

# HUMAN RIGHTS IN EUROPE: FROM CRISIS TO RENEWAL?



by Nils Muižnieks  
Commissioner for Human Rights



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War refugees on their way to Germany at the  
Gyekenyes Zakany Railway Station (Hungary).  
Gyekenyes, 5 October 2015

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# Foreword

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This is a collection of pieces my team and I wrote and published in various outlets from the beginning of my mandate as Commissioner for Human Rights of the Council of Europe in April 2012 through the end of August 2017. This period covers the lion's share of my six-year mandate. My time in office has been quite eventful, if not to say tumultuous. It has seen the crisis in and around Ukraine, the migration policy crisis, a wave of terrorist attacks and problematic policy responses, the attempted coup in Turkey and the broad crackdown that followed, and other significant human rights developments at both national and European levels.

This collection does not contain detailed analyses of human rights in individual countries – for such analyses, I refer the reader to my country reports. It seeks to address broader human rights issues affecting several or many Council of Europe member states. Most of the entries were published on my website as Human Rights Comments. These are brief, topical pieces addressing a human rights issue that affects several countries. In addition to providing country examples, they often recall applicable international standards, especially the case law of the European Court of Human Rights or the European Social Charter, and seek to provide guidance to states on the way forward. They often generated significant media coverage at national and European level. The compilation is rounded out by several pieces initially published as the concluding observations of my quarterly activity reports or as opinion editorials in various media outlets, along with a few speeches I delivered at conferences.

I hope that this compilation will be of more than historical interest. Most of the issues addressed remain topical today and the relevant human rights standards have not evolved so quickly. Much to my surprise, I have only been able to identify very few recent overviews of human rights issues in Europe covering a wide range of topics. Though the media did pick up on the Human Rights Comments, they are not as well known in the human rights community as I thought. To remedy this shortcoming, for some recent country visits, my team prepared and distributed smaller compilations of Human Rights Comments on the issues I focused on during the visits. These smaller compilations received positive feedback and some activists even asked if they could translate and distribute all of the Human Rights Comments into their national language.

I decided that it was necessary to provide context for the pieces and outline how my thinking on the issue in question has evolved over time. This has been done in short introductions to each chapter. The chapters are organised thematically, and the pieces within each chapter follow a logical, not necessarily chronological

order. The thematic chapters cover many topical human rights issues, but I try not to trespass too often onto the territory of the Council of Europe's human rights monitoring mechanisms, though I have seen my role as amplifying and reiterating their messages. The monitoring mechanisms cover much ground: torture, social rights, racism, minority rights, regional and minority languages, domestic violence and trafficking in human beings.

Nevertheless, a number of important gaps remain. The two biggest gaps, in my view, are children's rights and media freedom. I have tried to address these two issues regularly in both my country and thematic work. Further, I have found that several of the human rights crises that erupted during my mandate spanned many countries and issue areas.

For example, during my country visits, I have witnessed the many ways in which the economic crisis affected human rights, including its impact on social and economic rights, but also its effect on conditions of detention, access to justice, the situation of vulnerable groups and policies and attitudes towards minorities and migrants. When the migration movements and their mismanagement began to top the news, I realised that the monitoring mechanisms could only deal with certain discrete human rights aspects of this crisis within their respective mandates, usually within the context of individual countries. They could not address, for instance, the lack of European co-operation in search-and-rescue operations, the failure of responsibility-sharing for refugees, the neglect of the best interests of the child in migration and asylum policy, etc.

Though I publish this compilation under my name, it was truly a group effort with my entire team. They possess exceptional human rights expertise and nuanced country knowledge. While I salute them and thank them all for their efforts, two members of my team deserve special mention for their work on and commitment to this compilation – Giancarlo Cardinale and Sandra Ferreira. Without their dedication, this book would never have seen the light of day.

Nils Muižnieks

*Strasbourg, 1 October 2017*





# 1. Social Rights, Austerity and Preserving Europe's Acquis

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## INTRODUCTION

When I began my mandate as Commissioner in April 2012, I thought that the one big crisis I would have to deal with would be the global economic crisis that erupted in 2008 and its long aftermath. Even if this crisis turned out to be only one among many crises during my mandate, it had a significant negative impact on human rights in Europe. While all human rights were deeply affected, the global economic crisis has taken a particularly heavy toll on a set of these rights that is too often neglected, namely social rights.

At the beginning of my mandate, it was important to examine this crisis and the ensuing austerity measures through the prism of human rights, not least because some states were quite reluctant to establish links between the two. Indeed, austerity measures clearly worsened the human rights situation, particularly of women, youth, persons with disabilities, elderly persons, migrants, Roma and Travellers, to mention only some groups. As the Issue Paper on *Safeguarding human rights in times of economic crisis* published by my Office in 2013 demonstrated, there are human rights-compliant ways of addressing financial imbalances. Therefore, both during and outside times of crisis, states should ensure social protection floors and safety nets for all, including by maintaining social security guarantees for basic income and health care to ensure universal access to essential goods and services.

As the economic crisis unfolded, it became increasingly evident that respect for social rights is key to ensuring the human dignity of all persons and the protection of many other human rights. I called upon member states to honour their commitments and international obligations in this field, especially those flowing from the revised European Social Charter (the Charter) and the International Covenant on Economic, Social and Cultural Rights. Preserving Europe's social *acquis* resulting from the Charter, is essential. This is why I have supported the Turin process aiming at finding ways of improving the Charter's implementation and strengthening its role in the European system of human rights protection. The system of collective complaints is particularly relevant and I can only regret that over 20 years after its creation, only 15 states have ratified the Protocol establishing this procedure.

Throughout my mandate it was necessary to fight the idea that social rights are a luxury and/or are less justiciable and more programmatic than civil and political rights. This lingering myth is harmful and should be urgently deconstructed. Full respect for social rights is also a prerequisite for social cohesion, which is endangered everyday in Europe by the marginalisation and segregation of vulnerable groups. Evidence suggests that societies are more resilient when social rights are protected. I also saw how, when social rights are not guaranteed, disillusioned people can be drawn towards populist movements and parties, a factor that poses a serious threat to the stability of our societies. An essential element of the protection of social rights is the fight against discrimination in all its forms.

The main approach in my country work on social rights has been, at least initially, to cover the situation of specific groups that experience most difficulties in practice in the enjoyment of social rights: children; women; elderly persons; lesbian, gay, bisexual, transgender and intersex (LGBTI) persons; persons with disabilities; migrants; asylum seekers and refugees; Roma and other ethnic or religious minority groups; stateless persons; victims of trafficking in human beings; and internally displaced persons (IDPs), among others. This included, for instance, urging states to give access to water and other basic services for Roma people living in encampments, but also to IDPs or an increasing number of eco-migrants fleeing difficult living conditions and natural disasters. Throughout my country work, I have put a special emphasis on ensuring access to basic social rights (such as the right to food, housing and health) for certain vulnerable groups such as IDPs, persons living in conflict zones and irregular migrants.

During my mandate, I have devoted particular attention to persons with disabilities and, in particular, persons with intellectual and psychosocial disabilities. The human rights of the members of this group are among those I have taken up most frequently in my country work, with the most recurrent issues being the right to live in the community, the right to legal capacity and the right to an inclusive education, but also the issue of involuntary placement and treatment and coercion in psychiatry. In all these fields, I have promoted the 2006 United Nations (UN) Convention on the Rights of Persons with Disabilities as an invaluable instrument embodying the paradigm shift in attitudes and approaches to persons with disabilities, without which their rights cannot be effectively protected. However, I have also been saddened to notice during my country visits continuing practices that show this paradigm shift is still far from being fully internalised and understood. Whether it concerns persons with disabilities, elderly people or children without parental care, deinstitutionalisation is an urgent issue related to social rights protection on which states should focus more attention and resources if we want to tackle the isolation, marginalisation – and often, abuse – that institutions engender.

Concerning poor people, most European countries have become accustomed to seeing the UN development agenda as being “for export”, and not directly relevant for Europe itself. However, as poverty levels in Europe show, it is certainly topical on our continent as well. I have asked member states to take resolute measures to combat poverty with a special focus on children and elderly people. I have also noted with concern the feminisation of poverty, notably due to austerity measures. I have asked states to refrain from banning begging and sleeping rough in the street



and from taking any other measure – such as undue placement of children in child care services – that would constitute discrimination on the grounds of socio-economic status. More recently, I have examined poverty and human rights as a whole, emphasising that social security, the highest attainable standard of health, adequate housing and fair conditions of work are protected human rights under international law. States therefore have the legal obligation to ensure that these rights are made effective for the benefit of all.

Finally, social rights constitute a field where the human rights obligations of non-state actors are particularly crucial. Therefore I have followed with interest the adoption of national action plans on business and human rights in several countries in recent years. I have stressed that business enterprises have an independent responsibility to respect human rights that is distinct from state obligations, for instance in the context of combating human trafficking and forced labour. I consider that this new dimension of human rights protection and promotion should be further developed. In addition, states have the duty to require non-state actors to respect human rights. This is valid not just for human rights violations occurring outside Europe, but also for those happening daily within our borders.

In Europe, social rights have clearly been unjustifiably neglected and their importance downplayed. However, the recent economic crisis underscored the necessity of upgrading the place of social rights on our agenda. Work must continue to ensure that they receive the attention they deserve.

## **NATIONAL HUMAN RIGHTS STRUCTURES CAN HELP MITIGATE THE EFFECTS OF AUSTERITY MEASURES**

*Human Rights Comment published on 31 May 2012*

Effective protection of human rights at national level requires good laws and efficient judiciaries – but also strong, independent national human rights structures (NHRs). This need is especially evident in times of crisis and austerity.

NHRs – independent commissions, general or specialised ombudsmen, equality bodies, police complaints mechanisms and similar institutions – protect human rights for everybody, but they are particularly important to the most vulnerable groups. They provide an easily accessible helping hand to children, older persons, people with disabilities, Roma, migrants, asylum-seekers and refugees.

These vulnerable people – who have a difficult time defending their rights in the best of times – have often been hit hardest by budget cuts in many European countries. NHRs often prioritise helping such groups by doing outreach work and site visits, organising special telephone hotlines, providing legal assistance and representation in courts, and drawing the attention of the broader public and politicians to their plight.

