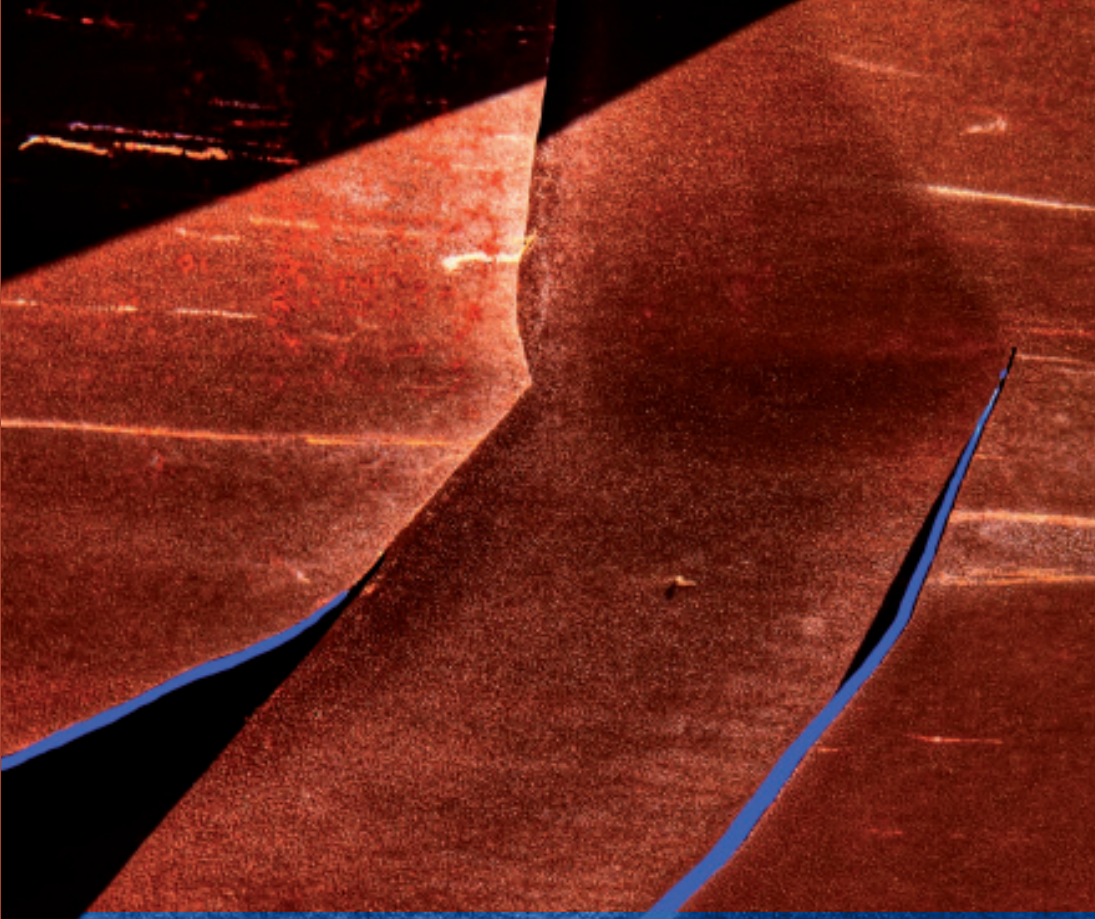

# Human Rights in Europe:
# GROWING GAPS

Viewpoints by **Thomas Hammarberg**
Council of Europe Commissioner for Human Rights

COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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# GROWING GAPS

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The Viewpoints are up to date of the date of publication. Further information on subsequent ratifications can be found on the Council of Europe's treaty website at: http://conventions.coe.int/

**Contents**

# Mind the gaps!

During my missions throughout Europe I have learned that certain groups of people are particularly vulnerable to exclusion or discrimination. Among them are the Roma and other national minorities, migrants and refugees, and some religious minorities. Compared with others they are disadvantaged not least on the job and housing markets.

Many elderly people and persons with disabilities live in extremely poor circumstances – this problem has become worse during the economic crisis. Women still suffer from negative pay gaps and job discrimination and even in the richest countries there is deep child poverty in disadvantaged communities.

In comparison with other parts of the globe, Europe is a fairly rich continent. However, of the about 800 million people in the broader Europe more than 150 million are estimated to live in poverty (living in households with less than half the median income).

The poor and the marginalised tend to lack influence and opportunities to make their voices heard. Surveys have shown that they feel ignored by political parties and they often appear to have little confidence in the authorities.

When they are victims of crime, they hesitate to report this to the police – because of mistrust. In the courts, they are at a disadvantage in comparison with those who can hire prominent lawyers and in prisons they are over-represented.

Children living in poverty often have little support to cope with problems in school. Some of them do not speak the dominant language and are therefore doubly excluded. They risk losing the ticket to jobs and a life in which one's rights are respected. Social exclusion is passed on from one generation to the next. Inequalities prevent social mobility.

These problems are not new. The gaps between the rich and the poor have in fact been on the increase in most European countries during the past two or three decades. The current economic crisis – with continued high unemployment rates and reduced resources for social welfare – puts a further burden on those who are already disadvantaged.

Those deprived – particularly the younger ones – are probably more aware of these injustices than earlier generations were. The contrasts have become starkly highlighted through modern information facilities. It is not difficult to see the risk of growing strains on the social cohesion on which our societies – and security – are based.

The obvious conclusion is that the gaps must not be allowed to grow further; social justice has to be restored. We need to remember that the Universal Declaration of Human Rights provides that "all human beings have the right to a standard of living adequate for their health and well-being, including food, clothing, housing and medical care" (Article 25).

The UN Covenant on Economic, Social and Cultural Rights and the European Social Charter have given further substance to these rights and highlight the necessity of implementing them without discrimination.

Another key human rights instrument to address injustice in Europe is Protocol No. 12 to the European Convention on Human Rights which sets out a general prohibition against discrimination. This general prohibition also covers discriminatory treatment regarding social rights. When ratified by a member state this norm becomes the basis for applications to the European Court of Human Rights in Strasbourg. So far 17 of the 47 Council of Europe member states have ratified this Protocol, others will certainly join in due time.

However, we have to realise that social justice cannot be established only through the traditional human rights instruments, even if they are updated and modernised. The enormous gap between the haves and have-nots is a major ethical, ideological and political challenge – the resolution of which will have to affect many aspects of our societies.

It is necessary to analyse in more depth how this gap has emerged and grown. The link between the enormous wealth of some and the extreme poverty of others has to be analysed. The reckless speculations that caused the banking crisis – leading to untold tragedies among many ordinary people – have illustrated the need for regulation.

Corruption is widespread, almost endemic, in several European countries. Too many politicians have allowed themselves to exchange favours with big business interests. When corrupt practices are tolerated in local and central government administration, poor people suffer from the consequences and are forced to pay bribes for services which they should receive for free as of right.

The unequal status of women is another reflection of continued discrimination and, at the same time, a source of injustices on a broad scale. It is estimated that about two thirds of those who live in absolute poverty are women. They are often in a weak position in poor communities and the barriers which prevent them from asserting their rights can be almost insurmountable. This is a tremendous loss for the whole of society.

This is also a question of basic attitudes. Unfortunate rhetoric, for instance, that the poor have themselves to blame for their fate, has been put forward as an excuse for political passivity. There has also been a tendency to see marginalised groups as security threats rather than as people in need.

In this atmosphere of xenophobia and reduced empathy, extremist political groups have an increased possibility to spread their message of fear and hatred. This is a threat against democracy itself – calling

for reflection and action. It is also one of the most difficult human rights challenges: to build a society in which every one is included and no one is left behind.

Several of the 26 viewpoint articles in this publication raise issues relating to discrimination and marginalisation. Some of them point to other gaps. One of them is the distance between the agreed norms on human rights and the continued violations – the implementation gap. Another is the striking difference between the rhetoric of politicians, not least during the election campaigns, and what is delivered when they are in office.

These gaps are of course inter-related, different sides of the same problem. They tend to undermine public trust in the possibility of social justice. I have become worried about this credibility gap and its consequences for democracy and, thereby, the protection of human rights – for all.

When writing the articles, I attempted to indentify the problems, to refer to already agreed human rights standards and to recommend meaningful action. I tried to provide honest criticism and constructive advice.

The texts reflect my reaction to problems I witnessed during visits to a large number of European countries where I met leading politicians, prosecutors, judges, ombudsmen, religious leaders, journalists, civil society representatives, migrants and ordinary citizens – including inmates and staff in institutions. After the country visits, special reports with recommendations were published on www.commissioner.coe.int.

The Director of the Commissioner's office, Isil Gachet, has given invaluable advice on the selection of issues and approach of argumentation. I am grateful to her.

*Thomas Hammarberg*

Strasbourg, 1 April 2010

# Racism: Europeans ought to be more self-critical and remain open to thorough and frank UN discussions

14 April 2010

Europe is not a racism-free zone. An intensified struggle against xenophobia and intolerance is acutely needed in most European countries. Hate crimes must be stopped and action taken against discrimination in employment, education, housing, sport and other social contexts. All this requires an honest recognition of the problems and political will to plan and enforce effective counter measures. A self-critical attitude would be the most convincing European contribution towards the efforts of the United Nations to develop a global strategy against racism.

During my visits to European countries, I have met people who are victims of racist acts, xenophobia and other forms of intolerance. Among them are the Roma, Sinti and Travellers, Africans or persons of African descent, members of Jewish communities, members of Muslim communities, national, ethnic or religious minorities, indigenous peoples, migrants, refugees, asylum-seekers and victims of trafficking in human beings.

Many of these persons are actually victims of multiple forms of discrimination because of their race, descent, national or ethnic origin, sex, gender, religion or belief, age, disability, sexual orientation, gender identity or other grounds. All the underlying causes need to be identified and addressed in order to improve their situation.

In some countries, political parties with xenophobic agendas have gained popular support and in some cases even won elections. With the worsening global economic crisis this trend is likely to continue, unless strong political action is taken to ensure the equal worth and dignity of every human being.


"Governments should implement further and more effective measures to fight racism and intolerance."

Many European countries have adopted comprehensive legal frameworks and national action plans. However, studies show that the implementation of anti-discrimination legislation remains uneven and that sanctions are often not applied effectively. The existing equality bodies need strong independent mandates and the necessary resources to combat discrimination successfully.

The European Commission has recently proposed a new directive which would ensure that there is protection against discrimination on most grounds. It addresses the anomaly that there is now unequal legal protection against discrimination offered to different groups.

The European Convention on Human Rights bans discrimination in the application of the rights specified in the Convention "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" (Article 14).

An additional protocol (Protocol 12) goes further and stipulates a general prohibition of discrimination. I recommend all member states of the Council of Europe to ratify that protocol as well.

There are also important standards to prevent racism in electronic media. The Additional Protocol to the Council of Europe Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems outlaws acts of a xenophobic nature committed through computer systems and the Internet. The European Union has adopted legislation banning the diffusion of hate speech through TV channels, and most recently, the EU countries agreed on common legislative standards to criminalise certain racist and xenophobic behaviour across the Union.

Each country needs to adopt a comprehensive and coherent strategy against racism, xenophobia and discrimination. The national action plans should identify the groups which are particularly vulnerable or disadvantaged and apply positive measures in their regard.

The process of preparing, implementing, monitoring and evaluating such action plans should be inclusive and involve all stakeholders, including the victims and representatives of civil society. The plans should be based on solid facts, preferably in the form of a baseline study. Disaggregated data are key in any serious attempt to redress the situation of the victims. Plans should also serve to establish indicators or benchmarks against which progress can be measured.

In many countries, there is a deficit of information regarding patterns of discrimination and hate crimes. This must now improve. Collection of sensitive data, however, should be coupled with proper safeguards and prevent the identification of individuals belonging to a particular group.

In sum, the national strategy should include the following points:

- National and local action plans should be prepared and implemented and systems for data collection set up, including methods to analyse the frequency and type of abuse.
- States should enact robust and comprehensive anti-discrimination legislation which covers all relevant grounds of discrimination as well as multiple and compound forms of discrimination. Non-discrimination legislation should be applicable in all major areas of activity and be accompanied by penal provisions against incitement to hatred and other hate crimes.
- All groups at risk of discrimination should be equally protected, any "hierarchy" among the individual victims based on the ground of discrimination should be avoided. Proportionate application of positive measures should be authorised in favour of those groups of people who do not yet fully enjoy their human rights due to past discrimination.
- Independent and effective equality bodies should be set up to receive complaints and monitor the implementation of the legislation. The available sanctions and compensation provided for by non-discrimination legislation should be effective and dissuasive towards potential perpetrators.
- Recommendations by Council of Europe mechanisms such as the European Commission against Racism and Intolerance; European Union institutions and bodies such as the Fundamental Rights Agency; and the UN treaty bodies such as the Committee on the Elimination of All Forms of Discrimination against Women should be carefully analysed when preparing the plans.
- Human rights education should be made widely available to promote the values of tolerance and respect for others. School children, youth and government officials must be educated to counter racist, discriminatory or xenophobic tendencies and have effective knowledge which promotes tolerance and respect for others who are different.

- Human rights training should be a mandatory and regular activity for professionals who have duties in the implementation of human rights.
- Awareness of human rights among the general public should be promoted with a focus on how to access different remedies. European campaigns such as "All different – All equal" and "Speak out against discrimination" can help to raise awareness of racism, xenophobia and discrimination and ways to tackle them. Popular role models speaking up and a vibrant civil society and the media can also actively contribute to counter racism and xenophobia.
- Early warning mechanisms should be developed. Important actors in this respect are national human rights monitoring bodies, civil society and non-governmental organisations.

The UN High Commissioner for Human Rights has proposed that a Universal Observatory on Racism be set up which will receive information from states, human rights treaty bodies, national human rights institutions, victims' groups, other international or regional organisations and non-governmental organisations. It will collect statistics, legislation, policies, programmes and best practices, and carry out analytical work to discern patterns and trends worldwide. This initiative deserves our support and is one of the proposals that might be discussed at a UN conference on racism in Geneva from 20 to 24 April.[1]

The purpose of that meeting is to review the implementation of the United Nations Durban Declaration and Programme of Action (DDPA) which resulted from a world conference in Durban, South Africa, in 2001. These two documents represent ambitious and comprehensive road maps to fight racism, racial discrimination, xenophobia and related intolerance for the international community.

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1. Contribution by the Council of Europe Commissioner for Human Rights to the Durban Review Conference (20-24 April 2009), document CommDH(2009)11.

The preparatory process for this review meeting has been difficult and extremely politicised. My appeal to all governments is to be constructive and not abstain from this crucial global exchange about what remains to be done to implement further and more effective measures to fight racism and intolerance.

# Anti-Gypsyism continues to be a major human rights problem in Europe – governments must start taking serious action against both official and inter-personal discrimination of Roma

27 April 2009

New pledges were made on International Roma Day to combat anti-Gypsyism. At the same time we received information that a group of Roma children, arrested in Kosice in eastern Slovakia, had been forced to strip and slap one another violently in the face in the police station where they were held. In Belgrade, a number of Roma families were suddenly evicted from their homes without alternative accommodation being offered to them. In Mitrovica, I witnessed Roma who continue to live in conditions dangerous to their health in lead-contaminated camps.

When the sadistic incident of police brutality in Slovakia became public, having been filmed and later leaked to the media, the involved policemen were suspended. Still questions remain. Was this event unique or have similar violations taken place before? Did the policemen know that this was totally unlawful? Did they even fear repercussions (one of them operated the camera)? Is there a serious gap in the training or instruction of the police and, therefore, does responsibility for these actions lie higher up?

These questions will certainly be investigated in Slovakia and further action taken. What is likely to remain, however, is the perception that such humiliation would not have taken place if the children had not been Roma. Certainly, this will be the conviction within the Roma community itself.

The EU Fundamental Rights Agency (FRA) has collected information about how Roma and other minorities feel about their situation in society. It has now published the first two parts of the survey on

"The long history of discrimination against Roma has resulted not only in poverty but also in alienation and exclusion."

minorities and discrimination in EU countries: a broad overview of the whole study and a more substantial report on the Roma, "who face the highest levels of discrimination".[1]

The Roma part of the survey focuses on seven member states: Bulgaria, the Czech Republic, Greece, Hungary, Poland, Romania and Slovakia. In each of them no less than 500 Roma respondents were interviewed.

1. European Union Minorities and Discrimination Survey (EU-MIDIS), Fundamental Rights Agency: http://fra.europa.eu.

The answers strongly confirm my own impression from missions to several of these countries – and to other European countries inside and outside the European Union:

- Half of the respondents answered that they had suffered discrimination at least once during the last 12 months and for many of them there had been several such incidents during this period (on average 11).
- The overwhelming majority of them had not reported these incidents as they did not believe that this would give any positive result. Most of them were not aware of any organisation or institution to which they could address such complaints.
- One in four stated that they were victims of personal crime at least once during the past 12 months and one in five responded that they had suffered racially motivated personal crime including assaults, threats and serious harassment.
- A clear majority – between 65 and 100%, depending on the country – did not report such crimes to the police. They did not trust that the police would be able to do anything.
- One in three Roma interviewed had been stopped by the police during the past 12 months and half of them thought this happened because they were Roma. Many of those stopped had experienced this several times, on average four times.
- The survey confirmed problems related to schooling – 30% had gone to school for only five years or less. In addition, the employment rate was generally low (from 17% in Romania to 44% in the Czech Republic).

The FRA report indicates that the long history of discrimination has resulted not only in poverty but also in alienation and exclusion. The institutions set up to receive complaints about human rights violations seem not to be known by many Roma or are not seen as open or useful for them. As incidents of harassment and racist crimes are not

reported in many cases, even today the depth of the discrimination is not fully reflected in official data. The exclusion of Roma is also a major cause of their migration in Europe. A recent study commissioned by the OSCE High Commissioner on National Minorities and my office highlights discriminatory practices which the Roma migrants currently face. The study concludes with a set of recommendations for action by states.[2]

We know that the Roma population – whether citizens, displaced persons or migrants – is worse off than any other group in Europe in relation to key social indicators on education, health, employment, housing and political participation.

This has not gone unnoticed. Twelve governments, including those in the Balkans, co-operate in a joint project called "Decade of Roma Inclusion 2005-2015" which seeks to address these problems of poverty and to enhance the Roma socio-economic status. This reflects a political commitment which hopefully will contribute to breaking the vicious circle.

At the same time, we have to conclude that progress is slow. We have learnt that there is no single reform or action which would cause a quick change for the better. Though, for example, a strong investment in education, including pre-schooling, for Roma children is essential, the results would still depend on other improvements, such as ensuring better housing conditions and enhanced health care. A comprehensive but also participatory and sustained programme is needed.

What is absolutely essential is to combat anti-Gypsyism. The continued negative attitudes of many in the majority population is a deep problem. Without changes in these, all the programmes will fail.

I believe that truth commissions on previous persecution of Roma would be useful to counter ignorance. The Council of Europe has

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2. See study on recent migration of Roma in Europe: www.coe.int/t/commissioner/Activities/themes/RomaMigration_2009_en.pdf

produced unique fact sheets on the Roma history in Europe which would teach any serious reader about the horrible consequences of anti-Gypsyism in the past – mass killing of Roma during the Nazi and fascist era but also other atrocities committed against these people for several generations.[3]

There is still too little factual, informative education about the Roma culture and history in ordinary schools. Production of national learning material can draw from the Council of Europe fact sheets – which, indeed, the Italian Government has recently decided to do.

Hate speech must be stopped. It is crucial that leading politicians and other opinion makers avoid anti-Roma rhetoric and, instead, stand up for principles of non-discrimination, tolerance and respect for people from another background. I have previously been prompted to react against some stereotyping statements by politicians, for instance, in Romania and Italy and have noticed that such statements are now becoming more rare.

However, politicians also express themselves through concrete decisions, and it still happens that mayors or other local authorities take steps which violate human rights of Roma communities. A recent example was when people were chased away from a Roma camp in Belgrade in a manner which did not follow acceptable procedures for eviction.

The eviction came as a surprise to the Roma who had been promised a later deadline and had not been offered appropriate alternative accommodation. The situation became worse when the locals attacked the Roma who had been relocated to temporary containers in one of the suburbs. These mistakes were not planned – and were regretted by the central government – but indicated a lack of serious care and human rights considerations by the local authorities. Would this have happened to non-Roma?

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3. http://romafacts.uni-graz.at

In north Mitrovica in Kosovo[4], I recently visited a Roma, Ashkali and Egyptian camp which had been established in a severely lead-contaminated area. Several years ago it has been established that living here was hazardous, in particular for children and pregnant mothers. This health danger had been convincingly proven by a medical team from the World Health Organisation as early as 2004. Now, five years later, many of the Roma still live on this toxic site.

Even considering the complicated political situation in north Mitrovica, it is utterly unacceptable that the camp inhabitants have not been assisted to move. It is even more embarrassing that the international community is at least partly responsible for this failure. The inhabitants I talked to were convinced that their situation would have been resolved long ago if they had belonged to another ethnic group. Unfortunately, I cannot but share their conviction.

4. "All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo".

