.
- There must be no discrimination on any grounds when appointing judges.
- The training of judges on the jurisprudence of the European Court of Human Rights is necessary, to ensure that problems are solved at the domestic level.

Another key factor is the efficient functioning of the judicial system – justice delayed is justice denied. The Strasbourg Court is inundated with applications concerning lengthy judicial proceedings.

This is a problem which affects the whole continent, although some countries are particularly plagued and have attempted to resolve this problem with domestic remedies for the excessive length of judicial proceedings. An efficient judiciary demands:

- Proper working conditions. In practice, this means that a sufficient number of judges should be recruited.
- Judges need adequate support staff and equipment.
- Judges need to be safe. States need to ensure the safety of judges by including the presence of security guards on court premises, or providing police protection where necessary.

Several of these recommendations could be addressed to all Member States of the Council of Europe. It is in the nature of these problems that further measures to safeguard the independence, impartiality, competence and efficiency of judges are relevant everywhere.

Though politicians should keep their hands off the judiciary they should give high priority to not only respecting, but also protecting its integrity. Member states need to take appropriate action to ensure that public confidence in the judiciary is high. Judges should inspire confidence.

# Homophobic policies are slow to disappear

16 May 2007

The European Court of Human Rights has recently taken another significant decision to address homophobic tendencies. A non-governmental group in Poland, the Foundation for Equality, was denied permission to organise a demonstration in Warsaw on their “Equality Days” two years ago. The Court found that the local authorities had violated three provisions of the European Convention – relating to freedom of assembly, the right to an effective remedy and the prohibition of discrimination. This ruling sends a message to authorities all over Europe.

It still happens that Gay Pride Parades are banned by authorities, or are disrupted. This was the case last year in Chisinau, Moscow, Tallinn and Riga. More recently, the Chisinau local authorities once again banned a march, despite the previous ruling of the Moldovan Supreme Court that a similar ban in 2006 was unlawful.

In Chisinau, the demonstrators took the risk to march despite permission being denied. This has happened in other cases as well – including in Warsaw in 2005 – and these parades have generally been peaceful. When problems occurred, this was due to mob attacks against the marchers and a lack of police protection.

It is a sad fact that discrimination against individuals, because of their sexual orientation, is still widespread in our continent. During my visits to Member States of the Council of Europe, I have repeatedly seen the signs and consequences of such prejudices. Individuals are victimised in their daily lives. Some live in constant fear of being exposed while others, who have “come out” into the open, are facing discrimination or even harassment. Their organisations have been made targets of hate speeches.

Few politicians have fully stood up to this challenge. Instead, some of them have themselves fuelled the prejudices through stereotyped descriptions of homosexuals as dangerous propagandists, who should not be allowed to be teachers or expose their “lifestyle” to others. In discussions about demonstrations, some mayors and other politicians have made clearly intolerant and homophobic public statements. This kind of populism is most unfortunate and tends to legitimise discrimination.

The dehumanisation of lesbians, gays, bisexuals and transgender persons (LGBT) did not disappear with Nazi rule, during which some 100 000 persons were arrested because of their presumed sexual orientation, and more than 10 000 were sent to concentration camps. Extreme right-wing groups still incite hatred and violence against LGBT persons. Some of the old Nazi “arguments” against homosexuals are still heard in public debates. Therefore, it is particularly important that politicians, religious leaders and other opinion-makers stand up for the principle that all people have human rights, irrespective of their sexual orientation.

The Council of Europe’s Congress of Local and Regional Authorities recently adopted recommendations on the need to protect the freedom of assembly and expression of LGBT persons, which ought to be studied carefully by local and regional politicians. The European branch of the International Lesbian and Gay Association is circulating an urgent appeal for the same freedoms – to be sent to the mayors of those cities where marches or other public events have been banned, restricted or faced violence.

The legal norms are absolutely clear. The European Convention of Human Rights – which is part of national law in all Council of Europe countries – does not allow discrimination against persons because of their sexual orientation or gender identification.

Guarantees against discrimination on any grounds are provided in Article 14 of the Convention and in its Protocol No. 12. The Protocol, which is now in force in 14 countries, prohibits discrimination in the enjoyment of any right set forth by law, as well as any discrimination by public authorities.

In significant rulings, the Strasbourg Court has decided that consensual sexual relations in private, between adults of the same sex, must not be criminalised; that there should be no discrimination when setting the age of consent for sexual acts; that homosexuals should also have the right to be admitted into the armed forces, and that same sex partners should have the same right of succession of tenancy as other couples. On the issue of parenting rights, the jurisprudence of the Court has evolved and it has ruled against discrimination on the grounds of sexual orientation when granting parental responsibility.

The Court has been more cautious on the question of adoption and has largely left it to Member States to strike a reasonable balance. Of course, no one has the right to adopt – the best interest of the child must be the decisive consideration. However, the obvious human rights approach is that homosexuals should have the same right as other adults to be considered as candidates when decisions are taken about who would be the best adoptive parent for a child in such need.

This approach has been adopted in several European countries, including Belgium, Denmark, Germany, Iceland, the Netherlands, Norway, Spain, Sweden and the United Kingdom. Some of these states also grant access to joint adoption by a homosexual couple. As for individual adoption by unmarried individuals, laws in most European countries do not discriminate on the grounds of sexual orientation.

The number of European countries that legally recognise same-sex partnerships, with significant protection, is increasing and already includes Andorra, the Czech Republic, Denmark, Finland, France, Germany, Iceland, Luxembourg, Norway, Slovenia, Sweden, Switzerland and the United Kingdom. In other countries, this debate is still in progress. Marriage offering full protection is already possible in Belgium, the Netherlands and Spain. Other countries, like Sweden, are likely to follow shortly.



Photo © Phil Moore

“There is no room for complacency. Remaining prejudices will not disappear by themselves. Further measures should be taken for the protection of human rights of lesbians, gays, bisexuals and transgender persons.”

In other words, homophobic policies are on the retreat. However, there is no room for complacency. Remaining prejudices will not disappear by themselves. Further measures should be taken for the protection of human rights of lesbians, gays, bisexuals and transgender persons:

- the legislation in several European countries needs to be reformed in order to ensure that LGBT people have the same rights as others;
- there should be a stronger reaction against officials who take unlawful decisions, such as banning peaceful demonstrations, or who use their positions to spread prejudices against people because of their sexual orientation;

- history education should be reviewed, with the purpose of ensuring that the Nazi crimes against LGBT persons, as well as other aspects of their victimisation, be objectively taught;
- schools should give objective information about homosexuality and encourage respect for diversity and minority rights;
- authorities should treat organisations advocating equal rights for LGBT persons with the same respect as they are expected to pay to other non-governmental organisations;
- hate crimes against LGBT persons should also be seen as serious crimes;
- courts, as well as ombudsmen and other independent national human rights institutions, need to address discrimination based on sexual orientation as a priority.

# Racial and religious profiling must not be used in the combat against terrorism

29 May 2007

Profiling<sup>2</sup> has been increasingly used in the fight against terrorism since 9/11: from the German data-mining initiatives to identify so-called terrorist “sleepers”, to the United Kingdom’s stop and search powers under the Terrorism Act 2000, and beyond to EU policy. The fear of further terrorist attacks is creating a new form of “terrorist” profiling, where Muslims, or people who appear to be of Middle-Eastern descent, are being discriminated against in the name of national security. This approach is not acceptable.

Before going any further, a distinction must be made between various kinds of profiling. In criminal investigation, it is necessary to define physical, psychological or behavioural indicators, which might help link a particular type of person to a particular crime. The value of profiling in law enforcement decisions is undeniable,

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2. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, addressed the issue of terrorist profiling in his report of 29 January 2007.

as it can narrow the focus of an investigation. In principle, profiling must therefore be seen as a permissible means of law enforcement activity.

However, this technique has been applied in a deeply problematic manner in the struggle against terrorism. The indicators used have included general and broad characteristics, such as a person's race, ethnicity, national origin or religion.

The risk of discrimination in carrying out such profiling exercises is certainly high. Taking law enforcement decisions based on grounds such as race or colour may violate the principle of non-discrimination, as enshrined in Article 14 of the European Convention on Human Rights.

The European Commission against Racism and Intolerance (ECRI) has expressed its concern about the consequences of the methods used in the combat against terrorism in a recommendation. Certain groups of persons, including visible minorities, have become particularly vulnerable to racism and/or racial discrimination across many fields of public life, including when subjected to checks carried out by law enforcement officials.

This tendency was confirmed by the Open Society Justice Initiative, which has been monitoring ethnic profiling in Europe for the last three years and concluded in a recent publication that such profiling is now widespread.<sup>3</sup> It may consist of stop and searches by the police, data-mining exercises, or mass identity checks at workplaces, businesses or homes.

This issue will be addressed in the next recommendation (No. 11) from ECRI, which focuses on the theme of combating racism and racial discrimination in policing. In particular, it recommends that racial profiling be banned.

The underlying assumption of the current terrorist profiling is dangerous: namely that young men of Muslim faith or Middle Eastern appearance are particularly likely to be involved in terrorist

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3. The Open Society Justice Initiative released a new book on 27 April 2007 examining ethnic profiling by police in Europe: *"I Can Stop and Search Whoever I Want" – Police Stops of Ethnic Minorities in Bulgaria, Hungary and Spain.*

activity. The result of this approach has been that a large number of totally innocent people have been harassed and treated as suspects for no good reason.

The complexity of the terrorism situation worldwide, and the constant development of terrorist aims and methods make it difficult to develop accurate profiles. Terrorist groups themselves are no doubt aware of such profiles and are targeting recruits who do not fit the preconceived stereotypes.

Moreover, there is no good evidence to say that profiling has been effective in the fight against terrorism so far. Overly broad profiles have the effect of casting the net too wide, and therefore wasting valuable police time and resources.

Terrorist profiling may also be counter-productive. It tends to alienate and humiliate large sections of society. At the same time it "legitimises" discrimination in the eyes of the general public, in a most unfortunate manner. The result is that it divides society and pits the stigmatised group against the law enforcement agencies.

This in itself is dangerous, since the police need the trust of the community for effective intelligence gathering. The OSCE's High Commissioner on National Minorities underlined the importance of community policing in his 2006 Recommendations on Policing in Multi-Ethnic Societies.

How should the law enforcement agents act in order to be effective without at the same time harming the innocent?

Surveillance, searches or other similar law enforcement activities should be rigorously based on individual behaviour and/or accumulated intelligence, rather than sweeping generalisations. By way of example, stop and searches may be legitimate when the profile used is based on a specific and time-bound description of a particular suspect.

It would be naïve to underestimate the level of the terrorist threat that we face as citizens of Europe today. It is clear that Council of Europe member states must take appropriate measures to counter terrorist threats and safeguard the lives of those within their



“The struggle against terrorism also calls for long-term measures, with a view to preventing the causes of terrorism, and not just short-term responses.”

jurisdiction. Effective police methods, including those used in intelligence gathering, should be developed to replace the current profiling.

The struggle against terrorism also calls for long-term measures, with a view to preventing the causes of terrorism, and not just short-term responses. This requires, for example, further efforts to promote cohesion in our societies and a multicultural and inter-religious dialogue.

## Do not criminalise critical remarks against religions

11 June 2007

The famous Little Mermaid statue in the port of Copenhagen was found dressed in a headscarf recently, according to media reports. No one took responsibility for this provocative action – maybe it was just a joke, maybe it was intended as a comment on the perceived lack of respect for Muslims. Anyhow, it was a reminder that the debate about how to combine freedom of expression and respect for religions is still not over.

I am among those who felt that the publishing of the so-called Danish cartoons was irresponsible and a reflection of Islamophobia. The damage was considerable and the hurt among Muslims was very deep. However, I was not in favour of any legal action against *Jyllands-Posten*. Neither did I feel that the cartoons illustrated a need for stronger blasphemy laws. My opinion is that we should try to tackle such differences through a free and open discussion.

Admittedly, this was a borderline case. Freedom of expression, as articulated in Article 10 of the European Convention on Human Rights, is not without limits. This freedom carries with it duties and responsibilities and may be subjected to restrictions to protect

public order and the rights of others, if this is deemed “necessary in a democratic society” and regulated by law.

The article specifies that the freedom may be limited “in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

These provisions may not be easy to interpret in individual cases. One thing, however, is clear: hate speech is not allowed. The European Court of Human Rights has ruled that freedom of expression gives no entitlement to hate speech, which “is incompatible with the values of the Convention, notably tolerance, social peace and non-discrimination”.<sup>4</sup> The same line is followed by a 1997 recommendation of the Committee of Ministers of the Council of Europe. The EU Council also took a similar position in a recent framework decision, condemning intentional hate speech.

Indeed, the International Covenant on Civil and Political Rights makes it an obligation for states to prohibit incitement to racial and religious hatred (Article 20). The key aspect here is the deliberate *incitement* which can lead to discrimination or violations against others. The term “hate speech” in the covenant is carefully defined as “advocacy of national racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

In reality, it may still not always be easy to draw the line between hate speech and other types of criticism. However, it is absolutely not intended that uncomfortable and irritating statements in general should be prohibited. The Court made this clear in a frequently quoted ruling that freedom of expression was not only applicable to information and ideas which were inoffensive, “but also to those that offend, shock or disturb the State or any sector of the population”.<sup>5</sup> This was an important interpretation.

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4. Decision as to the admissibility of application No. 23131/03 by *Norwood v. United-Kingdom*, 16 November 2004.

5. *Handyside v. United Kingdom*, 7 December 1976, para. 49.

“We should try to tackle differences through a free and open discussion.”

Banning information and the expression of opinions should be seen as an exceptional measure, which needs to be decided through democratic means and justified as a matter of absolute necessity. Otherwise, there may be a risk that inopportune statements are stopped because someone who is influential does not like them.

Freedom of expression is a key human right for the good functioning of democracy itself. We know from experience its importance when exposing societal problems, monitoring people in power and promoting tolerance. These values must be protected – even at the cost of accepting some dubious media reporting.

The Parliamentary Assembly of the Council of Europe has decided to prepare a report on legislation relating to blasphemy, religious insults and hate speech against persons on grounds of their religion, and the Venice Commission has been requested to prepare an overview of national law and practice in this area.

In a preliminary report, the Venice Commission<sup>6</sup> writes that “religious groups must tolerate, as other groups must, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to intentional and gratuitous insult and does not constitute incitement to disturb the public peace or to discriminate against adherents of a particular religion”.

This appears to be the legal situation in Europe today:

- practically all Council of Europe member states have legislation against incitement to hatred, including religious hatred;
- most states also provide for specific, more stringent or severe provisions relating to incitement to hatred through the mass media;

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6. Study 406/2006, CDL-AD(2007)006. Preliminary report on the national legislation in Europe concerning blasphemy, religious insults and inciting religious hatred adopted by the Venice Commission at its 70th plenary session, (Venice, 16-17 March 2007).