### *Detecting emerging problems*

Due to a general deterioration of the human rights situation caused by the economic crisis, many NHRs receive more complaints to handle. Sometimes these complaints

are of a new nature, concerning for example dwindling social benefits or the neglect and abuse of older and disabled persons. Rather than dealing solely with the consequences of the crisis and monitoring its impact, some NHRs have taken a proactive approach.

On a recent visit to Portugal, I was interested to learn of the good work done by the Ombudsman, who has three specialised hotlines – for children, older persons and people with disabilities. While the primary purpose of the hotlines is to listen and give people advice, the information provided by the complaints gives a good indication of emerging problems affecting these groups and should feed into the policy process. This tool has become particularly relevant during the economic crisis which has hit the country.

Another good example of a NHRs coping with the human rights consequences of the crisis is provided by the Spanish Ombudsman, who recently published a study on the situation of people who cannot pay their mortgages. Some of the recommendations set out in the study helped the authorities adopt measures to increase the protection of these people from the risk of exclusion and poverty.

The Scottish Human Rights Commission is working with the executive to screen the impact of austerity on human rights. In the UK, the Equality and Human Rights Commission recently published an important analysis of the government's spending review as it affects the right to equality on the basis of race, gender and disability.

### *Severe cutbacks*

Regrettably, many NHRs have seen their operational capacities curtailed through severe budget and staff cuts, the closure of regional offices, or the merger of various bodies into overarching structures that are not as focussed or accessible as the bodies they have replaced.

NHRs in Greece, Ireland, Latvia and the UK, for example, have faced cuts to their budgets or staff which may hinder their effectiveness. In some countries, such as Spain and Slovakia, regional ombudsmen or decentralised offices have been forced to close, thereby complicating individual's access to complaint mechanisms.

The crisis may also represent an obstacle for countries which still have to put in place a nation-wide human rights structure compliant with the principles of independence, effectiveness and competence adopted by the United Nations in 1993.<sup>1</sup>

### *Seeking advice from NHRs*

At a recent conference on the future of the European Court of Human Rights held in Brighton, all 47 member states of the Council of Europe reaffirmed the need to co-operate with national human rights institutions and to consider establishing them where this has not already been done. This is a further recognition that NHRs can provide a unique contribution to national efforts to protect and promote human rights.

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1 Principles relating to the Status of National Institutions (The Paris Principles), adopted by the UN General Assembly resolution 48/134 of 20 December 1993.



It is therefore necessary that Governments, particularly in countries undergoing serious austerity, involve NHRs at all stages of the budget process. They can provide expert advice on the groups that need the most protection, on the impact of various policy measures and on the more general human rights consequences of the crisis, which shows no signs of abating in many European countries.

## **PRESERVING EUROPE'S SOCIAL MODEL**

*Human Rights Comment published on 13 October 2014*

As we enter the 7th year of the economic crisis, the end is not yet in sight. Worse, in most countries, the adoption of austerity measures has so far contributed little to recovery, but has exacerbated the dire living conditions of millions of people. Not surprisingly, disillusioned Europeans are increasingly giving their support to populist movements and parties, which poses a serious threat to the stability of our societies.

Yet, this situation is far from inevitable. If Government leaders and money lenders started considering socio-economic rights not as a luxury, but as an integral part of recovery plans, they would increase the chances of reversing course, averting future shocks and boosting economic development. Growing evidence suggests that economic development is more sustainable and societies are more resilient when social rights are protected.

In this context, a renewed interest in the European Social Charter seems indispensable.

### *A pillar of human rights protection*

By adopting the Charter in Turin 53 years ago, and by modernising it over the decades, European Governments took a visionary decision: Europe's construction would be based not only on the pursuit of economic prosperity and the protection of civil and political rights, but also on the rights of all citizens to have a job, decent housing, health protection, social security and quality education, and on protection from poverty and from social exclusion.

In a few days, the commitment made in Turin can be rejuvenated, as Ministers, representatives of International Organisations, academia and civil society representatives gather in the capital of the Piedmont region to find ways of improving the Charter's implementation and strengthening its role in the European system of human rights protection.

By looking at the accomplishments of the Charter, we understand how topical it is for our daily lives. Were it not for the Charter, many more children would still be working, women treated as second-class citizens and vulnerable people denied adequate access to health and social protection.

Among the most striking accomplishments of the Charter is the introduction of legislation in many countries, including Czech Republic, Greece, Italy, Portugal, which prohibits children's work under the age of 15 and strictly regulates the work of older children.

In Austria, Germany and Italy, just to mention a few countries, the increased protection of women, both in terms of maternity rights and job security, as well as access to health care and equal pay helped overcome longstanding discrimination.

In other countries, including Portugal, Spain and the UK, the Charter contributed to the ban on corporal punishment of children while in Cyprus, France and Lithuania it also promoted the adoption of legislation fostering the social inclusion of persons with disabilities.

True, the situation on the ground is still far from satisfactory. In many countries children still work and suffer domestic violence, women and persons with disabilities are still discriminated against and other vulnerable groups, including Roma and migrants, still struggle to access their basic needs.

This reality shows that we still have a lot of work to do to close the implementation gap between commitments and reality.

### *From theory to reality*

To get there, I see three main steps that need to be taken.

The most obvious is the ratification of all the Charter's provisions by all Council of Europe member states. This would create a homogenous European space where citizens would be able to enjoy comparable social protection. To date, 43 countries have ratified the Social Charter as revised in 1996,<sup>2</sup> with only France and Portugal having ratified all its provisions.

The second step is to widen the application of the collective complaints procedure. Since 1998 this procedure has allowed trade unions, employers' organisations and international NGOs to lodge complaints with the European Committee of Social Rights. Though individuals are not authorised to use this procedure, it still represents a powerful bottom-up tool to have socio-economic rights enforced at national level, with a relatively quick procedure of only 18 months. So far only 15 countries have accepted this procedure, and in Finland also national NGOs can use it. This is an example that the other 14 countries should follow, not to mention the remaining 32 - 14 of which are also EU member states - that have not even accepted the procedure yet. In this context, a more proactive approach of the EU in promoting the ratification of the procedure among its member states and, more generally, in taking into account the Charter and the Committee's case-law would be highly beneficial to establish a more coherent legal space for the enforcement of social rights.

The third step is to increase the use of the Committee's jurisprudence by national courts, tribunals and national human rights structures. Judgments and decisions of national courts informed by the Committee's jurisprudence can in fact have a huge impact for people's everyday lives. Encouraging examples of national judgments referring to the Charter have already started to appear. In Italy, the Court of Cassation and the Regional Administrative Tribunal of Lazio pronounced two judgments in 2013 highlighting the normative obligations derived from the Charter.

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2 Only Liechtenstein, Monaco, San Marino and Switzerland have not ratified it.

Another interesting example comes from Spain, where in November 2013 a Labour Court in Barcelona set aside national legislation which had introduced the possibility of dismissing workers in their probation period without notice or compensation. The Court grounded its rationale on the decision of the Committee on a Greek case, considering that the Troika-imposed measures introduced in Spain were analogous to those adopted in Greece.

The significance of this judgment, followed by other Spanish labour Courts, has a bearing well beyond the case in question. First of all, it legitimises the transnational applicability of the Committee's jurisprudence, which can be therefore enforced by national courts without necessarily waiting for a case concerning their country. Second, by doing so, national courts can incorporate decisions taken under the collective complaints procedure also in countries, like Spain, which have not yet accepted it.

In addition to Courts, national human rights structures, such as Ombudsmen, human rights commissions and equality bodies, can contribute to strengthening socio-economic protection. By way of example, I was particularly impressed by the work done by the Ombudsman of Spain over the last few years in the field of socio-economic rights. In a recent visit to the Netherlands, I could also see how strong social rights are anchored in the work of the country's human rights bodies, in particular the Children's Ombudsman.

All these initiatives must be encouraged and further expanded because they provide additional tools to keep Europe's social promise.

### *Balancing financial and human rights concerns*

Undoubtedly, finding the right formula to tackle the impact of the financial and economic crisis and reorganise national budgets represents an extraordinary challenge for national and local governments alike.

In this difficult exercise, human rights concerns cannot be ignored. By laying down the foundations of our social model, the Charter has become Europe's crowning achievement and the aspiration for millions of Europeans.

We have to use its values and standards to carefully steer our response to the crisis. The society we want to live in and bequeath to future generations depends on our ability to take decisions today based on human rights norms and principles.

## **MAINTAIN UNIVERSAL ACCESS TO HEALTH CARE**

*Human Rights Comment published on 7 August 2014*

Universal access to health care has been undermined by austerity measures and the economic crisis. Cuts in health services and difficult economic and social conditions are beginning to have a measurable impact on the health of the population in many countries. Yet the right to health is guaranteed by international and European human rights instruments. Everyone's access to health care without discrimination belongs to the core content of this right.

## *Cuts in health services*

Health care spending in Europe began a downward slope in 2010, reversing a long-term trend as documented by the OECD.<sup>3</sup> At the same time, user charges have often gone up, making it more difficult for many population groups to receive the care they need. The WHO<sup>4</sup> has defined universal coverage as access of everyone to health care services without suffering financial hardship in paying for them.

During my visit to Spain in June last year, I reviewed the effects of austerity measures on health services which had previously been based on universal and free access. The crisis had resulted in massive cuts in medical staff and funding of public health centres, the closure of many emergency services and the introduction of co-payment schemes. Undocumented migrants only had access to emergency care. The regional government of Andalusia had set up a mechanism to maintain free and universal access to health care.

In Greece, public health spending was capped at 6% of GDP through the stipulations of international bailout packages, falling clearly below the EU average of 9% in 2010. Recent research<sup>5</sup> on Greece highlights drastic cuts in public hospital budgets, pharmaceutical spending and funding for mental health care along with spiralling out-of-pocket fees. The prevalence of major depression increased 2.5 times between 2008 and 2011 while the number of suicides rose by 45% between 2007 and 2011. Infant mortality increased by 43% from 2008 to 2010 after a long-term fall, raising concerns about access to pre-natal care by pregnant women.

Public health budget cuts in Latvia have also undermined the availability of care. A UN independent expert<sup>6</sup> has pointed out that the number of publicly funded hospitals with inpatient care provision decreased from 88 in 2008 to 39 in 2010 along with increased user fees for services and pharmaceutical products. In 2011, 26.8% of unemployed people and 18.3% of pensioners had to forego the medical treatment or examination they needed on at least one occasion because they could not afford it.