# The response to the crisis must include a shift towards more equality

11 May 2009

Measures against the economic crisis should not only focus on restoring the banking system and encouraging investments and more spending. There is also an urgent need to protect vulnerable groups from injustice.

To prevent a financial meltdown, governments have used colossal amounts of tax payers' money to bail out toxic debts. Moreover, key industries in a number of countries have been given state support to survive the crisis. At the same time increased unemployment is placing a further burden on the national budgets: less income and more expenditure.

The argument has already been made that there is now no room for social assistance to match growing needs. If that attitude gains ground there is a risk that the crisis will turn into a political and social one as well. People may not accept a lowering of their standards while financial institutions, widely regarded as having acted irresponsibly, are subsidised.

When speaking to the Council of Europe's Parliamentary Assembly in Strasbourg in late April, the Spanish Prime Minister Zapatero recognised the necessity to meet the needs of those who are now particularly vulnerable – those who will suffer the most from the adverse consequences of the crisis.

Mr Zapatero pleaded for solidarity with the poor, describing poverty as the main reason for social backwardness and violations of human rights, not least the rights of women. "The only way to guarantee our welfare is fighting poverty. This is not only a moral must. This is not

"The current crisis ought to be a turning point for concrete measures to restore social justice."

only a matter of image. This is a political responsibility", the prime minister said. Towards the end of his speech he added that the crisis should also be seen as an opportunity, a chance for positive change.

Such a change requires that protectionist tendencies are not promoted in government programmes. Fortunately, there seems to be a widespread recognition that solutions must be sought across borders, through multilateral agreements and inter-state initiatives beyond narrow national interests. It was significant that Mr Zapatero referred to the Millennium Development Goals; the new global order must include a genuine solidarity with developing countries.

Another positive trend is the acceptance that governments must play a more active role in preventing unethical business practices and

correcting structural market deficiencies. There is a clear link between this request and human rights, not least social rights. It is of great importance that human rights principles are given emphasis in the ongoing discussions on the lessons learned from the crisis.

The time is long overdue for a serious attempt to address the enormous gap between the wealthy and the destitute, between those who have the means and the contacts and those who are marginalised and powerless. In a globalised and inter-connected world such injustices should no longer be accepted or even possible.

In his inauguration speech, President Obama made the point that the crisis is not only the result of the reckless risk-taking of bank officials or the "greed and irresponsibility on the part of some". It was also, he said, the result of "our collective failure to make hard choices and prepare the nation for a new age".

That new age will not arrive if we continue to ignore the deep inequalities and injustices in our societies. These undermine social cohesion and thereby security for all. And certainly they violate the principles of human rights which we have pledged to respect over and over again.

Even in Europe there are large groups of people who are poor and marginalised. They tend to lack influence and opportunities for making their voices heard. In many cases they feel ignored by political parties and, in general, they have little confidence in the authorities. They are often victims of crime but can mistrust the police. In the courts they are disadvantaged in comparison to those who can hire prominent lawyers and they are over-represented in prisons.

The poor tend not to receive the right education which in our society provides the ticket to a life in which one's rights are respected. Many are also marginalised because they belong to a minority; some of them do not speak the dominant language and are therefore doubly excluded.

There is a gender aspect to these injustices as well. It is estimated that about two thirds of those who live in absolute poverty are women. This is not by accident; it fits into the general pattern. Women tend to have

a weak position in poor communities and the barriers which prevent them from asserting their rights can be almost insurmountable.

The current crisis ought to be a turning point for concrete measures to restore social justice – we must not allow these gaps to grow even further. It has to be recognised that the crisis goes deeper than obvious economic failures; it touches basic confidence and ethical values. It is time to start rebuilding a cohesive society which excludes no-one and leaves no-one behind.

This is our human rights challenge. The Universal Declaration of Human Rights provides that all human beings have the right to a standard of living adequate for their health and well-being, including food, clothing, housing and medical care (Article 25).

There has been some resistance to recognising these rights in the United States – including the right to education – as full human rights. Even in Europe there have been voices arguing that an adequate standard of living cannot be more than an ambition. However, an overwhelming majority of countries have ratified the UN International Covenant on Economic, Social and Cultural Rights and the European Social Charter (revised) has received further endorsement. A majority of the Council of Europe states have now ratified the charter in its original or revised form.[1]

Another key instrument to address injustice in Europe is Protocol 12 to the European Convention on Human Rights which sets out a general prohibition against discrimination. It lists a number of unacceptable grounds for discrimination by way of example, but goes on to state in Article 2 that no public authority should discriminate against anyone on whatever ground.

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1. Thirteen Council of Europe member states have ratified the 1961 Charter and 27 member states have ratified the 1996 Charter.

   Seven member states have ratified neither charter, namely Liechtenstein, Monaco, Montenegro, Russia, San Marino, Serbia and Switzerland.

This general prohibition will also cover discriminatory treatment on social rights. When ratified by member states this norm becomes the basis for applications to the European Court of Human Rights in Strasbourg. Seventeen Council of Europe member states have now ratified this protocol. I hope that more member states will make the same move.[2]

In fact, many countries have now adopted a comprehensive anti-discrimination law against all forms of discrimination, on whatever ground. Ombudsmen or other offices are established to promote equal opportunities and non-discrimination. However, major aspects of social injustice are often not tackled in the context of these efforts against discrimination. The focus has instead been on status-based equality such as gender or race.

A distinction between these two forms of injustice is artificial. In fact, they are in many real life cases totally intertwined as is demonstrated, for instance, through the phenomenon of female poverty.

The Equal Rights Trust, a non-governmental body based in London, has recently presented a Declaration of Principles on Equality, which argues that both these types of injustice must be tackled through a comprehensive approach. The text was drafted by human rights and equality law specialists and though it has no formal status, it has been endorsed by a great number of international human rights experts.[3]

One of the major points in the declaration is that positive or affirmative action is necessary to overcome past disadvantages and to accelerate progress towards the equality of particular groups. It also makes clear that equal treatment is not the same as identical treatment. To realise full and effective equality it is necessary to treat people differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals.

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2. Seventeen Council of Europe member states have ratified Protocol 12 and 20 member states have signed but not ratified the protocol.

3. www.equalrightstrust.org

Social justice cannot be established only through the traditional human rights instruments, even if updated and modernised. The enormous gaps between the haves and have-nots is a major political and ideological challenge, the resolution of which will affect profoundly many aspects of our society. And this, in turn, will promote the realisation of all the agreed human rights standards.

Perhaps this was what the drafters of the Universal Declaration had in mind when they wrote (Article 28): "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised".

# Governments should open up channels for civil society complaints against violations of social rights

25 May 2009

The protection of social rights will be further tested during the current economic crisis. Like other human rights they are enshrined in treaties agreed by governments, one of them being the European Social Charter. The challenge is to ensure that these agreements are enforced in reality. This requires that people are informed about them and have an opportunity to complain when they find their rights violated. In this way, active civil society groups can provide a valuable contribution.

The support for the European Social Charter (revised) has broadened in recent months. Hungary and the Slovak Republic have ratified this instrument and the Russian Federation and Serbia have initiated a process for taking such a decision within the near future. A clear majority of the Council of Europe member states have now bound themselves to respect the Charter in its original or revised version.[1]

This is progress. However, the key point about human rights norms is their enforcement in real life. To ensure realisation of the Charter, a monitoring body, the European Committee of Social Rights (ECSR), was set up to review reports from states parties about steps taken for implementation. The conclusions of the committee are submitted for further action to a governmental committee.

One further element has been added to this mechanism. The experience in the International Labour Organisation has demonstrated the value

1. Of the 40 states which have now ratified the European Social Charter, 27 are bound by the revised Charter and 13 by the 1961 Charter.


"The procedure of collective complaints contributes effectively to the enforcement of social rights."

of a channel for receiving submissions from social partners about concrete violations. Drawing from this experience, a system of collective complaints was established through a protocol to the European Social Charter.

This mechanism has existed now for more than 10 years but only 14 states have decided to be party to it.[2] This is a pity because the collective complaints procedure contributes effectively to the enforcement of the social rights guaranteed by the Charter.

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2. These are: Belgium, Bulgaria, Croatia, Cyprus, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden.

Previously, the European Committee of Social Rights had been limited to developing its case law under the reporting procedure by examining the reports submitted by member states and deciding on conformity with the Charter. With the complaints procedure, the verification process has been given a new dynamic. It allows the committee, in its own words, "to make a legal assessment of the situation of a state in the light of the information supplied by the complaint and the adversarial procedure to which it gives rise".[3]

Collective complaints may be submitted by international organisations of employers and trade unions which participate in the work of the governmental committee,[4] other international non-governmental organisations enjoying participatory status with the Council of Europe as well as national organisations of employers and trade unions of the contracting parties concerned. In addition, each state may, in a special declaration, authorise national non-governmental organisations to lodge complaints against it. Only Finland has so far done so.

The complaints are examined by the ECSR and declared admissible if the formal requirements are met. Then a written procedure is set in motion, with an exchange between the parties. Other states parties, as well as the employers' organisations, and the trade unions may also submit observations.

The ECSR may decide to hold a public hearing. Subsequently, it takes a decision on the merits of the complaint, which it forwards to the parties concerned and to the Committee of Ministers in a report, which is made public within four months. The Committee of Ministers adopts a resolution. If appropriate, it may recommend that the state concerned takes specific measures to bring the situation into line with the Charter.

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3. Decision as to the admissibility: *ICJ v. Portugal* (Collective complaint No. 1/1998), 10 March 1999, paragraph 10.

4. European Trade Union Confederation (ETUC), BUSINESSEUROPE (formerly UNICE) and International Organisation of Employers (IOE).

Despite the low number of states parties to the procedure and its quasi-judicial character, it has clearly exceeded expectations. The Committee has dealt with key issues of vulnerability and discrimination:

- insufficient protection for autistic children;
- discrimination both in law and in practice against Roma in the field of housing;
- insufficient medical assistance to children of illegal immigrants;
- corporal punishment of children;
- inadequate state prevention of the impact for the environment in the main areas where lignite was mined and lack of appropriate strategy in order to prevent and respond to the health hazards for the population;
- unsatisfactory implementation of the legislation on the prevention of evictions and the lack of measures to provide re-housing solutions for evicted families;
- discrimination in the education of children with intellectual disabilities;
- environmental hazards and lack of adequate health care for Roma.[5]

In its role as authentic interpreter of the Charter, the ECSR has demonstrated that it does not operate in vacuum. It has built on the Council of Europe's norms with particular reference to the European Convention on Human Rights and when relevant to other important international norms like the UN Convention on the Rights of the Child. Its case law is now also a reference for my work as Commissioner. The European Court of Human Rights recently explained how the ECSR case law can be a source of interpretation. [6]

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5. The full list of the 57 collective complaints lodged so far can be consulted at: http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp
6. *Demir and Baykara v. Turkey* [GC], 12 November 2008.

The procedure of collective complaints has a preventive dimension. The complaints lodged before the ECSR do not deal with individual cases but with general shortcomings in law and practice. Assessments made by the committee can assist states in taking required measures to remedy a situation and thus pre-empt individual applications before the Strasbourg Court. The fact that the committee can refer to an issue dealt with in its complaints procedure when submitting its regular reports adds to this preventive aspect.

Indeed, several states have redressed a situation brought to light by way of this procedure. In November 2006, I welcomed the adoption by the Greek Parliament of a law on domestic violence, under which corporal punishment of children has become prohibited. The law's adoption had been prompted by a decision of the ECSR on a collective complaint against Greece.

In response to a complaint concerning housing rights, France undertook to take into account the decision of the European Committee of Social Rights when implementing the Act on the enforceable right to housing.

In the case concerning the right to education of children with autism, the French Government declared that it would bring the situation into conformity with the revised Charter and that measures were being taken to this effect.

The collective complaints procedure has several advantages. It is relatively fast and non-bureaucratic. Its admissibility criteria are more flexible than those before the Strasbourg Court. A complaint may be declared admissible even if domestic remedies are not exhausted and even if a similar case is pending before national or international bodies.

I sincerely hope that more governments will take steps to open this channel for complaints relating to their own countries. I hope that trade unions, employers' groups and other civil society organisations will consider using this mechanism more systematically in order to protect social rights.

# International organisations acting as quasi-governments should be held accountable

8 June 2009

When international organisations exercise executive and legislative control as a surrogate state they must be bound by the same checks and balances as we require from a democratic government. Potential abuse of governmental power is combated in normal democracies by a separation of powers between the executive, the legislative and the judiciary. Where international organisations govern, power is in some instances invested in one person or organisation with too little accountability for the consequences of the decisions taken.

Accountability in terms of a government implies that the decision-making processes are transparent, that there is good access to government information, and that there is participation from civil society and the wider population.

Accountability also entails that there is a means to review and sanction the misconduct of those invested with public powers, such as civil servants and state officials. We require actors to bear the consequences of their actions.

For a number of years, it has been accepted that principles of accountability must apply to United Nations peacekeeping operations and the UN has taken a number of steps to prevent and punish abuse and sexual exploitation in its operations.[1]

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1. Following a 2004 report, the United Nations Secretary General initiated wide-ranging reforms covering standards of conduct, investigations, organisational, managerial and command responsibility, and individual disciplinary, financial and criminal accountability. See also UN Security Council Resolution 1820 (2008) in the field of women, peace and security.


"An international accountability deficit is no good for anyone, least of all the local population."

Accountability must also apply when an international organisation acts as a quasi government.[2] The UN has been involved in a number of territorial administration missions where it acted or acts as a surrogate government, for example in Namibia, Cambodia, East Timor, Bosnia and Herzegovina, and Kosovo.[3]

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2. See the report of the Council of Europe's Parliamentary Assembly, "The State of Human Rights in Europe: the need to eradicate impunity" by Rapporteur Mrs Herta Däubler-Gmelin, 3 June 2009, in particular, Chapter vii.
3. "All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo."

In these circumstances, the "international administrations" act both as de facto local public authorities and as an international organisation.

Lack of accountability may undermine public confidence in the international organisation and thereby its moral authority to govern. Such governing promotes a climate of impunity for acts committed by their staff and sets a negative model for domestic governments.

Models of good governance, on the other hand, call for answerability which in turn enhances the credibility of the work of the organisation and acts as a dissuasive to future abuses of power and misconduct. Mechanisms to ensure accountability are still needed when an international organisation is in charge – it is not enough to just rely on their good faith.

The European Union, for example, realised that its own institutions needed a mechanism for complaints. The European Ombudsman, elected by the European Parliament, was set up precisely to deal with complaints from citizens concerning maladministration by EU institutions and bodies. Moreover, the European Court of Justice in Luxembourg is empowered to review claims from the Council of the European Union, the European Commission, the European Parliament and member states regarding the illegality of EU acts. Individuals may also challenge decisions addressed to them.

I have discussed issues related to the accountability of international actors, in particular during my visits to Bosnia and Herzegovina, and Kosovo.

Thirteen years after the signing of the Dayton Peace Agreements, international organisations are still present in large numbers in Bosnia and Herzegovina. The Office of the High Representative (OHR) in Bosnia and Herzegovina was set up to facilitate the parties' own efforts to implement the Dayton Peace Agreements. A few years later, the High Representative's powers were extended to include the ability to remove from office public officials who violate legal commitments and the Dayton Peace Agreements, and to impose laws as he sees fit if Bosnia and Herzegovina' s legislative bodies fail to do so.

I visited Sarajevo in 2006 to discuss complaints made by some 260 police officers from the national police force that had been barred from police service ("decertified") and stripped of their social and pension rights through a vetting procedure organised by the UN International Police Task Force.[4] My concern related to the limited possibility for those individuals to challenge the merits of the task force decision and the absence of an appropriate legal remedy.

The Council of Europe's European Commission for Democracy through Law (Venice Commission) had proposed that the Security Council set up a special body to review these cases.[5] After my visit, I called on all parties to find a solution which would give justice to the individuals and enhance the credibility of the international community. Unfortunately, progress to find any suitable solution is still slow.

In Kosovo, UNMIK and KFOR (a NATO-led Kosovo Force) and their personnel, are all immune from any legal process.[6] The purpose of such a rule is to ensure that international organisations can perform their tasks without interference. Of course, this does not mean that personnel cannot be prosecuted in their home countries, although there are difficulties in ensuring that such prosecutions will be initiated or effective.

Moreover, according to the 2007 admissibility decisions of the European Court of Human Rights, in the cases of Behrami[7] and Saramati,[8] the actions of KFOR and UNMIK are attributable to the

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4. "Special Mission to Bosnia and Herzegovina" report by Thomas Hammarberg, CommDH(2007)2, 17 January 2007.
5. Opinion No. 326/2004, on the possible solution to the issue of decertification of police officers in Bosnia and Herzegovina.
6. UNMIK/REG/2000/47.
7. *Behrami and Behrami v. France*, Application No. 71412/01, admissibility decision of 31 May 2007.
8. *Saramati v. France, Germany and Norway*, Application No. 78166/01, admissibility decision of 31 May 2007.

United Nations, and not to contributing member states. The result being that the Strasbourg Court has no jurisdiction over such complaints.

In 2005, the UN established a Human Rights Advisory Panel in Kosovo as a human rights accountability mechanism. The panel acts as a quasi-judicial body which is fully independent of UNMIK. However, it has faced a number of difficulties which have hampered its smooth running, including delays in the appointment of its members, lack of sufficient secretariat support, and a question mark over how UNMIK will respond to the panel's recommendations. So far, no compensation has yet been paid following an adopted opinion of the panel.

I think that UNMIK should now look at the legacy of its actions in Kosovo and stand ready to provide compensation and redress for violations of human rights. The new European Union Rule of Law Mission in Kosovo (EULEX) which became operational last December must also establish its own accountability mechanism as a priority.

What type(s) of mechanism(s) ensure accountability of international actors?

- The creation of an independent human rights court or panel in the country in question is a good option.
- Other intra-organisational methods, such as complaints or claims commissions, can work, but the temptation to prevent information from becoming public which could damage the organisation may be too great.
- The creation of an Ombudsman's office with a strong mandate is one way to hold international administration regimes accountable for breaches of authority.
- States which contribute personnel to international peacekeeping missions should ensure independent investigations, and full accountability of all those responsible for human rights violations, including through criminal, administrative and disciplinary procedures, where appropriate.

- The International Criminal Court (ICC), as a court of last resort, has jurisdiction over crimes against humanity, war crimes and genocide, also when committed by UN peace keepers.
- Reporting obligations at the international level is also a form of accountability;
- International organisations sometimes engage outside actors to perform independent assessments of their activities, as where the UN Secretary-General created an independent body to conduct an inquiry into UN conduct during the 1994 Rwandan genocide.
- International and local media and NGOs have a key role to play as watchdogs.

An international accountability deficit is no good for anyone, least of all the local population. No-one, especially an international organisation, is above the law.

# European countries should defend the International Criminal Court and request the US authorities to withdraw the idea of impunity for US nationals

22 June 2009

The new administration in Washington has taken several encouraging steps to undo the damage to human rights protection caused by its predecessors. Torture is no longer accepted, the Guantanamo detention centre will be closed and secret interrogation prisons will no longer be used. Yet, another major change is needed: the undermining of the International Criminal Court has to stop.

The atrocities in the Balkans in the early 1990s were a reminder that an effective and independent international justice mechanism was needed to end impunity for the gravest of crimes: genocide, crimes against humanity and war crimes. The Rome Statute was agreed in 1998 after lengthy intergovernmental negotiations and the International Criminal Court (ICC) was established in 2002 after 60 states had ratified the treaty. Now with 108 state parties, the Court still faces major challenges.

From the start, the United States Administration has looked at the Court with suspicion and hostility. Within the Clinton administration there was fear that the Court might be misused for politically motivated prosecutions against US nationals. Yet, President Clinton signed the statute on 31 December 2000, the very last day it was open for signature. He said that ratification was not imminent and that such a proposal to the Senate would depend on whether the Court demonstrated political impartiality.

His successor was not even willing to go that far. Just before the entry into force of the statute, President George W. Bush declared, in a letter to the UN Secretary-General, that his administration would not ratify the Treaty and that it did not accept the obligations following

"The undermining of the International Criminal Court has to stop."

from its signature. In reality, this "unsigning" meant that the US Government no longer felt obliged to refrain from acts which would defeat the object and purpose of the Rome Statute.[1]

Thereafter the Bush administration engaged in a full-scale campaign against the ICC. In 2002, it pushed the UN Security Council to adopt a resolution which requested the ICC not to begin investigation or prosecution "involving present or former officials or personnel" from a state which had not ratified the statute. This exception was renewed

1. Article 18.a of the 1969 Vienna Convention on the Law of Treaties stipulates that a state which has signed a treaty is obliged to refrain from acts which would defeat the object and purpose of the treaty in question.

in June 2003 for a 12-month period but later attempts to renew it did not win sufficient support. The US finally withdrew the resolution.

The next step was to request other governments to conclude bilateral immunity agreements with Washington which would shield current or former US government officials, military and other personnel, including non-US citizens working for the US and other US nationals, from the jurisdiction of the Court.[2] No guarantee was provided that suspects would be prosecuted in a national criminal justice process.[3]

The political and diplomatic pressure exerted to obtain these agreements was unprecedented. Programmes on military training and even development assistance were terminated for those states who refused. In 2002, the American Service-members' Protection Act (ASPA) prohibited the US to engage in bilateral and multilateral activities aimed at co-operating or supporting the ICC and authorised the use of force to free any US citizen detained in the Hague on basis of an order of the Court.