- religious insults are a criminal offence in just over half the member states;
- denial of certain historical facts, such as the Holocaust and genocide, is an offence in certain countries;
- blasphemy is an offence in only a minority of member states and even where it is, it is rarely prosecuted nowadays.

The Venice Commission concludes that there is no need for new specific legislation on blasphemy, religious insults and inciting religious hatred. The focus should rather be on the full, correct and non-discriminatory implementation of the existing general legislation. This is a wise conclusion. New legislation would give the impression of favouring further restrictions of freedom of expression instead of accepting that – as the Commission stated – an open discussion of controversial issues is vital for democracy. In fact, what is needed is a review of existing laws in order to ensure that the restrictive ones are repealed.

As rightly stressed by the Venice Commission, it rests with the national courts to apply the legislation in a non-discriminatory manner. The national judges should build on the principles offered by the Court and, in their test of proportionality, take into account the impact of opinions and the context in which they are expressed. Following the *Giniewski* and *Aydin Tatlav*<sup>7</sup> judgments, the chilling effect of a sanction likely to discourage authors or publishers expressing non-conformist opinions on religions has to be considered carefully.

The Venice Commission also announced its intention to reflect on alternative measures for a fair balance of the rights of every group and individual. In order not to jeopardise the right to freedom of expression, we could envisage additional and complementary means of addressing possible conflict with the respect for religions, focusing on the prevention of insult.

The media in some countries have agreed upon codes of ethics and established review councils for the purpose of self-regulation.

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7. *Giniewski v. France*, 31 January 2006, para. 55; *Aydin Tatlav v. Turkey*, 2 May 2006, para. 30 (in French only).

The codes might be drafted or re-drafted in the light of new challenges. They could refer to the role played by journalists in the promotion of a culture of understanding and tolerance towards different cultures and religions. Co-regulatory frameworks involving the media, civil society and the public authorities should also be developed

# Security agencies must be put under democratic control

25 June 2007

We know that European national security services have taken part in the US-lead “war on terror”. They have co-operated in actions which have violated human rights in the most flagrant manner. The leading and co-ordinating role has been played by the American CIA, but European agencies must assume their share of the responsibility for the abductions, renditions, secret detentions and unlawful interrogations.

Some of these agencies have handed over suspects to the CIA, or looked the other way when people were being secretly abducted. They have facilitated flights with prisoners on board and provided information to the CIA.

Senator Dick Marty has reported to the Council of Europe Parliamentary Assembly that two of the member states even provided prison facilities for the secret detentions over a period of a couple of years.

There is still a crying need to review thoroughly what happened after 9/11 and learn from the mistakes made. Eroded human rights

standards must be re-established. This is also necessary in order to protect the credibility of the future combat against terrorism.

The fact that this crucial evaluation emerged may partly be due to the political bullying and fear-mongering by the Bush administration. However, there is also a widespread understanding in Europe that national security matters cannot be discussed openly. Governments have been afraid that transparency would block co-operation with other security agencies and hinder an exchange of information.

Human rights violations committed by executive bodies should, however, not be shielded from accountability as “state secrets”. A constructive and thorough discussion is urgently required, in order to create safeguards in this area. If there is political will this is possible, without the exposure of facts which must be kept confidential. The Canadian government gave an excellent example when setting up its commission in the Arar case.

The starting point must be that terrorism is a serious threat. After September 2001 there have also been horrendous attacks in Beslan, Istanbul, Madrid, London and other places. Actions must be taken to prevent, pre-empt and prosecute such acts. This does require surveillance work and the collection of data.

However, there have to be clear limits imposed on the activities of the security services, including the military agencies. Torture or other cruel, inhuman and degrading treatment can never be accepted, persons deprived of their liberty must be able to challenge their detention through correct procedures, and there must be safeguards against illegitimate use of information collected about individuals. Human rights standards must always be respected – even in periods of crisis, this is not a zero-sum game.

When so many security activities go on in secrecy, it is particularly important that there be a system of democratic control. One revelation during recent years has been that even government leaders have not always apparently been in the picture. Parliamentary and judicial control has been minimal. The intelligence services have pursued their co-operation with other agencies with little supervision.

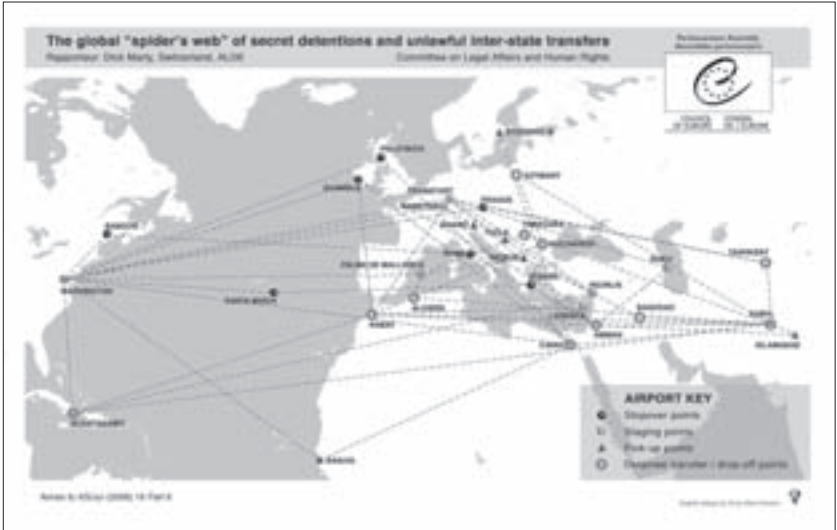


Photo © Report of the Parliamentary Assembly of the Council of Europe on “Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states” (Resolution 1507 (2006), Recommendation 1754 (2006), Doc 10957 + Addendum, Rapporteur: Mr Dick Marty)

“Human rights standards must always be respected – even in periods of crisis.”

Last year, the Council of Europe Secretary General, Terry Davis, raised this issue in relation to the question of secret detention and transport of detainees suspected of terrorist acts. He suggested enhanced control over the activities of both foreign and domestic secret services on the territory of member states.

The Venice Commission recently published an interesting report on how democratic control could be organised in order to ensure state accountability. Though it does not cover military and foreign intelligence services, the analysis of the Commission is particularly useful. It deals with four different forms of accountability: parliamentary, judicial, expert and complaints mechanisms.

- The formal authority of the security agency should be based on parliamentary supervision. The parliament could itself

set up an overseeing body, whose members would have to respect the necessary confidentiality. Such a mechanism might convince the broader population that there is indeed a continuous review, even if the facts about activities are withheld from the public.

- Decisions to authorise special investigative measures could rest with the judiciary. Also, it can play a role in reviewing such methods afterwards. However, the Venice Commission notes that data-mining and other information gathering methods tend to escape judicial control.
- Expert bodies could be set up to assist in overseeing the security activities. This may be preferable when there is a need to ensure that the members are independent experts and also have more time than parliamentarians and judges to fulfill a control function. There are also models of combined overseeing bodies – both experts and parliamentarians.
- Special mechanisms are necessary to give individuals who claim to have been adversely affected by the security services a possibility of redress before an independent body. This might strengthen accountability and encourage improvements of the system as such.

This report of the Venice Commission should be seen as a helpful guide for governments when reviewing the shortcomings which have been so devastatingly exposed.

# Europe is not free from child poverty – concrete action is needed

9 July 2007

Poverty among children and young people was one of Gordon Brown's priorities when he formed his new government. This is to be welcomed. It is important to give new strength to the fight against child poverty, not only in the United Kingdom, but all over Europe. Clearly, the first step is to recognise that this is a profound problem, affecting a great number of individuals and with negative consequences far into the future.

According to reports from UNICEF, statistics from South-Eastern Europe and the former Soviet countries in the Commonwealth of Independent States show that 25% of children still live in absolute poverty. These children have not benefited from economic recovery to the same extent as other groups in society.

In the richer parts of Europe, child poverty also exists. Few children are living in extreme poverty, but the percentage of children in households with incomes below half of the national median is still above 15% in countries such as the UK, Ireland, Italy, Spain and Portugal.



Photo © UNICEF/SWZK00006/ Giacomo Pirozzi

“The reality of poverty is deprivation of a broad spectrum of human rights.”

These figures give an indication of the scope of the problem. Unfortunately, a more precise measurement is not possible, as data on relevant aspects has not been obtainable. Even if the basic statistics about incomes and social benefits are reliable, it is difficult to assess their full impact on living standards. Also, poverty is not only about purchase power – other indicators are necessary to measure quality of life.

That is why the UNICEF studies into poverty in Europe have focused on issues such as unemployment, health and safety, educational well-being, the family and the risk of violence.

The picture emerging from these studies is that children who grow up in poverty are much more vulnerable than others. They are more likely to be in poor health, to under-achieve in school, to get into trouble with the police, to fail to develop vocational skills, to be unemployed or badly paid and to be dependent on social welfare.

This does not mean that all poor children are failing in their development. However, they risk being disadvantaged.

Child poverty is usually connected to poverty among those adults who care for them. It should, however, be understood that poverty has a more profound impact on children. It affects them not only in their immediate present, but also in the long term. Moreover, children themselves can do little to improve their situation. As a consequence, they greatly depend on public policy to grow out of poverty. This is particularly true when it comes to access to education and health services.

The UNICEF studies also show that there are large differences on child poverty between European countries, including between those sharing a similar economic situation. This seems to underline that the problem to a large extent relates to political priorities – child poverty can and should be reduced through determined policy measures.

An action plan against child poverty should, of course, seek to define vulnerable groups and risk situations. Single parent families and children with special needs may belong to this category. We know that children in rural areas, children of migrants and Roma communities have been deeply affected by poverty.

Direct subsidies to these risk categories are necessary and, indeed, the basis for many social and family benefits. Such support has to be appropriately targeted and sufficient to lift children – and their parents – out of poverty.

However, it is equally important to ensure that schools, health services, day-care centres and other public welfare institutions function without discrimination and benefit those most marginalised or otherwise disadvantaged. A policy of privatisation of such services should not be allowed to block access for the poor.

One of the first steps to reduce child poverty is to guarantee free access to education. Even when schools are free of tuition fees, education sometimes has hidden costs, such as uniforms or books which have to be bought. In some countries, parents even have to pay for the heating in the school. Education policies should particularly target school drop-out rates and youth unemployment by providing appropriate training and employment-related education.

Access to basic health services often remains impossible for many children living in poverty. Due to a lack of health insurance by their parents, proper registration with the national system or sufficient resources, children are excluded from health care. Experiences of free medical and dental check-ups at schools have been very positive.

One attitude has to be rejected strongly: that poverty is the fault of the poor. This “argument” is ill-conceived, as far as adults are concerned, and also totally invalid in relation to children. Some people have so far been denied basic welfare – for different reasons, mostly beyond their own influence.

We need to acknowledge that the reality of poverty is deprivation of a broad spectrum of human rights. Anti-poverty policies should promote access to human rights, including the right to education, training and employment, decent housing, social services and health care.

# Victims of human rights violations deserve more

23 July 2007

Torturers and others who violate human rights should be brought to account – at the same time, we should not forget the victims. What they have gone through tends in many cases to cause distressing trauma, disruption of everyday life and the destruction of future prospects. Justice requires that redress is achieved for the victims.

The right to a remedy and reparation is indeed a basic human right. It is enshrined in numerous international human rights instruments and tribunals, including Article 13 of the European Convention on Human Rights. Victims of serious human rights abuses and humanitarian law have a right to redress for the suffering and harm caused to them.

Reparation is the last step in the achievement of full human rights protection. Firstly, violations of human rights should be prevented. Secondly, if a violation does take place, it must be investigated by the state authorities (promptly, thoroughly and impartially). Thirdly, victims should have access to justice. And, finally, victims have the right to receive adequate reparation.

The fact that reparation is the last step in the achievement of full human rights protection might be one reason why so little focus has been put on this issue so far.

In 1993, Professor Theo van Boven, in a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, concluded that the question of reparation had received little attention and should be addressed more consistently and thoroughly, both on a national and international level.

Today, the question of reparation for victims still fails to receive the attention it deserves. Even in the cases of the many individuals who have been wrongfully detained and tortured during the “war on terror” few strong opinions have been voiced about the need for just compensation. Governments have ducked the issue and left the former prisoners themselves to fight for their own rights in complicated court procedures.

What does reparation entail? Financial compensation is the most widespread form of reparation. Some damage can be easily estimated in monetary terms – for example loss of earnings, costs of assistance. Other violations – like physical, mental or moral damage – cannot.

However, financial compensation is not the only remedy victims seek. Other forms of reparation include the following:

- restitution: restitution of the situation before the violation took place. This could mean the release of detainees, restitution of property confiscated, restoration of employment;
- rehabilitation: access to legal and social services, as well as mental and physical care;
- acknowledgement: which could include verification of the facts, public disclosure of the truth and a public apology, and commemoration of the victim;
- revelation of the truth: this is a form of catharsis for the society in question, which helps to prevent the past from recurring;



The Holocaust Memorial, Berlin

“The question of reparation for victims fails to receive the attention it deserves.”

- guarantees of non-repetition: amending laws or institutions to improve the rule of law.

Indeed, these various types of reparation were recently highlighted in the United Nations' *Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law*, adopted by the General Assembly on 21 March 2006.

By taking a victim-oriented approach, we affirm our human solidarity with victims of gross violations of human rights. We seek to compensate them for risks which the state could not prevent from turning into damage and harm.

Of course, reparation can never fully undo the damage that has been done. Gross violations of human rights are irreparable. But

this must not impede us from fighting to achieve just redress for victims. The UN Basic Principles are a good starting point for implementing the various aspects of reparation, a key element to full human rights protection.

# Children in migration should get better protection

6 August 2007

Migrant children are one of the most vulnerable groups in Europe today. Some of them have fled persecution or war, others have run away from poverty and destitution. There are also those who are victims of trafficking. At particular risk are those who are separated from their families and have no – or only temporary – residence permits. Many of these children suffer exploitation and abuse. Their situation is a major challenge to the humanitarian principles we advocate.

Human Rights Watch recently published a critical report on how the 900 unaccompanied children, who arrived by boat from Africa to the Canary Islands last year, had been received. Such reports are particularly important, as there is little official data on the reality of Europe's migrant children. In order to formulate a wise and comprehensive policy on this issue, we need more facts. Statistics and other relevant data are missing on almost all aspects of the migration cycle: those coming to the borders, who they are and what happens to them; those who are in the country without a permit, whether they are in school or work, and who they live with; and those who have residence permits and the nature of their social situation.