## *Vulnerable groups*

Many vulnerable groups face specific barriers in access to health care. Children's health was a particular concern during my visit to Spain because of rapidly rising poverty, homelessness and malnutrition among them. The Ombudsman of Catalonia reported that children belonging to disadvantaged social groups faced a six-fold higher risk of mental health problems in comparison with other groups. I have also raised the lack of availability of psychological and psychiatric care for children in

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3 OECD (2012), *Health at a Glance: Europe 2012*, OECD Publishing.

4 World Health Organization, *World health report 2010. Health systems financing: the path to universal coverage*, 2010.

5 A. Kentikelenis, M. Karanikolos, A. Reeves, M. McKee, D. Stuckler, "Greece's health crisis: from austerity to denialism.", *Lancet*, 22 February 2014.

6 Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina on Mission to Latvia (14 to 18 May 2012), A/HRC/23/37/Add.1, 27 May 2013.

Estonia. The WHO has warned of possible life-long effects of extreme poverty on children's health which may include deficits in cognitive, emotional and physical development.<sup>7</sup>

Discrimination, lack of insurance coverage, homelessness and limited transportation options from remote areas have precluded many Roma from accessing health care, as highlighted by a report published by my Office. In fact, Roma often suffer from significantly lower life expectancy than the national average. Lack of identity documents is another contributing factor as I noted during my visit to "the former Yugoslav Republic of Macedonia". A programme of health mediators had been put into place for improving the availability of care and promoting preventive measures.

Access to health services is a vital concern to asylum-seekers when the care they need is not available in their countries of origin. I stressed this issue in Denmark where rejected asylum-seekers holding humanitarian status on grounds of their health situation can be expelled once treatment becomes available in the country of origin. Unfortunately, returns may have gone ahead even when it has been unclear whether the medication or treatment required has in fact been within the reach of the persons concerned.

### *European standards*

The "right of everyone to the enjoyment of the highest attainable standard of physical and mental health" is guaranteed by the International Covenant on Economic, Social and Cultural Rights. In Europe, the revised European Social Charter recognises the right to protection of health and the right to social and medical assistance.

In its 2013 conclusions on Spain, the European Committee of Social Rights stressed that the health system must be accessible to the entire population. The Committee also pointed out that the economic crisis could not serve as a pretext for a restriction or denial of access to health care that affects the very substance of this right.

Although the right to health is not part of the European Convention on Human Rights, its provisions on the right to life and the prohibition of torture and inhuman or degrading treatment have been applied in cases related to the quality of care and access to it. For example, the case-law of the European Court of Human Rights on prisoners' access to health care is quite extensive. The extreme effects of austerity measures on the accessibility of health care could be open to contestation in the Court.

### *Human dignity*

Universal access to health care is about respecting everyone's human dignity. We should start viewing health inequalities through a human rights perspective by putting the person at the centre of health service delivery. Scotland's National Action Plan for Human Rights is actively pursuing this approach in on-going reforms of health and social care. By involving the users in the development of care and respecting

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7 WHO Regional Office for Europe, *Impact of economic crises on mental health*, 2011.

their right to self-determination we enable individual choices and make services responsive to people's real needs.

There are good reasons for carrying out reforms to make health services more effective. The rapid demographic changes and technological advances we are currently experiencing will require new responses. It is also important to address wasteful practices and corruption in health care. However, such reforms should not simply amount to cost-cutting exercises. They should always aim to deliver quality care to the entire population without excessive user charges. Governments have a duty to maintain health and social protection floors which are available to everybody at all times.

## **YOUTH HUMAN RIGHTS AT RISK DURING THE CRISIS**

*Human Rights Comment published on 3 June 2014*

Young people have been one of the groups hardest hit by the economic crisis in Europe, with youth unemployment being the most common pathology of many countries implementing austerity measures. However, it is not only the social and economic rights of young people that are being undermined, but also their right to equal treatment, their right to participation, and their place in society, and more broadly, in Europe. Due to chronic unemployment, many young people are losing hope in the future of their countries, their faith in the political elite, and their belief in Europe. A rights-based approach should replace the current neglect of young people in discussions about the crisis.

### *Youth unemployment and labour standards*

In March 2014, the youth unemployment rate (under 25 years) was 22.8% in the 28 members of the Council of Europe that are also European Union countries. The highest levels were recorded in Greece (56.8%), Spain (53.9%) and Croatia (49.0%). The youth unemployment rate in the EU was more than twice as high as the general average rate of 10.5%. Among other European countries, youth unemployment exceeded the 50% rate in 2013 in Bosnia and Herzegovina, Serbia and "the former Yugoslav Republic of Macedonia" according to the ILO.<sup>8</sup>

While youth unemployment is a major concern, increasing attention is also being paid to the rising number of young people who are not in employment, education or training (so-called "NEETs"). A report by Eurofound put their number in 2011 at 14 million, or 15.4% of the EU population aged between 15-29 years.<sup>9</sup> In Bulgaria, Ireland, Italy and Spain the figures were higher than 20%. A Eurobarometer survey

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8 ILO Report, *Global Employment Trends 2014: The risk of a jobless recovery*, 21 January 2014.

9 Eurofound (2012), *NEETs – Young people not in employment, education or training: Characteristics, costs and policy responses in Europe*, Publications Office of the European Union, Luxembourg.

published in April found that more than half of young Europeans felt young people had been marginalised and excluded from social and economic life by the crisis.<sup>10</sup>

The hurdles young people face in their transition from education to work can have long-term negative effects and impact their enjoyment of human rights. It is particularly difficult to reach NEETs and integrate them in the labour market. We risk producing a “lost generation” of disillusioned young people with serious consequences for inter-generational solidarity, social cohesion and political stability. Measures tackling youth and long-term unemployment should be given priority in labour policies, as I have stated in a recently published Issue Paper on the crisis.

Any temptation to lower labour standards and social protection when employing young people must be resisted. Schemes to work as an intern or an apprentice should not be abused in this respect. The European Committee of Social Rights has upheld a collective complaint against Greece about the rights of apprentices. It found violations of the European Social Charter in the fact that ‘special apprenticeship contracts’ had established a distinct category of workers who were excluded from the general range of protection offered by the social security system. There had also been age discrimination in remuneration as young people’s minimum wage had been set substantially lower than that of the general population, in fact falling under the poverty line.

### *Rights-based approach*

Young people are not only concerned about unemployment, poverty and financial autonomy. The European Youth Forum has also highlighted the rights to education, participation and non-discrimination, the freedoms of expression, religion and movement, and the right to a healthy life and reproductive rights.<sup>11</sup> The European youth movement is advocating a rights-based approach towards young people and raises awareness of the lack of specific attention afforded to young people in most European and international human rights instruments.

Although the European Convention on Human Rights does not have explicit provisions on young people, it protects the human rights of all people, including young persons. The case-law of the European Court of Human Rights has covered many issues of interest to young people. Such cases have related, for example, to university education, access to a professional career, conscientious objection, expulsion of second-generation migrants and forced labour.

In contrast, the revised European Social Charter includes specific references to young people to ensure their social, legal and economic protection along with its general provisions applying to everybody. In addition to young people’s labour rights, the European Committee of Social Rights has highlighted positive measures regarding young people’s access to adequate housing and the rights to non-discriminatory access to education and professional training, among other issues.

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10 Flash Eurobarometer of the European Parliament (EP EB 395), *European youth in 2014: analytical synthesis*, Brussels, 28 April 2014.

11 European Youth Forum, “Policy paper on youth rights”, adopted by the EYF General Assembly, November 2012.

### *Specific legal instrument*

The recent trend in improving protection against age discrimination has highlighted questions about young people's enjoyment of human rights.<sup>12</sup> New age-based human rights instruments are under consideration following the existing model of the UN Convention on the Rights of the Child. In the UN, the preparation of a convention on the rights of older persons is being discussed and the Council of Europe Committee of Ministers has already adopted a Recommendation on the topic. The Parliamentary Assembly of the Council of Europe has proposed the preparation of a binding legal framework on young people's access to fundamental rights.

It is essential that young people can exercise their right to participation in the elaboration of legal instruments related to them. At the same time, we have to stress the fact that existing human rights instruments do apply to young people even when they don't include specific references to young persons.

### *Empowering young persons*

Young people should be empowered to assert their rights. This requires strengthening awareness of human rights and opportunities for effective participation in social, economic, cultural and political life. We have to be sure that being young does not become an obstacle to the full exercise of human rights during the crisis and that young people can participate in national decision-making to voice their needs, hopes and fears. Ombudspersons, equality bodies and human rights commissions should also reach out to young persons so that their concerns and complaints can be addressed. Governments should not only view young people as holding keys to our future but recognise their rights and role in Europe today.

## **PROTECT WOMEN'S RIGHTS DURING THE CRISIS**

*Human Rights comment published on 10 July 2014*

Women and men entered the economic crisis on an unequal footing. The crisis and resulting austerity measures have hit women disproportionately and endangered the progress already made in the enjoyment of human rights by women. A gender-sensitive response is necessary to halt and reverse this trend.

### *Female poverty on the rise*

In most of the countries affected by the economic crisis, an increasing feminisation of poverty has been observed. A study conducted in 2013 on access to food banks in France revealed that the primary beneficiaries were women between 26 and

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12 C. Kollonay Lehoczky, "Who, Whom, When, How? Questions and Emerging Answers on Age Discrimination", *The Equal Rights Review*, Vol. Eleven (2013).



50 with at least one child.<sup>13</sup> This is emblematic not just of the vulnerability of lone parent families, but also of the gender implications of the crisis. In Europe there are on average 7 times more lone mothers than lone fathers. Moreover, as indicated by Eurostat, “single women over 65 are at substantially higher risk of poverty than single men of the same age”.<sup>14</sup>

In Spain, as recently highlighted by Human Rights Watch,<sup>15</sup> women have been disproportionately affected by housing foreclosures related to excessive mortgages following the housing crisis. In fact, women, and especially younger women, have become more visible among the homeless of Europe as reported by FEANTSA.

These concerns have been further reflected by both the Parliamentary Assembly of the Council of Europe and the European Parliament, which have also stressed that women in poverty or at risk of poverty are more likely to work in low-paid, precarious and informal jobs, including in the field of domestic work, and face the risk of exploitation and trafficking in human beings.