In addition, an amendment to a law on economic assistance named after its initiator, Congressman George Nethercutt, badly affected several poorly off countries when they took a principled position not to undermine the Rome Statute.

European institutions were clearly sceptical towards both the substance and the methods of this campaign and governments seeking good

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2. These agreements were also called "Article 98" agreements. Article 98(2) of the statute states that the Court "may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender." Many international law experts agreed that such agreements were contrary to international law and the Rome Statute.
3. The Rome Statute offers comprehensive safeguards against abuse for political purposes. The preamble of the Rome Statute says that the ICC shall be complementary to national criminal jurisdictions and its Article 17 provides that the Court may exercise its jurisdiction only when the state which has jurisdiction over the case is unwilling or genuinely unable to carry out the investigation or prosecution.

relations with both the EU and the US administration were in an uncomfortable position. Romania and Azerbaijan, for instance, signed the Bilateral Immunity Agreement with the US but then never ratified it.

The Parliamentary Assembly of the Council of Europe discussed this issue in various sessions. In 2003, it regretted the ongoing US campaign and stated that the agreements sought were in breach of the Rome Statute. It continued:

> *The Assembly condemns the pressure exercised on a number of member states of the Council of Europe to enter into such agreements, and regrets that the contradictory demands made on them by the United States on the one side, and the European Union and the Council of Europe on the other, confronts them with a false choice between European and trans-Atlantic solidarity. The Assembly considers that all countries should be left free to decide on their stance vis-à-vis the ICC on the basis of considerations of principle alone.*[4]

In the end, only four European states ratified the immunity agreement: Albania, Bosnia and Herzegovina, Georgia and "the Former Yugoslav Republic of Macedonia". In my subsequent discussions with government representatives from these countries, I did not detect any enthusiasm for the agreement.

Significantly, not even half of the agreements became legally binding as many governments never followed up on their first promises to the US administration. Of the 102 signed agreements, only 21 were ratified by parliaments and only 18 others were described as executive decisions, which would not require ratification.

Even within the Bush administration, enthusiasm appeared to fade with time. The number of exceptions to the ASPA increased and, in the end, punitive actions were no longer sought.

The new administration is certainly more positive. The sanctions foreseen by the bilateral agreements have been waived and Secretary of

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4. Parliamentary Assembly Resolution 1336 (2003), 25 June 2003.

State, Hillary Clinton, stated to a Senate Committee that the "hostility" to the ICC would end. The US endorsement of the ICC action on Sudan may anticipate a new era for international justice.

It is high time that the US policies towards the ICC are reviewed by the Obama administration, in the spirit of active and positive co-operation with the Court. In particular, the US Government should restate its support by reactivating its signature; repeal the ASPA and engage in the works of the review conference in 2010.

Moreover, the Obama administration should now ask the Senate to ratify the Rome Statute and contribute to making the Court an effective instrument of last resort against impunity for crimes that, too often thus far, have gone unpunished despite their horrendous character.

European spokespersons should seek a renewed dialogue on this issue in spite of the scars which may still be there after the bullying of the Bush administration. Remaining US worries, if any, could surely be clarified and remedied. Such talks should also encourage those European states which have still not ratified or acceded to the Rome Statute, to come on board. The Council of Europe's Parliamentary Assembly recently recommended full co-operation by all Council of Europe member states with the Court.[5]

We should aim for universal participation. Developments since the treaty was adopted a decade ago have unfortunately proved that the International Criminal Court is badly needed.

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5. PACE Resolution 1644 (2009) on Co-operation with the International Criminal Court and its Universality. The Assembly further urged Armenia, Azerbaijan, the Czech Republic, Moldova, Monaco, the Russian Federation, Turkey and Ukraine, as well as the observer states United States and Israel, to ratify the statute.

# Many Roma in Europe are stateless and live outside social protection

6 September 2009

There are Roma in a number of European countries who have no nationality. They face a double jeopardy – being stateless makes life even harder for those who are already stigmatised and facing a plethora of serious, discrimination-related problems. For those who happen to be migrants as well, their situation is even worse.

Many Roma lack personal identity documents which hinders their access to basic human rights, such as education and health services, and increases their susceptibility to continued statelessness. In fact, estimates indicate that thousands have no administrative existence at all. They often have never obtained a birth certificate and do not overcome administrative hurdles when trying to be recognised by the state. They live entirely outside of any form of basic social protection or inclusion.

This is largely a hidden problem. Naturally, it is difficult to establish facts in this area but too little effort has been made by state authorities to collect relevant data about the scope and nature of this systematic marginalisation. As repeatedly noted by the European Committee of Social Rights, states have an obligation to identify the dimension of the exclusion of vulnerable groups such as the Roma, including through statistical means.

Political developments in recent years have made Roma in Europe more vulnerable. The break-up of former Czechoslovakia and former Yugoslavia caused enormous difficulties for persons who were regarded by the new successor states as belonging somewhere else – even if they had resided in their current location for many years.

"It is not acceptable that European citizens are deprived of their right to a nationality – a basic human right."

**Absence of data, only estimates available**

There are no precise statistics on the number of stateless Roma. Estimates in South-Eastern Europe indicate the following:

Bosnia and Herzegovina: 10 000; Montenegro: 1 500; Serbia: 17 000; Slovenia: 4 090 (citizens of former Yugoslavia, many of whom are ethnic Roma).

According to the UNHCR, the great majority of the persons referred to as stateless face problems being formally recognised as citizens of the country where they are habitually resident. This is because they lack proper registration and documentation and encounter many difficulties in their attempt to obtain proof of nationality.

The Czech Republic used a citizenship law which made tens of thousands of Roma stateless (the intention was that they should move to Slovakia). This law was, however, amended after interventions from the Council of Europe and others in 1999. Thereby the main part, though not all, of the problem was finally resolved.

In Slovenia several thousand persons, among them many Roma, became victims of a decision to erase non-Slovene residents from the Register of Permanent Residents. They had missed a deadline and had not sought or obtained Slovenian citizenship soon after the independence of the country. Many of them had moved to Slovenia from other parts of Yugoslavia before the dissolution of the Federation.

Croatia and "the former Yugoslav Republic of Macedonia" also adopted restrictive laws which made access to nationality very difficult. Again, this hit Roma people in particular. One consequence was that those who had migrated to other parts of Europe were in limbo; they were not accorded nationality either by their host country or by the new states which had emerged in the areas where they had previously lived.

The Kosovo[1] conflict led to a large displacement of Roma people primarily to Serbia, Bosnia and Herzegovina, Montenegro and "the former Yugoslav Republic of Macedonia" but also to other countries outside the region. While in Kosovo recently, I met with one NGO which is currently working on a large civil registration project, hoping to register the 10 000 to 11 000 members of the community who find themselves with no papers.

It is not acceptable that European citizens are deprived of their right to a nationality – a basic human right. It is necessary to address this problem with much more energy than has been done so far.

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1. "All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo."

European host states where children of Roma migrants have been born and have lived for several years should do their utmost to provide a secure legal status to these children and their parents. Both the UN Convention on the Rights of the Child and the International Covenant on Civil and Political Rights stipulate that children shall have the right to acquire a nationality. In other words, the host country has an obligation to ensure that children do have a nationality; the fact that their parents are stateless is no excuse.[2]

When in Italy, last January, I was pleased to learn that the government was preparing draft legislation to provide Italian nationality to stateless minors whose parents had left the war-torn former Yugoslavia and where at least one of their parents was in Italy prior to January 1996. The government also announced that it would ratify the 1997 European Convention on Nationality without any reservation.[3] A number of Roma stateless children will benefit from such legislative developments – when adopted.

Problems relating to nationality also affect many adult Roma. When in Montenegro, I learned about the impressive efforts of the UN High Commissioner for Refugees who is trying to break the vicious circle caused by the absence of identity documentation. Without such papers individuals are hindered from asserting their most basic rights. The programme has already helped a great number of individuals including some who had left Kosovo.

I also noticed positive steps during a visit to "the former Yugoslav Republic of Macedonia". Progress has been made to ensure that Roma can attain personal documents including birth certificates, identity cards, passports and other documents related to the provision of health and social security benefits.

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2. Convention of the Rights of the Child, Article 7 and International Covenant on Civil and Political Rights, Article 24.
3. Paragraphs 54-55 of Italy's comments on my report of 16 April 2009. Although to date it has still not done so.

These are the good examples. However, it should be remembered that such measures are an obligation. The Strasbourg Court has stated that the non-provision by states of proper personal documentation which would facilitate employment, medical care or providing for other crucial needs, may indeed contradict the right to private life, a human right protecting the individual's moral and physical integrity.[4]

The Council of Europe has been a pioneer in the field of protecting Roma rights. The messages coming from its various bodies emphasise that host states should employ all possible means to end the *de facto* or *de jure* statelessness of Roma and provide them with a nationality, in accordance with the standards of the 1997 European Convention on Nationality and the 2006 Council of Europe Convention on the avoidance of statelessness in relation to State succession.

Both treaties contain general principles, rules and procedures of the utmost importance for the effective enjoyment of the human right to a nationality in Europe. Some core provisions are:

- respect for the overarching principle of non-discrimination in law and practice;
- obligation on states to avoid statelessness, including in the context of state succession;
- obligation to grant nationality to children born on their territories and who do not acquire another nationality at birth;
- restrictive conditions on loss of nationality by law;
- duty of states to reason and provide in writing their nationality-related decisions.

The problem of the stateless Roma must be addressed with determination. They often do not have the means to speak out themselves. A study

4. See *Smirnova v Russia*, judgment of the European Court of Human Rights, 24 October 2003, paragraphs 95-97.

recently published by the EU Fundamental Rights Agency showed also that many Roma do not know how to approach ombudsmen and other national human rights institutions.

National human rights action plans should pay attention to the urgent need to provide resources to facilitate legal work for stateless Roma. In Croatia, a free legal aid scheme for Roma was put into place in 2003. This was a good step to promote the necessary legal empowerment. Many more initiatives of this kind are needed.

# Stop and searches on ethnic or religious grounds are not effective

20 September 2009

Members of minorities are more often than others stopped by the police, asked for identity papers, questioned and searched. They are victims of "ethnic profiling", a form of discrimination which is widespread in today's Europe. Such methods clash with agreed human rights standards. They tend also to be counter-productive as they discourage people from co-operating with police efforts to detect real crimes.

A broad survey conducted by the EU Agency for Fundamental Rights (FRA) indicates that minority groups feel targeted by the manner in which the police select persons for stop and search procedures. Not surprisingly, many among them see this tendency as a sign that they are suspected, badly regarded and not welcomed by society at large.

The recent FRA report on Muslims (based on interviews in 14 European countries) showed that one out of every four Muslim respondent had been stopped by the police during the past year and that 40% of them believed that this was because of their immigrant or minority status. Many of them had been stopped more than once during the last 12 months (the average was three times).[1]

A previous FRA report on the situation of Roma showed that this group had also been targeted by stop and search interventions and that many of them felt that this was precisely because of their belonging to this minority.

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1. htpp://fra.europa.eu/eu-midis. The countries in which interviews were made: Austria, Belgium, Bulgaria, Denmark, Germany, Finland, France, Italy, Luxembourg, Malta, Slovenia, Spain, Sweden, and the Netherlands.

"There should be an objective reason why a certain individual is stopped and searched, a reasonable and individualised suspicion of criminal activity."

Stop and searches are a serious problem in several European countries, and have become more frequent since the terror acts of 9/11. It is not just minority communities who are targeted. The European Court of Human Rights recently held a hearing in a case which concerned police power in the United Kingdom under anti-terrorism legislation to stop and search individuals without reasonable suspicion.[2] Although in this case the applicants were not arguing that they were stopped on the grounds of their ethnicity, they complained that the use of power to stop and search each of them breached a number of their Convention rights.

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2. *Gillan and Quinton v. the United Kingdom* (application No. 4158/05). Hearing held on 12 May 2009.

Ethnic or religious profiling is all too prevalent in Europe. The non-governmental organisation, the Open Society Justice Initiative, has recently analysed ethnic profiling in the European Union. Its latest report finds a pervasive use of ethnic and religious stereotypes by law enforcement agencies across Europe. The effect of such practices is that real efforts to combat crime and terrorism are actually being harmed.[3]

The report found that ethnic profiling actually back-fires. Such practices have resulted in the overlooking of criminals who do not fit the established profile. They have also undermined the rule of law and perceptions of police fairness; stigmatised entire communities; and alienated people who could work with police to reduce crime and prevent terrorism. Alternatives to ethnic profiling are recommended, such as profiling based on individual behaviour.

There should be an objective reason why a certain individual is stopped and searched, a reasonable and individualised suspicion of criminal activity. The colour of your skin, your dress or visible religious attributes are not objective reasons.

In 2007, the European Commission against Racism and Intolerance (ECRI) published a highly relevant recommendation on "Combating racism and racial discrimination in policing".[4] It recommends that governments clearly define and prohibit racial profiling by law. Governments should also introduce a standard of reasonable suspicion to ensure that control, surveillance or investigation activities are only carried out when the suspicion is founded on objective criteria.

Furthermore, the ECRI emphasises the importance of training the police on how to use the reasonable suspicion standard and suggests that police activities in this area are monitored, including through the collection of data broken down by grounds such as national or ethnic origin, language, religion and nationality.

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3. *Ethnic Profiling in the European Union: Pervasive, Ineffective and Discriminatory,* OSI, May 2009.

4. ECRI General Policy Recommendation No. 11, adopted 29 June 2007.

These measures will be more effective if taken within a comprehensive approach based on clear legislation; rules on accountability; available complaints mechanisms; and active support from high-level police leadership to implement rights-based procedures.

Positive action in this spirit is needed in several countries. Indeed, the purpose of another Open Society Justice Initiative project, carried out in 2005, was not only to expose shortcomings in practice but also to improve relations between the police and the minorities through more accountable and effective use of police powers. Positive steps were taken towards enhanced police training and improved supervision and monitoring of ID checks, stops and searches which can serve as models for others.[5]

Methods used during stops and identity checks were assessed during this project as well as whether they affected minority communities in a disproportionate manner. The collected data demonstrated two points. Firstly, that the police indeed were engaged in ethnic profiling – minorities were more likely to be stopped, and secondly that members of minorities were not found to have offended more than the majority population.

This was an important finding as those who have defended ethnic or religious profiling have often claimed that minority groups are more likely to be involved in crime than others and therefore this justified increased police intervention.

It is clear that disproportionate stops and searches have a detrimental and negative impact on the community in general. All groups in society should have reason to trust the police. All the more so for those groups who may be the targets of xenophobic action or even hate crimes.

An unfortunate lack of trust is fostered if minorities feel that the police are a tool of the state and not of the community.

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5. Addressing Ethnic Profiling by Police. A Report on the Strategies for Effective Police Stop and Search Project. AGIS 2006 and Open Society Institute. www.justiceinitiative.org

Instead the police themselves should promote equality and prevent racial discrimination; they should be trained to work in a diverse society and they must recruit members from minority communities.

As always, every police officer is also a human rights defender.

# State budgets reveal whether the government is committed to human rights

3 August 2009

The current economic crisis has made it particularly important to screen state budgets for their compliance with human rights. The allocation of resources will affect human rights protection – including gender equality, children's rights and the situation of old or disabled persons, migrants and other groups which risk being disadvantaged. The way state revenues are obtained will also have an influence on justice and fairness in society; in this regard no tax system is neutral.

Budget analysis should therefore be seen as a potent instrument in the struggle for human rights. Looking at budget proposals from a rights perspective can assist politicians and planners to assign priorities in a non-discriminatory manner and to allocate resources where they are needed most.

Such a human rights-based budget analysis can also be a valuable tool for those who want to assess whether governments and parliaments have indeed taken steps to make reality of pledges given when international human rights standards have been ratified. The implementation of these treaties is certainly not cost-free and has to be reflected in the budget. This type of analysis could be used to hold the government accountable.

This is to a large extent a question of democratising the public discussion of the budget proposals. This in turn requires a presentation of the proposals and options which are understandable. Ministers for finance should of course clarify how their proposed budgets affect different groups in society, including those marginalised and disadvantaged.


"Budget analysis should be seen as a potent instrument in the struggle for human rights."

While many European governments and EU institutions have required detailed budgetary accountability – including on human rights consequences – from countries receiving development aid, European states have themselves been slow to apply a similar approach to their own budgets. Obviously, also European countries would benefit from a transparent screening of state budgets with regard to their effect on everyone's rights.

International and European treaties require an end to discrimination on the basis of gender, ethnicity, nationality, social origin, sexual orientation and several other characteristics. Some of them – for instance, the UN Convention on the Rights of the Child – also specify that the state should use the maximum extent of its available resources to ensure the economic and social rights.

With the enormous transfer of state money to the banking system in the past months, there is clearly a risk that little is left to cover the social needs which are increasing with the higher unemployment. This is a stark illustration of the need for a frank and thorough discussion of the budgetary implications of our human rights promises.

Rights-oriented budget analysis is a fairly new approach. In the European context, the most concrete work so far has been done in the area of gender equality. Gender budgeting is a mechanism for translating a government' s commitments into its state budget so as to ensure that women and men can enjoy their human rights on an equal basis. Budget analysis can also be used to screen public revenue, especially taxation, against the possible discriminatory effects of fiscal policy. Gender budgeting often applies performance targets and inclusive participation to improve efficiency, accountability and transparency.

Austria, Belgium, France, Germany, Finland, Norway, Spain and Sweden are among the countries which have already applied a conscious gender perspective in their national budgetary cycle. The inclusion of gender budgeting in the budget guidelines of the ministry of finance has often been a key factor for encouraging a gender-sensitive approach among other ministries.

Gender budgeting has also been used at the regional and local levels. In the Federal State of Berlin the regional parliament has taken a leading role in introducing gender budgeting as an integral part of the budget process. In Switzerland, the City of Basel carries out regular budgetary impact analyses based on gender. The Council of Europe has recently published a handbook on the practical implementation of gender budgeting.[1]

Human rights budgeting in other areas is still in its infancy in Europe. However, an interesting project has been initiated by the Human

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1. *Gender budgeting: practical implementation – Handbook*. Prepared by Sheila Quinn, Directorate General of Human Rights and Legal Affairs, Council of Europe, April 2009.
http://www.coe.int/T/E/Human_Rights/Equality/PDF_CDEG%202008%2015_en.pdf

Rights Centre at Queen's University in Belfast. It examines the effect of public expenditure on economic and social rights in Northern Ireland through a budget-based analysis. The aim is to identify international best practices as well as to analyse various examples of government resource allocation in areas such as housing. The results of the project should also strengthen the advocacy and monitoring capacity of civil society organisations.

Outside Europe, there are several examples of how budget analysis helps to evaluate the compliance of governments' decisions with human rights. Such efforts have moved beyond the gender dimension even if this crucial aspect is incorporated as well. A good example is the IDASA (Institute for Democracy in South Africa), an independent public interest organisation.

IDASA has analysed the impact of the South African state budget on social development, affordable housing, education, health and reduction of poverty. In its analysis of the 2009 budget, IDASA notes the effect of the economic crisis on South Africa, holds the government accountable for its budgetary decisions and stresses the need to improve the efficiency, effectiveness and equitability of the state budget.

One lesson of what has been attempted so far is that rights-based budgeting or budget analysis require that there exist disaggregated data in relation to different groups in society.

Another experience is that the adoption of a participatory approach to budget formulation, which would involve different ministries, national human rights structures and civil society organisations, makes this approach more meaningful and in fact contributes to good economic governance. Rights-based budgeting puts the emphasis on results, transparency and accountability.

The key problem in all human rights work is still the gap between pledges and reality. This 'implementation gap' can only be bridged when budget processes and the budgets themselves reflect our vision about human rights for all.

# Serious implementation of human rights standards requires that benchmarking indicators are defined

17 August 2009

A gap still exists between the rights proclaimed in human rights treaties and the reality in member states. Closing this implementation gap is crucial for all human rights work today. It requires a systematic approach, including effective collection of relevant data and comprehensive planning through a participatory process. An important element in this endeavour is to define meaningful indicators which can be used to assess progress.

Indicators make human rights planning and implementation processes more efficient and transparent. They make it easier to hold governments accountable for the realisation of human rights and also help highlight success through accurate criteria. Moreover, indicators have great potential for clarifying and communicating the practical content of human rights in concrete situations.

Not surprisingly, the discussion about human rights indicators has largely been initiated by international bodies set up to monitor the realisation of the agreed standards. Various Council of Europe structures as well as UNICEF, the UN Development Programme and the UN High Commissioner for Human Rights, have all sought to define relevant human rights indicators, generally or in specific fields.

The discussion is ongoing. It is understood that all aspects of human rights cannot be measured through statistical information and that there is also a need to assess qualitative aspects – for example, the competence of judges may be more relevant than their number. Another problem is that quantitative data do not always exist or may be unreliable.