Sudanese mother and children waiting for asylum, Calais, France  
Photo© René Collin

“Europe cannot afford to fail our young newcomers.  
Their fate is ours.”

Though the scope and nature of the problem is partly hidden, we know enough to realise that the situation is serious. The lack of precise statistics and facts is therefore no excuse for political passivity. While efforts are made to collect data, a more energetic policy should be developed to protect the rights of these children.

There are international norms in this area. Both the UN Convention on the Rights of the Child and the UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families give clear guidance on how the rights of migrant children should be protected.

The Parliamentary Assembly of the Council of Europe has also adopted recommendations on refugee children and separated migrant minors. The UN High Commissioner for Refugees has issued guidelines to governments and also launched a joint project together with Save the Children, entitled “Separated Children in Europe Programme”.

### *Prejudices*

Such efforts are needed, as the agreed rules and guidelines are not always enforced. One reason is obviously xenophobia. There are extreme political parties and groups promoting prejudices and fear in several European countries today. Some of them have got a foothold in parliaments or local assemblies. Unfortunately, some of the bigger political parties have adjusted their message to reflect such tendencies instead of exposing them. Extremist media have also played a negative role and disseminated stereotypes and, in some cases, even hate propaganda.

Xenophobia and fear of xenophobia have tended to focus the migration debate on border security – whether migrants should be let in or not – rather than on the broader picture of migration in all its aspects. This has become worse after 11th September 2001 and Islamophobia has increased during recent years.

The consequences have also been negative for those migrants, not least the younger ones, who already live in our societies. It is therefore particularly unfortunate that so few politicians highlight the value of diversity and multiculturalism in today's world.

What should be done in concrete terms to protect and promote the rights of migrant children? How should the norms and guidelines be implemented?

### *Children's rights*

The starting point must be that migrant children are first and foremost children. They are vulnerable and have the same rights as others. The principle of the best interest of the child means that each child must be seen as an individual and special consideration must be given to his or her particular circumstances. All children should be listened to with respect.

Many migrant children have been uprooted once, twice, or even more times. Separation from earlier homes, relatives and friends can cause trauma. This makes it even more crucial that adult support is found. Save the Children and UNHCR have proposed that a legal guardian or representative be appointed for each arriving, separated child. These children have the right to be met with respect and by personnel who have the training and capacity to understand children.

### *Family unity*

Family reunification is an urgent need for many migrant children. Tracing of other family members should be undertaken as a matter of priority and on a confidential basis. No child should, however, be sent back to their country of origin if adequate reception and care are not guaranteed.

The Council of Europe Parliamentary Assembly has recommended member states “facilitate the family reunification of separated children with their parents in other member states even when parents do not have permanent residence status or are asylum seekers, in compliance with the principle of the best interest of the child” (Recommendation 1596).

This may be controversial in some political camps, but is fully in line with the agreed norms on children’s rights. The right to family reunification applies to all children. Those governments which have limited this right only to the younger children – for instance, only to those below 15 years of age – should be reminded of their child rights obligations.

### *Health*

The right to health should be given priority. Poverty and poor housing conditions undermine health in general. Also, many migrant children have experienced very difficult backgrounds and may therefore require psychological support. This is an area where schools have a key role, not only in detecting problems, but also following them up, through ongoing supportive treatment, for example.

Considerations of health are also a strong argument against the detention of children at any stage of the migration process. It is shameful that, even in Europe, unaccompanied children are still locked up, while waiting for decisions about their fate or before being deported.

### *Education*

Whatever the child’s background, the right to education is absolutely central. Migrant children should be ensured access to compulsory education – irrespective of their, or their parents’, legal

status. It is crucial that the quality of the schooling received is guaranteed and that pupils have the opportunity to learn the majority language (while also developing their mother tongue). One of the problems in some countries has been a lack of trained teachers who can care ably for migrant children.

Europe cannot afford to fail our young newcomers. Their fate is ours and they have much to contribute – if given a chance. The first step is to recognise that they have human rights.

# The slow march towards gender balance in politics

20 August 2007 – updated 29 August 2007

The distribution of power between men and women is still very unequal. This was the underlying motivation for a milestone recommendation by the Council of Europe four years ago. The Committee of Ministers agreed on action for “balanced participation of women and men in political and public decision-making”. The idea was to open the door for women into positions of power. The time has come to start assessing the results.

Interestingly, the Committee defined a precise benchmark. It stated that balanced participation in decision-making bodies meant that the representation of either women or men should not fall below 40%.

Only two countries – Sweden and Finland – have gone above that level in the national parliament, while other Scandinavian countries, Austria, Belgium, Germany, the Netherlands and Spain are very much behind. In half of Europe, the representation of women is below 20% and eight countries have less than 10% (Albania, Armenia, Georgia, Malta, Monaco, Russia, Turkey and Ukraine).

The situation is similar in governments. Three countries have in recent years reached a complete balance of 50/50 – Austria, Spain



Finnish President Tarja Halonen and German Chancellor Angela Merkel, May 2007  
Photo © Office of the President of the Republic of Finland

“It is now rather an electoral disadvantage not to be able to bring forward a gender-balanced list.”

and Sweden – while several governments have had no female representation at all and the average remains below 20 %.

The Council of Europe itself is no exception. In the Parliamentary Assembly, no more than 26% of the members are women and in the Congress of Local and Regional Authorities the figure is 27%. Among the ambassadors in Strasbourg only 13% are women and among the 46 current foreign ministers no more than five (11%) are female.

The conclusion is obvious: progress towards gender balance is too slow. What ought to be done?

The Committee of Ministers, in its 2003 recommendation, asked for special measures to stimulate and support women’s motivation

to participate in political and public decision-making. Such efforts are needed, especially in regions where patriarchal attitudes remain and women are kept on the sidelines. Social and family policies that help women to return to work after having children, ensure that women remain in active employment and feel able to join in the political debate.

There has, indeed, been some progress in this regard. For instance, recent reports from Turkey indicate that some women are now seeking political positions. These are encouraging signs.

However, the Committee of Ministers went further and raised the issue of quotas. It recommended that member states “consider setting targets linked to a time-scale with a view to reaching balanced participation of women and men in political and public decision-making”.

This approach is controversial. It has been said that quotas imply a form of discrimination against those not qualifying. Another argument has been that those favoured through such target-setting might not be respected as fully competent as they got “help”. It has also been proposed that a target can merely preserve the status quo if it is not sufficiently ambitious.

Admittedly, positive discrimination can have negative consequences and should therefore only be used when there is an objective and reasonable justification for such measures. The underlying idea is, however, important: to compensate for a deep-rooted negative discrimination in order to break habits and perceptions which perpetuate the inequality. Indeed, gender quotas can, in my opinion, contribute to attitude change and thereby further progress.

Obligatory legal quotas are still unusual in Europe, where it is more common that countries try various forms of voluntary targets. In some cases, the mere threat of a binding regulation has spurred political parties to rethink their nomination procedures.

In some countries, including Spain, the breakthrough started inside one or more of the political parties – for instance through a decision that every second candidate on the party list for the election should be a woman. The list of nominations for the post of judge

to the European Court of Human Rights, must also now contain candidates of both sexes, to ensure a better gender balance.

In these countries, it is now rather an electoral disadvantage not to be able to bring forward a gender-balanced list. In fact, gender targets are no longer necessary – the nomination process has become self-correcting. This is what should become the norm.

Is this important? Yes, very:

- it concerns the full enjoyment of human rights and social justice for everyone;
- it is about genuine democracy. A society where half of the population is more or less excluded from political participation is not fully democratic;
- it is a necessity, in order to avoid the waste of intellectual and other human resources;
- it would – as the Committee of Ministers put it – “lead to better and more efficient policy making through the redefinition of political priorities and the placing of new issues on the political agenda as well as to the improvement of quality of life for all”.

## States should protect the right of individuals to apply to the Strasbourg Court

3 September 2007

The right of individuals to appeal to the European Court of Human Rights in Strasbourg has to be protected. Governments must not try to hinder anyone from submitting a complaint and they must co-operate fully when the Court examines a case – relevant national documentation should willingly be provided.

The European Convention of Human Rights states that “the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right” (Article 34).

This right is a key component of the European human rights system. Everyone living within the jurisdiction of the States Parties shall enjoy this right – refugees, stateless persons and irregular migrants included.

It is of particular importance that governments do not hinder submissions to the Strasbourg Court. The Court itself has stated that applicants or potential applicants should be able to communicate with it freely, without being subjected to any form of pressure from the authorities to withdraw or modify their complaints.

The Court has described such pressure as including “not only direct coercion and flagrant acts of intimidation against actual or potential applicants, members of their family or their legal representatives, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy”.<sup>8</sup>

A report, recently prepared within the Parliamentary Assembly of the Council of Europe, gives examples of alleged intimidation against applicants, potential applicants, their lawyers and members of their families, preventing them from applying before the Court.

It also refers to information that individuals have been warned not to appeal against in national courts, thereby preventing them from exhausting domestic remedies (which is normally a condition for an application to be deemed admissible in the Strasbourg Court).

These are very serious allegations. The fact that it has not been possible to corroborate some of them is no reason to trivialise the problem. Any such allegation should be thoroughly investigated and any tendency towards such abuse be prevented as a matter of urgency.

Indeed, politicians and others in position of authority should demonstrate that they do not object to complaints, and that “going to Strasbourg” is not in any way regarded as unpatriotic or as an act of political opposition.

During my travels, I have met people who told me that they wanted to submit an application to the European Court of Human Rights, but feared that this would stigmatise them as trouble makers. Such an atmosphere undermines the spirit of the Convention.

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8. Court judgment in *Mamatkulov and Askarov v. Turkey*, 4 February 2005, para. 102.



“The judgments of the Court are therefore directly relevant as the authoritative interpretations of important elements of the law of the land throughout Europe.”

The report in the Parliamentary Assembly also contains a wide range of examples where the respondent state has willingly not co-operated with the Court and not provided it with the necessary existing evidence. Case files, or other relevant documents such as medical files, have not been disclosed and witnesses have not been made available.

Such lack of co-operation violates a specific provision of the European Convention, which makes it an obligation for States Parties to provide all necessary information to the Court for the effective conduct of its examination of the case (Article 38).<sup>9</sup>

Another problem is that states sometimes fail to comply with binding interim measures, which the Court decides upon in order

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9. Also Rule 44a of the Court’s Rules.

to avoid an irreversible situation – such as an extradition to a country where there is a risk of torture.<sup>10</sup> When this happens, the Court is no longer in a position to examine the application properly, nor to ensure that the applicant gets effective protection.

The Court itself has addressed this very problem and affirmed that States Parties must refrain from “any act or omission which, by destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Court from considering it under its normal procedure.”<sup>11</sup>

Acts to discourage applications and the failure to fully co-operate with the Court are both serious matters which call for open discussion. The Committee of Ministers in Strasbourg has addressed these issues and will have to do so again.<sup>12</sup>

The time has come for all the Council of Europe member states to sign and ratify the important treaty adopted in 1996, which enables the right of individual petition to be exercised effectively – the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights.<sup>13</sup>

The Parliamentary Assembly is right to put this high on its agenda. Pressure from parliamentarians is needed to ensure that all member governments support and fully co-operate with the Court.

We need not be reminded that the Strasbourg Court is a unique institution. Its creation was an historic achievement for the protection of freedom and security of individuals in Europe, and it has set a model for the rest of the world.

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10. Such Court decisions are in accordance with Article 39 of its Rules.

11. Court judgment in *Mamatkulov and Askarov v. Turkey*, 4 February 2005, para. 102.

12. Resolution ResDH(2006)45 on states obligation to co-operate with the European Court of Human Rights, adopted by the Committee of Ministers on 4 July 2006.

13. ETS No. 161. Entered into force on 01/01/1999. As of 29/08/2007 the treaty is not signed by: Armenia, Azerbaijan, Bosnia and Herzegovina, Montenegro, Poland, the Russian Federation and Serbia; it is not ratified by: Estonia, Malta, Portugal, San Marino and “the former Yugoslav Republic of Macedonia”.

The European Convention is now part of the national legal framework in all 47 member states of the Council of Europe. The judgments of the Court are therefore directly relevant as the authoritative interpretations of important elements of the law of the land throughout Europe.

This should contribute to ensuring that domestic remedies genuinely protect human rights and, consequently, that individuals will see no need to “go to Strasbourg” in the future. This is our vision. We will only move in that direction if governments fully co-operate with the Court and protect the right to individual petition.

# Investigative journalists and whistle blowers must be protected

17 September 2007

In Europe today, journalists are threatened or even put in prison for merely doing their job. Individuals who provide information to the media about abuse of power or corruption run the risk of dismissal, or worse. Such tendencies undermine democracy and must be countered through a clearly rights-based media policy, based on the principle of freedom of expression.

The purpose of journalism is not to please power-holders or to be the mouthpiece of governments. Indeed, the media have an important role as a “public watchdog” and to inform the public about relevant developments in society, including those which may embarrass the powerful and wealthy.

The Court of Human Rights in Strasbourg has stated that freedom of expression might include the dissemination of information that could “offend, shock or disturb”. This was an important clarification and underlined that it must be possible for the media to be controversial.<sup>14</sup>

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14. *Handyside v. United Kingdom*, judgment, 7 December 1976; para. 49.

This does not mean that there are no limits to freedom. Hate speech, incitement to violence and the dissemination of child pornography are not permissible. The European Convention clarifies that the state is allowed to introduce restrictions to protect national security and public safety, for instance.<sup>15</sup>

The boundaries for such exceptions should, however, be regulated by law and be interpreted narrowly. It must be clear that critical reporting is allowed, including information about the activities of authorities or private companies, as well as individual politicians or businessmen.

Appeals for the release of imprisoned journalists relate to those who are penalised only because of critical, or otherwise controversial, reporting. In this area, it is a major problem that defamation is still criminalised in several parts of Europe. Laws are in place which make it a criminal offence to say or publish true or false facts, or opinions that offend a person, or undermine his or her reputation.

The OSCE Representative on Freedom of the Media, Miklos Haraszti, has recommended that offences against “honour and dignity” should be de-criminalised and that such cases in the future be dealt with in civil law courts. The mere existence of criminal defamation laws could intimidate journalists and cause unfortunate self-censorship. I agree with this assessment.

A new report within the Parliamentary Assembly of the Council of Europe proposes that prison sentences no longer be used in cases of defamation. Furthermore, it suggests that public figures should not have more protection in defamation laws than ordinary citizens.<sup>16</sup>

Indeed, it has already been established that the margin for criticism must be broader in the case of politicians – they have to

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15. European Convention on Human Rights, Article 10 para. 2.