#### *Negative impact of austerity measures*

Regrettably, these warnings have largely remained unheard. Many European governments have in fact implemented austerity measures which have exacerbated the negative effect of the economic crisis on women. For instance in the United Kingdom<sup>16</sup> and Greece,<sup>17</sup> a significant number of jobs have been cut and salaries reduced in the public sector, where female workers form the majority.

In addition, as women rely more than men on social benefits, budget cuts in the welfare system have further endangered the enjoyment of social and economic rights by women. An independent audit by the UK Women’s Budget Group has concluded that the total cuts in government spending “represent an immense reduction in the standard of living and financial independence of millions of women, and a reversal in progress made towards gender equality”. This risk of retrogression of women’s rights, and especially social rights, has also come to the fore in other countries, for example in Greece regarding women’s access to health care and in Ireland regarding childcare benefits.

The stagnation of pension rates under austerity puts older women at a higher risk of poverty as women live longer and more often alone than men, as I observed in my report on Estonia.

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13 Etudes Banques Alimentaires – Ipsos 2013 « Profil des bénéficiaires. Etude nationale sur les épiceries sociales & solidaires ».

14 Europe 2020 Targets: Poverty and Social Exclusion Active Inclusion Strategies, [www.ec.europa.eu/eurostat](http://www.ec.europa.eu/eurostat).

15 Human Rights Watch, *Shattered Dreams. Impact of Spain’s Housing Crisis on Vulnerable Groups*, 27 May 2014.

16 Katie Allen, “Public sector austerity measures hitting women hardest”, *The Guardian*, 1 July 2013.

17 UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the seventh periodic report of Greece adopted by the Committee at its fifty fourth session (11 February – 1 March 2013)*, CEDAW/C/GRC/CO/7, 1 March 2013.

Women's rights are also jeopardised by financial cuts made to programmes and infrastructures promoting gender equality, as was the case for instance in Spain where the Ministry of Equality was eliminated in 2010.

Lastly, action against gender-based violence is yet another field negatively impacted by the combination of the crisis and ensuing austerity measures. While demand for assistance among women victims of violence has been on the rise in a number of European states, some women's shelters have had to close due to budgetary cuts.

### *Protect women's rights and empower women*

It is time that states put an end to this disturbing "gender-blindness of public cuts", as described in a 2013 report published by the European Commission.<sup>18</sup>

In responding to the crisis, European governments should guarantee women's equal access to human rights, including the rights to decent living conditions, work, healthcare and education. They should ensure that all women can enjoy social protection floors guaranteeing the minimum core levels of economic and social rights at all times.

There are internationally agreed standards that can contribute to the protection of women's rights: for example, alongside the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Council of Europe Conventions on violence against women and combating human trafficking, as well as the 2011 ILO Convention 189 on Decent Work for Domestic Workers are all relevant texts to help ensure better protection of human rights, including women's rights. Council of Europe countries which have not ratified these instruments should do so and implement them without further delay.

Moreover, European states should combat discrimination on the grounds of sex in all fields of life, in line with Protocol No. 12 to the European Convention on Human Rights and the Revised European Social Charter. In particular, they should ensure that none of the austerity measures that they adopt has a discriminatory impact on women, including migrant women, young or elderly women, women with disabilities or those belonging to ethnic and religious minorities.

There is a clear need for systematic assessments of the impact of the economic crisis and the recovery measures on gender equality in all fields of life, including through the collection of gender disaggregated data. Gender-sensitive policies should be devised, including by taking into account the gender perspective during the budgetary process (gender-budgeting), as stressed in the Committee of Ministers' Recommendation CM/Rec(2007)17 on gender equality standards and mechanisms.

The agenda for empowering women and achieving gender equality in all aspects of life should not be lost to the crisis. States must take into account the impact of austerity measures on women and ensure their active participation in recovery policies.

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18 European Commission, *The impact of the economic crisis on the situation of women and men and on gender equality policies*, 2013.

## **RESPECTING THE HUMAN RIGHTS OF PERSONS WITH PSYCHOSOCIAL AND INTELLECTUAL DISABILITIES: AN OBLIGATION NOT YET FULLY UNDERSTOOD**

*Human Rights Comment published on 24 August 2017*

The human rights of persons with disabilities is one of the areas I have taken up most frequently in my country work, with the most recurrent issues being the right to live in the community and deinstitutionalisation; the right to legal capacity; and the right to an inclusive education. A considerable part of this work has focused on the rights of the persons with psychosocial and intellectual disabilities, who are among the most vulnerable and marginalized groups in society.

In all these fields, the 2006 UN Convention on the Rights of Persons with Disabilities (hereinafter the CRPD) is an invaluable instrument because it embodies the paradigm shift in attitudes and approaches to persons with disabilities, without which their rights cannot be effectively protected. This paradigm shift entails a move from the medical model to the social model of disability, i.e. viewing persons with disabilities as active *subjects* with equal rights, capable of taking their own decisions and contributing to societies rather than *objects* of charity and medical treatment.

It is encouraging that the overwhelming majority of the Council of Europe member states (with the exception of Ireland and Monaco) as well as the EU have ratified the CRPD and that a large number of states have also ratified its Optional Protocol, which establishes an individual complaints mechanism for alleged violations of the Convention. However, after five years of examining these questions on the ground, I am convinced that many Council of Europe member states are still a long way from internalising the paradigm shift they endorsed by ratifying the CRPD. On the whole, in all the areas mentioned above, their priority has been on adjusting existing systems which are fundamentally non-compliant with the CRPD rather than reforming those systems from the ground up. Our societies still seem to consider that some people are better off in institutions or that some people are simply too impaired to make any choices affecting their own life or to benefit from a decent education alongside their non-disabled peers. It is this attitude that we need to overcome to bring about the necessary transformation.

### *The right to live in the community and deinstitutionalisation*

Article 19 of the CRPD stipulates that all persons with disabilities have the right to “live in the community, with choices equal to others”, requiring states to facilitate the full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community.

Special institutions for persons with disabilities are the symbols of the most severe violation of this right: not only do they create high risk environments for neglect, violence and abuse as I highlighted in my work concerning Bulgaria and Romania; they also hide persons with disabilities from the public eye, thereby reinforcing existing prejudicial social attitudes towards them. I have consistently called on Council of Europe member states to stop new placements in institutions and develop

transition plans for gradually moving from institutions to arrangements relying on community-based services. Nevertheless, large, segregated facilities continue to exist throughout Europe. Some European countries are still refurbishing existing institutions or even building new ones – sometimes, this has been done with the aid of EU structural funds, as reported in Bulgaria, Hungary, Lithuania and Romania. Deinstitutionalisation efforts can also be halted or reversed by austerity measures, as was the case in Spain, where budgetary cuts substantially affected the provision of community-based services.

Even though there have been modest steps towards more community-based services in certain countries, the deinstitutionalisation process has been extremely slow and riddled with major setbacks. A worrying trend I have observed in this respect is the replacement of large-scale institutions with smaller ones, as I have noted in my reports on Bulgaria, Denmark and Hungary. The material conditions in some of these facilities may be of a high standard, but they fail to afford the control over one's life and meaningful contact with the community and the outside world that Article 19 of the CRPD requires.

### *Legal capacity*

Control over one's life, which lies at the very core of the CRPD, is what our legal capacity regimes are about. Many people are deprived of their legal capacity on the basis of an intellectual or psychosocial disability and are therefore deprived of their fundamental right to make decisions. This is an area where mental resistance, including from policy makers as well as legal and medical professions goes a long way in explaining the current lack of progress.

I have observed during my country visits that a large number of European states, including Denmark, Hungary and Romania, have laws that provide for substituted decision-making, including full guardianship regimes which strip the persons concerned of the freedom to make decisions about all important aspects of their lives, such as the right to have a family (marriage and parental rights), personal integrity (including consent to medical treatment), contractual matters, and the right to work. An issue of specific concern in this regard is the automatic deprivation of the right to vote for persons placed under plenary guardianship in certain countries, in blatant disregard not only of the CRPD but of the 2011 Recommendation of the Committee of Ministers of the Council of Europe on the participation of persons with disabilities in political and public life.

Moreover, procedures interfering with a person's legal capacity are often not accompanied by appropriate procedural safeguards or where such safeguards are available, they are not applied. For example, the right of a person to be heard before being placed under guardianship can be excluded in some domestic laws or can be disregarded in practice. Similarly, certain systems do not provide for automatic and periodical judicial reviews of the decision on deprivation of legal capacity or for adequate safeguards against conflicts of interest for guardians or undue influence or exploitation.

I have welcomed the forward momentum in some countries, for example in Austria and Finland, where promising pilot projects on supported decision-making were launched. Some other countries, like the Czech Republic and Latvia were the first to abolish plenary guardianship. Similarly, Lithuania has taken some positive steps by abolishing the possibility to declare a person “incapable” in all aspects of life. However, our ultimate aim must be to phase out all substituted decision-making in every member state and replace it with supported decision-making systems which respect the person’s autonomy, will and preferences and are accessible to all persons with disabilities, as clearly stated by Article 12 of the CRPD.

### *Involuntary placement and treatment*

Another sensitive and problematic issue, which is closely linked with the rights to legal capacity and to live in the community, is involuntary placement, coercive treatment and use of restraints in psychiatry. I have come across questionable practices during my country visits, such as the large numbers of compulsory hospital placements in France, or the long-standing problem of the use of coercion in Norway.

This grim picture is a result of the premise that involuntary placement of persons with mental health problems is an inevitable necessity, since they present a danger to themselves and others. I have repeatedly stressed the need to shift the focus to how coercion can be avoided in the first place, and how the person can best be supported in making healthcare choices. The states, however, have rather been focusing on designing judicial safeguards and controls, which often do not work in practice (for example in Romania, I noticed that despite existing safeguards, the persons concerned had no effective access to judicial review and were prevented from exercising their right to be heard in person). This is precisely why I expressed a negative opinion on plans currently on-going in the Council of Europe to draw up a legal instrument (in the form of an Additional Protocol to the Oviedo Convention) which aims at protecting the human rights and dignity of “persons with mental disorder” with regard to involuntary placement and involuntary treatment by reviewing the effectiveness of the applicable legal safeguards.