A useful model has been developed by the Office of the UN High Commissioner for Human Rights in its efforts to facilitate country

"Indicators make human rights planning and implementation processes more efficient and transparent."

monitoring carried out by the UN treaty bodies.[1] This approach has produced three categories of indicators: structural, process and outcome indicators.

- Structural indicators look at the ratification of international treaties and the existence of laws and basic institutional mechanisms for the protection of human rights.
- Process indicators assess state policies and specific measures undertaken to implement commitments.

1. Office of the High Commissioner for Human Rights, Report on indicators for promoting and monitoring the implementation of human rights, 6 June 2008, HRI/MC/2008/3.

– Outcome indicators measure the individual and collective attainments that reflect the degree of realisation of human rights in the given context.

Example I – **The right of detainees to basic standards**

The structural indicators would assess to what extent the relevant international treaties have been ratified and the laws have incorporated protection against torture, but also whether a national monitoring mechanism had been established.

The process indicators would focus on the number and nature of complaints and responses and the co-operation with the European Committee for the Prevention of Torture (CPT). Detailed indicators would assess the extent to which standards are met for floor space, cubic content of air, heating, inmate/staff ratio, food, health-care facilities and the training of prison staff.

The outcome indicators would focus on the actual health of inmates, reported cases of torture or cruel, inhuman and degrading treatment and the proportion of victims who have received compensation or rehabilitation.

Example II – **The right to primary education**

The structural indicators would deal with responses to international standards as well as provisions in national law. Likewise, they include the coverage of the national plan of action in relation to the principle of compulsory and free primary education.

The process indicators would include data about the budget for education and response to complaints or recommendations from national or international monitoring bodies. Other indicators may highlight differences between public and private schools, response to reports of violence, teacher/pupil ratios and the proportion of children being taught in their mother language.

The outcome indicators would include enrolment, drop-out and completion ratios, including for special groups like minorities and children with disabilities.

The use of indicators in this manner is becoming more and more common. The Council of Europe has prepared rights-based indicators to measure component parts of social cohesion for the implementation of its Strategy for Social Cohesion.[2] The EU Fundamental Rights Agency (FRA) recently published child rights indicators to measure the impact of EU law and policy on the ability of children to exercise their rights.[3]

However, the full use of human rights indicators as an assessment tool depends largely on relevant and reliable data. Different types of data are necessary in order to get a comprehensive and valid picture. Certainly, non-governmental organisations, national human rights structures and the media are valuable sources of information on human rights violations.

Governments all over Europe have established official statistical systems which nowadays normally provide information related to school enrolment, employment rates, access to social services and health care. In fact, an effective national statistical office is an important instrument for human rights reform.

Disaggregated data based on gender, ethnicity, sexual orientation, disability and age, are crucial. It is a shortcoming that they are not available in some cases as such information can help to expose discriminatory practices. Collection can be a complex task. People might, for good reasons, be unwilling to disclose their ethnic background or sexual orientation. Such data should be collected on a voluntary basis and coupled with proper safeguards to respect the privacy of the persons involved.

The indicators themselves must also be defined with some care. They should be relevant to the context in which they are applied. One way

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2. *Concerted development of social cohesion indicators – Methodological guide.* Council of Europe, 2005.
3. *Developing indicators for the protection, respect and promotion of the rights of the child in the European Union. Summary report.* European Union Agency for Fundamental Rights, March 2009.

to ensure the relevance and feasibility of indicators is to involve those directly concerned, for example the relevant public authorities, national human rights structures and non-governmental organisations.

The use of human rights indicators at the local level has great potential. Information on human rights violations or on progress achieved in municipalities and regions is highly relevant for decision-making both at the local and national level.

The use of indicators should be seen as part of a broader process of systematic work for implementing human rights. Together with national action plans, baseline studies and rights-based governance, indicators are a tool for enforcing human rights.

# Flawed enforcement of Court decisions undermines the trust in state justice

31 August 2009

Court decisions in several European countries are often enforced only partly or with long delays – or sometimes not at all. This is one of the most frequent problems identified by the European Court of Human Rights (the Strasbourg Court). Flawed execution of final court decisions must be seen as a refusal to accept the rule of law and is a serious human rights problem.

The non-enforcement of court judgments can affect large groups of the population and particularly vulnerable groups. When state authorities ignore judicial decisions that social benefits – such as pensions or child allowances – should be paid, this can have profound consequences for all the family involved.

Other examples concern compensation for damage sustained during military service or after wrongful prosecution. A high number of non-executed decisions which have been brought to the Strasbourg Court relate to the return of property which was nationalised by former communist governments.

A great number of other cases of non-enforcement of domestic judicial decisions are also raised among the complaints to the Strasbourg Court – which has found and continues to find numerous violations in this area. Among the countries with cases have been Albania, Bosnia and Herzegovina, Moldova, the Russian Federation, Serbia and Ukraine.

Indeed, the flawed response to domestic judicial decisions in several countries must be regarded as a structural problem which should require the national authorities to take priority action.

It is an important principle that every judgment is enforced, including those delivered against the governmental administration. Therefore,

"Full and prompt execution of court decisions is one of the hallmarks of a democratic society."

it is particularly worrying that even political decision-makers at high levels sometimes tend to seek all kinds of pretexts to disregard judicial decisions and make public statements that convey a lack of respect for the judiciary.

It has to be made clear that the non-execution of court judgments by the authorities constitutes a breach of the right to a fair trial as defined in Article 6 of the European Convention on Human Rights. In its judgment in the case of *Hornsby v. Greece,* the Strasbourg Court affirmed that the "right to a court […] would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party."[1]

1. Court judgment, 19 March 1997, paragraph 40.

The Court observed also that the states, by ratifying the Convention, had undertaken to respect the principle of the rule of law. To ignore the implementation of judicial decisions would be incompatible with this principle. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees under Article 6 are rendered devoid of purpose.

The complexity of the domestic enforcement procedure or of the state budgetary system cannot relieve the state of its obligation to guarantee to everyone the right to have a binding judicial decision enforced within a reasonable time, stated the Court. Nor is it open to a state authority to cite the lack of funds or other resources as an excuse for not honouring a judgment debt.[2]

Several Council of Europe bodies have focused on these structural problems. This has been a focus of attention for the Parliamentary Assembly or for specialised organs such as the European Commission for the Efficiency of Justice (CEPEJ) and a priority for the Committee of Ministers in the framework of the execution of the judgments of the European Court of Human Rights.

The Council of Europe has a special department which assists the Committee of Ministers in the supervision of the execution of the judgments of the European Court. This department has also organised discussions to address the problem of delayed or lacking action on domestic court decisions.[3]

The conclusions drawn have stressed the need of a legal and regulatory framework which will ensure enforcement of the domestic court decisions:

– there should be clear procedures adapted to national budgetary contexts that are compatible with the need for rapid and proper execution of judgments;

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2. See, *inter alia, Burdov v. Russia (No. 2)*, 15 January 2009, paragraph 70.

3. Documents prepared by the Department for the Execution of Court Judgments can be found at: http://www.coe.int/t/dghl/monitoring/execution/default_en.asp

- an effective and independent bailiffs' service should be established;
- the responsibility of the relevant national officials should be increased with regard to the execution process for domestic judgments, both by increasing their personal responsibility and through stricter control over their actions;
- there should be effective domestic remedies to accelerate execution proceedings, and compensation in cases of non-execution should be made available.

This last requirement is essential. In a recent pilot judgment the Strasbourg Court further specified the requirements and the criteria for efforts to verify the effectiveness of preventive or compensatory remedies that allow for adequate and sufficient redress at domestic level.[4]

In fact, a number of measures have been taken by several countries in this direction. Progress is under way through action plans or national strategies, reforms of the bailiffs' systems, new laws introducing remedies, enforcement mechanisms set up for instance by both the Supreme Court and the Council of State.

It is clear, however, that for all these efforts to be effective, there is a need of proper knowledge of all involved. Exchanges of experiences between the countries concerned, discussions with the Council of Europe and legal advice are essential in this respect.

These efforts require more awareness raising and action by key national actors. Parliamentarians may push for the rapid introduction of the necessary legal reforms. Independent state authorities like ombudsmen have a key role to play due to their power to control the administration. Such institutions may inform the citizens about new laws providing for domestic remedies in cases of non-enforcement and also push the administration to abide by the law.

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4. *Burdov v. Russia (No. 2),* op. cit.

The credibility of the justice system is at stake. It is not sufficient to reform legislation, increase the resources of the courts or encourage the public to settle their disputes in court. Members of the public who have placed their trust in the judicial system should obtain satisfaction, not only on paper but also in practice. To ensure full and prompt execution of court decisions is one of the hallmarks of a democratic society.

# A neglected human rights crisis: persons with intellectual disabilities are still stigmatised and excluded

14 September 2009

People with intellectual disabilities tend to be among the most marginalised. Even today their treatment is clearly inhuman in country after country, even in Europe. They have limited possibilities to make themselves heard and this has contributed to making their situation a hidden human rights crisis. It is time for political decision makers to stop ignoring these vulnerable citizens.

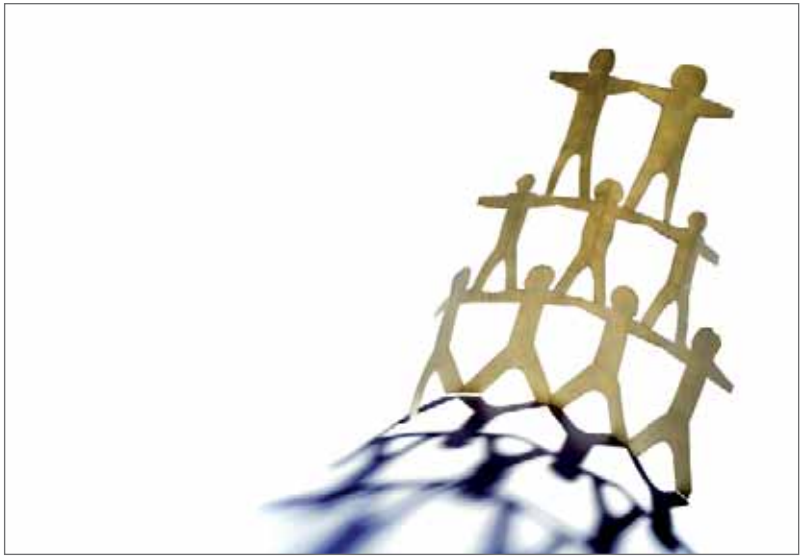
Before policies are designed, it is necessary to be clear about different kinds of disabilities and apply the relevant terminology. A distinction is necessary between persons with psychiatric problems (e.g. schizophrenia and bipolar disorder) and those with intellectual disabilities (e.g. a limitation caused by, among others, Down's syndrome).

Though there are some people with intellectual disabilities who also have mental health problems, the two kinds of impairment are different; they have different causes and effects and, therefore, define different needs.

Though persons with any of these disabilities suffer human rights abuses, I am focusing here on those with intellectual disabilities. What is common for them is a reduced level of intellectual functioning which may affect learning and language capacity as well as social skills.

It is, however, stressed by experts on disability and health that the degree of impairment differs greatly between individuals and that generalisations should therefore be avoided. The response has to be individual.

The key point is that persons with intellectual disabilities, as for other human beings, are entitled to basic human rights and fundamental freedoms. This was also the simple request formulated at a remarkable



"Persons with intellectual disabilities, as other human beings, are entitled to basic human rights and fundamental freedoms."

WHO conference in Montreal five years ago. Among the participants were persons with intellectual disabilities, their representatives, families, service providers and other specialists.[1]

The adopted "Montreal Declaration on intellectual disabilities" made points which should not have to be raised, but had remained ignored until then and, in fact, are still not taken seriously enough.

The declaration called upon governments to implement the agreed human rights norms for persons with intellectual disabilities; to consult

1. The meeting was organised by WHO and Pan-American Health Organisation, 5-6 October 2004; the declaration can be found on www.declaracionmontreal.com

with them on relevant laws, policies and plans; and to take steps to ensure their full inclusion and right to participate in society.

Furthermore, it asked governments to allocate sufficient resources and to provide the necessary support to persons with intellectual disabilities and their families; to strengthen their organisations; and to develop education, training and information programmes for them.

These proposals are realised only to a limited extent. During missions to Council of Europe member states, I have had to conclude that persons with intellectual disabilities are still stigmatised and marginalised; that they are rarely consulted or even listened to; that a great number of them continue to be kept in old-style, inhuman institutions; and that moves to provide housing and other services in community-based settings have met obstacles and been delayed.

Conditions in some of the "social care homes" are appalling in many countries across Europe. In these segregated institutions very little, if any, rehabilitation is provided. Not infrequently, persons with intellectual disabilities are placed together with persons having psychiatric problems and unnecessarily given sedatives against their will. They are in some cases deprived of their liberty and treated as if they were dangerous.

Many are cut off from the outside world. Intellectual disabilities – like other disabilities – carry a stigma, and many people have been abandoned by their families through shame and lack of alternatives.

Staff at these institutions are almost always underpaid. However, I have met many dedicated and caring employees who try to do their very best with extremely limited budgets. Almost without exception they stress the need for more political support and resources at a more reasonable level. Though many governments have adopted plans of action in this field, these have not been sufficiently funded. Many have also not been monitored appropriately, so that plans often drop out of political attention and there is no follow-through.

The call for de-institutionalisation has, however, not gone unheard. In Albania, for instance, I noticed that the process of moving persons

to community and family-based housing had already had some satisfactory results. In the "former Yugoslav Republic of Macedonia", an ambitious strategy was adopted, and strong efforts were also being made in Serbia – though some families were unable to receive their relatives back home.

More efforts are obviously needed to prepare such moves and to develop adequate services at the local level – in consultation with organisations protecting persons with disabilities. It has to be recognised that life in the broader community may not be easy, even for those who have not been heavily institutionalised. Prejudices against persons with intellectual disabilities are widespread.

Some progress has been made in the case of children in the process of de-institutionalisation, therapy and rehabilitation. The infamous collective homes for disadvantaged children are being slowly phased out, including in eastern European countries, where they were common. Every European government has recognised that such institutions are not good for children.

However, it has also been learnt that closure of these homes must be done with some care to avoid institutionalised children being further damaged. Furthermore, there is a need to take measures to create alternatives, which include efforts to build support to families, to establish a child-friendly foster care system and to monitor their functioning.

In spite of some progress during recent years for the rights of the child in general, too little is done to ensure that children who show symptoms of intellectual disability are given sufficient attention, care and support. Efforts to diagnose problems at an early stage in order to facilitate early intervention are not given sufficient priority.

Schooling is another problem. Very few children with intellectual disabilities are offered specialist assistance tailored to the individual child in ordinary schools, while "special schools" – a segregated system which is often the beginning of lifelong social exclusion – remains the norm. Many children are not provided with their right to education at all. For instance, the European Committee of Social Rights concluded

that children with intellectual disabilities and living in homes for mentally disabled children in Bulgaria were deprived of an effective right to education.[2]

Health care for both children and adults with intellectual disabilities is another serious problem. Persons with intellectual disabilities may have greater health needs than others. At the same time they are often confronted with discrimination by health-care systems, whose staff neglect to provide health care on an equal basis with others, and fail to appropriately communicate with persons with intellectual disabilities.

The result is that the care they receive tends to be of poor quality and that health problems go undetected. There are indications that they have a shorter life expectancy and higher morbidity rate than the average population. The sum of all this is that the medical system has failed to meet the particular needs of persons with intellectual disabilities.

Adults with even minor intellectual disabilities are discriminated against in the labour market, even for jobs they have the qualifications and skills to do. Efforts to provide sheltered job places have in some cases, unfortunately, contributed to the further isolation of the individuals.

Little is also being done to develop a wise and rights-based approach to the problem of the legal capacity of those with intellectual disabilities. It may be in the nature of this impairment that problems occur in relation to how one represents oneself towards authorities, banks and other such institutions. This, however, is no justification for a policy to routinely incapacitate people with mental disabilities and put them under legal guardianship where they have no say in important decisions affecting their lives.

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2. ECSR, *Mental Disability Advocacy Center (MDAC) v. Bulgaria,* Complaint No. 41/2007, Decision on the merits of 3 June 2008. The Special Rapporteur on the right to education also made strong recommendations towards inclusive education for persons with disabilities. See "The right to education of persons with disabilities", report A/HRC/4/29, 19 February 2007.

Another major problem is that families with members having intellectual disabilities are often left on their own, in spite of their important role as care givers and as people who can understand and communicate with the person with intellectual disabilities.

A sad consequence in some cases is that parents and other family members just cannot cope, and that the individual with a disability will be seen as nothing but a burden. In some countries, families seek to place their adult child with intellectual disabilities under guardianship and send them to an institution, as they want to ensure that their adult child survives when the parents are no longer able to look after them.

On one aspect there has, however, been considerable progress since the Montreal meeting in 2004. We have now international agreements which include norms on the rights of persons with intellectual disabilities. Every state should ratify the UN Convention on the Rights of Persons with Disabilities and all members of the Council of Europe should respond constructively to its action plan (2006-2015) to promote the rights and full participation of people with disabilities in society.[3]

It is urgent to move from word to action and to ensure that effective steps are indeed taken. The UN Convention requires states to set up a mechanism to co-ordinate government action; to establish an effective system of independent monitoring; and to invite civil society – and in particular persons with disabilities themselves and their organisations – to take part in the monitoring.[4]

Such measures would help address the stigmatisation and marginalisation of persons with intellectual disabilities and encourage instead their participation and integration into society to the maximum extent possible. This change would make our societies more humane.

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3. According to recent information from the United Nations, only the following European countries have so far ratified the UN Convention on the Rights of Persons with Disabilities: Austria, Azerbaijan, Belgium, Croatia, Denmark, Germany, Hungary, Italy, San Marino, Serbia, Slovenia, Spain, Sweden and the United Kingdom.
4. Article 33 of the UN Convention.

# Persons with mental disabilities should be assisted but not deprived of their individual human rights

21 September 2009

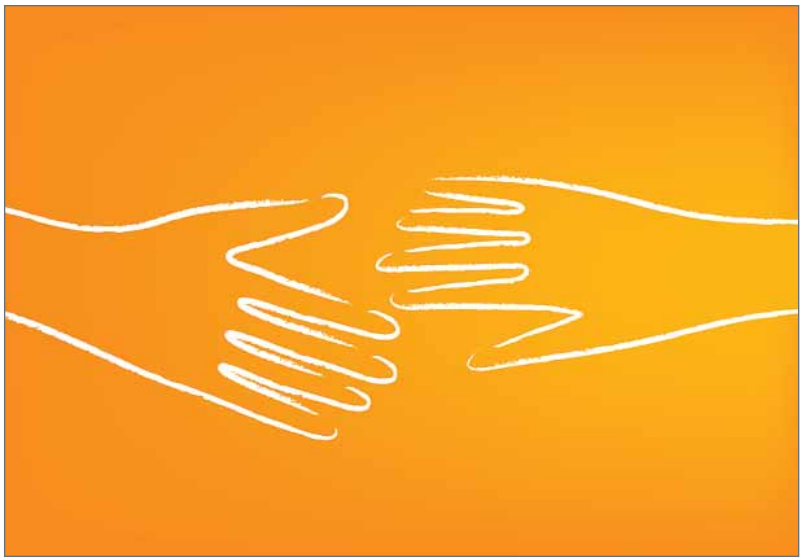
Individuals with mental health or intellectual disabilities have been discriminated, stigmatised and repressed even in recent years. Their mere existence has been seen as a problem and they have sometimes been hidden away in remote institutions or in the back rooms of family homes. They have been treated as non-persons whose decisions are meaningless.

Though much of this has changed with the progress of the human rights cause, persons with mental health or intellectual disabilities do still face problems relating to their right to take decisions for themselves, also in important matters. Their legal capacity is restricted or deprived completely, and they are placed under the guardianship of someone else who is entitled to take all decisions on their behalf.

Some persons with mental health or intellectual disabilities may have objective problems in representing themselves to authorities, banks, landlords and other such institutions – as a consequence of their actual or perceived impairments. They may also be manipulated to make decisions which they would otherwise not make.

A basic principle of human rights is that the agreed norms apply to every human being, without distinction. However, the international human rights norms have been denied to persons with disabilities. It was this failure which prompted member states of the United Nations to adopt the Convention on the Rights of Persons with Disabilities, which emphasises that people with all types of disabilities are entitled to the full range of human rights on an equal basis with others.

The aim is to promote their inclusion and full participation in society. When we deprive some individuals of their right to represent themselves we contradict these standards.



"The aim is to promote the inclusion and full participation in society of persons with mental disabilities."

How then should the concrete situations be handled?

The UN Convention addresses this issue in its Article 12 which starts by stating that governments shall "recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life".

The Convention recognises the reality that some people, because of their impairments or external barriers, are unable by themselves to take important decisions. For them, the Convention requests governments to provide access to support they may require in exercising their legal capacity.

The nature of this support is a crucial aspect. Supported decision-making is a developing field in some Council of Europe member states, and the practice has been embedded for several years in many Canadian provincial laws. What happens in those jurisdictions is that a network of supporters are recognised – but not imposed on the adult – and these supporters provide information and options for the adult to make a decision.