16. “Towards decriminalisation of defamation” (Committee on Legal Affairs and Human Rights, Rapporteur: Mr Jaume Bartumeu Cassany, Doc. 11305, 14 May 2007).



“Governments must therefore demonstrate more forcefully that they are prepared to protect the freedom of the media not only in words, but also through concrete action.”

accept that their words and actions are open to a higher degree of scrutiny, both by journalists and the public at large.<sup>17</sup>

This discussion is of paramount importance and should include the role of self-regulatory mechanisms within the media. There have been encouraging results in countries where media representatives have developed codes of ethics and designed their own special procedures to enforce professional standards – through press councils or press ombudsmen, for instance. Media outlets have matured, the public has better protection against abuse, and the right of reply has been enhanced.

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17. *Lingens v. Austria*, 8 July 1986, para. 42., European Court of Human Rights.

Decriminalising defamation and increasing the relevance of self-regulatory mechanisms would not protect the media from civil law charges. The report within the Parliamentary Assembly, mentioned above, raises the problem of very high damages, which are not in proportion to the actual injury. If such charges potentially target individual journalists, this might have a chilling effect.

Some countries have introduced a system of “responsible publishers”, in which the legal accountability is placed on one clearly-defined authority within the media enterprise – normally the publisher or the editor. Such a system puts the responsibility where it belongs and protects the individual journalist from the risk of having to pay damages.

Another pillar in a rights-based media policy is to ensure the protection of sources of information. Journalists should be free to receive information, anonymous or otherwise, from everyone, including government employees. This right should be confirmed in national law: no one should be allowed to investigate into journalist sources. Not even judges should be able to order the media to reveal their confidential sources.

The Strasbourg Court has stated that the protection of journalistic sources is one of the basic conditions for press freedom, and that an order to disclose a source could not be justified unless there is an overriding requirement in the public interest.<sup>18</sup> Indeed, every democratic society should welcome and protect “whistle blowers” – they are a safety valve against the abuse of power in both public and private enterprises.

In recent years, some leading investigative journalists have not only found their sources scared into silence, they have themselves fallen victim to the most brutal contract killings: Anna Politkovskaya in Russia, Hrant Dink in Turkey, Georgyi Gongadze in Ukraine and Elmar Huseynov in Azerbaijan. No effort must be spared to apprehend and bring to justice not only the actual killers, but also those who ordered these murders.

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18. *Goodwin v. United Kingdom* judgment 27 March 1996; paras 39-40; see also Committee of Ministers Recommendation (2000), on the right of journalists not to disclose their sources of information.

Such heinous crimes may make other journalists more cautious and thereby cause self-censorship. Governments must therefore demonstrate more forcefully that they are prepared to protect the freedom of the media not only in words, but also through concrete action.

An immediate step would be to release all those who have been imprisoned because of their journalistic work and to declare a moratorium on the use of criminal defamation laws.

# Media diversity: a core element of true democracy

1 October 2007

Governments often complain about the mass media in their own countries; they feel that their messages are distorted and unfairly criticised. True, there are media outlets which are not very serious and professional. However, this problem should not be exaggerated and is not a good excuse for draconian interventions or state control. Instead, governments should promote a media policy which encourages voluntary self-discipline and allows for a wide variety of media voices. This is what democracy requires; it also enhances further democratisation.

Editors and other media representatives should take careful note of criticism levelled against the quality of some of their reporting. Improved training of journalists and a developed system of self-regulation, including codes of ethics and press councils, is of paramount importance.

However, the main media problems are these: too little meaningful information is circulated and too few voices are heard.

Though the internet has created new possibilities for a more democratic dialogue on political matters, the mass media will surely

continue to function as the main messenger of common interest news and as the key arena for public debate.

All over the world, governments and strong business interests dominate media production, not least on the television side. This is to some extent inevitable, in view of heavy investment costs. However, this makes it even more essential to encourage competition and take steps to democratise media structures. A minimum requirement is that there is transparency about who is behind the various media outlets.

It is sometimes said that consumers act as a corrective. Media outlets which are too propagandistic tend not to be read, viewed or listened to. However, when there are no or very few alternatives, the problem generally remains. The increased possibility to tune into foreign radio transmissions or satellite television does help, but it is still not a realistic option for many, because of language and other barriers.

Some principles are particularly essential in democratic media policies: that governments and parliaments encourage genuine competition; that the official public service media act impartially and in the interest of all people in society; and that governments are transparent and allow access to their own information.

### *First: competition*

There are governments and parliaments in Europe which have actively subsidised smaller media, often those run by minorities, in order to secure a broader output. Other governments, however, have actively undermined the media they have felt negative about and thereby sabotaged free competition.

The way wavelengths for television and radio are allocated is a test which some governments have failed. State agencies deciding on this should work according to agreed, objective criteria and not discriminate against more independent applicants.

Another problem, in some countries, is that the government buys advertisement space only in the "loyal" media, signalling to business companies to follow their lead, with the consequence that, in effect, independent media are boycotted.



“Too little meaningful information is circulated and too few voices are heard.”

A number of other discriminatory measures have been taken against independent media; some of them obviously intended to push them into bankruptcy. Repeated defamation charges in court and obstacles to buying print paper, printing or distributing the papers are some examples. Such actions must be seen as violations of freedom of expression.

It is important that there are real alternatives. I once asked the ombudsman in one of the former Soviet states which reform he would consider the most important for human rights protection in the country. His answer was: a truly independent TV channel! This, in his opinion, would be the most efficient way of promoting an open, free debate and an honest monitoring of problems in society.

*Second: the role of “official” media*

They should operate in an impartial manner in the interest of the population at large. They could indeed be an essential counterweight to the business-driven entertainment media.

The “public service” media – often financed from tax money or other common resources – should, of course, not be used as propaganda instruments for certain politicians. Their independence and impartiality are of paramount importance and ought to be protected through agreed guidelines and an appropriate procedure of appointing directors.

*Third: the transparency of the public authorities*

Media culture is considerably affected by the attitude of the authorities towards journalists asking for data, including that on sensitive matters. The media have a legitimate interest in requesting information about government decisions and actions. They can serve as representatives of citizens, who have the right to know how their elected leaders act on their behalf. Open access to government information is therefore a democratic principle of high priority.

It is not enough that ministers are generous in giving interviews. There should be legal affirmation of the rights of citizens, including journalists, to obtain written documents and other information from the authorities. Exceptions from this transparency rule should be regulated strictly and allowed only for the protection of legitimate state secrets.

These problems are still more acute in transition countries, where news and political information were previously firmly controlled by those in power. However, there is a need to discuss these questions all over Europe: do we have a genuine competition in the media market? Does the public service media play the role it should? Are governments genuinely transparent?

# Long delays in court proceedings threaten the rule of law

15 October 2007

Courts in Europe are not all perfect. One unfortunate reality in many countries is the excessive length of proceedings. In spite of a broad recognition that “justice delayed is justice denied”, too little has been done to secure conclusions in courts within a reasonable time. We know this because of the huge number of complaints which are brought before the European Court of Human Rights in Strasbourg from France, Greece, Italy, Poland, Portugal, Turkey and other countries.

Unduly delayed court proceedings are in themselves a violation of the European Convention which provides that “everyone is entitled to a fair and public hearing within a reasonable time” (Article 6 § 1). This provision applies to both civil and criminal trials, as well as certain disciplinary and administrative proceedings.

The subject matter of certain cases calls for special diligence on the part of the authorities. So-called “priority” cases include those where one of the parties is ill, or where the issue concerns an employment dispute, a child care matter or a claim for compensation resulting from medical malpractice. In such cases it is particularly important that there is a quick resolution.



“Long periods of inactivity on the part of the court in question should be examined closely.”

The European Convention also specifically mentions that everyone arrested or detained has the right to be brought promptly before a judicial authority and is entitled to a trial within a reasonable time (Article 5§ 3).

In a number of resolutions, the Council of Europe’s Committee of Ministers has stated that excessive delays in the administration of justice constitute a significant danger, in particular for the rule of law.

This warning should be taken seriously. Inordinately long court proceedings tend to undermine the credibility of the justice system as a whole. The general public needs to feel confident that the state is able to dispense justice in a timely fashion. Otherwise, justice is illusory and citizens may be tempted to take matters into their own hands. This is potentially dangerous.

Legal certainty requires that matters of dispute are resolved and peaceful co-existence is restored. Court users should be able to

foresee when a court proceeding is likely to end. Lack of predictability creates frustration and an unfortunate feeling of powerlessness.

Excessive delays may also have very concrete negative implications for the parties to the proceedings, whether claimant or defendant:

- as time passes, evidence disappears and new evidence has to be adduced. This may cause practical as well as financial difficulties;
- witnesses may forget the events at issue, lose credibility or move on;
- court costs increase.

Furthermore, lengthy proceedings may themselves result in breaches of other human rights. In custody or parental authority cases, for example, delays in deciding matters between parents can have decisive or irreversible results for one of the parties.

Of course, it has to be emphasised that some cases do reasonably necessitate lengthy examination. Complex cases (either legally or factually) or those spanning a number of levels of appeal, for example. In addition, the applicant's conduct cannot be ignored. However, long periods of inactivity on the part of the court in question should be examined closely.

An effective remedy before a national authority is particularly important in cases involving allegations of unreasonable length of proceedings. This was emphasised by the Strasbourg Court in the *Kudła v Poland* judgment of 26 October 2000. National authorities are, of course, better placed than the European Court to act quickly to accelerate pending proceedings and/or provide compensation.

Following the impetus given by the Court in this judgment, several solutions have been put forward in member states, in order to provide effective remedies, allowing violations to be found and adequate redress to be provided. These include measures to accelerate proceedings in ongoing cases, as well as financial reparation for damage already incurred.

The European Convention system has an interest in ensuring that its long-term effectiveness is not jeopardised by an ever-increasing

number of applications before the Strasbourg Court. After all, the onus on implementing the Convention lies on the State Parties themselves, first and foremost.

Introducing a domestic legal remedy for lengthy court proceedings is a first step, but not a final solution. More work still needs to be done to tackle the problem at its root: better case management, judicial training, penalties for late submitting of documents/evidence, the setting of strict deadlines, more resources given to increasing the number of judges, as well as court clerks and assistants.

In this way, improvements in the administration of justice help to bolster the rule of law.

# No one should have to be homeless – adequate housing is a right

29 October 2007

All cities over our continent have a population of homeless persons – often in poor health. We can see them spending their nights under bridges or on park benches. They are living proof of failed social policy. Less visible are the extremely primitive housing conditions for many migrants and asylum-seekers, some of them thoroughly exploited by ruthless landlords. Hidden are the tragedies of elderly people who cannot afford to stay in their old flats due to increased rent and tax charges or the despair of families in former Communist countries whose insecure leaseholds have not yet been transformed into property rights. Across Europe the time has come for a serious discussion about housing rights.

One vulnerable group is the Roma and Travellers. They remain disproportionately represented among the homeless and those living in sub-standard housing conditions. In several European countries Roma families have been evicted with little, if any, notice or warning. Too often this occurs without the offer of a genuine alternative or an opportunity to appeal.

Among the migrants, non-documented individuals are at particular risk as their irregular status with authorities can be exploited on the housing market.

The poorest among larger refugee communities also tend to be disadvantaged. I recently met some refugees in both Azerbaijan and Armenia who after about 15 years are still living in extremely primitive and unhealthy conditions (both governments promised to solve this remaining problem in the near future).

Persons with disabilities have particular requirements in regards to housing. A policy of deinstitutionalisation and a shift to community living among people with disabilities has increased the need to provide accessible and secure housing at an affordable cost. Many remain in primitive institutional settings, unable to develop their lives or personalities.

Victims of domestic violence, especially women with children, often need accommodation outside their homes to get away from an abusive relationship.

Access to adequate housing is, however, not only a concern for minorities and other vulnerable groups. Insecurity in the housing market can have profound consequences on broader categories as well. Market developments can be cruel to people with modest means and urban “beautification” programmes are sometimes enforced with little respect to the tenants in the targeted area.

The decline in social housing is also forcing many people with low incomes into high cost rental housing or into high interest mortgage loans. In such cases, the remaining income after housing expenditure may not be enough to cover other necessary living costs.

When housing conditions are bad, the possibility for using basic services tends to be hampered – undermining the rights to education, health care and employment. This may produce a vicious cycle of deprivation and also perpetuate a pattern of social and spatial segregation. In turn, this can result in long-lasting inequalities which are especially difficult to remedy.

The first step is to recognise that adequate housing is indeed a universal human right. This is clarified in various international treaties such as the Revised European Social Charter and the International Covenant on Economic, Social and Cultural Rights. The fact that housing has increasingly been privatised and thereby



“Adequate housing is indeed a universal human right.”

“Positive measures should be taken to support disadvantaged groups.”

made subject to market forces does not mean that governments have been relieved of their obligation to protect the rights of the individual.

Of course, this obligation does not entail that governments must build apartments for the whole population or provide housing for everyone free of charge. This would be totally unrealistic and is not the point. This human right is about concrete measures to prevent homelessness, to ban arbitrary and forced evictions and to ensure a minimum standard of living conditions including access to drinking water and sanitation facilities. All forms of discrimination in housing should be prevented.

Such measures have rightly been seen as sufficiently important to be defined as binding obligations. Those actions which are particularly resource dependent may be taken step-by-step as long as there is a clear policy of gradual improvement.

The Revised European Social Charter defines more precisely the scope of what a government needs to ensure:

- access to adequate and affordable housing;
- reduction of homelessness and housing policies targeted at all disadvantaged groups;
- procedures to limit forced eviction to ensure security of tenure;
- equal access for migrants to social housing and housing benefits;
- housing construction and housing benefits related to family needs.

The charter also stresses that the enjoyment of the right to adequate housing must be ensured without discrimination on any grounds.

These obligations underline the need for governments to devise a clear housing strategy which should define objectives, priorities, and budget input. Such a strategy should be matched by robust national legislation.

Constitutional provisions should be coupled with ordinary laws and statutes that clearly spell out the duties of national and local authorities. The right to adequate housing has to be made justiciable before the courts so that individuals can seek remedies if they cannot access adequate housing.

Recent legal developments in Scotland and France stand as good examples to follow in the field of housing rights. The Scottish Homelessness Act 2003 obliges local authorities to provide permanent accommodation to people who have priority needs and temporary accommodation to people without priority needs. Priority needs will cease to be used as a rationing criterion in 2012. Individuals can complain to the courts if their housing needs are not met.

The French Act on the Right to Housing 2007 renders the state responsible for housing rights. Priority needs are identified in the Act while a two-tier system of complaints is envisaged. Regional Mediation Commissions will serve as the first instance after which cases can be taken before administrative courts.