Using the existence of a disability as ground for involuntary confinement not only amounts to arbitrary deprivation of liberty but also constitutes discrimination on the basis of disability in breach of Article 14, §1(b) of the UN CRPD which reads “the existence of a disability shall in no case justify a deprivation of liberty.” as well as Article 25 (d) of the UN CRPD which establishes the right for persons with disabilities to enjoy the highest attainable standard of health care, without discrimination and on the basis of free and informed consent.

I have welcomed a number of good practices which show that alternatives to coercion exist, such as Finland’s Open Dialogue approach to acute psychosis which involves the patient in all treatment decisions and appears to have a very high success rate. I invite the member states to draw inspiration from these good examples and reform their mental health care systems with the aim of drastically reducing and progressively eliminating coercive practices in psychiatry. Non-consensual placements in closed settings – including social care homes – should be limited to life-threatening emergencies as a last resort and must always be based on objective

and non-discriminatory criteria which are not specifically aimed at people with disabilities.

### *Inclusive education*

Education of persons with disabilities is another area where member states are still far from fulfilling Article 24 of the CRPD, which requires them to ensure an inclusive education system at all levels.

Separate education is at variance with the right of children with disabilities to quality education on the basis of equal opportunity, as it is often characterised by low expectations, sub-standard teaching and worse material conditions. It also reinforces and validates the marginalisation of children with disabilities in the later stages of their lives, including their access to the labour market (as specialised education does not usually provide children with any diploma at the end of their studies). For their non-disabled peers, teachers, and others in the community, separate education means being deprived of knowledge about human diversity and essential life skills.

My own work indicates that separate education remains the norm in many member states. In Belgium and the Czech Republic, a high number of children with disabilities are still segregated in specialised schools with little prospect of being reintegrated into mainstream education. Similarly in France, almost 80% of children with autism do not have access to mainstream education, a situation which the European Committee of Social Rights repeatedly found to be in violation of the European Social Charter in its decisions taken within the framework of the collective complaints procedure. Even in countries like Spain which accomplished a high rate of inclusion, austerity measures have led to existing individualised supports being withdrawn. In other instances, countries appear willing to settle for some form of segregation and rename segregated forms of education under a more acceptable brand (such as “appropriate education” in the Netherlands) or even as inclusive education (for instance, “inclusive education centres” in Romania). Often these shortcomings are justified by the education authorities on grounds of lack of resources to ensure accessibility or provide individual supports. However, lack of resources should never serve as an excuse for sub-standard or separate education for children with disabilities.

### *The way forward*

As the above examples illustrate, the member states of the Council of Europe have yet to fully internalise the paradigm shift mandated by the CRPD. Without this shift even well-intended policies are bound to end up reproducing isolation rather than supporting independent living. Member states should show leadership and start rethinking the systems that are fundamentally non-compliant with the CRPD as a whole, instead of trying to adjust them. They should intensify their efforts to reform their legislation to eliminate practices incompatible with the CRPD and back them up with comprehensive and well-funded action plans. Above all, policy makers should live up to the rallying cry of “Nothing about us without us!”, which is the guiding spirit behind the CRPD, by ensuring the active involvement of persons with disabilities in the development of policies that profoundly affect their lives.

## THE NEW DEVELOPMENT AGENDA SHOULD FULFIL HUMAN RIGHTS

*Human Rights Comment published on 14 October 2015*

Most European countries have become accustomed to seeing the United Nations (UN) development agenda as being “for export”, as not directly relevant for Europe itself. However, the economic crisis and austerity have made this universal agenda topical on our continent as well. The 2030 Agenda for Sustainable Development, launched by a UN summit in New York on 25-27 September 2015, is aimed at ending poverty in all its forms everywhere. Its 17 Sustainable Development Goals comprise an ambitious blueprint for a world which leaves no one behind and is based on the universal respect for human rights. Europe should make this agenda its own to the benefit of the most vulnerable in our societies.

### *Universal development agenda*

The 2030 Agenda for Sustainable Development (“the 2030 Agenda”) replaces the Millennium Development Goals (MDGs) which were agreed by governments in 2000 and will run their course at the end of this year. The eight MDGs set basic targets in the fields of extreme poverty, primary education, gender equality, child mortality, maternal health, disease prevention, environmental sustainability and global partnerships for development. The MDGs were mainly considered targets for developing countries, with funding provided by developed countries, including Europe. The main goal of halving extreme poverty was achieved.

In contrast, the 2030 Agenda is founded on universal implementation even though it recognises the principle of “common but differentiated responsibilities” which takes into account variations in national situations. The European governments and the EU are not simply viewed in their role as funders of official development assistance (ODA) but they are also expected to implement the agenda in their own countries. This is a major shift of emphasis and makes the 2030 Agenda directly relevant to Europe.

### *Human rights and development*

While the MDGs were not designed to tackle the root causes of poverty and inequality and made no direct reference to human rights, the 2030 Agenda takes a far more comprehensive approach. The new 17 Sustainable Development Goals (SDGs – also called “Global Goals”) and their 169 targets are not only aimed at eradicating poverty and hunger in all their forms but also “seek to realize the human rights of all and achieve gender equality”. A people-centred approach of the agenda aims to ensure that all human beings can fulfil their potential in dignity and equality echoing the Universal Declaration of Human Rights (UDHR). Sustainability of the planet, shared prosperity, peaceful, just and inclusive societies, and global partnerships for sustainable development are the other elements underpinning the SDGs.

The 2030 Agenda envisages “a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination”. It is explicitly grounded in the UDHR and international human rights treaties and emphasises the



responsibilities of all states to respect, protect and promote human rights. There is a strong emphasis on the empowerment of women and of vulnerable groups such as children, young people, persons with disabilities, people living with HIV/AIDS, older persons, indigenous peoples, refugees, internally displaced persons and migrants.

Although the 2030 Agenda includes strong human rights language, especially in its preamble, it does not live up to the expectations of a fully rights-based approach. For example, in the final negotiations, the explicit reference to states' responsibility to "fulfil" human rights was dropped and replaced by the word "promote". The provisions on non-discrimination were also made less explicit even if the list of protected grounds remains open. The compromise was to revert to more general human rights language already spelled out in Articles 8 and 9 of the Rio+20 Conference Outcome Document of 2012 which established the link between sustainable development and human rights. It should also be noted that the SDG on inclusive and accountable societies and access to justice is not framed in terms of human rights even though most of its targets are essential for fulfilling civil and political rights.

### *Austerity in Europe*

The economic crisis and austerity measures have accentuated the relevance of the 2030 Agenda to Europe. Even within the EU, poverty is a fact of life. In 2013, 122.6 million people or 24.5% of the EU population were at risk of poverty and social exclusion. More than a third of the population was at risk in Bulgaria (48%), Romania (40.4%), Greece (35.7%), Latvia (35.1%) and Hungary (33.5%). Children were at greater risk of poverty or social exclusion than the rest of the population in most EU countries. The EU figure stood at 27.6% in 2013. In 2010, the EU committed itself of lifting at least 20 million people out of the risk of poverty or exclusion by 2020.<sup>19</sup> Far more effort will be needed to meet the target as the current figures for the EU are still worse than those for 2008.

The 2030 Agenda is committed to promoting youth employment and decent work for all. Unemployment among young people (under 25) remains a major concern in Europe. In July 2015, 4.6 million young persons, or 20.4%, were unemployed in the EU.<sup>20</sup> The highest rates were observed in Greece (51.8%), Spain (48.6%), Croatia (43.1%) and Italy (40.5%). Another revealing figure is that in 2013, 7.5 million young people in the EU were not in education, employment or training (NEET), nearly a million more than in 2008. Although unemployment figures have started to fall in the EU, it is still clear that young people continue to face serious challenges in their inclusion in the labour market.

Universal health coverage is among the goals of the 2030 Agenda. Austerity measures have resulted in substantial cuts in health services in many European countries. Public health care spending in Europe dived during the economic crisis while user charges went up. According to the OECD Health Statistics 2015, health care spending

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19 European Commission, *EUROPE 2020 A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, 2 March 2010.

20 Eurostat news release "Euro area unemployment rate at 10.9%", 147/2015, 1 September 2015.



continued to shrink in Greece, Italy and Portugal in 2013 and most EU countries reported real per capita health spending below the levels of 2009.

### *People with disabilities, Roma and migrants*

In addition to children and young people, there are other vulnerable groups in Europe whose right to sustainable development should be recognised. For example, the SDG to ensure inclusive and equitable quality education for all is especially relevant to people with disabilities, Roma and migrants. In many European countries, children with disabilities and Roma children continue to be educated separately although adequate support would enable their full integration into mainstream education. There are also too many immigrants who drop out from education early on.

In a previous Human Rights Comment, I pointed out that poverty, persistent discrimination and social marginalisation are the main underlying reasons for this inclusive education deficit, which needs to be reversed by determined and systematic action by all European states. It is notable that one of the SDGs is geared towards reducing inequalities within countries and at promoting the social, economic and political inclusion of all.

The 2030 Agenda recognises the positive contribution of migrants for inclusive growth and sustainable development. This is highly relevant in the current European context, with the influx of significant numbers of newcomers. It calls on full respect for the human rights and humane treatment of migrants, refugees and displaced persons while highlighting the need to meet the special needs of people living in areas affected by complex humanitarian emergencies. Europe must face its responsibilities towards migrants and refugees. The SDGs aimed at combating climate change and conserving the environment can also have an impact in terms of migration and displacement.

### *Resources and the role of the private sector*

It is naturally a big question how resources for the global implementation of the SDGs will be generated. While ODA will still be part of the picture, domestic resource mobilisation, technology transfers and multi-stakeholder partnerships will play a major role. The agreed Technology Facilitation Mechanism is an example of multi-stakeholder collaboration involving states, civil society, private sector, scientific community and the UN. It is very likely that the private sector will be increasingly involved in development activities.

The 2030 Agenda highlights the business sector and public-private partnerships in solving sustainable development challenges while paying attention to the protection of labour rights and environmental and health standards. ILO labour standards, the Convention on the Rights of the Child and the UN Guiding Principles on Business and Human Rights are referred to specifically. Further initiatives to clarify the respective human rights obligations of states and the business sector are on the way. The UN Human Rights Council has started a process towards a legally binding human rights instrument to regulate the activities of transnational corporations and other business enterprises. Another recent development is the adoption of national action

plans on business and human rights by a growing number of countries in Europe and elsewhere.<sup>21</sup>

### *Indicators and follow-up*

The human rights relevance of the 2030 Agenda will also depend on the choice of concrete indicators for monitoring its implementation. Such indicators are being developed currently and a study carried out by the Danish Institute for Human Rights<sup>22</sup> demonstrates that many of the proposed indicators are also useful for gauging the realisation of human rights. For example, disaggregated data on the percentage of population covered by social protection floors can be found among the indicators for eliminating poverty. The proportion of women and girls subjected to intimate partner violence is likely to become one of the indicators for gender equality. Unemployment rate by sex, age-group and disability, and percentage of NEET youth are useful indicators for employment and decent work for all. All of these indicators are relevant to Europe.