The Convention states that there should be appropriate and effective safeguards in order to prevent abuse. The rights will, and preferences of the concerned person should be, respected and there should be no conflict of interest and undue influence between those supporting the adult, and the adult him- or herself.

Further, the arrangement for the support should apply for the shortest time possible and be subject to regular review by a competent, independent and impartial authority or judicial body.

These formulations allow for a range of alternatives to guardianship to be provided for adults with disabilities. The starting point for the reforms is full legal capacity combined with the right of the individual to seek support. The exercise of this support should always be regulated with safeguards to avoid that the trust be misused.

This is different from the actual practice in a majority of countries, including in Europe, where there has been a tendency to declare almost routinely people with mental health and intellectual disabilities legally incapable and put them under legal guardianship.

However, the UN Convention – as well as the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society improving the quality of life of people with disabilities in Europe 2006-2015 – may have had a positive effect in some countries. A European Union high-level group on the implementation of the Convention reported recently that it had got assurances about a review

process on this issue from the Czech Republic, France, Hungary, Ireland, Latvia, Portugal and Slovakia.[1]

The report also referred to the fact that these countries and others "had all expressed an interest in sharing information by organising conferences, expert working groups and seminars on the topic, involving civil society and all relevant players, including the judiciary, and discussing legal terms with a view to developing legislation, policy and practice in this area".

Such discussions are necessary in order to make real the shift of laws and policies which were agreed in principle when the UN Convention and the Council of Europe action plan were drafted and agreed. Obviously, the case law of the Strasbourg Court will be studied in detail during this process, and more litigation before that Court is needed in order to better integrate the UN Convention's approach into the European jurisprudence.

In a case last year (*Shtukaturov v. Russia*) the Court had to deal with deprivation of legal capacity; enforced hospitalisation and treatment without consent. Mr Shtukaturov, an adult who was diagnosed with schizophrenia, had been deprived of his legal capacity in a decision made without his knowledge at the request of his mother, who had become his guardian. He was legally prohibited from challenging the decision in Russian courts and had subsequently been detained in a psychiatric hospital.

After reviewing his case, the European Court of Human Rights stated that "the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation". The Court stated that domestic legislation must provide for a "tailor-made response". The Court found that the decision-making process depriving him of his legal capacity constituted a disproportionate interference with his

1. Information note to accompany the second Disability High Level Group Report on the UN Convention (2009), 4 June 2009, p. 5.

private life, and found various violations of the European Convention on Human Rights.[2]

This judgment must be interpreted to promote an approach in line with the UN Convention. Any restrictions of the rights of the individual must be tailor-made to the individual's needs, be genuinely justified and be the result of rights-based procedures and combined with effective safeguards.

Interestingly, the UN Convention underlines the particular importance of protecting the right of persons with disabilities to own property, control their own financial affairs and to have equal access to bank loans and mortgages.[3] This appears to be based on the experience that decisions on incapacitation in this area have been taken against the spirit of human rights.

I would like to add that persons with mental health and intellectual disabilities should have the right to vote in elections and stand for election. Though this is stated clearly in the UN Convention (Article 29), individuals in a number of European countries are excluded. Being deprived or restricted of their legal capacity they have been denied these rights as well. This has further exacerbated their political invisibility.

We should remember that there is a great difference between taking away the right to take decisions about one's life and to provide "access to support". The first views people with disabilities as objects of treatment, charity and fear. The second places the person with disabilities at the centre of decision-making and views them as subjects entitled to the full range of human rights.

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2. *Shtukaturov v. Russia,* 27 March 2008. Also see the pending case of *D.D. v. Lithuania* (Application No. 13469/06) lodged on 28 March 2006. The statement of facts was published on the Court's Website on 10 December 2007.
3. This is spelled out in the fifth and last paragraph of Article 12 of the UN Convention. Note also in this regard the case *Winterwerp v. the Netherlands* in which the European Court ruled that the capacity to deal with one's property is a "civil right" and protected by the European Convention.

# It is still necessary to act for the abolition of the death penalty

5 October 2009

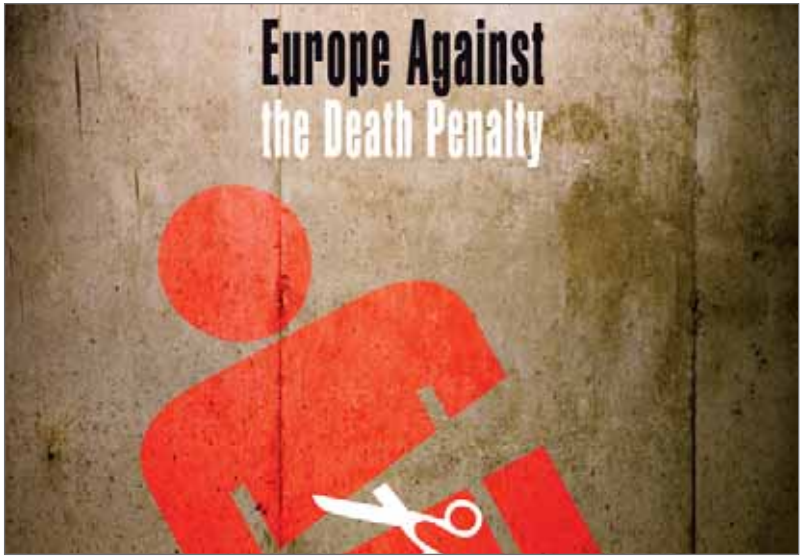
Step by step, the death penalty is being abolished. Most countries of the world have now stopped using this cruel, inhuman and degrading punishment: 94 states have decided on total abolition, 10 have abolished the penalty for all ordinary crimes and 35 others have not executed anyone for more than 10 years. Europe is nowadays close to being a death penalty free zone. However, the abolitionist cause is not yet won.

The most populated countries in the world retain the death penalty: China, India, the United States and Indonesia. This means that the majority of the world's people live in countries which continue to practice execution as punishment. In election campaigns in the United States, this is a taboo issue, and even the more progressive candidates refrain from raising it for fear of a backlash.

Politicians have problems in relating to public opinion on this issue also in other countries. The Russian Federation gave an undertaking when joining the Council of Europe 13 years ago to do away with the penalty. A moratorium was introduced but the Duma does not appear to be ready yet for a *de jure* abolition.

After the monstrous terrorist attack against the school in Beslan in September 2004, there were strong emotions in favour of executing the sole attacker who survived the disaster. However, the judicial authorities in Russia were loyal to the moratorium decision also in this extreme situation; the death sentence was transformed into life imprisonment.

Surveys of public opinion about the death penalty have usually shown a majority to be in favour of retaining this punishment. This has been the case particularly when a brutal and widely publicised murder has taken place.




"The death penalty is cruel, inhuman and degrading – and will always be so."

However, opinion polls on this issue are not easy to interpret. There is a wide difference between asking for a gut reaction to brutal crime and soliciting a considered opinion about the ethics and principles relating to legalised state killing.

It is significant that there have been no widely-based demands for the re-introduction of the death penalty in European countries. Any such proposals are not coming from larger political parties.

Still, I believe it is important to present again the very strong arguments against killing as a judicial sanction. This is a debate which will go on and younger generations should be able to benefit from our past experiences.

It can be convincingly argued that the death penalty is ineffective. It has not had the intended deterrent effect. The crime rate is not lower in countries which have retained the penalty and has not gone up where it has been abolished. If anything, the trend is the opposite.

What is demonstrated, however, is the real risk of executing an innocent person. No system of justice is infallible, judges are human beings and mistakes are made in the court room. When the convicted person is executed, it is too late to correct the mistake. There have been a number of such cases – some of them revealed afterwards through new DNA techniques – and there are no guarantees that they will not occur in the future.

It has also been demonstrated that the death penalty regime has a clear tendency to discriminate against the poor and against minorities. Privileged people with contacts run much less risk of such punishment than others who have committed the same crime. The greatest risk is run by those who are marginalised; they tend to be at a disadvantage in the judicial process – also in death penalty cases.

These arguments are strong. However, it is not only a question of effective crime prevention, judicial certainty or prevention of discrimination; it is about the essence of human rights.

The Universal Declaration of Human Rights states that no one shall be subject to torture or to cruel, inhuman and degrading treatment or punishment. There have been attempts to find means of executing with little pain in order to make the process more "humane". This has failed; there have been recent examples of prolonged suffering in the electric chair or when a person is injected with poison. Even if this could be avoided, it does not reduce the psychological pain when waiting for the execution. The death penalty is cruel, inhuman and degrading – and will always be so.

The key argument against the death penalty is that it violates the right to life. State killing is indeed the ultimate denial of human rights. That is why it is so essential that we continue to act for abolition.

The Council of Europe has been in the forefront in this effort. All member states have ratified Protocol 6 of the European Convention on Human Rights concerning abolition in peace time and the majority has also agreed to be bound by Protocol 13 regarding abolition in all circumstances (including in situations of war). Those remaining states should join.[1]

It should also be made clear that Belarus can only aspire to membership or even status as observer after it has abolished the death penalty. Governments in the United States and Japan should be reminded that their status as observer is questioned because of their position on this issue.

In the meantime the successful diplomatic initiatives in the United Nations should continue. A resolution was adopted with a broad majority in the General Assembly in 2007 which recommended a global moratorium on the use of the death penalty. A similar resolution was agreed in 2008, again stressing that the moratorium should be established "with a view to abolishing the death penalty".[2]

Our position on the death penalty indicates the kind of society we want to build. When the state itself kills a human being under its jurisdiction, it sends a message: it legitimises extreme violence. I am convinced that the death penalty has a brutalising effect in society. There is an element of "an eye for an eye" in each execution.

A civilised society should expose the fallacy behind the idea that the state can kill someone to make the point that killing is wrong.

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1. Azerbaijan and the Russian Federation have not signed Protocol 13. Armenia, Latvia, Poland and Spain have signed but not ratified. The remaining 41 member states have ratified.

2 The vote in the Assembly in 2007 (A/62/PV.76) was 104 for, 54 against and 29 abstentions. In 2008 (A/63/PV.70) the result was 106 for, 46 against and 34 abstentions.

# Climate change is causing an unprecedented, global human rights crisis – and must now be countered by co-ordinated, rights-based action

19 October 2009

The daily lives of millions are already being affected by the effects of global warming: desertification, droughts, flooding or cyclones. Basic human rights – such as the right to life, health, food, water, shelter or property – are threatened. The ones who will suffer most are those who are already vulnerable, not least people in poor areas and among them the elderly, women and children. A strong climate deal at the United Nations conference in Copenhagen in December is, therefore, particularly important also for the protection of human rights.

The Universal Declaration of Human Rights states that "everyone is entitled to a social and international order in which [their] rights and freedoms… can be fully realised". That order is undermined today by the absence of effective action against climate change.

Mary Robinson, the former UN High Commissioner for Human Rights, wrote recently that "we have collectively failed to grasp the scale and urgency of the problem. Climate change shows up countless weaknesses in our current institutional architecture, including its human rights mechanisms. To effectively address it will require a transformation of global policy capacity – from information gath-ering and collective decision-making to law enforcement and resource distribution".

The challenge in Copenhagen will be to remedy these failures and to start developing a co-ordinated capacity to prevent further dangerous global warming and, at the same time, to take the necessary measures to balance the degradation which is now unavoidable or has already taken place.

This will require a unique spirit of global solidarity. We need to recognise our interdependence. The richer countries have contributed most

"To take the necessary measures to prevent further dangerous global warming will require a unique spirit of global solidarity."

to global warming while the poorer ones so far have had to take most of the consequences.

The carbon emission cuts pledged by developed states have certainly not met the expectations of the developing world. Neither have the adaptation funds designed to help poor nations to protect their societies against climate change impacts. This, in turn, has made developing countries less willing to restrain the increase in their own emissions.

Another flaw in the climate change discussion so far has been the lack of emphasis on human rights. Though the reports of the Intergovernmental Panel on Climate Change (IPCC) describe the social consequences of global warming, they do not apply a human rights analysis.

However, the Office of the UN High Commissioner for Human Rights has now timely released a report on the relationship between climate change and human rights. The document describes the effects of climate change on individuals and communities and underlines the treaty-based obligations of governments to protect those whose rights are affected by the impact of global warming or by the policies and measures designed to address climate change.[1]

Another recent report – published by the International Council on Human Rights Policy – argues that the disciplinary boundaries between environmental and human rights law should now be crossed.[2] It shows that both the policy to reduce emission levels (mitigation) and the efforts to strengthen capacities of societies to cope with climate change impacts (adaptation) can be more effective if linked to human rights.

A human rights analysis would, indeed, add important perspectives to the negotiations on measures against climate change. Not least, it could help to clarify the concrete consequences on the daily lives of people and thereby remind us that climate change is about human suffering.

It is important to understand who is at risk and how they could be better protected. Knowledge about the human rights impact on individuals and communities will hopefully encourage awareness so as to prevent chain effects such as mass displacement and conflict. It can guide the targeting of assistance to the most vulnerable groups.

Human rights standards and principles would also provide safeguards which should be integrated into plans and policies to address climate change. Economic and social rights shall be protected by making best

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1. Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights – Summary (A/HRC/10/61).

2 *Climate Change and Human Rights. A Rough Guide* published by the International Council on Human Rights Policy, 2009. The quote by Mary Robinson is from the foreword to this report.

use of the available resources. In other words, they should be given priority.

This requires that affected populations have the right to be well informed and to participate in relevant decision-making through genuinely democratic processes. These intentions are reflected in the 1998 Aarhus Convention with provisions for proactive information sharing and involvement of affected people in the preparation of plans and programmes to combat environmental risks.[3]

There is also a burning need to discuss accountability. By using human rights standards, states can define minimum requirements for both mitigation and adaptation policies. It should be made clear that damage to the environment that goes beyond a certain threshold causing harm to certain human rights is unacceptable and illegal.

Mary Robinson mentioned the need to sharpen the human rights mechanisms to handle the new challenges relating to climate change. There ought to be effective procedures to establish accountability and to provide reparation to victims. However, it will not be easy to establish concrete responsibility in cases where there are many perpetrators and from countries other than those where the damage is felt.

The European Court of Human Rights has to some extent recognised environmental rights (mostly in connection to Article 8 of the European Convention). In one case, the Court noted that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely".[4]

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3. The UNECE on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 1998.
4. See case of *Lopez Ostra v. Spain*, application No. 16798/90, judgment 9 December 1994, paragraph 51.

The Court has also confirmed the obligation of states to conduct proper studies before allowing an activity which could cause environmental damage and bringing those studies to the public's knowledge.[5]

It has, furthermore, found a violation of the right to life in a case where the authorities did not take preventive action when they were aware of an increased risk of large-scale mudslides and had not kept the population informed of the risk.[6]

The European Social Charter provides for the right to health and requires state parties "to remove as far as possible the causes of ill-health" (Article 11). On this basis, the European Committee of Social Rights has held states responsible for showing measurable progress in lowering levels of pollution.[7] The same ruling would cover nuclear hazards, risks related to asbestos or food safety.

These are just the first steps. With the growing awareness of the harm caused by climate change it will be necessary to clarify in further depth the obligations that must be connected to the right to a healthy environment.

Already the first United Nations Conference on the Human Environment in Stockholm in 1972, declared as a right for humans to have "adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being…"

The statement did not end there: it also made clear that we all have "a solemn responsibility to protect and improve the environment for present and future generations." Yes, that is what it is about.

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5. See case of *Taşkin and others v. Turkey*, application No. 46117/99, judgment 30 March 2005.
6. See case of *Budayeva and Others v. Russia*, application No. 15339/02, judgment 29 September 2008.
7. European Committee of Social Rights decision in the case *Sarantopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, decision on the merits of 6 December 2006, paragraphs 203 and 205.

# Intelligence secrecy must not be used as an excuse to ignore or cover up human rights violations

2 November 2009

Lessons are only now being learned from the breakdown of human rights which followed the US-led "war on terror" after September 2001. While more and more detailed and shocking information is gradually emerging about systematic torture, secret detentions and other serious human rights violations, political authorities appear reluctant to face facts. There is an urgent need to improve the democratic oversight of intelligence and security agencies and to regulate cross-border co-operation between them.

Terrorism is a grim reality and states must seek effective ways to combat this threat. However, many counter-terrorism measures used today are illegal and even counter-productive. This was the conclusion of an international panel of eminent judges and lawyers, convened by the International Commission of Jurists, in an authoritative report earlier this year.[1]

The panel found that the failure of states to comply with their legal duties had created a dangerous situation wherein terrorism and the fear of terrorism were undermining basic principles of international human rights law.

One phenomenon documented by the panel was a trend towards intelligence agencies acquiring new powers and resources without legal and political accountability keeping pace. This tendency has become more marked since 2001.

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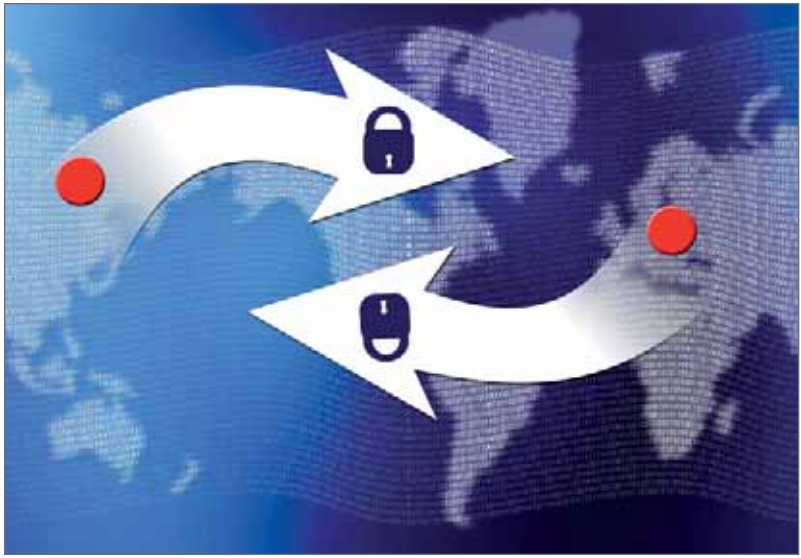
1. *Assessing Damage, Urging Action – Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, February 2009. International Commission of Jurists.



"There is an urgent need to improve the democratic oversight of intelligence and security agencies and to regulate cross-border co-operation between them."

Standards have been defined, for instance, in relation to the collection and processing of personal data. The Council of Europe's guidelines on human rights and the fight against terrorism (2002) allow for such activities only under certain conditions: when governed by domestic law provisions, when deemed proportionate to the aim of the interference and when they are supervised or monitored by an independent authority.

Most European countries have today some oversight arrangement to hold intelligence and security services accountable and to ensure that laws are respected and abuses avoided. In some countries this is done by a parliamentary committee on a permanent basis or through special

investigations in particular cases. In others, the oversight body may be made up of experts with various relevant backgrounds to serve as supervisors or watchdogs.

The effectiveness of these bodies largely depends on their statutory powers, on the level of co-operation from the government and the agencies themselves and on their own competence and resources. They are naturally bound by rules of confidentiality which makes it difficult to assess their impact and importance.

However, it is my clear impression that several member states of the Council of Europe need to improve the democratic control of their agencies. There are some good models: the Norwegian Parliamentary Oversight Committee, for instance, has the means to review all records and archives and appears to actively control inter-agency communications. There are other countries, however, where the oversight bodies seem to have little access to sensitive information or even strategy discussions.

There have been individual cases where particularly embarrassing lapses have been evident. In Sweden, the Parliamentary Committee on Constitutional Affairs reviewed the case of two Egyptians who had been deported to Egypt – where they suffered torture during interrogations – without managing to obtain basic relevant facts. It was only through subsequent investigative journalism that it became known that this operation was conducted in close co-operation with the US Central Intelligence Agency and that the deportees had, in fact, been handed over to CIA agents on Swedish soil.

In this case, the Swedish Government argued afterwards that it had not been possible to even inform the parliamentary committee as this could have jeopardised intelligence operations with the foreign agency concerned. In the United Kingdom, the government tried to prevent the High Court from releasing a key document which would have thrown light on the nature of the inter-agency co-operation in a case of torture – again arguing that the US Government would have reacted negatively. The same point has been made by other governments in similar situations.

This argument requires a response. Though cross-border co-operation between the services is essential, it is not acceptable that investigations into possible human rights violations or general oversight of intelligence exchanges are prevented by such "understandings".

There is an obvious risk that the argument of maintaining good relations with an agency in the other country will be misused – by one side or both – to cover up illegal actions, including human rights violations or other misconduct. When this happens, it seriously undermines the principle of accountability.

Furthermore, there is a clear danger that information which is secretly shared might be inaccurate, but still acted upon – without any possibility for those targeted to get any mistakes rectified. There have been cases in the last couple of years where this has led to serious injustice against individuals and, in some cases, also harmed their family and friends.

The trading of information between intelligence services has grown dramatically in recent years and the control systems set up previously will be of little value if these exchanges are not covered.

Thanks to the Council of Europe, the European Parliament, media and non-governmental organisations, some facts have emerged about human rights violations which took place during the secret collaboration between the agencies.

These revelations have not undermined the struggle against terrorism. Indeed, several of them, though embarrassing to some, have led to crucial discussions on how to make the struggle against terrorism more effective which of course requires human rights violations to be halted.