Governments should also recognise that their general economic and social policies do impact on the right to housing. National housing policies can be applied to control land and property speculation when they prevent the enjoyment of housing rights. The availability of several housing models in addition to home ownership is also necessary to meet the needs of labour mobility. Positive measures in favour of vulnerable groups are necessary and justified when they are proportionate to a legitimate aim.

A minimum programme for a rights-based housing strategy must include the following points:

- national laws should spell out housing rights and identify those who are responsible for their implementation at different levels. Minimum standards for adequate housing and emergency accommodation should be clearly defined;
- non-discrimination legislation should include housing rights both in the public and private markets;
- positive measures should be taken to support disadvantaged groups;
- effective remedies to violations of housing rights and discrimination should be available to everyone. The right to adequate housing should be justiciable before courts;
- adequate and effective legal and consumer protection for those in private rental housing and those with mortgages for homes;
- the realisation of housing rights should be monitored at the national and international level. Ombudspersons and human rights' institutions have a role in this process.

# Time to re-examine the use of life sentences

12 November 2007

There is now a trend in Europe towards more life sentences for an increasing number of convicts. Many of those sentenced to life-long imprisonment are deprived of the possibility of ever being freed, they are “actual lifers”. This is a reaction to incidents of extremely serious, violent and organised crime. However, this trend seems also to be a response to the perception politicians have that they should demonstrate firm determination in the face of public demands for tougher punishments. The use of life sentences should be questioned. Are they necessary? Are they humane? Are they compatible with agreed human rights standards?

During visits to member states of the Council of Europe I have met “lifers” in several prisons. Many of them are held in very harsh conditions. In too many cases, the authorities keep these prisoners under a special regime, treating them as particularly dangerous and therefore cutting them off from contact with the outside world and often from other inmates as well. Prison guards also face the difficult task of dealing with lifers who have no incentive to demonstrate good behaviour.

A distinction should be made between the length of the sentence imposed and the degree of security restrictions considered necessary. "Lifers" are not necessarily more dangerous than others and should not therefore be automatically kept under a "maximum security" regime. There should be an individual assessment of each detainee, with regard to the threat he/she poses to safety and security.

This issue was addressed in a recommendation adopted in 2003 by the Council of Europe Committee of Ministers on "the management by prison administrations of life sentence and other long-term prisoners". This policy document sets out a number of important guiding principles:

- individualisation: there should be individual plans for the implementation of the sentence that take into account the personal characteristics of the prisoners;
- normalisation: prison life should resemble, as far as possible, life in the community;
- responsibility: prisoners should be given opportunities to exercise personal responsibility in daily prison life;
- security and safety: a clear distinction should be made between any risks posed by life sentence and other long-term prisoners to the external community, to themselves, to other prisoners and to those working in or visiting the prison;
- non-segregation: consideration should be given to not segregating life sentence and other long-term prisoners on the sole grounds of their sentence.

I have become aware that these principles are not fully applied in a number of member states. The same conclusion can be drawn from the published reports of the European Committee for the Prevention of Torture. This committee has also highlighted a range of psychological problems among this category of prisoners, including loss of self-esteem and impairment of social skills.

The UN Convention on the Rights of the Child prohibits life sentences without the possibility of release. There are not yet any universal provisions banning such sentences against adults. It is, however, significant that the Rome Statute of the International



“The present trend towards life sentences must be questioned.”

Criminal Court – dealing with the most serious crimes: genocide, crimes against humanity and war crimes – stipulates a review of prison sentences after 25 years.

My opinion is that sentencing to indefinite imprisonment is wrong. In fact, some countries in Europe – for instance Norway, Portugal, Spain and Slovenia – do not allow for life sentences, irrespective of the crime, (though very long fixed-term prison sentences can be handed down). This gives the convict at least some clarity about the future. Some other countries permit reviews after a certain period of time, during which the behaviour of the prisoner is normally one criterion. Convicts in these cases may therefore see a possibility of release.

However, there is an increasing number of prisoners who can nurture no or little hope of ever being freed. Not surprisingly, there are reports about cases of severe depression and other psychological problems in this category of inmates. In a prison I visited

recently in Azerbaijan, I could see the tension caused by bitterness and frustration among “lifers”, who had hoped for a review of their sentences sooner than after 25 years (the time prescribed by law). Relatives of the prisoners were also desperate.

Life imprisonment, without the possibility of release, does raise human rights concerns. Especially in combination with “maximum security” conditions, it could amount to inhuman or degrading punishment and thereby violate Article 3 of the European Convention on Human Rights.

Actual life sentences also negate the human principle that people can change. There are, of course, recidivist criminals, but there are also examples of prisoners who have reformed themselves. Court decisions assuming that someone constitutes a permanent threat to society are therefore misplaced. The vision of rehabilitation should be protected, not undermined.

There is also a need to discuss a new category of “lifers” which has emerged in a growing number of countries: offenders who have never been convicted to a life sentence but might well serve one in reality. By virtue of new laws adopted in the name of so-called public security, serious offenders may be denied not only conditional release but even release once they have served their full sentence – if they are defined as dangerous by experts. If release is denied persistently, until the end of a detainee’s life, this will amount to *de facto* life imprisonment.

Such legislation raises concerns about compatibility with the rule of law, the principle of legal certainty and the right not to be tried or punished twice – important principles of our penal law systems and the international human rights norms. Are prisoners who face the prospect of indefinitely prolonged detention not in a situation of “mounting anguish”, condemned by the European Court in relation to death rows?<sup>19</sup>

Two important cases relating to life sentences are now pending before the Grand Chamber of the Court.<sup>20</sup> The rulings on them will guide the interpretation of the European Convention in this area.

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19. *Soering v. the United Kingdom*, 7 July 1989.

20. *Kafkaris v. Cyprus* and *Léger v. France*.

It is my conviction that the present trend towards life sentences must be questioned. Though severe punishments will continue to be necessary, in some cases, to protect public safety, if there is a political will it is possible to give room to human considerations and for the possibility of rehabilitating convicts.

## Listen seriously to the views of children

19 November 2007

The UN Convention on the Rights of the Child has been a remarkable success. It has not only been ratified by all countries of the world, except the United States and Somalia, it has also acted as a catalyst for a series of concrete actions for real implementation of the agreed norms. However, much more needs to be done in several fields to grant children their full rights. One right which has not been ensured in reality is the right of children to have their views taken into account.

The importance of respecting children and their opinions was the main message of the Polish writer, doctor and educationalist, Janusz Korczak, whose teaching came to inspire the drafting of the UN Convention.

In an orphanage in the Warsaw Ghetto during World War II, he, his colleagues and some 190 children practised the rights of the child for real. In the midst of the horrible brutality outside, they developed a small democracy. They all formed an assembly for important decisions. They agreed upon rules of behaviour and a court was established to deal with offenders (in most cases the

“sentence” was to apologise). There was a billboard for messages and a newspaper for news and discussion.

This experiment in child democracy came to a terrible end on 6 August 1942 when the German Nazi soldiers marched them all, staff and children, to a train which would bring them to the gas chamber in Treblinka.

Korczak’s example and writings have, however, not been forgotten. His books are still reprinted in different languages and continue to be influential. However, some of his ideas are still seen as either unrealistic or something to be implemented in the future, rather than now.

This also seems to apply to the reference in the UN Convention to the views of children:

*“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”*

This provision is probably the least implemented aspect of the Convention. It seems not to be fully understood that this Article 12 places an obligation on governments to ensure that children’s views are sought and considered, in all matters that affect their lives.

It is time to confront this challenge more concretely. Obviously, there is no clear vision of the content and implication of a child’s right to be heard and to participate in decision-making. Therefore, as a first step, goals and standards for the realisation of this right need to be spelled out in more concrete and substantive terms.

Implementing this right requires long- and short-term objectives and strategies to address social attitudes and behaviours, and to develop viable models for children and adolescents to participate in political and societal decision-making. Mechanisms need to be developed within political bodies that ensure systematic consultation with children and serious consideration of their views.

The objective should be to create a culture of greater receptivity to, and respect for, children’s views. Unfortunately, many adults seem to consider this prospect a threat. The issue of children’s influence is seen as a “zero-sum gain” – that is, a situation in which



Commissioner Hammarberg at a lecture dedicated to Janusz Korczak in Warsaw, 20 November 2007

“The objective should be to create a culture of greater receptivity to, and respect for, children’s views.”

one side wins only if the other side loses. In other words, if children get more power, adults believe they will lose some of theirs and be less able to control the family, or uphold discipline in the classroom.

In some countries, adults have aggressively opposed children’s participation in the name of parents’ rights or religious principles. To change such entrenched patriarchal attitudes towards children may take some time.

How can this issue be raised in a meaningful way? How can it be shown that there is no contradiction between giving children the possibility of influencing their lives and society, on the one hand, and safeguarding the role of adults to care for, guide and protect children, on the other? How can it be made obvious that this is not a win-lose game, but that all sides stand to gain, if adults learn to support children in the exercise of their rights?

Here are some suggested first steps:

1. The child's primary arena is the home. Raising awareness among parents and caretakers about a child's right to be heard, and helping them cope with their parenting roles in this respect, must be a priority.
2. The other key arena is the school and kindergarten. Interactive learning, relevant curricula and democratic attitudes and procedures are essential contributions. Such measures should focus on strengthening children's ability to express themselves, to handle democratic processes and to understand society and its problems better. A huge task ahead is capacity-building among teachers and school staff on how to listen to children, enhance dialogue and promote conflict resolution in a democratic manner.
3. Children's organisations advocating for the realisation of children's rights could be promoted, and other NGOs working with or for children, such as sports clubs or charity groups, could be encouraged to listen to children and respect their views.
4. Political parties should be encouraged to develop their capacity to consider children's views and enhance children's influence in political affairs.
5. Television, radio and the press should have "child-friendly" news presentations and make sure that children's views are presented on matters of special concern to them. More child-focused correspondents and young journalists should be welcomed.
6. Steps should be taken to make the justice system child-friendly. The court procedures must be adjusted to meet the needs of children, be they perpetrators, victims or witnesses. Children should have an influence on administrative or judicial decisions relating to themselves, for instance on custody care and adoption.
7. Governments should define issues which have great impact on children's lives and on which they therefore ought to have a say, for instance, family policies, the planning of community facilities, school policies, children's health care

and recreation services. They should identify meaningful ways to take children's views into account and ensure that they are representative and relevant. Channels of expression should be explored which are adequate to different age groups, including young children – such as dialogues with pre-schoolers, school councils, opinion polls, representatives and other models. Special measures should be taken to enhance the voice of groups of children with disabilities, or other disadvantaged groups, and explore how to overcome possible constraints.

These steps would be in line with the vision of Janusz Korczak. Enabling children to express themselves and have their views heard and respected in the home, in the school and in the community from an early age will enhance their sense of belonging – and readiness to take responsibility.

# There must be no impunity for police violence

3 December 2007

Police brutality is still a grave problem in several European countries. During my missions I have received numerous allegations against the police of unprovoked violence before, during and after arrest. When I have asked the victims why they have not filed complaints, the answer has often been that they feared being beaten up again. Others, however, have taken their case to the European Court of Human Rights in Strasbourg which this year has passed a great number of judgments against states for excessive or abusive use of force by the police.

Such illegal behaviour by policemen is particularly serious, as the very role of the police in a democratic society is to defend the population against crime, including violent crime. When the law enforcement forces themselves break the law, the whole system of justice is derailed.

This is, of course, generally recognised among governments in Europe. Much effort is also made to recruit and train police officers to cope with difficult situations, within the limits of the law. Corruption is discouraged and codes of ethics promoted. Still, cases of police brutality remain.

The solution is not to stigmatise the members of the police forces: they are human beings who often work in difficult circumstances. It should also be stressed that acts of police brutality are often not isolated incidents, but products of a mentality. In several transition countries, there is a continuing perception that a good police is one that can “solve the case” by producing a confession. At the same time, courts have relied excessively on such signed statements, instead of requesting other types of evidence. This has worked as an incentive to obtain confessions by coercion.

There is certainly a need to take effective action to prevent or prosecute, judge and punish criminal acts. However, all means are not justified. The general interest of security and rule of law should be defended – but not at the cost of the fundamental rights of the individuals. The Strasbourg Court has clarified that there is a limit: “The Court, being aware of the danger [...] of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate”.<sup>21</sup>

There are, of course, situations when the use of police force can be justified – for instance, to control a riot, or to apprehend a suspect. However, this possibility should be strictly contained. One requirement is lawfulness; it is particularly important that the laws are clear for such situations. The Strasbourg Court has stated that “[the] legal and administrative framework [must] define the limited circumstances in which law enforcement officials may use force and firearms. [...] Police officers [are not] to be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase against a person perceived to be dangerous”.<sup>22</sup>

Another requirement is that of proportionality. The use of force is justified only in a situation of absolute necessity and should even then be practised with the maximum restraint. This requires that such operations are planned and controlled with this particular

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21. *Klass v. Germany*, 6 September 1978, para. 49.

22. *Makaratzis v. Greece*, 20 December 2004, para. 59.



“Clear guidelines for police conduct, drafted in line with international human rights principles, are an essential tool.”

intention. The broadly-published police action against demonstrators in Tbilisi recently fell short of these standards.

Police violence against persons deprived of their liberty is, however, not acceptable, except for extreme cases of self-defence. Prisoners often complain that they are beaten and kicked when moved between places of detention. The safety of such transportations has to be ensured through other means and is no justification for such violations.

Ill-treatment during interrogation is still common in a number of countries. During my visits to Azerbaijan, Armenia and Albania this autumn I was informed about the frequency of such cases. It is absolutely essential that the authorities take firm action to stop such malpractices.

The Strasbourg Court has made clear that there should be a legal obligation to undertake effective inquiries into serious allegations

of such violations. They should be adequate to lead to the identification and the trials of those responsible and they must be independent, transparent, prompt and thorough. All cases of death in custody should automatically be subject to an impartial examination.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has issued policy guidelines for such investigations and pointed out, among other requirements, that any inaction to initiate an investigation into serious allegations has to be motivated. Neglect on this point might, in itself, amount to a violation of the European Convention on Human Rights.

In order for the investigations to be credible, it is necessary that those conducting the inquiry have no relationship to the law enforcement staff implicated in the case. Instead of the police itself doing the investigation, the prosecutor might have a specialised team for the review of such cases. Another model is that a general or special police ombudsman be entrusted with the investigations. A further possibility would be police complaints commissions with participation from members of civil society.