The follow-up and review of the new sustainable development agenda will take place at global, regional and national levels. Governments should acknowledge the human rights potential of this agenda and associate national human rights structures in its monitoring. European and international human rights mechanisms can help develop suitable indicators and provide data on the realisation of SDGs. The 2030 Agenda for Sustainable Development offers a unique opportunity to promote development approaches which also improve the respect, protection and fulfilment of human rights all over the world. The agenda should be fully implemented in Europe as well.

## **BUSINESS ENTERPRISES BEGIN TO RECOGNISE THEIR HUMAN RIGHTS RESPONSIBILITIES**

*Human Rights Comment published on 4 April 2016*

The effects of business practices on human rights have become a central issue for human rights protection. For a long time already, concerns have been raised about malpractices related to labour rights, health and safety at work and the use of child labour by some business enterprises. Later on, the outsourcing and privatisation of essential services previously carried out by public authorities ranging from security to education and child protection have raised issues about the preservation of human rights duties and accountability. More recently, the right to privacy and freedom of expression have become major themes with reference to private companies which control and operate on the Internet and the wider digital environment, questions

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21 C. Methven O'Brien, A. Mehra, S. Blackwell, C. Bloch Poulsen Hansen, "National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool", *Business and Human Rights Journal* 1(1) 2015, pp.117-126.

22 Danish Institute for Human Rights, *Human Rights Guide to the Sustainable Development Goals (SDGs)*, [www.sdg.humanrights.dk](http://www.sdg.humanrights.dk).

which were highlighted in a research paper on the rule of law on the Internet my Office published in 2014.

While states remain the ultimate duty bearers for the protection of human rights, there is now wide recognition that businesses should also respect human rights. Some multinational enterprises have become so powerful that they can surpass the financial resources available to middle-sized states. A recent survey carried out by *The Economist*<sup>23</sup> highlighted the fact that many businesses have actually started to view themselves as important actors in respecting human rights. This is partly the result of intensive international and national efforts to clarify the human rights responsibilities of the business world.

#### *“Protect, Respect and Remedy” Framework*

In 2011, the UN Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights (hereafter “the Guiding Principles”). These principles spell out the UN “Protect, Respect and Remedy” Framework developed by John Ruggie, at the time the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Guiding Principles are based on three pillars: the state duty to protect human rights, the corporate responsibility to respect human rights, and the right of victims to access an effective remedy. They are the first global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. The Guiding Principles do not create new legal obligations, rather they elaborate on the implications of existing obligations and practices for states and business.

The state has the duty to protect individuals within its territory or jurisdiction against human rights abuses committed by non-state actors, including business. Although states are not responsible for human rights abuses by private actors, they must take steps to prevent, punish and redress such abuses through legislation and regulation. The Guiding Principles also affirm that business enterprises have an independent responsibility to respect human rights which is distinct from state obligations. The corporate responsibility for human rights includes the “Do no harm” principle that makes it necessary to carry out due diligence in identifying and addressing the human rights impacts of business practices. Companies need to take all necessary and reasonable precautions to prevent harm.

Access to remedy by individuals and groups of people is a critical element of the framework. While states are required to take appropriate steps to investigate, punish and redress, there is also a corporate responsibility to set up complaint mechanisms at the company level to provide early warning and resolve grievances before they escalate. States have a particular duty to ensure access to judicial and non-judicial mechanisms for effective remedies. Non-judicial mechanisms may include labour tribunals, ombudspersons, national human rights commissions and equality bodies, for example.

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23 The Economist Intelligence Unit report, *The road from principles to practice. Today's challenges for business in respecting human rights*, March 2015.

## *European standards*

The Guiding Principles have gained wide acceptance around the world. In Europe, the Council of Europe Committee of Ministers welcomed the principles in a Declaration in 2014 and expressed strong support for their implementation by member states. On 2 March 2016, the Committee of Ministers adopted a detailed Recommendation on human rights and business. The Recommendation builds on the Guiding Principles and provides more specific guidance to assist European governments in preventing and remedying human rights violations by business enterprises while insisting on measures to induce business to respect human rights. It spells out the relevance of the European Convention on Human Rights and the European Social Charter in this area. In particular, the Recommendation elaborates on access to judicial remedy drawing on Council of Europe expertise and legal standards in the fields of civil and criminal liability, reduction of judicial barriers, legal aid, and collective claims.

The European Union has recognised the Guiding Principles as “the authoritative policy framework” in addressing corporate social responsibility. Since 2011, the European Commission has been encouraging EU member states to develop national action plans (NAPs) for implementing the Guiding Principles. In its Recommendation, the Council of Europe Committee of Ministers also urged member states to develop and adopt NAPs. In addition, the Committee of Ministers intends to share NAPs and good practices in this area through an information system to be maintained by the Council of Europe.

## *National action plans*

Nine European countries have already published NAPs on business and human rights: Finland, Denmark, Italy, Lithuania, the Netherlands, Norway, Spain, Sweden, and the United Kingdom. Nine further NAPs are on the way in Azerbaijan, Belgium, Czech Republic, Germany, Greece, Ireland, Portugal, Slovenia and Switzerland. The UN Working Group on Business and Human Rights has published guidance on the development of a NAP.

The Working Group defines a NAP as a policy strategy developed by a state to protect against adverse human rights impacts by business enterprises. The NAP needs to reflect the state’s duties under international human rights law, including the principle of non-discrimination, to promote business respect for human rights through due diligence processes, and to provide effective access to remedy. The NAP should address the country’s actual and potential business-related human rights abuse by defining realistic measures for preventing and remedying such harm. An inclusive and transparent process involving relevant stakeholders is necessary in the development of a NAP and its regular review and revision.

NAPs on business and human rights belong to systematic human rights work at the national level which I have often encouraged during my country visits. They are not simply documents but part of a continuous, inclusive and transparent process of

implementing human rights. Experts<sup>24</sup> have stressed the importance of establishing review and follow-up mechanisms to support states in producing, implementing and reporting on NAPs. In addition to facilitating the sharing of good practices about NAPs, the Recommendation of the Committee of Ministers envisages a stakeholder review of the implementation of the Recommendation within five years. This will provide a good opportunity for taking stock of the impact of NAPs in Europe.

### *Groups in need of additional protection*

The Recommendation of the Committee of Ministers stresses the need to provide additional protection to workers, children, indigenous people and human rights defenders. Naturally, workers are directly affected by the activities of their companies. States have the duty to require business enterprises to respect the rights of workers. European and international human rights instruments are essential in ensuring workers' freedom of association, their right to collective bargaining, the prohibition of discrimination, child and forced labour, and the protection of health and safety at work. The UN Committee on the Rights of the Child has given detailed guidance on state obligations regarding the impact of business on children's rights. It highlights the need for states to facilitate the access of children to remedies and for businesses to undertake child rights due diligence.

Indigenous peoples are often excluded from consultations on business activities that influence their lives which may result in further social and economic marginalisation. In particular, business enterprises should obtain the free and informed consent of indigenous peoples prior to the approval of projects which affect their lands, territories or other resources. Human rights defenders can face challenges and risks while holding companies accountable. States have an obligation to promote an environment that is safe and enabling for human rights defenders. Companies should consult them about the possible impacts of business activities on human rights and refrain from obstructing their work.

### *Next steps*

It is encouraging that businesses themselves are becoming more aware of the impact of their activities on human rights. In addition to simply avoiding harmful effects, it will be useful to highlight the potential of business enterprises to promote human rights in their operations, for example in the field of non-discrimination. The involvement of all stakeholders in the adoption and implementation of NAPs on business and human rights can further accelerate this process. National human rights institutions also have a role to play. The Danish Institute for Human Rights has already co-authored a toolkit for the preparation of NAPs and prepared a specific toolbox for the human rights impact assessment of business projects.<sup>25</sup>

Experience in the implementation of NAPs will provide valuable elements for on-going

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24 C. Methven O'Brien, A. Mehra, S. Blackwell, C. Bloch Poulsen Hansen, "National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool", *Business and Human Rights Journal* 1(1) 2015, pp.117-126.

25 See [www.humanrights.dk](http://www.humanrights.dk) for more information.

UN efforts to draft a legally binding human rights instrument to regulate the activities of transnational corporations and other business enterprises. It is likely that the instrument will take a long time to conclude but that should not discourage the active implementation of existing international and regional standards on business and human rights, also in the form of NAPs. Business enterprises have an increasing role in promoting human rights and this responsibility should be recognised by businesses and governments across Europe.









## 2. Migration and Human Rights

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### INTRODUCTION

The treatment of refugees, asylum seekers, immigrants and IDPs has always been a major human rights issue. The so-called “refugee crisis” has amplified this. It has brought out the best in some. Massive efforts to receive refugees were made in some countries. Huge numbers of citizens, civil society, religious organisations and health workers organised themselves to provide humanitarian assistance, save lives at sea, welcome refugees and help them integrate, often stepping in where governments failed to do so. At the same time, the “crisis” has brought out the worst in others. We have seen a proliferation of fences, pushbacks, ill-treatment, large-scale detention and the militarisation of border control. Legitimate concerns about the effects of large-scale arrivals in Europe were put forward, but responses have also been fed by, and have fed, xenophobic sentiments. Europe’s values of respect for human rights and solidarity were put to a serious test and failed. With hundreds of thousands in need of protection reaching Europe, the importance of a strong human rights framework became even clearer. However, actions and public discourse linking security to migration have been key drivers of increasing anti-human rights posturing in Europe, which affects both refugees and migrants, and the European human rights system as a whole.