One conclusion is that exemptions in freedom of expression legislation based on national security considerations should be strictly limited.

However, it must also be recognised that there are facts which should not be made public and aspects which should legitimately be kept confidential. That is the reason why oversight bodies are needed: they should represent the public interest and control the agencies in a manner

which makes them worthy of trust. Therefore, they must also be able to deal with the flow of information between the different national agencies.

A first step in this direction is to establish that collaboration between agencies can only be allowed according to principles established in law and when authorised or supervised by parliamentary or expert control bodies.[2]

Both the supply and receipt of data should be regulated through explicit agreements between the parties. This should be required by law – as is the case in the Netherlands. The agreements should include human rights safeguards and be submitted to the relevant oversight body.

The supply of data should be made conditional upon clear restrictions on its use. Further distribution should be strictly regulated. The use of information for intelligence purposes should not be allowed in, for instance, immigration or extradition proceedings.

The rule should be that information must only be disclosed to foreign agencies if these undertake to apply the same controls – including guaranteeing respect for human rights safeguards – as exercised by the "donor" agency. Likewise, "recipient" agencies should make imported data subject to full scrutiny by the national oversight mechanism.

It would be easier for individual European countries to conclude bilateral agreements with other states if they had agreed between themselves on principles to apply in inter-agency co-operation. In fact, the European Commission recently suggested a common "information

2. The suggestions in this part are largely inspired by the research of Professor Ian Leigh at the Durham Human Rights Centre. He will publish a paper entitled "Rendering an Account? Accountability, oversight and international intelligence co-operation", in M. Nowak and R. Schmidt (eds.), *Extraordinary Renditions and the Protections of Human Rights* (Neuer Wissenschaftlicher Verlag/Intersentia, Vienna, 2010).

model" which would define criteria for gathering, sharing and processing information obtained for security purposes.[3] The Council of Europe is well placed to promote such understandings.

While extensive international co-operation now exists between the intelligence and security services, this is not the case for the national oversight bodies. The modest network which has been set up needs to be further developed. Fortunately, models of national mechanisms from which others can learn already exist.

The national parliaments could play a definite role in promoting such contacts in order to facilitate better control of the trans-agency collaboration. Above all, they would need to make clear that such co-operation must be compliant with the agreed human rights standards.

3. Communication of 10 June 2009 on the development of the area of freedom, security and justice in the European Union.

# Realising children's rights requires more than rhetoric – systematic and concrete actions are now needed

16 November 2009

The UN Convention on the Rights of the Child has become one of the most well-known and broadly supported international human rights treaties. Practically all the states in the world have ratified it and thereby legally bound themselves to implement its provisions. As a result, the situation of children has been put higher on the political agenda. Yet, the actual implementation of the Convention has been less effective than we anticipated. The main reason is the absence of a systematic, comprehensive approach to children's rights as a political priority.

Although children make up a large section of the population and constitute the future of society (in more ways than one), their concerns are seldom given top priority in politics. Ministers responsible for children's affairs tend to be junior and stand outside the inner circle of power. When political issues are divided into "soft" and "hard", those relating to children are dealt with as "soft-soft". Often these issues are seen as non-political and sometimes simply trivial. The image of politicians on the campaign trail kissing babies has become symbolic of this trivialisation.

Gestures are not enough to meet the requirements of the Convention – what is needed is serious political discussion and real change. Improvement in the status of and conditions for children is of course the very purpose of the Convention. With ratification, a state has committed itself to respect the principles and provisions of the Convention and to transform them into reality for all children.

One possible reason for the delay in implementing the Convention could be the decision-makers' lack of understanding or acceptance of

"It is particularly in times of crisis that the state has to reaffirm its commitment and to fully respect the rights of children – all children."

the obligations arising from it. They may not always have made the distinction between charity and a rights-based approach.

Children in need, just like persons with disabilities, have long been the favourite "objects" of charity. They have been given support, not as a matter of right, but because people have felt pity for them. This is one of the attitudes that the Convention challenges.

The Convention sees the child as a subject. He or she has the right to schooling, health care and an adequate standard of living as well as to be heard and have his or her views respected. This goes as much for the cute toddler as for the problematic teenager.

The very notion that children have rights is a radical one, totally alien to the old-fashioned belief that children are only entitled to rights on their 18th birthday and that their parents hold these rights until that date.

That children and their interests should be given priority is another important message in the Convention. It states as an overarching principle that "the best interests of the child shall be a primary consideration" in all actions concerning them whether taken by local or national authorities, parliaments, courts, or social welfare institutions, including those run on a private basis (Article 3).

The Convention also requires concrete steps to be taken to guarantee genuine implementation. It prescribes that governments must take legal, administrative and other measures and use "the maximum extent of their available resources" to ensure that children can enjoy their rights (Article 4).

Many of us who took part in the drafting of the Convention were aware of the risk that the final text would be seen by some as an idealistic wish list rather than as a definition of the human rights of children. The challenge was to give clear substance to the obligations which would follow from the rights approach.

The UN Committee on the Rights of the Child, the elected body to monitor the application of the Convention, has attached a great deal of importance to the methods and means used for its implementation. Based on that experience and suggestions from UNICEF, non-governmental organisations and some governments, one could define key measures in a checklist on systematic measures that serious governments ought to take. These include the need to:

- develop a comprehensive national agenda for children;
- ensure that all legislation is fully compatible with children's rights which requires incorporating the Convention into domestic law and practice as well as ensuring that its principles and provisions take precedence in cases of conflict with national legislation;

- make children visible in the process of policy development throughout the government by introducing child impact assessments;
- carry out adequate budget analysis to determine the proportion spent on children and to ensure the effective use of resources;
- establish permanent bodies or mechanisms to promote co-ordination, monitoring and evaluation of activities throughout all sectors of government, including the local authorities;
- ensure that sufficient data are collected and used to improve the state of all children in each jurisdiction;
- raise awareness and disseminate information on children's rights and what they mean in reality, including through training for all those in government whose work relates to children or who work with children;
- involve children themselves as well as civil society in the process of implementation and awareness-raising;
- develop independent statutory offices for children – a children's ombudsman, commissioner or other similar institutions – to promote children's rights; and
- give children's rights priority in all forms of international co-operation, including in programmes for technical assistance.

These 10 recommendations are mutually reinforcing and have several characteristics in common. Each relies on public debate and transparent procedures. Each advocates a "first call" for children while recognising the need for co-ordinated efforts to ensure that children's rights are incorporated into the existing administrative structures. They require children themselves to take part in the procedures.

The basic idea is that children's issues be moved from the exclusive realm of charity onto the political agenda – and placed high thereon.

Several European governments have taken action on these recommendations, for instance, through adopting a national strategy, improving

their internal co-ordination on children's issues, developing the data collection system and appointing an ombudsman for children – within the office of the general ombudsman or separately.

Yet, there are glaring gaps which appear to indicate that the governments have not been sufficiently serious. This is also reflected in the continued lack of child protection.

Too little is being done to give children with disabilities an opportunity for schooling. Children within minorities, not least the Roma, are disadvantaged in most spheres of life. Children in conflict with the law are too often detained. Children among the irregular migrants are vulnerable and suffer exploitation. Refugee children are not well treated. Corporal punishment is retained in about half of the countries in Europe and some children also face violence in school. Justice, schools and cities are not yet child-friendly.

One reason why powerful politicians tend to be rhetorical rather than concrete on children's issues is probably because many of them lead a life which isolates them from a child's everyday reality. The opinions of children themselves are not taken seriously and their parents or guardians have, in many cases, little time or opportunity to present their views.

In fact, the seriousness of the political commitment is now being tested in the ongoing budget discussions. In the wake of the current recession, there have already been budget cuts in several countries which have affected children – either directly in the state budget or via reduced support to local authorities.

Funds for education, health care and social benefits for vulnerable groups have been significantly reduced in some countries. And this is before governments start paying back the debts incurred when state money was used to meet the financial crisis and rescue the banking system.

This has provoked a discussion on the concrete meaning of "the maximum extent" of the available resources to go to children. Inevitably, children's interests will also suffer when the whole society is forced to tighten its belt. However, what is clearly against the very spirit of

the Convention are decisions which would penalise those who are already vulnerable and thereby increase the existing inequalities.

It is now particularly important that the short- and long-term impacts on children are analysed before the next budgets are approved. Also in Europe, we already have a serious problem of child poverty – appallingly widespread in some countries. Here, a large number of children are disadvantaged from the very start. This has to be addressed; the current crisis is no argument for not doing so – on the contrary.

Resource limitations cannot be seen as an excuse for ignoring obligations to protect child rights and for delaying the implementation of measures. The greater the difficulties, the more reason to act with a clear political will in order to address the problems in a systematic fashion.

Indeed, it is particularly in times of crisis that the state has to reaffirm its commitment and to fully respect the rights of children – all children.

# Multiculturalism is an important dimension of our national identities

30 November 2009

Europe today is not free from racism, xenophobia, Islamophobia, anti-Gypsyism, anti-Semitism, homophobia and other phobias directed against others. Minorities are made targets of hate speech, violence and systematic discrimination, not least in the job market. Responsible politicians must take such negative tendencies more seriously. There is a need to analyse and address the very root causes of these human and political failures.

It appears that intolerance has spread during the economic crisis. During my travels, I have observed that extremist groups and parties have become more active and more threatening and have succeeded in recruiting supporters from amongst young, unemployed men.

Groups such as Roma, who are already marginalised, have been increasingly targeted and subjected to particularly violent attacks. The response from mainstream political parties and other majority representatives has often been meek and confused.

The impact of "globalisation" is seen as one explanation for these problems. Increased migration inside and between countries and the ongoing electronic revolution have contributed to a feeling of insecurity among many. More and more people appear to feel the need to define their own identity in a world which is changing so rapidly.

President Sarkozy has initiated a country-wide debate in France on the very issue of the French national identity. In other European countries, there are calls for the "identity" to be defined.

"Europe has always benefited from being an inherently pluralist, multi-faceted continent."

Such discussions could be helpful if those taking part avoided the trap of promoting one single identity which defines who is included and by extension who is excluded.

Despite its sad history of discrimination and oppression of minorities and vulnerable groups, Europe has always benefited from being an inherently pluralist, multi-faceted continent. Our ability to interact positively with one another will affect the future of Europe. Multiculturalism is a value which must be protected.

I hope that some of those taking part in the soul-searching talks on national identity will read two particularly relevant books: Amartya Sen's *Identity and Violence: Illusions of Destiny* and Ryszard Kapuscinski's *The Other*.

Professor Sen observes that the world is increasingly seen as a federation of religions or civilisations and that we thereby ignore all the other ways in which people define themselves. He questions the presumption that people can be categorised into a single, overarching system of partitioning.

He is of course right. In reality we all belong to a number of different categories depending not only on ethnicity, nationality or faith, but also on local roots, gender, sexual orientation, parenthood, language, education, profession, social class, politics, age group, health, leisure activities, membership of organisations and many other distinctions.

The relative importance of belonging to a particular group or having a particular identity can only be determined by the individual. Though nationality or religion could be of upmost importance to some, this is not the case for many others. For instance, a widespread misunderstanding is that most Muslims go to the mosque on Fridays, which is as far from the truth as the notion that most Christians are regular churchgoers.

We know from experience that the imposition by the state or other authority of one allegedly unique identity – such as a particular civilisation or a particular religion – creates a basis for sectarian confrontation.

Sen stresses the risk that a fostered sense of identity with only one group can be made into a powerful weapon to brutalise another. Within-group solidarity can feed between-group discord.

Kapuscinski, the Polish journalist and writer, underlines that practically all civilisations have had a tendency towards narcissism leading to arrogance and contempt for "others". We should learn the lessons of history. He also writes that one's identity is highly influenced by how one is seen by the others and underlines the importance of intergroup contacts and relations.

While he argues in favour of multiculturalism, he stresses that the ability to take part in a multicultural world requires a strong, mature sense of self-identity. This is where the decreasing trust in the political system and the consequences of the economic crisis could be most damaging.

Widespread unemployment is a real threat to bridge-building and respecting people as they are. Joblessness undermines self-confidence and can easily be exploited by extremist groups who offer "identity" through attacking the others, especially the vulnerable ones.

What are the concrete challenges for national human rights policies?

- States should actively promote the fundamental principles of pluralism, tolerance and broadmindedness on which democracy is actually based.
- Guided by these key values, states should show greater receptiveness to diversity in their societies and take appropriate measures to allow members of existing minority groups to determine and express their own identities.
- States should create consultative mechanisms, at national, regional and local levels, which would ensure an institutionalised, open, sincere and continuous dialogue with representatives of all non-dominant groups, such as minorities. These consultative bodies should have a clear legal status and be inclusive and representative.
- Social rights are absolutely crucial in order to avoid widening gaps and further injustices. Minorities suffer disproportionally as a result of such inequalities and tend, moreover, to become scapegoats when other sections of the population grow disappointed.
- Further concrete measures are needed to address latent discrimination in public and private employment policies. More efforts should be made to recruit minority representatives into key professions like teaching and policing as well as into political positions.
- Greater priority should be given to the school system. Primary and secondary education should not be segregated, but inclusive. Respect for others should be part of the curricula as stated in the United Nations Convention on the Rights of the Child (CRC).

- Human rights should be once again made the cornerstone of the policies on migration.
- Hate speech and discrimination against Roma should be stopped. The problems here remain scandalous and appear to indicate that European governments are not as serious as they should be about promoting human rights for everyone. An official apology for past violations would be a good place to start.
- Comprehensive, anti-discrimination legislation should be adopted and monitoring bodies established to guarantee equality for all.
- Steps to promote equal opportunities should not overshadow the positive achievements made in this field to date. Our dependence on one another, including on migrants, also needs highlighting.
- Different groups should be allowed to fully integrate into society and, over time, demonstrate what they and their culture have to contribute. Curiosity and open-mindedness should be encouraged as well as a dynamic vision of the future instead of fear and suspicion.

"Building bridges of understanding", writes Kapuscinski, "is not just an ethical duty, but also an urgent task for our time in a world where everything is so fragile and where there is so much demagogy, disorientation, fanaticism and bad will".

# Human rights activists all over Europe are still learning from the example of Andrei Sakharov

14 December 2009

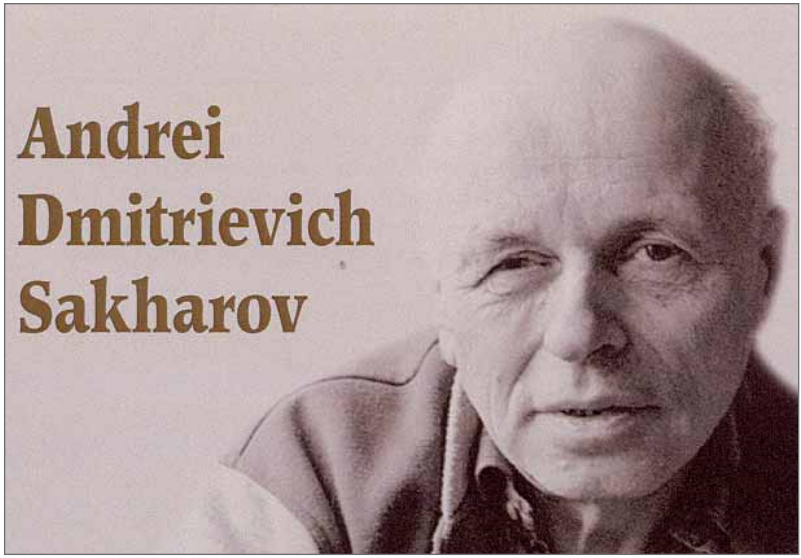
Andrei Dmitrievich Sakharov was a unique person of whom both Russia and Europe should be proud. He became a voice of moral conscience which could not be silenced even by the repressive machine of a super power. His principled messages inspired others and contributed to the non-violent, revolutionary changes of 1989 and thereafter. He died in the midst of those upheavals but had set an example which continues to influence the work for justice and human rights in Russia, other states of the former Soviet Union and the rest of Europe.

Sakharov was not meant to become a one-man opposition against Soviet misrule. He was at an early age a brilliant physicist, richly rewarded by the government for his work on the hydrogen bomb.

The turning point came with his concern about the risks of nuclear weapons and his appeals for a ban on all nuclear tests. He demanded an honest debate about the danger of thermonuclear war, but no one in power listened. Gradually he became more and more critical: his three decade long campaign for reason had started.

He certainly wanted to influence political decisions but had no political ambitions for himself. However, after his release from seven years of enforced exile in Gorky, in December 1986, he did become active as a reformer in the political arena – striving to contribute meaningful content to "Perestroika".

At that stage, he was seen by many as an unofficial leader of the democratic movement and was elected to the First Congress of the People's Deputies. There, he argued for democratic reform and criticised strongly Article 6 of the Soviet constitution which guaranteed the supremacy of the Communist Party.




"Sakharov presented a universal vision for a peaceful and progressive society based on human rights standards."

He was appointed to a commission tasked with drafting a new constitution. Typically, he produced his own draft – which contained strong provisions for the protection of human rights – which he presented to General Secretary Mikhail Gorbachev.

Though still seen as a trouble maker in government and party circles, Sakharov's ideas could not be ignored. A number of them were included by Gorbachev when he presented his own goals: honest and transparent government; popular participation; truth telling about the past; the rule of law; freedom of association; and freedom of media.

Sakharov was constructive as a matter of principle. Even during his years in exile and through earlier periods of severe KGB harassment,

he made constantly clear that he was seeking a rational dialogue. He wrote numerous letters to the Soviet leaders seeking to convince them about the demands of reason, often referring to provisions in the law.

There were no replies but the letters became known through informal channels and also reached abroad – and built a case. This is how Sakharov himself evaluated these efforts in his memoirs:

> *[They] have produced little in the way of immediate results. But I believe that statements on public issues are a useful means of promoting discussion, proposing alternatives to official policy, and focusing attention on problems. Appeals on behalf of specific individuals also attract attention to their cases, occasionally benefit a particular person, and inhibit future human rights violations through the threat of public disclosure.*

Sakharov was a tireless activist. When his appeals went unheard he became involved in non-violent, direct action, sometimes putting his own health at risk. He travelled long distances to monitor trials and, when turned away from the court room, he demonstrated outside. He went on hunger strike several times, the first time in 1974 for the release of political prisoners.

He and his wife, Elena Bonner, received a growing number of appeals from people who had been victimised by repression. Sakharov became an unofficial ombudsman for minorities such as the Crimean Tartars, for Baptists and others who suffered religious discrimination and for Jews who wanted to leave the country.

He was alarmed by the inhuman conditions in Soviet prisons. Another deep concern was the misuse of psychiatry, the involuntary detention in mental institutions of those who disagreed or disobeyed. This method bypassed all pretence of legality and frequently resulted in enforced medication for "health reasons" and other forms of abuse. The reports on these violations created an unusually strong reaction abroad and the number of cases went down.

Sakharov presented a universal vision for a peaceful and progressive society based on human rights standards. In his writings, not least in his Nobel lecture 1975, he articulated the deeper significance of human rights and their relationship to peace and the development of a better world.

He argued that human rights ensure democratic supervision of a country's foreign and security policy which would prevent militarisation and limit the risk of war. Also, human rights promote exchange of information and ideas between people which in turn lowers the level of distrust and thereby the risk of conflict.

"I am convinced that international confidence, mutual understanding, disarmament and international security are inconceivable without an open society with freedom of information, freedom of conscience, the right to publish, and the right to travel and choose the country in which one wishes to live. I am likewise convinced that freedom of conscience, together with the other civil rights, provides the basis for scientific progress and constitutes a guarantee that scientific advances will not be used to despoil mankind, providing the basis for economic and social progress, which in turn is a political guarantee for the possibility of an effective defence of social rights. At the same time I should like to defend the thesis of the original and decisive significance of civil and political rights in moulding the destiny of mankind."

Sakharov identified hatred as a major danger for society. He argued persistently for measures against national and racial prejudices and religious intolerance. Particularly unforgivable was state incitement of hatred of "others".

He took a clear position against capital punishment and regretted that he was prevented from coming to the international conference against the death penalty in Stockholm in 1977. The message he sent argued for a total abolition:

> *I regard the death penalty as a savage, immoral institution which undermines the ethical and legal foundations of society. The state, in the person of its functionaries (who, like all people, are prone to*

*superficial judgments and may be swayed by prejudice or selfish motives), assumes the right to the most terrible and irreversible act – the taking of human life. Such a state cannot expect an improvement in its moral atmosphere. I reject the notion that the death penalty has any real deterrent effect whatsoever on potential criminals. I am convinced that the contrary is true – the savagery begets only savagery.*

Though firmly rooted in Russia, he was a true internationalist. He believed that the fates of all human beings are indivisible. "Mankind can develop painlessly only if it looks upon itself in a demographic sense as a unit, a single family without divisions into nations other than in matters of history and traditions", he wrote in his *Reflections on Progress, Peaceful Coexistence and Intellectual Freedom* (published in *The New York Times*, 1968).