When in Ireland recently, I visited the special ombudsman office set up there in May: Garda Síochána Ombudsman Commission. It receives complaints from the public and seeks to provide an independent and effective overseeing of policing. It is clearly a serious agency and a model for other countries. It is recruiting more than 80 staff members and about half of them are investigators, of whom a large number are recruited from abroad. The Garda Ombudsman can initiate mediation, but also recommend disciplinary action or criminal prosecution when police misconduct has been revealed.

Change of mentality requires no less than a new culture of policing. Clear guidelines for police conduct, drafted in line with international human rights principles, are an essential tool. The European Code of Police Ethics is a useful guide here. Thorough initial and continued training of members of the forces to increase their awareness of the importance of respect for human rights in their work is crucial.

The building of a new culture of policing would be promoted by an open and public debate. Public trust in the police requires a free discussion in the media. As the Court reiterated in a recent judgment: “in a democratic state governed by the rule of law the use of improper methods [by the police] is precisely the kind of issue of which the public have the right to be informed”.<sup>23</sup>

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23. *Voskuil v. the Netherlands*, 22 November 2007, para. 70.

# The new European migration policy should be based on human rights principles, not xenophobia

17 December 2007

The demographic trend in Europe gives a clear message: the ageing continent needs more immigration. However, anti-foreigner parties have advanced or maintained their strong position in recent elections. At the same time, some of the mainstream parties – instead of explaining facts and defending the rights of immigrants – have copied slogans from the extremists and thereby legitimised xenophobic jargon. Expressions like “if they do not love our country they can get out” have been repeated from the rostrums. This should be deplored.

Such an atmosphere victimises all foreigners, including genuine refugees and even citizens with foreign origin. However, the main targets are the irregular migrants, those who stay in the country without permission. Decisions are taken to intensify efforts to round them up for deportation.

Each state has, of course, the right and duty to keep control of its borders and to know who is inside. Irregular migration can pose problems for the country in question and may also harm the many

migrants who suffer exploitation, including those who have been trafficked. The challenge for the state is to strike a proper balance between protecting the rights of those who are inside, or at its borders, and at the same time maintain control of the frontiers.

This is not a small problem. Though precise statistics are not available, for obvious reasons, it is estimated that there are more than 5.5 million irregular migrants within the European Union and more still in other parts of Europe. In the Russian Federation it is estimated that there are no less than 8 million.

The irregular migrants may have entered the host country illegally, without valid visas, by avoiding border controls or with false documents. There are also those who enter legally but overstay their visas; this is likely to account for most irregular migrants, including those who are trafficked. Migrants may also enter on a non-working visa but then still take a job.

A humane migration policy requires that we learn more about migrants' present situation and find alternative ways of protecting the irregular migrants. Some steps in that direction are being taken in national programmes against the trafficking of human beings. Victims, when identifiable, are now treated with respect in many countries, given protection and sometimes even a permit to stay, at least for a limited time.

It should be fully recognised that irregular migrants do in fact have human rights, even if their right to stay is not protected. Indeed, most human rights apply without distinction between citizens and aliens. The principle of equality and non-discrimination means that distinctions between groups are only permissible if they are prescribed by law, pursue a legitimate aim, and are strictly proportionate to that aim.

The UN Convention on the Rights of the Child applies also to migrant children, including those who have been denied a permit to stay. For instance, the state has an obligation to ensure a child's right to health care and education.

The Council of Europe's Parliamentary Assembly has spelled out the need to clarify the rights to be enjoyed by irregular migrants. On the basis of the European Convention of Human Rights, and other relevant treaties, it highlighted rights such as the right to



“Irregular migrants have human rights, even if their right to stay is not protected.”

primary and secondary education for children, the right to emergency health care, the right to reasonable working conditions, the right to have one’s private and family life respected, the right to equality, the right to seek asylum and be protected from *refoulement* (enforced return to a place where the individual’s life or freedom could be threatened) and the right to an effective remedy before removal.<sup>24</sup>

However, even if the irregular migrants formally have such rights, their insecure status makes them vulnerable to human rights abuse. In reality, they are often unable to claim their rights when these have been infringed by officials, employers or landlords. Exploitation is common. This is the problem which governments in Europe still have not tackled with sufficient priority.

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24. PACE Resolution 1509 of 2006.

Another truth now needs to be recognised: a large proportion of the irregular migrants will remain in Europe and will not – or cannot – be returned to their country of origin. In some cases, this is because removal would constitute *refoulement* and is therefore prohibited under international law. In other cases, the removal would not be realistic because nationality or identity are disputed, or because the country of presumed nationality refuses to co-operate. In other cases, the migrants are stateless and there is therefore no country to return to.

This raises the issue of regularisation – government decisions to legalise the presence of certain irregular migrants. Such moves do not entail any diminution of the state’s national sovereignty, nor of its right to control its national borders. They are voluntary acts, similar to amnesties, in which the state intentionally decides to overlook the infringement of immigration controls in limited and specific cases.

This is controversial, but the Council of Europe’s Parliamentary Assembly – to its credit – has raised the issue.<sup>25</sup> I do recommend that member states listen to this signal and seriously consider such regularisation programmes as a means of safeguarding the dignity and human rights of a particularly vulnerable group of persons.

As in many other fields, the European Union itself is becoming a key player in the broad policy area of migrations. I recently had a discussion on the issue with Franco Frattini, Vice-President of the European Commission. He is proposing a comprehensive EU migration policy which would improve border controls and prevent illegal employment in the EU countries and, at the same time, develop common admission procedures and strengthen integration policy. He also suggests more development aid to countries of origin.

Measures for stricter border control have already been taken, with the strengthening of the Borders Agency (FRONTEX) and the establishment of the Rapid Border Intervention Teams (RABITs). Co-operation between the EU and the UN High Commissioner

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25. See PACE Recommendation 1807 (2007) on regularisation programmes for irregular migrants.

for Refugees has been initiated, to ensure that border operations fully observe international protection standards, including the right to apply for asylum.

It is particularly urgent that the responsibility to rescue persons at sea is respected as a first priority by all parties. Moreover, it is crucial that the principle of non-refoulement is guaranteed, so that no one is forced back to a situation of persecution and torture.

Vice-President Frattini should be commended for trying to push governments towards more co-operation: there is indeed a need for a common European migration policy. It is important, as well, that these moves are also co-ordinated with relevant countries outside the EU and that the Council of Europe and its Parliamentary Assembly are seen as important partners. The aim is a policy based on facts and human rights, not on xenophobia.

# An international or European treaty is needed for the protection of women against violence

7 January 2008

Domestic violence still plagues European societies. In spite of all the international conferences and declarations, women continue to be battered in their own homes. It is apparent that it will take a long time before such ill-treatment is put to an end, but that is why it is even more necessary that further efforts are made now – by both central and local governments. That requires something more than mere political lip-service.

During my country visits I often discuss this issue with leading politicians, most of them men. Some have grasped its importance but others display an unfortunate complacency. They have argued that “there is no need to discuss this in our country”. Not only have they been dismissive about the problem as such, some of them have even volunteered chauvinistic jokes which should belong to the past.

Domestic violence is a problem in every country. Where there are shelters for women who must seek refuge, they have proven necessary to prevent worse tragedies. In recent months I have visited

such homes in, for instance, Cork (Ireland), Vlora (Albania) and Graz (Austria) and have been convinced of their value. Residents, both past and present, have explained that the protection and care in these homes represented a turning point in their lives.

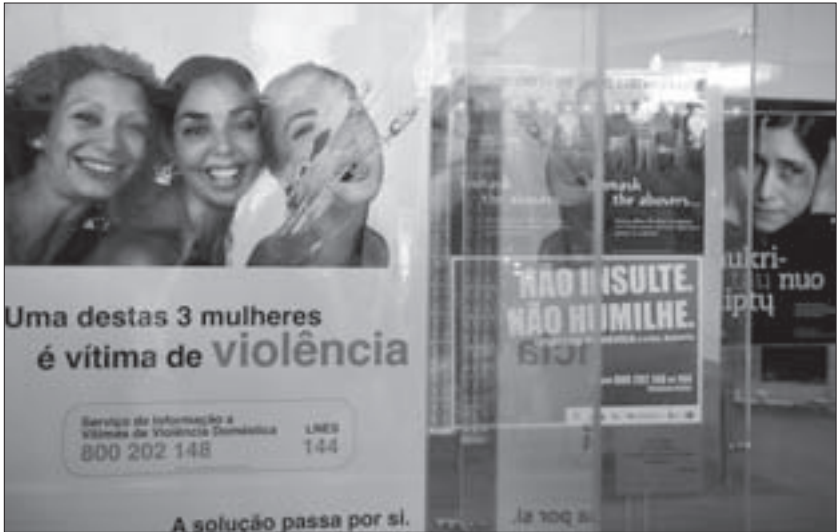
Though such shelters are often run by engaged non-governmental groups, the authorities have a responsibility to assist and co-operate. Their activities must also be complemented with other protective and social measures – they should be seen as an emergency, temporary solution. Of course, they do not justify that the victim should be the one who has to move from the home.

It is, in many cases, a very difficult step for a woman – sometimes accompanied by her children – to turn to a shelter. Hotlines and telephone help services do provide help and good advice. Health clinics are often among the first services to come into contact with the victims of violence. It is important that personnel there are well trained, gender sensitive and have clear referral systems in place to link to other support sectors. Health care providers should be able to refer the victim to temporary safe housing or counselling, and, if need be, to the police.

After-care following the worst crisis period is essential, to avoid the risk of repetition. There have been cases of women leaving the protected shelter only to be assaulted again. Decisions on whether or not to restrain the perpetrator are necessary. There should be legal measures in place to exclude offenders from the family home and prevent further harassment where necessary.

Another weak link in the protection chain has been the judicial proceedings, in cases where a trial has become unavoidable. Women have been forced to confront their aggressor or rapist in the court room and pushed through cross-examinations of the most traumatic nature. Too little has been done to avoid such abusive procedures.

Special attention has to be given to those women most at risk. Staff at the shelters have stressed the particular vulnerability of migrants. A migrant woman who is subjected to domestic violence is unlikely to report the incident to the police, for fear of losing her residence status, if it is dependent on her husband's status. Some countries have addressed this concern by allowing victims



“The victim must be able to overcome all the various difficulties and consequences that violence has caused.”

of domestic violence to apply for permanent residence status, irrespective of their spouses’ support for the application. This is a responsible approach.

Sensitivity to the needs of the victims also calls for comprehensive and accessible services. The victim must be able to overcome all the various difficulties and consequences that violence has caused. Support services must take into account and respond to both the immediate and long-term needs of the victim.

Intervention centres, which combine comprehensive police, judicial, social and health support, should be developed in order for victims to avoid having the burden of going from one institution to the next. This is being tried in Austria, with positive results.

Services must be provided without prejudice. We know that some women in need avoid seeking assistance because they fear being stigmatised or blamed. Others have suffered years of abuse and lack the confidence to start a new life on their own.

There is a need for a broad policy framework for the reforms. Some governments have indeed already started to develop programmes which ought to inspire others. Measures which ought to be implemented are already known and include:

- a precise and strict legal framework, providing a broad definition of violence against women;
- legal provisions or guidelines to enforce the law;
- a well thought out strategy and an action plan, covering both national and local levels which would include preventive and educational measures;
- a programme for the education of police, social workers, health workers, teachers and the judiciary, which would include training on how to recognise and deal with violence against women;
- provision of facilities which contribute to rehabilitation and rebuilding of lives by the support services.

Such a framework could be enhanced by a comprehensive, international treaty on violence against women. A convention or a protocol with binding standards should, of course, include measures against domestic violence. The purpose would be to encourage national reforms and thereby also contribute to the necessary changes in attitude.

The time has come to develop legally binding norms for the prevention, protection and prosecution of violence against women, including measures for the care of victims. A discussion should start on the most effective format for such a treaty, European or international. The aim is clear: zero tolerance.

## Europe is moving towards a total ban on domestic violence against children

21 January 2008

A majority of the 47 Council of Europe member states have now committed themselves to put an end to all corporal punishment of children. Full prohibition in law has so far been adopted by 18 member states and at least seven others have publicly pledged to do the same in the near future. If these governments fulfil their commitment, Europe will be more than halfway to universal prohibition. This is welcome progress.

Some positive steps have also been taken in other parts of the world. Last year, New Zealand became the first English-speaking country to prohibit all corporal punishment, including in the family. And so did three Latin American countries: Uruguay, Venezuela and Chile.

They had responded to recommendations in the report of the UN Secretary General's study on violence against children, submitted to the General Assembly in October 2006. Its main message was that "no violence against children is justifiable; all violence against children is preventable". It recommended all states move quickly to



Boy at a UNICEF-assisted centre for children living and working on the streets in Chisinau, Moldova.  
Photo © UNICEF / Giacomo Pirozzi

“The prevention of domestic violence against children is nowadays recognised as a human rights concern.”

prohibit all forms of violence against children, including all corporal punishment, before the end of 2009.

This was another strong challenge to the still fairly widespread opinion that relations inside the family are no matter for outsiders. Already, the 1989 UN Convention on the Rights of the Child, adopted and ratified by almost every member state of the United Nations, had made clear that there are situations in which authorities have to protect a child from all forms of violence behind the family door.

This is not a zero-sum-game between children and parents. The Convention is very family-friendly – it stresses the absolute importance of a good family environment and the need, in some cases, for community support to parents in crisis. Violence against children is a reflection of family breakdown and calls for the protection of the life, well-being and dignity of the child. This is a major reason why the prevention of domestic violence against children is nowadays recognised as a human rights concern.

The purpose of prohibiting corporal punishment of children is precisely one of prevention. The idea is to encourage a change of attitudes and practice and to promote non-violent methods of child-rearing. An unambiguous message of what is unacceptable is very important. Adults responsible for children are sometimes confused about how to handle difficult situations. The line should simply be drawn between physical or psychological violence on the one hand and non-violence on the other.

The problem is deep and serious. As part of their daily lives, children across Europe and the world continue to be spanked, slapped, hit, smacked, shaken, kicked, pinched, punched, caned, flogged, belted, beaten and battered in the name of “discipline”, mainly by adults whom they depend upon.

This violence may be a deliberate act of punishment, or just the impulsive reaction of an irritated parent or teacher. Both cases constitute a breach of human rights. Respect for human dignity and the right to physical integrity are universal principles. But, despite this, social and legal acceptance of adults hitting children and inflicting other humiliating treatment on them persists.

Corporal punishment of children is often inhuman or degrading, and it invariably violates their physical integrity, demonstrates disrespect for their human dignity and undermines their self-esteem. This sense of deeper damage was described by the Polish doctor, writer and educationalist Janusz Korczak who once said: “There are many terrible things in the world, but the worst is when a child is afraid of his father, mother or teacher”.