At the early stage of the war in Syria, European states were slow to recognise migration challenges, and even slower to respond. I remember in particular the scale of the Syrian conflict becoming evident to me when I started encountering Syrian refugees everywhere in the early years of my mandate: in Armenia, in a Serbian forest, in Greek police cells and in squats in Rome and The Hague. Still, European states were hoping the issue would be confined to Turkey, Lebanon and Jordan, while at the same time providing them with vastly insufficient assistance. Towards the end of 2013, I undertook a special mission to track Syrian refugees in Europe, to try and sound the alarm bell. As the crisis widened and deepened, I called for a radically different approach, focusing on providing safe and legal routes, human rights-compliant border practices and integration of refugees. Whilst some steps were taken, the following period was marked by major restrictions. The main focus of this approach was the closure of the Balkan route combined with the adoption

of the European Union-Turkey statement. Although this was seen as easing the pressure on European countries, it also led to desperate situations for refugees and migrants caught up in these measures in, for example, Greece, “the former Yugoslav Republic of Macedonia” and Hungary.

The most emblematic and disheartening aspect of the “crisis” is the massive loss of lives at sea that continues to date. War, persecution and poverty have been major drivers of migration to Europe. Confronted with restrictive policies, many feel forced to take sea journeys, with thousands of migrant deaths in the Mediterranean every year. The tragedies eventually pushed European states into action to save lives at sea, although this focus was rapidly complemented by another: to try and ensure that refugees and migrants do not find their way to Europe in the first place. The increasing focus on co-operating with countries like Libya to prevent boat departures, in the face of all the human rights risks that are associated with this, is something that is likely to remain a key feature of European migration policy for the foreseeable future. Those hit hardest in this context are the most vulnerable. This is why I have emphasised the need to pay particular attention to the needs of migrant women and children (see chapters below on women’s rights and gender equality and children’s rights).

The response to recent refugee flows also dealt a blow to the fight against the criminalisation of migrants. New measures to sanction the irregular crossing of borders were put forward, and the use of immigration detention got a new lease of life. I have consistently tried to demonstrate to states that alternatives to detention can and should be applied. This has gone hand in hand with the continued and sometimes renewed marginalisation of certain groups of migrants. Throughout my mandate, I have tried to shed light on persons stuck in limbo. For undocumented migrants, I have repeatedly emphasised that being without papers does not mean that you are without rights. The European Committee of Social Rights’ case law according to which undocumented migrants should have access to basic social rights is significant. It continues to be highly relevant as member states seek to make their countries less attractive by depriving rejected asylum seekers and irregular migrants of access to the most basic facilities. The marginalisation of migrants across Europe has also made them more vulnerable to human trafficking and exploitation.

A similarly marginalised and forgotten group are internally displaced persons (IDPs), whose situation I began addressing early on in my mandate. I worried about the millions of people living their lives in protracted displacement as a result of conflicts in the Caucasus, the former Yugoslavia and Russia. Unfortunately, the situation in Ukraine and renewed fighting in the south of Turkey has made concern for a lost generation of IDPs very topical again.

In the years to come, the European focus on pushing migration control outside the borders of Europe will create new problems for human rights protection. Human rights violations will increasingly take place out of view of European watchdogs, for example, on the borders of Syria or in the Sahel. The outsourcing of migration control to non-European countries threatens to diminish the transparency of Europe’s actions and accountability for the outcome of these actions. Ensuring transparency and accountability will therefore be a major challenge in the years to come. This also means that European states need to be held to account for human rights violations

occurring wherever they exercise effective control, including by ensuring adequate oversight mechanisms are set up.

No easy solutions exist. However, alternatives have been available for some time. Providing safe and legal routes to those in need of protection has never been more important. So far, there has been little serious attempt at making these a reality. With some exceptions, European states have provided vastly inadequate places for refugee resettlement, and they have restricted the possibilities for refugee family reunification.

As I have emphasised time and again, we need to realise that new people will keep coming, and efforts to integrate them into our societies need to be stepped up. Civil society has a pivotal role to play here. This requires supporting and strengthening civil society actors, rather than criticising them for their humanitarian efforts and imposing restrictions on their activities, as seems to be the emerging trend.

## **SYRIAN REFUGEES: A NEGLECTED HUMAN RIGHTS CRISIS IN EUROPE**

*Human Rights Comment published on 20 December 2013*

One of the world's biggest refugee crises of recent times is unfolding on Europe's doorstep, but most European governments have reacted with complete indifference. Close to 4 million people are internally displaced in Syria and almost 3 million have left the country since the beginning of the conflict. The vast majority of the refugees benefit from the hospitality of Syria's neighbouring countries, including Turkey, which have taken the brunt of this humanitarian crisis. As for the rest of Europe, the response has so far been limited to providing humanitarian assistance to some of these countries. However, when it comes to actually receiving refugees, Europe has been much less generous and often negligent in abiding by its human right obligations.

I could personally witness the extent of this crisis and the multiple challenges it represents for Europe during this last week, which I've spent visiting Syrian refugee camps and centres in Turkey, Bulgaria and Germany. More than half of the refugees fleeing Syria are children, the majority of them younger than 12. Several thousand of them are unaccompanied or separated, while many are not registered and remain at risk of statelessness. It is estimated that at least half of the more than 1 million refugee children of school age in the neighbouring countries do not currently enjoy their right to education. Although many are eager to study, the lack of resources prevents them from starting or going back to school.

Instead, one in ten Syrian children is thought to be engaged in labour. Children who have barely reached school age spend their time on the streets looking for work every day and end up being exploited in jobs that often expose them to hazardous conditions. They end their childhood abruptly and take on the heavy responsibility of being their families' breadwinners.

This does not need to be so. It is heartening to see how quickly children can start flourishing again, even in flight, if they are given an opportunity and if their rights are respected. I have witnessed this in Turkey, where education is provided in the 21 government-run refugee camps to more than 45 000 children, although access to education outside camps remains difficult.

### *Europe has failed to rise to the challenge*

In spite of the size and proximity of this human tragedy, Turkey is the only country to have opened its arms fully to Syrians in need, having received alone an estimated 1 million. This amounts to well over ten times the number of Syrians in all other 46 Council of Europe states combined. Germany, Sweden, and Armenia have also taken some steps to receive Syrian refugees through humanitarian admission and facilitated family reunification.

However, with only a few thousand places available under these programmes (some 15 000 places available for resettlement as a whole) some Syrians have attempted to reach a safe haven in Europe on their own. But measures such as tightened visa requirements and strict conditions for family reunification have made it impossible for them to do so. Worse, there are increasing reports that Syrians seeking refuge have been informally returned, literally “pushed back”, from the borders of certain European countries they were trying to reach and in some cases seriously ill-treated during these operations.

Unfortunately, I have also seen how Syrians, when they somehow manage to reach the territory of some member states and seek asylum there, are subjected to detention or inadequate, even degrading, living conditions.

### *The response: solidarity and respect for human-rights*

European countries must support all Syrians in need of aid and international protection. They must respond generously to UNHCR’s appeals not only for funding but also for resettlement of refugees from countries neighbouring Syria to their own territory. They must fully abide by their human rights and refugee law obligations emanating notably from the European Convention on Human Rights and the UN Refugee Convention. They should, at least:

- keep their borders open to allow Syrian refugees to access their territory to seek and enjoy asylum, including by granting humanitarian visas;
- immediately cease any expulsions of Syrians at their borders and other practices contrary to the principle of *non-refoulement*;
- adopt formal moratoria on returns of Syrian refugees to Syria;
- refrain from returning Syrian refugees to countries neighbouring Syria, thereby avoiding adding to the challenges faced by their governments and local communities;
- refrain from using the “Dublin Regulation” for returning Syrian refugees to other European countries whose asylum systems are already overstretched, in particular Bulgaria, Greece, Italy and Malta;

- ensure that recognised Syrian refugees and beneficiaries of other forms of international protection have adequate opportunities for integration in their host communities.

Finally, European states must fully live up to their responsibilities to help Syrian children regain their childhood and build their future. Every day of missing help and rights denied is a day stolen from their life and from humanity itself.

## **SYRIAN REFUGEES: 'RESET' NEEDED IN EUROPE'S APPROACH**

*Human Rights Comment published on 3 February 2015*

Just over a year ago, I decided to follow the steps of Syrian refugees in Europe, to better understand what they were going through. At that time, I was worried that most European governments were reacting with indifference to the biggest refugee crisis facing our continent in over two decades. There were reports of Syrian refugees being pushed back, while others, having arrived in Europe, ended up in detention. Turkey was the only country to have opened its arms to Syrians in need. Elsewhere in Europe, Germany, Sweden and Armenia had taken steps to receive a limited number of Syrians through resettlement and other forms of admission, while other countries were lagging behind. I concluded that Europe had failed to rise to the challenge and was neglecting this crisis.

*The crisis widened and deepened in 2014*

In the week spanning the passage from 2014 to 2015, more than 1 000 refugees, the majority of whom were Syrians, were rescued from two overcrowded "ghost ships" towed ashore in Italy. Their arrival caused alarm and prompted new promises that Europe would increase its efforts to primarily fight smugglers in the Mediterranean. Yet, the situation of Syrian refugees gives far more cause for alarm than that.

In 2014, the scale of the Syrian refugee crisis continued to grow exponentially. Syrians have become the largest refugee group in the world under the UNHCR mandate, the vast majority of them – over 3.8 million – still being hosted by Syria's neighbouring countries. The number of Syrian refugees has by now exceeded 1.6 million in Turkey, 1.1 million in Lebanon, and 620 000 in Jordan.

However, these countries are now struggling to address the basic needs of Syrian refugees. Problems include overcrowded schools and health facilities, the strain on water, sanitation and electricity infrastructures, and the lack of adequate housing. Some 85% of Syrians in Jordan and Turkey live outside the refugee camps, many of them being forced by extreme poverty to resort to desperate coping strategies, including begging or exploitative work. Faced with serious economic difficulties, Lebanon has recently introduced entry restrictions for Syrians.

Beyond all hardships, the new, very young generation of Syrians is also confronted with the threat of statelessness. UNHCR data<sup>26</sup> show that more than 50 000 Syrian children have been born in the neighbouring countries since the conflict started in 2011. Of these, around 70% may be without a birth certificate.

In Europe, in a positive move, several countries pledged in 2014 more resettlements as well as humanitarian and other admissions for Syrian refugees, Germany leading with 30 000. Although similarly generous gestures are needed from other big European states as well, this is a clear improvement from the total number of some 15 000 places pledged a year earlier. Also, despite the disparity in recognition rates, over 90% of the asylum claims made by Syrian refugees in EU member states received a positive decision in the first three quarters of 2014.