This understanding of global interdependence made him express concern about poverty in the developing countries, the war in Afghanistan and the fate of refugees. He appealed for a general amnesty for those imprisoned for their views everywhere and inspired Amnesty International to launch a global campaign for the release of all prisoners of conscience.

As a gifted scientist, he realised early the global dangers if we ignore the need for ecological balance (he used the term "geohygiene"). He became involved in protests to save Lake Baikal from being poisoned by toxic waste from surrounding industries and concluded later that "[t]he salvation of our environment requires that we overcome our divisions and the pressure of temporary, local interests."

The example and thoughts of Andrei Sakharov remain acutely relevant.

Society has an obligation to support
abandoned children and offer them
a positive home environment
– also when budget resources are limited

28 December 2009

The notorious large-scale institutions for orphans and children with disabilities are being phased out, including in the former communist countries of central and eastern Europe. This process of de-institutionalisation must continue, but it has to be pursued with care in the best interests of the child. Suitable alternatives must be developed and supported by the authorities – also in a period of economic crisis.

An extreme example of a distorted attitude towards children was exposed after the fall of the Ceausescu dictatorship in Romania some 20 years ago. Steps had been taken there to prevent people from using contraceptives and as a result unwanted children were born. Parents who could not care for their children were asked to hand them over to state institutions.

These collectives functioned badly. Contact between the parents and the children were actively discouraged or even prevented. The staff were too few to cope with the many children. They were untrained for their task and badly paid, which gave their job a low status. I visited some of these homes at the time and was struck by the difficult material conditions and the depressed atmosphere.

Some of the institutions, especially those for children with disabilities, were hidden far away from population centres and were hardly given the bare minimum of staff and material resources. No efforts were made to encourage the development of these children – no schooling, no organised play, no love. Some of the children were kept tied to their beds, day and night.

"The process of de-institutionalisation must continue, but it has to be pursued with care in the best interests of the child."

The situation in Romania was extreme but large, inhumane institutions also existed in countries such as Bulgaria, Estonia, Hungary, Latvia, Lithuania, Moldova, Poland and Russia. It became a major task for the new rulers to start the process of de-institutionalisation. Progress has been made during the past two decades, though major problems remain and require further efforts.

It has become widely recognised that a family environment is generally much better for children than institutional care. The adoption of the 1989 UN Convention of the Rights of the Child – and the discussion about its consequences – strengthened this understanding.

Recommendations from Council of Europe bodies have contributed further to a child-friendly approach which could be summarised as follows:

- Placement of children in institutions should, as far as possible, be avoided. In particular, the old-style, large institutions have a negative effect on children and their development. They tend to neglect children's needs for affection and to be recognised as individuals. In such institutions, cases of abuse tend to be common – both by adults and by other children.
- A first line of defence would be to give strong, sustained support to parents so that the rights of the child can be protected in the home environment.
- Unfortunately, there are situations in which it is in the best interests of the child to move somewhere else. The aim then should be to seek a good family environment – foster care might be the best option.
- For each child in this situation, there should be an individual plan based on his or her needs and the family circumstances. The principle of the best interests of the child should guide all decisions and the children themselves should be able to influence.
- If an institutional placement is necessary, it should be as family-like as possible. Staff should be well-trained and professional.
- The spirit in such child centres should be clearly child-friendly and education seen as a right for everyone. There should be clear and effective complaints procedures.
- If at all possible, the child should be able to communicate with and see the parents – reintegration into the family should be an aim.
- Monitoring of the situation of each child is of key importance. All forms of alternative care should be regularly reviewed. There should also be a serious follow-up review of the situation after the period of alternative care.

The fact that these principles have been recognised does not mean that they are automatically applied. Some of the old-style institutions are still there and suitable alternatives have not been sufficiently developed. Also, too little is being done to strengthen families and thereby prevent the risk that children become abandoned.

It is of paramount importance that the current economic crisis does not undermine the process to support children at risk. Unfortunately, budget cuts have already been made which will inevitably damage the best interests of children.

There is an obvious risk that the number of abandoned children will increase as the social support for troubled families is reduced. Families break down under the pressure of poverty and unemployment. Too many children are forced to grow up in families where alcoholism and other drug abuse is part of daily life. These factors are root causes which place children at risk.

Most of the children in the orphanages have at least one parent alive. In her Korczak lecture, the Russian social policy expert Marina Gordeeva called them "social orphans" and explained some of the background:

> *Traditional family ties between generations are disrupted, the number of divorces is growing, the level of material support of families with children is lowering, many parents lead an asocial life and avoid their parental duties.*

She argued for a policy which would combine determined efforts to support vulnerable families, step-by-step closure of the old residential care institutions and creation of support services to substitute guardians, such as foster families. She stressed that the main aim is not to close down the residential institutions but to achieve a successful family placement of each child in need.

These steps would require strong political backing and sufficient budget resources. In addition, local authorities must take their share of responsibility for the efforts to provide support services for children. I have noticed that there are shortcomings in this regard in several countries,

including in Russia and Bulgaria. Co-ordination between ministries also tends to be insufficient in family policy matters. Marina Gordeeva spoke about "a gap in managerial decision-making".

The financial and managerial gaps cannot be closed only through the work of civil society groups. Non-governmental initiatives should in general be welcomed, but unpredictable charity is not the solution, this task is primarily a government obligation.

We know now what to do to protect children in need. The programmes are not controversial and they are backed by all available expertise. What is needed is the political will to turn them into reality.

# Impunity for rape of women has to be stopped

11 January 2010

Sexual assault crimes must be taken more seriously by governments and parliaments. The injuries inflicted by rape are deep and long-lasting, in many cases gravely hurting the physical and psychological integrity of the victims. Though these crimes are largely hidden and their precise scale is difficult to determine, we know that they are widespread and that many, many women live in constant fear of being assaulted. They have the right to be protected. More needs to be done both to prevent and to punish these crimes.

In fact, most rapes are never reported. One reason is that the perpetrator in many cases is a family member or close acquaintance, for example a husband, a partner or ex-partner, a father or a step-father, or another relative. This makes it more difficult for the victim to go to the police, because such a report may lead to retaliation or other serious consequences in her daily life.

Those who do report are not always taken seriously at the police station or during a trial. Too often the victims are interrogated in a most insensitive manner by officials who have little understanding of the traumatic aspects of such crimes. This is another disincentive to bringing charges.

Though the legislation on sexual assault has improved considerably in European countries, the court proceedings are generally not sufficiently adapted to the seriousness of this crime and to its psychological impact upon the victims. The trial itself could put the woman in a situation of having to relive a deeply agonising experience. In particular, the confrontation with the perpetrator may be extremely traumatic.

"More needs to be done both to prevent and to punish these crimes."

Moreover, in cases which actually do reach the courts in spite of these obstacles, the number of convictions continues to be very low. In most cases, the perpetrators go unpunished, which can be a very hard blow to a woman who takes the risk to report. This fact certainly does not encourage other victims to initiate proceedings.

There have been too many trials during which the credibility of the woman has been questioned in an inappropriate manner. In many cases, the woman's own behaviour or even her style of dress has been given undue attention during the proceedings. The suspicion is aired that she herself might have provoked the assault.

In some instances, courts have been influenced by the argument that a woman wearing a short skirt has "asked for it". In such cases the blame, or at least part of the blame, is shifted from the attacker to the victim.

This is unacceptable. It must be made clear that free consent is always necessary for sexual intercourse. This principle must dominate not only the law but also the concrete procedures in the justice system. Marriage or partnership shall not be construed as an excuse for sexual abuse; no type of relationship makes the principle of free consent redundant.

Consent should be real. There should be a genuine freedom of choice so that the participation in the act is truly voluntary. Absence of violence is not a sufficient criterion as a proof of consent. Sexual intercourse under threat of violence or other coercive circumstances must be regarded as rape. It should not be necessary that the woman has physically resisted the attacker; she may be physically unable to do so, be paralysed by fear or in a blackmail situation.

The European Court of Human Rights has analysed this particular aspect in a case relating to the judicial response to a charge relating to rape (*M.C. v. Bulgaria*; 4 March 2004):

> *[T]he Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.*

The same point was made in recent decisions taken by the Council of Europe Parliamentary Assembly. It recommended member states to define consent as "agreement by choice when having the freedom and capacity to make that choice". It also suggested that rape by a spouse, partner or ex-partner might be regarded as an aggravating circumstance in the judicial process.[1]

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1. Resolution 1691 (2009) and Recommendation 1887 (2009) of the Council of Europe Parliamentary Assembly, adopted 2 October 2009.

The German parliamentarian Marlene Rupprecht, who acted as the rapporteur of the Assembly on this issue, stressed the need to empower girls and women not to be victims – their self-esteem and their capacities for self-defence should be promoted. She also emphasised the need to teach boys and men to respect women – and their decision to say no.

One obvious aspect of a comprehensive strategy to give better protection for women against sexual assault is to ensure that all relevant professionals fully understand the principle of free consent and its implications – including police, judicial and forensic personnel. In addition, the competence of social workers and health professionals to assist victims is of great importance. Education and training for this purpose should be further promoted.

Such education should make clear a point that Marlene Rupprecht also made in her report: that rape should not be understood as a "sexual" activity as it is usually motivated by a desire to control, harm and humiliate a woman. Typically, marital rape is more common at the end of relationships, for instance when a woman has sought divorce or when there is a battle about custody of children.

Rape is not only a private issue between two individuals. It must also be seen as a human rights concern – as governments have not provided sufficient protection of individuals against this great harm from others. The Strasbourg Court is right to refer both to Article 3 about protection against ill-treatment and to Article 8 about respect for one's private life.

In fact, sexual assault should be seen as one of the most serious human rights problems of our time. Sadly, its scale appears to be widespread. The fact that it is largely hidden is not an excuse for ignoring its existence. On the contrary, it should be a political priority to protect women from this threat. The very first step should be to investigate why there are so few convictions in cases brought to court – and to remedy this failure.

This is a question of respecting the integrity of a person, one of the most crucial aspects of human rights.

# Language rights of national minorities must be respected – their denial undermines human rights and causes inter-communal tensions

25 January 2010

Language rights have become an issue of contention within several European countries, and as a consequence also between neighbouring states. While some governments take steps to strengthen the standing of the official language, national minorities are concerned that their linguistic rights are being undermined.

The spelling of personal names on passports, the displaying of street names and other topographical indications, the language used in schools, the language requirements when communicating with the authorities and the possibility to establish minority media – such issues are again being raised by minority representatives in several European countries.

The redrawing of the political map in Europe over the past 20 years has in some places made these problems more acute. Also, emerging nationalistic tendencies – combined with confusion and insecurity about "national identity" – appear to have encouraged extremists to promote a xenophobic discourse against minority interests.

This is an area in which mature political leadership is particularly needed. Language is an essential tool for social organisation, including for the very functioning of the state. However, language is also a central dimension of individual identity on a personal level, and is often especially important for those in a minority position.

Disputes have arisen in some countries where the status of the state language has been perceived as threatened in regions where minorities are strongly present in number and perhaps also in politics. An argument for the controversial amendments last year to the Law on State


"Human rights concerns could only be effectively addressed through a serious assessment of the genuine needs of the minorities."

Language in Slovakia was the importance of ensuring that Slovak-only speakers would be able to understand all official communications, even when residing in areas primarily populated by the Hungarian minority.

Minorities, primarily the Hungarian population, found the proposed law changes discriminatory, reacted strongly against the introduction of sanctions for non-respect of the language law and felt that the minority languages needed better legal protection. This discussion also affected Slovak-Hungarian relations.

The OSCE High Commissioner on National Minorities became engaged in resolving this dispute. Moreover, the government in Bratislava took the wise decision to refer the amended law to the Venice Commission for comment. There are therefore good prospects for a rights-based solution.

Problems related to language issues are certainly not a new phenomenon. Indeed, norms have been developed on how to resolve them in a number of international and European human rights treaties.

- The Framework Convention for the Protection of National Minorities (Framework Convention) is a Council of Europe treaty which, *inter alia,* protects and promotes the language rights of persons belonging to national minorities. It has a monitoring body to assist the implementation by state parties: the Advisory Committee.
- The European Charter for Regional or Minority Languages (ECRML) protects and promotes languages as a threatened element of Europe's cultural heritage. Implementation is monitored by the Committee of Experts.
- These standards are further complemented by the European Convention on Human Rights, which prohibits discrimination, for instance, on the grounds of language (Article 14). The case law of the European Court of Human Rights (the Strasbourg Court) is highly relevant also in this area.
- The OSCE has developed standards in this area which are promoted by the High Commissioner on National Minorities. One important document is the Oslo Recommendations regarding the Linguistic Rights of National Minorities (with an Explanatory Note).
- Among the relevant UN documents is the International Covenant on Civil and Political Rights which states that persons belonging to minorities shall not be denied the right, in community with the other members of their group, to use their own language. Less binding but still highly relevant is the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

These treaties and recommendations state key principles and define governmental obligations. However, as the nature of the problems differs greatly from one country to another, there is in many cases a need to interpret the agreed framework norms in order to meet the intended purpose and to achieve the appropriate balance.

There has to be a certain "margin of appreciation" – to use the language of the Strasbourg Court – when applying the standards. This margin should, however, not be to avoid the obligation to respect the human rights of persons belonging to minorities.

The national discussions should consider the conclusions of the various international monitoring bodies and the case law of the Strasbourg Court. They provide important guidance for the political decision-makers.

### *Personal names*

The Strasbourg Court has stated that "the name is not only an important element of self-identification; it is a crucial means of personal identification in society at large". In one case (*Guzel Erdagöz v. Turkey*, 2008), it decided that the refusal of the government authorities to accept the preferred spelling of a person's name violated the right to respect for private life as spelled out in the European Convention (Article 8).

These principles are also relevant in situations where the state language and the minority one are based on different alphabets or scripts. When visiting Lithuania recently, I learned that the spelling of Polish names on passports and other official documents had become a controversial issue. However, the government in Vilnius has now submitted a proposal to parliament which, if adopted, would be seen as a constructive step towards fuller respect for minority rights.

### *Local names, street names and other topographical indications*

The Advisory Committee on the Framework Convention concluded in the case of Lithuania that the absence of bilingual public signs in certain areas was incompatible with the convention. There appeared to be a contradiction between the Law on the State Language and the Law on National Minorities which ought to be addressed.

In my own report on Austria, I addressed the controversy around the possibility of displaying topographical signs both in German and in Slovenian in certain municipalities in Carinthia, and recommended

the implementation without further delay of the judgment of the Constitutional Court on this issue. The judgment protected the principle of bilingual signage in areas where there was a significant number of persons belonging to a national minority.

Such an approach also means that local authorities, when dominated by minority representatives, should accept that the official language should be used in parallel with the minority one when necessary. Persons belonging to the majority in the country should not be discriminated against when they live in a region where they are in the minority.

### *Education*

Minority language education is absolutely essential for protecting language rights and for maintaining languages. Governments should seek to ensure that persons belonging to minorities have adequate opportunities to learn the minority language or even to receive instruction in this language. Bilingualism should be encouraged for all.

The right to adequate opportunities for minority language education should be implemented without prejudice to the learning of the official language or to being taught in that language. In fact, both the Advisory Committee and the High Commissioner on National Minorities have stressed the importance of the right to quality education in the official language, also for minorities.

This is essential in regions where persons belonging to national minorities have poor or no command of the state language(s) and as a result are excluded from essential aspects of community life. The Advisory Committee has discussed this problem in connection with Estonia, Georgia, Latvia and Moldova among others.

A deep problem in most European countries is that the teaching of and in the Romani language is almost totally neglected – even where there is a significant number of Roma inhabitants.

### *Contacts with authorities*

The possibility to communicate with the authorities in one's own language is another human rights concern voiced by persons belonging

to a minority. This right cannot always be fully guaranteed in practice due to limited human and financial resources. However, the Framework Convention and the Charter state that governments should endeavour to enable such communication as far as reasonably possible when there is a real need.

Many states have chosen to regard the numerical size of a minority in a given area as the relevant factor for granting certain language rights and have established minimum thresholds for this purpose. These should however not be too high; the Advisory Committee has deemed a minimum level of 50% to be unreasonable.

In recruitment policies, public administrations should not demand proficiency in the state language beyond what is necessary for the post in question. Access to employment for persons belonging to national minorities must not be unduly limited. In parallel, a constructive approach is recommended, for instance, through offering applicants from national minorities an opportunity to be trained in the state language. At the same time, recruitment of civil servants with knowledge of the relevant minority languages will also enable administrations to better serve the whole population.

Such positive measures are especially important when the government decides to take steps to protect and promote the official language. Sanctions to enforce the law on the state language should be avoided. The focus should rather be on the need to harmonise such legislation with the law protecting minority languages – to avoid contradictions and to guarantee that the language rights of all citizens are respected.

### *Media*

The possibility to establish minority language media is another area of interest for persons belonging to national minorities. The media should ideally reflect the plurality and diversity of the population. State regulation of the broadcast media should be based on objective and non-discriminatory criteria and should not be used to restrict enjoyment of minority rights.

Persons belonging to national minorities should have access to national, regional and local broadcast time in their own language on publicly funded media. Quotas for broadcasting time in the official language(s) should not prevent public or private broadcasting in minority languages. The Advisory Committee has found a number of negative examples of this type of quota, for instance in Azerbaijan.

A positive example was the decision in Turkey to open a 24-hour television channel in Kurdish which was seen as a signal of a changed attitude towards a minority whose rights have been repressed for years. I have been informed that there are similar plans for the Armenian language.

The basic lesson we ought to have learned on all these issues is that the human rights concerns could only be effectively addressed through a serious assessment of the genuine needs of the minorities.

Too often authorities have not listened carefully to them when policies have been developed. It is crucial that governments maintain close communication with persons belonging to national minorities and seek a thorough and continuing consultation – a constructive dialogue.

# The Strasbourg Court is a source of hope for many – its continued effective functioning must be guaranteed

8 February 2010

The European Court of Human Rights has been overwhelmed by the response from ordinary people all over Europe. More than 50 000 applications were received during 2009 and the number of pending cases is now well over 100 000. These figures underline the need to reform the proceedings of the Court – but above all the necessity to improve human rights protection at national level.

The main message brought by this massive inflow of cases is that the Strasbourg Court is essential to many individuals who feel that their rights have not been protected in a European state. In four out of five judgments delivered since 1959, it has found at least one violation of the Convention by the respondent state.

In order to cope, the Court has taken steps to improve its efficiency. The annual number of final judgments has more than doubled during the past decade. With the entry into force of the well-known Protocol No. 14 there will be further possibilities to streamline the procedures and strengthen the Court's efficiency.

However, there is no doubt that further measures are needed in order to avoid the Court being drowned under its workload. It is imperative that the quality of the decisions be maintained, that judgments be delivered within a reasonable time and, above all, that they be executed fully and effectively by states concerned.

The relevance of the Court is obvious because of the concrete effects of its decisions on peoples' lives, irrespective of their status.

However, the Court is also relevant beyond the individual cases through the fact that the European Convention on Human Rights has been incorporated into domestic law in all member states of the

"Much more must be done to protect human rights at domestic level."

Council of Europe. Rulings by the Strasbourg Court thereby function as the most authoritative interpretation of that piece of national law – for all member states.

The forthcoming accession to the Convention by the European Union will add to the significance of this dimension of the system.

The key characteristic of this system is the right to individual petition – the fact that all 800 million individuals in the Council of Europe area have the right to seek justice, as a last resort, at supranational level. Human rights-oriented government representatives and civil society activists in other parts of the world are studying this unique European model and draw inspiration.

To safeguard the effectiveness – and thereby the credibility – of this remarkable institution, there will be a need for further reforms. One

major problem is that its functioning is hampered by having to deal with many applications which are clearly inadmissible or manifestly ill-founded. In fact, no less than 90% of the applications received belong to this category. This begs for more serious efforts to spread information in member states about the procedures.

Furthermore, there is a serious problem of "repetitive cases". About 50% of the cases declared as admissible do actually raise issues that have already been subject to the Court's judgments. Therefore, they should really have been resolved by the respondent states within their respective national systems.

This confirms that there is a serious gap of systematic implementation of the Court judgments. These require a prompt, full and effective execution so that recurrence of similar violations is prevented. In fact, effective embedment of the Convention's standards in domestic law and practice is far from being attained in a number of countries in spite of strong recommendations from the Committee of Ministers.[1] This is problematic as the credibility of the European human rights protection system ultimately depends on whether the standards are made effective in practice.

The discussion about the difficulties of the Strasbourg Court must to a larger extent focus on the need for prevention. The main question is not why the Court has difficulties coping, but why so many individuals feel the need to go there with their complaints.

The conclusion is that much more must be done to protect human rights at home, at domestic level. The European system can in no way act as a long-term substitute for the national systems.