Special exceptions allowing for some level of violence against children in otherwise universally applicable laws against assault are therefore particularly unfortunate. They also breach the basic human rights principle of equal protection under the law.

The invention of concepts such as “reasonable punishment” and “lawful correction” arises from the perception of children as the property of their parents. Such “rights” are based on the power of the stronger over the weaker and are upheld by means of violence and humiliation.

The Parliamentary Assembly of the Council of Europe called in 2004 for a Europe-wide ban of corporal punishment. It stated that “any corporal punishment of children is in breach of their fundamental

right to human dignity and physical integrity. The fact that such corporal punishment is still lawful in certain member states violates their equally fundamental right to the same legal protection as adults. Striking a human being is prohibited in European society and children are human beings. The social and legal acceptance of corporal punishment of children must be ended.”

Progress has been made since then, but some member states have not acted upon this suggestion, or those from the UN study. In order to encourage further discussion, I have been in correspondence with the government heads of those member states which have yet to reform their laws adequately.

Their responses give a hint that further progress is possible. In fact, no one defended the use of corporal punishment. Seven indicated that reforms to prohibit all corporal punishment were in progress. Some of the others replied that their existing law was sufficient, but demonstrated an open attitude towards further progress and the possibility of explicit reform.

Of course, eliminating corporal punishment requires more than legal reform. Sustained public education and awareness-raising of the law and of children’s right to protection is required, together with promotion of positive, non-violent relationships with children. The Council of Europe programme “Building a Europe for and with children” is promoting the abolition of corporal punishment through law reform, the promotion of positive parenting and awareness-raising efforts likely to change public attitudes and behaviours.

Children have had to wait the longest to be given equal legal protection from deliberate assaults – a protection the rest of us take for granted. It is extraordinary that children, whose developmental state and small size is acknowledged to make them particularly vulnerable to physical and psychological harm, have been singled out for less protection from assaults on their fragile bodies, minds and dignity.

Challenging legal and social acceptance of violence has been a fundamental part of women’s struggle for equal status. The same applies to children: there could not be a more symbolic reflection of children’s persisting low status as property than adults’ assumption of their “right” and even “duty”, to hit children.

# Serious human rights violations during the anti-terror campaign must be corrected – and never repeated

4 February 2008

Strong and co-ordinated action is needed to prevent and punish terrorist acts. The tragic mistake after September 11 2001 was not the determination to respond, but the choice of methods: terrorism must not be fought with terrorist means. The US-led “war on terror” has violated core principles of human rights – including in Europe. It has victimised thousands of individuals, many of them totally innocent. It is urgent that the damage now be repaired.

The fact that democratic states have used illegal methods might well be what terrorist leaders hoped for. It has seriously harmed the credibility of the international system for human rights protection. It is a fundamental principle that respect for human rights, basic freedoms and the rule of law be upheld, including in times of tension and crisis – and by everyone.

The first step to restore the primacy of these values, is to recognise the facts. European decision makers would do well to take note of the debate in the United States which is now, at long last, both frank

and self-critical. The *New York Times*, among others, has repeatedly articulated deep human rights concerns. In an editorial in mid-January it summarised the main points:

“In the years since Sept. 11, we have seen American soldiers abuse, sexually humiliate, torment and murder prisoners in Afghanistan and Iraq. A few have been punished, but their leaders have never been called to account. We have seen mercenaries gun down Iraqi civilians with no fear of prosecution. Hundreds of men, swept up on the battlefields of Afghanistan and Iraq, were thrown into prison in Guantanamo Bay, Cuba, so that the White House could claim they were beyond the reach of U.S. laws. Prisoners are held there with no hope of real justice, only the chance to face a kangaroo court where evidence and the names of their accusers are kept secret, and where they are not permitted to talk about the abuse they have suffered at the hands of American jailers.

In other foreign lands, the CIA set up secret jails where ‘high-value detainees’ were subject to even more barbaric acts, including simulated drowning. These crimes were videotaped, so that ‘experts’ could watch them, and then the videotapes were destroyed, after consultation with the White House, in the hope that Americans would never know.

The CIA contracted out its inhumanity to nations with no respect for life or law, sending prisoners – some of the innocents kidnapped on street corners and in airports – to be tortured into making false confessions, or until it was clear they had nothing to say and so were let go without any apology or hope of redress.”

This editorial reveals flagrant defiance of core principles of justice on which human rights are built: protection against torture; presumption of innocence; no deprivation of liberty without due process; the right to a fair trial; the right of appeal; and the right to reparation.

European citizens are also among the victims. Some have been brought to Guantanamo for indefinite detention and interrogation, in violation of the United Nations Convention against Torture. Others have been “blacklisted” by the Security Council on the suggestion of the US. They have had their bank accounts frozen



“Democracies should never accept the use of secrecy doctrines to excuse lack of action against serious human rights violations.”

and have been prevented from any travel – without legal procedures or any possibility to appeal.<sup>26</sup>

European governments have not defended their citizens in these situations with sufficient vigour. They have been late in clearly condemning these methods of counter-terrorism. They have yet to fully clarify the facts about European co-operation with the US intelligence services in this counter-terrorism policy.

Senator Dick Marty, in the Council of Europe Parliamentary Assembly, managed in his investigation to uncover co-operation of European countries in the “spider’s web” of detainee transports to Guantanamo, as well as to secret prisons.

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26. See PACE Resolution 1597 (2008) and Recommendation 1824 (2008), based on PACE Doc. 11454.

This needs to be discussed in depth. Tendencies to see the protection of human rights as an obstacle to effective work against terrorism must be discarded. As Kofi Annan once said, respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism. It is of utmost importance to uphold human rights standards in times of crisis – that is when the strength of our values is tested.

Attempts to redefine the very meaning of torture must not be accepted. Simulated drowning (“water boarding”) remains torture when it is used against terrorist suspects. Sending people back to situations where they risk torture is unacceptable – so-called diplomatic assurances from regimes that practice torture cannot be used as a pretext to circumvent the ban on such deportations.

Independent and effective national investigations should be set up whenever there are credible allegations of unlawful renditions or secret detentions. States are required to investigate human rights violations under the European Convention on Human Rights.

One such case is the Swedish handover to CIA agents of two asylum-seeking Egyptians – Ahmed Agiza and Mohammed al-Zari – at an airport in Stockholm from where they were flown to security cells in Cairo and subjected to “harsh” interrogation. The handling of this case has been severely criticised by the United Nations Committee Against Torture. Although the Swedish government has admitted mistakes, it has not yet agreed to a full investigation into all circumstances of the case.

One argument against such investigations has been the fear of damaging relations with US intelligence services. Exchange of secret information between the security agencies is essential for both sides. However, the Canadian authorities<sup>27</sup> demonstrated in the case of Maher Arar – a Canadian citizen who was stopped at a US airport and handed over to the Syrian security police and badly tortured – that a thorough and fair investigation is possible, without endangering the intelligence nerve system.

This is also about a crucial principle. Democracies should never accept the use of secrecy doctrines to excuse lack of action against

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27. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar.

serious human rights violations. It should be absolutely clear that security agents must also be held accountable – parliamentary and judicial scrutiny must be possible. One of the lessons of the mistakes made during the “war on terror” is that the national security agencies must be kept under effective democratic control.

This was indeed one of the recommendations resulting from inquiries conducted by the Parliamentary Assembly of the Council of Europe,<sup>28</sup> the Council of Europe Venice Commission<sup>29</sup> and the Temporary Committee of the European Parliament.<sup>30</sup> The Secretary General of the Council of Europe suggested measures to oversee the activities of national and foreign security agencies and also to prevent illegal air transports of detainees.<sup>31</sup>

Three problems in particular were addressed in these recommendations:

- activities of national and foreign civilian and military intelligence services operating in European countries should be regulated;
- transiting civil and state aircraft should be controlled so that illegal transport of detainees is prevented;
- measures should be taken to ensure that secrecy doctrines and state immunity do not become a shield against investigating serious violations of human rights.

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28. PACE Recommendation 1801 (2007) <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta07/EREC1801.htm> 1#1 – Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report.

29. Venice Commission Report on the democratic oversight of the security services (doc. CDL-AD (2007)016, 11/06/07).

30. European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)) – 14 February 2007.

31. Follow-up to the Secretary General’s reports under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies (SG/Inf(2006)5 and SG/Inf(2006)13) – Proposals made by the Secretary General (SG/Inf(2006)01, 30/06/06).

The full truth about European co-operation with the secret detention and unlawful rendition programmes must be exposed, the breaches of the European Convention of Human Rights addressed, the victims granted reparation and decisions taken to ensure that these violations will not be repeated.

European governments must act on these recommendations. A head-in-the-sand attitude cannot be defended. These issues must be fully addressed, and the time is now.

# Protection against torture must be strengthened

18 February 2008

Torture and other cruel, inhuman or degrading treatment or punishment is prohibited under international law. No exceptions are allowed, ever. Torture was made unthinkable – or at least impossible to defend - after the ban had been inscribed in United Nations Human Rights treaties, the humanitarian Geneva Conventions and the European Convention on Human Rights. However, once again, this great achievement in the struggle against barbarity and for human rights must now be defended.

International watch mechanisms have been established to ensure that states adopt measures to uphold these treaties and to condemn any practices of torture should they occur. The European Committee for the Prevention of Torture (CPT) also holds the authority to make unannounced visits to places of detention.<sup>32</sup>

This is not a theoretical debate – the application of torture continues on a distressing scale. The proper response is to strengthen

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32. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (<http://www.cpt.coe.int/en>).



“Each government should put in place an effective prevention programme.”

the existing mechanisms. It is therefore shocking that misdirected counter-terrorism strategies are now challenging the very consensus against torture.

The devious “ticking bomb” argument has returned and is often taken seriously by some leading opinion makers, not least in the United States where it has been used to defend one of the most cruel torture methods, the so-called waterboarding technique (mock drowning).

The argument is a familiar one, built on a hypothetical scenario in which police or security forces could save lives by torturing someone who knows where a bomb is placed and thereby obtain information to prevent the explosion.

The purpose of this argument is to question the absolute prohibition of torture: if there is a case in which you would save lives by torturing – how could the ban be general and total? This line of reasoning may appear reasonable at first glance, but it is flawed and dangerous.

The scenario itself is built upon a series of assumptions the combinations of which are extremely unlikely in reality: that the captured person has the necessary information and that the police know that; that he or she will talk under torture and only then; that he or she will tell the truth; that no other means is available to obtain the information in time; and that no other action could be taken to avoid the harm.

To create legal room for exceptions from the ban on torture – the obvious intention behind the argument – would have alarming consequences. The use of torture would become a relative issue of ends and means, a question of judgment from case to case. The consequence would be the spread of torture, we would find ourselves on a “slippery slope”.

Even today with the clear and absolute ban in national and international law, torture is still a reality – ,before and during interrogations – also in European countries. Any confusion about its illegality would almost certainly increase the number of cases. This is also why the attempts of the US administration to “redefine” torture are so disquieting.

What is needed is a solid underpinning of the legal ban. Every government must make clear that nothing but zero tolerance is acceptable, that the judiciary reacts decisively on any reported case and that evidence produced under torture is never accepted in police investigations or any judicial or administrative procedures.

No one must be deported to countries where they risk torture. The attempts to overcome this prohibition through “diplomatic assurances” are not acceptable. Governments which have used torture cannot be trusted to make an exception in an individual case through a separate bilateral agreement. Moreover, respect for such promises are very difficult to monitor. It is absolutely wrong to put individuals at risk through testing such dubious assurances.

Each government should put in place an effective prevention programme. Police and security staff must be instructed on legal methods of interrogation. Capacity for disciplined, lawful behaviour must be a key factor when recruiting law enforcement personnel; unsuitable officers have to be removed.

Safeguards must be in place to guarantee that anyone arrested has prompt access to a lawyer and impartial medical examination upon arrival and release. There must be an effective system of continued, independent monitoring of all places where people are held and deprived of their liberty.

This is the intention behind the 2002 optional protocol to the United Nations Convention Against Torture (OPCAT). One obligation for states which have ratified the protocol is to establish a *national preventive mechanism* to monitor police detention cells, prisons, psychiatric hospitals, detention centres for refugees and migrants, institutions for young law offenders and any other place where individuals are held involuntarily.

Certainly, there have been systems to visit such places before in Europe. The value of the protocol is that it clarifies the mandate of these mechanisms and facilitates constructive cooperation with the special United Nations sub-committee established under the protocol.

It is up to each country to decide on the precise nature of the mechanism. In France, there is a proposal about a new institution, a *Contrôleleur General*. In the United Kingdom, several existing monitoring bodies would share this responsibility and in several other countries the plan is to leave this task to the Parliamentary Ombudsman.

Whatever model is chosen, it is important that the mechanism be fully independent and authorised to undertake visits without forewarning, with access to all places of detention - without exception. It should be staffed and funded in a manner which guarantees its independence.

The one effect which a newly established national preventive mechanism should certainly *not* have is a restriction on access to non-governmental organisations from places of detention. NGOs continue to be essential actors in the work against ill-treatment in places of detention - even where national preventive mechanisms exist.

So far, 17 member states of the Council of Europe have ratified the OPCAT, six have put in place a national preventive mechanism.<sup>33</sup>

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33. Ratifications: Albania, Armenia, Croatia, Czech Republic,\* Denmark,\* Estonia,\* Georgia, Liechtenstein, Malta, Moldova,\* Poland,\* Serbia, Slovenia,\* Spain, Sweden, Ukraine, United Kingdom (\* with a national preventive mechanism put in place).

I hope the other members will do the same. At a meeting recently in Paris a number of ombudsmen and other representatives of National Human Rights Structures in European countries discussed the implementation of the protocol.<sup>34</sup> The general opinion was that the time was ripe for more systematic work against torture – and that the Protocol is a useful basis for this renewed effort.

I am sure that such development would be welcome by serious law enforcement agencies. They know that torture is ineffective, that it tends to produce unreliable information and at the same time transform their agents into criminals themselves.

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34. This meeting was conceived and co-organised by the French Ombudsman and my Office to foster the sharing of thoughts and experiences amongst representatives of International Organisations, national human rights structures, NGOs and other associations, on the possible ways to implement the OPCAT provisions. More information at: [www.coe.int/t/commissioner/Activities/news2008/080118OPCAT\\_en.asp](http://www.coe.int/t/commissioner/Activities/news2008/080118OPCAT_en.asp).

# Mind the gap – women are underpaid all over Europe

3 March 2008

Equal pay for equal work is a fundamental principle of justice. This is one of the core standards of the International Labour Office (ILO) and a central provision in the agreed treaties on economic and social rights, including the European Social Charter. However, surveys demonstrate that salaries of women continue to be considerably lower than those of men and that the trend towards closing the gap is slow. This is a symptom of structural injustice that should be tackled much more forcefully by responsible politicians than has been the case so far.

Last year the European Commission presented a report showing that women in EU countries earned on average 15 % less than men - compared to 17 % ten years earlier. In some countries the gap was even wider, for instance in Cyprus, Slovakia, Estonia, Germany and the United Kingdom.<sup>35</sup>

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35. See COM (2007) 424 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *Tackling the pay gap between women and men*.



“The gender pay gap is both an injustice in itself and a symptom of other injustices towards women.”

There is less statistical data available for other parts of Europe but it seems clear that the pattern there is more or less the same.

These are facts which have to be analysed. There are still cases of blatant injustice in the sense that women are less paid than men in identical jobs. Such gaps are often “disguised” through different job titles or job classifications while the actual work is the same – this should be seen as nothing but false cosmetics.

A major factor is that large job sectors dominated by women are less paid than typically “male professions”. Though some of these stereotypical dividing lines are now being penetrated – not least through advances in the education system – there is still a need to reassess the inherent importance of some professions, for example, in the health, child care and education sectors. The skills, competencies and responsibilities required for these jobs must be fully recognised.

Other forms of indirect or hidden discrimination have crept into personnel policies in too many work places: gender biases in the methods of job evaluation as well as in the grading and remuneration systems.

The well-known phenomenon of the “glass ceiling” is based on outdated attitudes. Though there has been an important breakthrough in some countries, women continue to be grossly under-represented in higher level positions. It is still relatively rare that women are welcomed in management jobs. This is not only unfair but also a tremendous waste - great competence is lost today, not least in the private sector.

The other side of that coin is the fact that men in general still take a limited responsibility for household obligations and the support of their children. One EU report showed that while men on average spent seven hours a week for such unpaid work, women invested much more time in this area: 35 hours by those who worked part-time and 24 hours by those with full-time employment.

Another negative tendency, though often more difficult to identify, is that women are denied promotion or employment because male managers or employers fear that they may become pregnant or have to stay at home sometimes with sick children. Such discrimination should just not be accepted.

A reflection of the gender difference regarding the care of children is that many more women work part-time than men. This in turn affects careers and wage levels. The availability of day care services for children is therefore also important for the development towards gender equity on the labour market.

It must be possible to combine paid work and child care – for both women and men.

A real challenge is to ensure that women who take leave for child-bearing are not disadvantaged in their professional future. Provisions for paternity leave, where existing, have had positive effects in encouraging parents to share responsibility for the upbringing of children. These should be extended. In many countries, paternity leave for fathers is restricted to two weeks.

In other words, the gender pay gap is both an injustice in itself and a symptom of other injustices towards women. As these phenomena of discrimination to such a large extent rest on deep-rooted attitudes, good laws are not sufficient. There is a need for a comprehensive, political approach based on clear signals from the executive powers.

The authorities in their role as employers must set an impeccable example. They must implement fully the principle of equal pay for work of equal value within the government administration at all levels; tackle the problem of the “glass ceiling” for females; and promote reforms in the labour market with a child-care friendly profile.

Private employers and their collective bargaining partners should be called upon to develop gender-neutral salary scales and set up procedures to detect gender discrimination in pay scales.

Tackling the gender pay gap problem is urgent for the whole society – for women, men and children.

## States should not impose penalties on arriving asylum-seekers

17 March 2008

A minimum of solidarity with those oppressed is to receive them when they are forced to flee. The “right to seek and to enjoy in other countries asylum from persecution” is indeed a key provision in the Universal Declaration of Human Rights. Sadly, this right is not fully observed in parts of Europe today. Instead, refugees are met with suspicion and too often even placed in detention.

It has to be repeated that some of those who seek to enter Europe have well-founded fear of persecution. They are under threat because of their ethnicity, religion, nationality, political opinion or membership of a particular social group. Some of them have already suffered serious ill-treatment in their country of origin. They are refugees who have been *forced* to migrate.

Their background distinguishes them clearly from other migrants and has made it necessary to provide them with a special protective status under international law. Unfortunately, that status is not always respected. Some of the actions taken to deter groups of migrants from arriving have made it impossible for refugees among them to apply for asylum.

Refugees who have entered the country without a permit should not suffer a penalty. Restriction of their freedom of movement may take place only on exceptional grounds. These have been fundamental principles established in international refugee law for almost 60 years.

The 1951 UN Refugee Convention (as amended by the 1967 Protocol) has prescribed in Article 31 that “Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who (...) enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

States may only restrict refugees’ freedom of movement if such restrictions are considered “necessary”, that is, in clearly defined exceptional circumstances and in full consideration of all possible alternatives. The United Nations High Commissioner for Refugees has been stressing this principle for many years.<sup>36</sup>

This position was clearly endorsed by the Council of Europe’s Committee of Ministers in 2003 when it adopted Recommendation Rec (2003)5 to member States *on measures of detention of asylum seekers*. In 2005, the European Union also expressly accepted this principle in Article 18 of the Council Directive 2005/85/EC on minimum standards on procedures for granting and withdrawing refugee status.

The conclusion of these standards is that detention upon entry of asylum seekers should be allowed only on grounds defined by law, for the shortest possible time and only for the following purposes:

- to verify the identity of the refugees;
- to determine the elements on which the claim to refugee status or asylum is based;
- to deal with cases where refugees have destroyed their travel and/or identity documents or have used fraudulent documents to mislead the authorities of the country of refuge;
- to protect national security or public order.

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36. See UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the detention of Asylum Seekers*, February 1999, [www.unhcr.org](http://www.unhcr.org).



Asylum-seekers, Calais, France  
Photo © René Collin

“Refugees are particularly vulnerable persons; they need special protection by the States of refuge.”

Like all limitations to fundamental rights and freedoms, these exceptions should be applied *restrictively*. Some vulnerable categories, for instance unaccompanied children must should never be detained. Unfortunately, my own experience and information I receive from credible sources show a very different reality.

For example, I am worried about reports on the situation of refugees in the Aegean Sea and the detention by the national coast guards of all new arrivals, including asylum seekers. Among those detained on border islands have been disabled persons, pregnant women and minors. This is not the only case; clearly, the treatment of those arriving to some other parts of Europe also requires review.

The detention of persons who have claimed asylum but whose claims have been refused is a matter of concern as well. Again, such deprivation of liberty can only be defended if there is an objective risk that the individuals would otherwise abscond and

that alternative measures like regular reporting do not exist. Such detention, if necessary, should be limited in time and open to challenge before a judicial authority.

I am concerned by the fact that some EU member States detain asylum seekers when their transfers are under way to the member State responsible for examining their application, in the context of the “Dublin II Regulation” (No 343/2003).

The “Dublin II Regulation” should be revised in order to reflect the basic principle of non-detention of asylum seekers. An effective EU-wide monitoring system is also necessary so that places used for detaining asylum seekers are under constant surveillance by an independent organ. Special attention, in this context, should be paid to the widely used detention in airport (transit) areas.

The need for common European procedures in this area is obvious. I have met government representatives who have been worried that a rights-based policy would send “signals” which would attract further refugees. That attitude tends in turn to feed a negative chain-reaction. Policies should instead be coordinated on the basis of the agreed human rights standards.

I sincerely hope that the judgment of the European Court of Human Rights’ Grand Chamber in the case of *Saadi v UK* (29/01/2008) will not be understood as a justification for a general practice of detention. The Court accepted, in effect, that a State may detain an asylum seeker for seven days “in suitable conditions” for a fast-track procedure, if that State is confronted with an “escalating flow of huge numbers of asylum-seekers”.

No doubt, an increase of asylum applications may cause administrative problems. This, however, should not be seen as a reason to allow the corrosion of an established international law principle that proscribes the detention of asylum seekers upon entry. It is important that the *raison d’État* does not automatically prevail over the *État de droit*.

In view of the above, I think it would be useful to recall and stress some crucial principles that the European States have already accepted, at least in law:

- refugees are particularly vulnerable persons subject to persecution in their countries of origin; thus, they are in need of special protection by the States of refuge;

- the non-detention of asylum seekers upon entry should remain a fundamental international law principle, respected by States in practice;
- detention should be allowed restrictively only in the four aforementioned situation;
- detention should take place in special detention facilities for refugees;
- alternatives to detention measures should be considered by States and provided for clearly in domestic legislation;
- states should always provide special attention and care to particularly vulnerable refugees, such as those who are torture or other trauma victims, unaccompanied minors, pregnant women, single mothers, elderly persons or persons with mental or physical disability;
- states should effectively apply the procedural and substantive safeguards provided for by Article 5 (Right to liberty and security) of the European Convention on Human Rights;
- state organs dealing with asylum seekers in detention should be specially trained and subject to a continuing, special training.

These are not just humanitarian principles. Under international human rights and refugee law they correspond to individual rights which, in turn, engage State responsibility.

The principle and practice of asylon is a challenge for modern Europe but its origins are found on this continent. European States should try harder to cope effectively with this challenge and to live up, at the same time, to their own tradition.

# The key to the promotion of Roma rights: early and inclusive education

31 March 2008

In many European countries, the Roma population is still denied basic human rights. They remain far behind the majority populations in education, employment, housing and health standards and have virtually no political representation. Many Roma live in abject poverty and have little prospect of improving their lives or integrating within wider society. Their exclusion feeds isolationism which in turn encourages anti-Ziganism among the xenophobes. It is absolutely crucial that more efforts be made to break this vicious cycle.

Europe has a shameful history of repression and violent atrocities against the Roma. This has of course left scars in the Roma communities. There have been little in the way of official recognition of these cruelties, only meagre reparation and minimal apologies. The recent decision to establish a memorial in Berlin in respect of the Roma victims during the Nazi era is a welcome exception to the norm.

This tragic history in combination with continued daily discrimination – including hate speech and sometimes physical attacks by racist extremists – have not helped the Roma people feel welcome within the broader community. This lack of trust must be understood by the responsible politicians.

Because of anti-Ziganism, many Roma have been afraid to display their Roma identity openly. This is one reason why the number of Roma in national censuses is usually much lower than the real figure. The stereotypes which reduce the voice and identity of the Roma people must be exposed. We must move to recognise the contributions Roma have already made to European societies and cultures. This is one aim of the ongoing Council of Europe campaign *Dosta!* (Enough! in Romani).

Fortunately, it is no longer true that the social marginalisation of Roma is ignored. The problem has been placed on the political agenda throughout Europe and a number of international organisations have developed programmes for the Roma. The Council of Europe promotes a special forum for Roma and Sinti while the OSCE office in Warsaw for Democratic Institutions and Human Rights (ODIHR) is assisting member countries in implementing concrete development programmes.

Among the non-governmental organisations, the Open Society Institute has been particularly constructive through its program for *Equal Access to Quality Education for Roma* which supports the Decade of Roma Inclusion 2005-2015. The European Roma Rights Centre in Budapest provides an outstanding contribution through its critical monitoring reports.

Evaluations of the results so far have been disappointing. Some of the aid programmes have not been well designed and, for instance, fail to pay sufficient attention to the crucial need for partnership with the Roma themselves. However, it is also clear that these problems run deep and cannot be resolved in a few years.

There is not one simple, single solution. While anti-Ziganism is a threat to all efforts to ensure the Roma of their rights, several existing and acute social problems are interlinked. If you cannot get a job, you cannot improve your housing. Poor housing conditions in turn affect one's health and also the education of one's children.



Photo © UNICEF / Giacomo Pirozzi

“In several countries, Roma children are placed almost automatically in special classes for pupils with learning problems. This discrimination is unacceptable.”

If Roma children do not receive sufficient schooling they will be disadvantaged in the job market. And so on.

In other words, a comprehensive programme is needed to tackle all these problems simultaneously. However, there is one aspect which must not be excluded if the vicious cycle is to be broken: *quality education*.

Many Roma children remain outside national education systems altogether. There is a high drop-out rate among those who enrol and the achievements in general among Roma pupils are low. One explanation is of course the high levels of illiteracy among parents.

This is the core of the problem and requires more analysis based on relevant data, a clearer policy, and stronger action. It is important to recognise the value of *preschool education*, in order to lower the entry threshold for children coming from a background where studying has no tradition.

Unfortunately, not all pre-school education is free of charge. Furthermore, such schools may not exist in the Roma neighbourhood raising the problem of transport which can be expensive and cumbersome for the families. Governments should make concerted efforts to remove such barriers.

By way of one example, the National Programme on Roma in Latvia 2007-2009 stresses the importance of outreach to the parents and advocates the importance of preschool attendance:

“Though Latvian regulations have required attendance at pre-schools for children aged 5 and 6 since 2003, many Roma parents are still not informed of this requirement. Compared to other children, Roma children are thus disadvantaged from the very outset of the education process, having not received sufficient preparation for the beginning of primary school.”

Another major problem is the improper placement of Roma children in special schools or classes for pupils with intellectual disabilities. In my work as Commissioner, I pay a special attention to this issue. I visited schools in several countries where Roma children were placed almost automatically in special classes for pupils with learning problems even when it was recognised that the child was obviously capable despite having had little study encouragement from home. This discrimination is unacceptable. My reports recommend adequate measures to the concerned Governments to revert the situation, and my Office is engaged in a constant monitoring of the developments.

The Roma segregation in education has been also addressed by the European Court of Human Rights which on 14 November 2007 delivered a landmark ruling in the case *D.H. and others v. the Czech Republic*. This brought new focus to the over-representation of Roma in such settings.

In the *D.H. case*, the European Roma Rights Centre demonstrated to the Court that Roma students in the Czech Republic were 27 times more likely than similarly situated non-Roma to be placed in special schools. The Court found that this pattern of racial segregation violated the European Convention (Article 14 on non-discrimination and Article 2 of Protocol 1 on the right to education).

Interestingly, the Court also noted that the Czech Republic was not alone in this practice and that discriminatory barriers to education of Roma children were present in a number of other European countries. This remains true.

Quality education for Roma pupils requires material in the children's mother tongue. Although this is not easy considering the different variations and dialects of the Romani language, it is still a right for the Roma children and efforts should be undertaken to meet this need.

Teachers in the ordinary schools may need special training to handle diverse classrooms. Today there are not many Roma teachers and it is certainly critical that their numbers increase. More could be done to ensure that other staffs in schools are recruited with a Roma background. Experiments with Roma class assistants in some schools have produced positive results.

It cannot be overstated how important it is that the schools establish contact with Roma parents. This has not worked well in most cases, greater efforts are necessary. The adult generation must be welcomed and also offered, belatedly, a chance to basic education themselves – if they so wish.



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