In order to bridge the implementation gap, governments need to work out a systematic and holistic strategy that would ensure the full realisation of the European human rights treaties, starting of course with the Convention and the Court's case law. The development of a national

1. Recommendations Rec(2004) 4, 5, 6 of the Committee of Ministers to member states of 12 May 2004 as key components of the "reform package".

plan for the implementation of the human rights obligations would be an ideal framework for such a systematic approach.[2]

- It could start with a national baseline study giving a broad and accurate picture of the current human rights situation in the country. A thorough evaluation of existing policies and practices and recognition of problematic areas would the basis. The degree of implementation of the international treaties would be assessed as well as the response to the Court decisions (including the leading judgments relating to other countries). The appointment of an inter-ministerial committee for this task – as was done in Poland and Sweden – can be very helpful.
- The next major step should be the development of a national human rights action plan to address the human rights challenges identified in the baseline study. Such plans should contain concrete activities and indicate the authorities responsible for their implementation. The activities should be coupled with time-frames and benchmarks for follow-up and evaluation. International reporting obligations should be integrated into the process.
- States should involve all stakeholders in these processes, including ombudsmen and other national human rights structures, civil society and representatives of disadvantaged groups of people. Such an inclusive and participatory approach will contribute to the legitimacy of the plan, create shared ownership and make implementation effective.
- The implementation of action plans should be reviewed in a regular way and there should be an independent evaluation of results upon their completion. It is equally as important to assess the process, in terms of participation, inclusiveness and transparency, as it is to evaluate the end result.

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2. See also Commissioner's Recommendation on systematic work for implementing human rights at the national level, CommDH (2009)3, 18 February 2009.

- States should ensure high-level and long-term support for the action plans through the active involvement of politicians and the leadership of the authorities and agencies responsible for the plan's implementation. Action plans stretching over national and local elections should be discussed and/or adopted by parliaments to ensure continuity.
- The human rights planning should be co-ordinated with the budgetary process to secure proper funding for human rights work. It is necessary to review budget proposals from a human rights perspective to inform politicians of the consequences of their decisions and to hold them accountable.
- A significant part of this policy should be to integrate human rights into the ordinary work of the public administrations and to ensure effective co-ordination and co-operation between the authorities at all levels by setting up networks or other fora for discussion and exchange of experiences.
- Local authorities should be encouraged to develop comprehensive local baseline studies, action plans or similar documents ensuring regular reviews of the local situation and co-ordinated efforts to address human rights challenges. Adequate systems should be established for monitoring the provision of health care, education or social services, whether provided by private or public actors, using the rights-based approach.
- It is essential to set up adequate systems for data collection and analysis, including data on disadvantaged groups of people. Collection of sensitive data should be voluntary and accompanied by proper safeguards to prevent the identification of individuals belonging to a particular group. Official data should be complemented with relevant information from national human rights structures and from NGOs.
- The independence of the ombudsmen and other national human rights structures must be respected. They should have sufficient resources to fulfil their role. Consideration should be given to

establishing such institutions at the regional or local level to facilitate easy access for ordinary people. These bodies, if adequately resourced, may also facilitate the establishment of national systems of information on the Convention and the Court's procedures and make this information easily accessible for every interested individual.

– Fostering a human rights culture through the full integration of human rights in education and training as well as through awareness-raising is another major building block. It is essential that concrete and accessible language be used in all human rights education. The educational needs of public officials and other professionals who deal with the human rights of others should be assessed to ensure that they have a thorough and up-to-date knowledge of the international standards relevant to their field of competence.

A serious package of reforms along these lines would improve the protection of human rights in any country. It would respond to the fundamental principle of subsidiarity which is enshrined in the Convention. The ideal is that each individual is able to seek and receive justice at home.

Other parts of the Council of Europe – including my own office and the Directorate General of Human Rights and Legal Affairs – offer advisory services to member states in order to facilitate such systematic measures for the domestic realisation of human rights.

These efforts will only give the desired results if governments give them much higher priority than hitherto. Even so, their implementation will take some time which in turn underlines the need for immediate reforms of the Court proceedings in Strasbourg.

Indeed, this Court will never be redundant, even if a large number of cases now coming there would instead be satisfactorily resolved at national level. The wisdom of the Court will continue to be decisive in key cases when we need an authoritative interpretation of the Convention.

# European migration policies discriminate against Roma people

22 February 2010

European governments are not giving Roma migrants the same treatment as others who are in similar need of protection. Roma migrants are returned by force to places where they are at risk of human rights violations.

In Germany, Austria and "the former Yugoslav Republic of Macedonia", large numbers of Roma migrants have been given tolerated status, essentially a form of temporary protection against expulsion. It does not confer residence or social rights. An example of this is the German *duldung* status.

There are credible allegations that Roma from outside the EU are more likely to be provided with *duldung* status rather than a more durable status, compared with non-Roma third country nationals.

These aspects were examined in a study ("Recent Migration of Roma in Europe") published jointly by me and Knut Vollebeck, the OSCE High Commissioner on National Minorities, in April 2009.

The study provides an analysis of the existing human rights standards on migration in Europe and highlights discriminatory practices that Roma migrants still face. It concludes with a set of recommendations for action by member states in order to enhance effective protection of the human rights of Roma migrants in Europe.

I have had to deal with this issue with respect to the forced returns of Roma, Askhali and Egyptians to Kosovo.[1] After a visit there in

1. "All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo."

"To push Roma families between countries, as now happens, is inhumane."

March 2009, I published a report which concluded that Kosovo does not have the infrastructure that would allow a sustainable reintegration of the returnees. This went all the more for the Roma.

Another visit there in mid-February convinced me that this continues to be the case. In Kosovo itself, there are still about 20 000 internally displaced persons since 1999 who have not been able to return to their original habitats. The unemployment rate in Kosovo is about 50% and there is just not sufficient capacity now to give a further number of returnees humane living conditions.

The reintegration strategy endorsed by the authorities in Pristina is not being implemented, the responsible actors at the municipal level are not aware of their responsibilities and there is not even a budget allocated for the strategy.

Of particular concern is the fact that some Roma who have been forcibly returned have ended up in the lead-contaminated camps of Česmin Lug and Osterode in northern Mitrovica, inhabited for a decade now by Roma families, including children, with deeply serious effects on their health.[2]

Though there are now, at long last, plans to move the camp inhabitants to a less hazardous environment, the Roma and Askhali families living there are in desperate need of prompt rescue and intensive health care. They should not have to wait any longer.[3]

The offer to them must also respond to their fear for their own safety – they have not forgotten the events of 1999 when they were chased away – and to their concern about schooling for their children in a language they understand. Also, there should be a possibility to find jobs. This should be the priority, also for the international community which has part of the responsibility for the present crisis.

The relationship between the Kosovo authorities and the European governments is not one between equal partners, it is in fact widely asymmetric. When the reception of returnees is made a condition for talks about visa liberalisation or opening for other privileges, the authorities in Pristina have to give in and the fate of the refugees becomes secondary.

This raises questions about the readmission agreements now requested by European governments. My conclusion has been that for the moment only voluntary returns – genuinely voluntary – should be pursued.

During 2009, more than 2 600 forcible returns took place. Of these, 429 related to Roma and Askhali. The majority of them came from Germany, Sweden, Austria and Switzerland. Preparations are being made to increase the rate of returns.

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2. In 2009 alone, no less than 18 returned families ended up in these camps according to credible information provided to me in Kosovo.

3. Apart from the Roma, there are also two other minorities living under very similar conditions in Kosovo: the Askhali and the Egyptians.

Individual assessments of the protection needs should of course also be applied in these cases. However, such testing must consider the particularly vulnerable situation of Roma-Ashkali in Kosovo today.

In general, European governments seem not to accept that Roma could have protection needs. In the European Union, the policy is that all EU member states shall be considered "safe countries of origin" in respect of each other in asylum matters. Consequently, a citizen of one EU member state may not be granted international protection in another EU member state.

It may be sobering to learn that whereas Roma from Hungary have been refused asylum in France, for instance, Roma individuals from the same country – and from the Czech Republic – have sought and been granted asylum in Canada.

The agreed directives within the EU do not support Roma rights in reality. In practice, the Free Movement Directive impacts differently on Roma than on other EU citizens. It provides that every EU citizen has the right to reside in any EU member state for a period of three months without any other requirement than a valid passport. For longer periods of stay, however, the persons concerned must prove that they are not a burden to the host state, through either employment or adequate financial resources. A majority of Roma cannot fulfil this requirement.

Also, the protective provisions of the Free Movement Directive are breached much more easily in respect of Roma than any other identifiable group. Expulsions of Roma have been carried out in contravention of EU law. In other cases destruction of Roma dwellings has been used as a method to persuade Roma to leave "voluntarily".

Discrimination of Roma in migration policies has met with little or no opposition in almost every country. This may not be surprising in view of the lingering anti-Gypsyism in large parts of Europe.

However, it is high time to review the approach.

To push Roma families between countries, as now happens, is inhumane. It victimises children – many of whom were born and grew up in the host countries before they were deported.

The return policy is also ineffective. Of those forcibly returned to Kosovo no less than 70-75% could not reintegrate there and moved to secondary replacement or went back to the deporting countries through illegal channels.

Expulsions between EU countries have also failed in a great number of cases as the Roma have used their right as EU citizens to move within the European Union area.

States now spending considerable amounts to return Roma to their countries of origin, would make better use of this money by investing in measures to facilitate these persons' social inclusion in their own societies.

# Rulings anywhere that women must wear the burqa should be condemned - but banning such dresses here would be wrong

8 March 2010

Prohibition of the burqa and the niqab would not liberate oppressed women, but might instead lead to their further alienation in European societies. A general ban on such attires would constitute an ill-advised invasion of individual privacy. Depending on its precise terms, a prohibition also raises serious questions about whether such legislation would be compatible with the European Convention on Human Rights.

Two rights in the Convention are particularly relevant. One is the right to respect for one's private life and personal identity (Article 8). The other is the freedom to manifest one's religion or belief "in worship, teaching, practice and observance" (Article 9).

Both articles specify that these human rights can only be subject to such limitations as are prescribed by law and are notably necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Those who have argued for a general ban of the burqa and the niqab have not managed to show that these garments in any way undermine democracy, public safety, order or morals. The fact that a very small number of women wear such clothing has made proposals in such a direction even less convincing.

Nor has it been possible to prove that these women in general are victims of more gender repression than others. Those who have been interviewed in the media have presented a diversity of religious,

"Instead of banning the burqa and the niqab, we should promote multicultural dialogue and respect for human rights."

political and personal arguments for their decision to dress themselves as they do. There may of course be cases where they are under undue pressure – but it is not shown that a ban would be welcomed by these women.

No doubt, the status of women is an acute problem within some religious communities. This needs to be discussed, but prohibiting symptoms like clothing is not the way to do it, especially as these may not always be the reflection of religious beliefs, but the expression of broader cultural aspects.

Rightly, we react strongly against any regime ruling that women must wear these garments. This is absolutely repressive and should not be accepted. However, this is not remedied by banning the same clothing in other countries.

A serious approach requires an assessment of the genuine consequences of decisions in this area. For instance, the suggestion to ban the presence of women dressed in the burqa/niqab in public institutions like hospitals or government offices may only result in these women avoiding such places entirely.

The fact that the public discussion in a number of European countries has almost exclusively focused on what is perceived as Muslim dress has been unfortunate and created the impression of targeting one particular religion. Some of the arguments have been clearly Islamophobic and that has certainly not built bridges or encouraged dialogue.

Indeed, one effect is that the wearing of a full cover dress has become a means of protesting against intolerance in our communities. The insensitive discussion about prohibitions has provoked a polarisation.

In general, the approach should be that the state must avoid legislating on how people dress themselves. It is, however, legitimate to regulate that those who represent the state, for instance police officers and judges, do not wear clothes or carry symbols which signal a partisan religious – or party political – interest. Likewise, civil servants in contact with the public should not have their face covered.

This is where the basic line should be drawn.

The European Court ruled recently in this spirit. This was in a case about the criminal conviction of individuals who had worn headgear and religious garments in a public place. The Court found that this conviction constituted a violation of their right to freedom of conscience and religion and that the interference was not "necessary in a democratic society".[1]

Beyond this, there are particular situations where there are compelling community interests that make it necessary for individuals to show

1. *Ahmet Arslan and Others v. Turkey*, judgment of 23 February 2010.

themselves for the sake of safety or in order to offer the possibility of necessary identification. This is not controversial and, in fact, there are no reports of serious problems in this regard in relation to the few women who normally wear a burqa or a niqab.

A related problem has come under discussion in Sweden. A jobless man of Islamic faith lost his subsidy from a state agency for employment support because he had refused to shake the hand of a female employer when turning up for a job interview. He had claimed religious reasons.

A court ruled later, after a submission from the equality ombudsman, that the agency decision was discriminatory and that the man should be compensated. Though this is in line with human rights standards, it was regarded as controversial in the public debate which followed.

It is likely that more issues of this kind will surface in the coming years and, on the whole, it is only healthy that they should be discussed – as long as Islamophobic tendencies are avoided. However, attempts should be made to broaden the discourse to cover essential matters, including how to promote understanding of different religions, cultures and customs. Pluralism and multiculturalism are essential European values and should so remain.

This in turn may require more discussion of the meaning of respect. In the debates about the Danish cartoons from 2005, it was repeatedly stated that there was a contradiction between demonstrating respect for believers and protecting freedom of expression as stipulated in Article 10 of the European Convention.

The Strasbourg Court analysed this dilemma in the famous case of *Otto-Preminger-Institute v. Austria* in which it stated that:

> *those who choose to exercise the freedom to manifest their religion … cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.*

In the same judgment, the Court stated that consideration should also be given to the risk that the respect for religious feelings of believers may be violated by provocative portrayals of objects of religious significance and that:

> *"such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society."*

In other words, tolerance is a two-way street.

The political challenge is to promote diversity and respect for the beliefs of others and at the same time protect freedom of speech. If the wearing of a full-face veil is understood as an expression of a certain opinion, we are talking here about similar or identical rights – though seen from two different angles.

A prohibition of the burqa and the niqab would, in my opinion, be as unfortunate as it would have been to criminalise the Danish cartoons. Such banning is alien to European values. Instead, we should promote multicultural dialogue and respect for human rights.

# Atrocities in the past must be recognised, documented and learned from - but not distorted or misused for political purposes

22 March 2010

Gross human rights violations in the past continue to affect relations in today's Europe. In some cases, the right lessons have been learned; genuine knowledge of history has facilitated understanding, tolerance and trust between individuals and peoples. However, some serious atrocities are denied or trivialised, which has created new tensions. There are also cases where violations in the past have been exploited in chauvinistic propaganda, causing division and hatred. Bogus interpretations of history have in fact been used to justify discrimination, racism, anti-Semitism and xenophobia.

There is an understandable urge among all peoples to seek pride in their own history. Or to focus on previous misdeeds by other peoples. This tendency is often more dominant in situations of crisis or when national identity is uncertain or questioned. Experience shows that strong nationalistic feelings tend to limit the space for an honest analysis of what one's forefathers or their neighbours may have done in the past.

Coming to terms with history is always essential, but particularly crucial in cases of massive atrocities and human rights violations. Such crimes cannot be ignored without severe consequences. Prolonged impunity or lack of acknowledgment over several generations tends to create bitterness among those who identify themselves with the victims, which in turn can poison relations between people who were not even born when the events in question took place.

The former colonial powers in Europe have been reluctant – even long afterwards – to recognise the full extent of the damage caused by the ruthless exploitation of human beings and natural resources in Asia,

"Historical controversies should not hold human rights hostage."

Africa and Latin America. They strongly opposed an original proposal at the World Conference against Racism in Durban in 2001, that the outcome document should refer to these historic facts – which resulted in a bleak compromise formulation. This was rightly criticised.

The Nazi crimes and in particular the Holocaust were denied, trivialised or ignored by many when the killings were going on. Afterwards, every sane person has had to recognise this monumental crime against humanity – which also made the world community adopt the concept of genocide and an international convention for the prevention and punishment of such crimes in the future.

It has to be recognised that post-war Germany has made enormous efforts to expose the Nazi crimes, to compensate surviving victims, to punish perpetrators when possible and to educate future generations

about the horrors committed in the name of their forefathers. All this has been absolutely necessary, nothing less would have been acceptable.

Authorities in some other countries have been less open about cooperation with the Nazis in the executions of Jews which were committed on their soil. The mass killings of Roma have not been given sufficient attention, and compensation to survivors has been late and minimal. The murders of homosexuals and the medical experiments on and killings of persons with disabilities have also tended to be pushed aside.

Crimes in the Soviet Union were exposed, not least by the powerful writings of Alexander Solzhenitsyn. The *glasnost* during Mikhail Gorbachev's presidency opened the doors for further revelations; Andrei Sakharov and the organisation "Memorial" contributed massively to revealing the truth. Still, the full scale of the Stalinist repression seems not to be recognised by everyone in Russia. The initiated review of history education in schools should address this problem.

The recent discussion in some European countries about the role of the Soviet army during World War II was not appreciated in the Russian Federation. There was a feeling that the sacrifices during what the Russians call "the Great Patriotic War" were disregarded and – even worse – that their contribution to fight against Nazism was compared with the brutalities of Hitler's army. The exchanges illustrated the need to make the necessary distinctions when history is discussed – in this case between Stalin's dictatorial policy and the efforts by soldiers and civilians from the same country to defend their nation and combat Nazism.

Even more controversial has been – and is – the very description of the enforced mass displacement, the ensuing deaths as well as the outright killings of ethnic Armenians in 1915 under the Ottoman Empire. Even though this happened before the creation of the new Turkish republic, there has been unwillingness there to discuss these crimes. Writers and journalists who raised the issue were brought to

trial. Now, the first steps towards recognising the facts have at long last been taken – through academic discussions – but more needs to be done.

One group of people whose history has been grossly neglected in Europe is the Roma. Not only have the Nazi crimes against them been largely ignored, the accounts of the brutal repression of or systematic discrimination against them before and after this period in several European countries have not been recognised. Official apologies have been slow to come, if they have come at all.

In the Balkans, the different versions of historic events – some of them going back several hundred years – became a distinct factor in the conflicts during the 1990s and severely undermined international peace efforts. During the war new atrocities were committed, the scope and even the existence of which became disputed. Human rights organisations all over the former Yugoslavia are asking for a regional truth commission – which would be an important initiative to avoid distortions of history becoming the cause of new tensions in the future.

Not only in the Balkans but also in other previous conflict zones, there could be more than one single historical narrative to be discovered. They can all be truthful – though seen from different perspectives and with emphasis on different aspects. It could be of paramount importance that different groupings in the community become aware of such diversity of historical accounts – and accept that there are differences even when the basic facts are established.

One example of a constructive project to create understanding of this kind was initiated in Northern Ireland. A dialogue was organised with the purpose of encouraging the different sides to recognise the legitimate version of the others. Judgments of the European Court of Human Rights in relation to unsatisfactory investigations into sectarian killings in Northern Ireland played a part in this historical reconstruction.

After the fall of the junta in Greece in 1974, trials were held to establish accountability. Similar efforts in post-dictatorship Spain and

Portugal focused a lot on the activities of the secret services. In the former Communist countries in Eastern Europe the so-called lustration process was used as an instrument to address the past.

Establishing true accounts of previous human rights violations is indeed essential for building the rule of law in all post-conflict situations. In the immediate aftermath this is crucial to the efforts to bring those responsible to justice, to compensate the victims and to take actions to prevent the recurrence of these crimes.

To establish the truth is also important in a longer-term perspective. Those killed were human beings, not numbers. Individual survivors as well as the children and grandchildren of the victims have the right to know and to grieve in dignity. The possibility to remember and commemorate must be protected.

Society as a whole must learn from what happened and therefore continue to document the events, to establish museums and memorial sites and to give the next generation a chance to understand through proper education.

The Council of Europe has extensive experience in fostering multi-perspective history teaching through the provision of interactive teaching materials and bilateral co-operation. It has developed teaching kits for key events of the 20th century and the European dimension of history. Women's history has been part of these endeavours. Currently new materials are being prepared for the portrayal of "the other" in history teaching to ensure a diversity of perspectives.

In Bosnia and Herzegovina, the Council of Europe co-ordinated the preparation of common guidelines which led to the drafting of new history and geography textbooks as well as teaching manuals. Teachers have taken an active part in the process and demonstrated enthusiasm about learning multi-perspectivity and new interactive teaching styles.

The Parliamentary Assembly of the Council of Europe has also highlighted the role of history teaching for reconciliation in post-conflict

situations.[1] It has stressed the need to deal with controversial questions in history teaching without resorting to a politically expedient approach of representing one single interpretation of events. It noted that there is now international acceptance that there may be many views and interpretations – all based on evidence.

Historical controversies should not hold human rights hostage. One-sided interpretations or distortions of historical events should not be allowed to lead to discrimination of minorities, xenophobia and renewal of conflict. New generations should not be blamed for what some of their forefathers did.

What is important is an honest search for the truth and a sober, fact-based discussion about the different versions. Only then can the right lessons be learned.

1. Parliamentary Assembly Recommendation 1880 (2009) on history teaching in conflict and post-conflict areas.

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**Office of the Commissioner for Human Rights**
**Council of Europe**

F-67075 Strasbourg Cedex
Tel.: +33 (0)3 88 41 34 21 – Fax: +33 (0)3 90 21 50 53

E-mail address: commissioner@coe.int
Website: www.commissioner.coe.int

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Thomas Hammarberg is the Council of Europe Commissioner for Human Rights. He writes regular, brief articles on human rights problems he has met during his missions. This is the fourth compilation of such Viewpoints, all showing that there are still problems in Europe.