However, these numbers should not give rise to complacency. In fact, from 2011 until now, Europe, one of the globe's wealthiest regions, has received only around 6% of all Syrian refugees – some 210 000 persons in total, of whom 126 590 in 2014.<sup>27</sup> Moreover, violent push-backs of Syrians have continued to be reported in 2014. Also, as the conflict in Syria approaches its fifth year, in many European countries recognised Syrian refugees are still left to fend for themselves, without adequate measures to facilitate their integration, despite the obviously long-term character of their forced displacement.

#### *Increased protection, solidarity and integration are needed in Europe*

As another year has passed in which more and more Syrians suffered the consequences of conflict in their country, all European states are urged to be more generous and assume their responsibility for providing effective protection to those in need. States' action in this area can be guided by the following recommendations:

- Policies and practices impeding the access of Syrian refugees, notably collective expulsions at land or sea borders, should cease. Non-entry policies and practices actually increase irregular migration and are grist for the mill of smugglers and traffickers.
- Syrian refugees should not be returned to countries whose asylum systems and economies cannot cope with increased numbers of refugees and are thus unable to provide adequate reception and protection especially to particularly vulnerable persons such as children.<sup>28</sup>
- Europe must continue to respond readily and generously to UNHCR's appeals to support Syria's neighbouring countries. This should not only mean financial help: European states, especially the biggest and wealthiest, should show international solidarity also by taking in more Syrian refugees, through relocation and humanitarian admission, as well as other specific programmes.
- It is high time for European countries to step up the integration of Syrian refugees into their societies. Given the protracted nature of the Syrian conflict, many of

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26 UNHCR news item "Born in exile, Syrian children face threat of statelessness", 4 November 2014.

27 See UNHCR Syria Regional Refugee Response Inter-agency Information Sharing Portal.

28 ECtHR judgment, *Tarakhel v. Switzerland*, application no. 29217/12, 4 November 2014.

these refugees are likely to remain in Europe and become citizens of their host countries. This is true also of countries like Hungary, Bulgaria or Serbia, which until now have seen themselves as transit countries. Integration policies should be overarching, covering human rights sensitisation and awareness-raising amongst the host communities and refugees, education, employment, housing, healthcare and other social services.

- Last but not least, no Syrian refugee child in Europe should be left without a nationality. Securing the future of Syrian children must remain a priority of Europe's response to the plight of Syrian refugees.

## **EU-TURKEY DEAL ON REFUGEES DISREGARDS HUMAN RIGHTS (STOP YOUR BACKSLIDING, EUROPE)**

*Opinion Editorial published in The New York Times, on 14 March 2016*

The protection of refugees is an integral part of the international order for safeguarding human rights that countries developed in the aftermath of the atrocities of World War II. It's in that context that European nations agreed on an array of rules on human rights and the treatment of refugees, resulting in probably the world's best-functioning system for protecting them.

Now, however, the refugee crisis unfolding along the borders of the European Union has elicited a chaotic response. There is a clear danger that the union and its member states are losing their way, and are at risk of backsliding on fundamental commitments.

The deal the European Council is discussing with Turkey is a case in point. In exchange for concessions on visa requirements for Turks traveling to Europe, the European Union is asking Ankara to take back all migrants, including refugees from Syria, Iraq and Afghanistan, and others, who are currently crossing from Turkey into Greece by irregular means; the European Union proposes in turn to accept an equivalent number of Syrian refugees directly from Turkey.

Some union officials are portraying this deal as a good solution to the crisis. In reality, the automatic forced return that the deal allows is illegal and will be ineffective.

It is illegal because forced returns run contrary to the European Convention on Human Rights, which prohibits the collective expulsions of aliens. They also violate the right to seek asylum that was established in 1948 by the Universal Declaration on Human Rights, and contravene guarantees established by the 1951 United Nations Refugee Convention, which recognizes that seeking asylum can require refugees to breach immigration rules.

International law does not call into question a country's right, in principle, to repatriate people who do not need international protection. But it does prohibit actions that are incompatible with states' obligations under those conventions.

In 2002, the European Court of Human Rights ruled that Belgium had failed to take sufficient account of asylum seekers' personal circumstances in a case involving



collective expulsions. The Strasbourg court has continued to uphold that position in other cases. The latest of these, two years ago, concerned a group of Afghans, Sudanese and Eritreans who had entered Italy irregularly and were immediately expelled to Greece.

As for why the European Union's deal with Turkey is unlikely to work, it is obvious that as soon as the agreement goes into effect, the Syrian refugees – together with their smugglers – will find other ways to reach Europe. They will keep taking dangerous routes because, risky as they are, these journeys offer more hope than the prospect of living for years in refugee camps or, worse, of being caught up in the continuing violence of the Syrian conflict.

No deal is better than a bad deal. Instead of racking their brains to find a legal fig leaf for measures like collective expulsions, the European Council's members should have the courage to scrap the deal. Instead, they should adopt bold measures at the summit meeting this week that would radically shift the union's approach to migration.

There is no magic wand that can solve this complex issue in the short run, but European countries are well aware that a range of longer-term solutions are available. Their first step should be to unite behind the negotiations toward a political solution to the conflict in Syria.

Then they must ramp up the relocation of asylum seekers from Greece and Italy to resettlement centers elsewhere in Europe. Member states should ensure that the so-called hot spots in Southern Europe have the capacity to assess asylum claims and return individuals who do not qualify for refugee protection. But this can be done only in full compliance with human rights standards, in particular honoring the prohibitions of torture or cruel, inhuman or degrading treatment.

A third measure must be to increase European Union support for Greece and Macedonia to help them handle the immediate humanitarian emergency. Turkey should also receive help, since it is the first entry point to Europe and is already hosting about three million refugees.

European countries must also add to the legal options available to refugees from conflict areas and neighboring countries seeking protection in our Continent. As the United Nations High Commissioner for Refugees (also known as the United Nations Refugee Agency) has proposed, tools like humanitarian admission programs, private sponsorships, family reunion policies, student scholarships and labor mobility programs can help refugees avoid resorting to smugglers. Initiatives like these are already working: Just last month, Italy admitted 93 Syrian refugees directly from camps in Lebanon. A high-level meeting to promote legal avenues for admitting Syrian refugees, to be held on March 30 in Geneva under the auspices of the United Nations Refugee Agency, is an opportunity for countries to make concrete pledges.

It's vital that the European Union states find ways to coordinate and share responsibility for tackling the migrant crisis. That will include establishing registration centers in the main countries of arrival, and setting up a system to distribute asylum requests equitably across Europe, among both union members and nonmembers.

These measures will require political leadership, as well as considerable resources. But if the chaotic arrivals and states' beggar-thy-neighbor responses continue, together with backsliding on human rights commitments, they will eventually impose even greater political, social and economic costs.

All Europe's states are bound by the European Convention on Human Rights and the United Nations Refugee Convention. To hold true to these moral and legal commitments, they must meet this crisis with policies that comply with them.

## **EU AGREEMENTS WITH THIRD COUNTRIES MUST UPHOLD HUMAN RIGHTS**

*Article published The Huffington Post United Kingdom, on 2 February 2017*

As the European Council is set to meet in Malta on Friday to address the Union's response to migration, one topic should be prominent on all points of its agenda: states' obligations to uphold the human rights of migrants.

The urgency for this is clear. Since 2014 over 17 000 migrants have died in the Mediterranean, hundreds of thousands are locked up in often poor conditions across Europe and in third countries which are partners of the EU, while thousands of unaccompanied migrant minors are missing.

No doubt the movement of refugees, asylum seekers, and other migrants has put considerable pressure on European states in recent years, straining their asylum systems and demanding scarce resources. However, many European countries have used this challenge as an excuse to trample on their obligations to protect those who flee wars and persecution. All too often we have seen laws, agreements and practices that have made it harder for people to cross borders and seek and enjoy asylum in Europe.

All this is more than a compelling reason for the European Council to prepare an ambitious plan able to ease the pressure on member states while upholding the human rights of migrants including asylum seekers.

This requires a paradigm shift of European immigration and asylum policies. On several occasions, I have stressed the need to establish a system based on the principles of inter-state solidarity and fair responsibility sharing; the need to increase the resources and tools available to member states and their local authorities to strengthen their capacity to receive and integrate refugees and migrants; and the need to accelerate the relocation of asylum seekers from Greece and Italy and empower registration centers in the main countries of arrival to effectively assess asylum claims and distribute them equitably across Europe.

All this remains to be addressed. At the same time, there is a need to avoid pursuing cooperation agreements with third countries without foreseeing necessary human rights safeguards. As the EU-Turkey agreement proved, this kind of pact may not only be unlawful, but also cause much harm to migrants including asylum seekers without stopping migratory flows. This is particularly true when cooperation agreements

are signed with certain partner countries, like Libya, which have notorious human rights records and suffer from severe political instability.

To continue with these agreements a number of safeguards must be introduced to prevent EU decisions and money from contributing to violations of the human rights of migrants by third countries.

First, prior to entering into such agreements the European Commission should conduct a thorough assessment of the risks migrants face and make it public. If migrants' human rights are at risk, in particular their right to life, freedom from torture and full access to effective asylum procedures, then such agreements should not be made until tangible improvements occur in the third country concerned.

When an agreement is made, the European Union and member states must ensure constant, independent monitoring and reporting on the situation on the ground and establish mechanisms that can react promptly if threats to the human rights of migrants are reported. The whole process should be totally transparent and subject to public and democratic scrutiny, in particular by the European Parliament. The EU Ombudsman's recent recommendations on adequate human rights reporting on the EU-Turkey agreement should be taken to heart.

Another particularly important element is to ensure that such agreements do not lead to push-backs, an illegal practice under European human rights law that, regrettably, some European countries and partners still routinely engage in. Such a practice makes it impossible to assess notably the protection needs of migrants, thus undermining the fundamental human right of individuals to seek and enjoy asylum enshrined in the 1948 Universal Declaration of Human Rights. It also violates the case-law of the European Court of Human Rights – whose judgments bind all EU member states – which has consistently applied these standards, including as regards operations carried out by a state outside its national territory.

If such agreements can save migrant lives, they are of course welcome steps. However, they should in no circumstance forfeit the EU and member states' duty to ensure that partner countries uphold the human rights of migrants and refugees. Nor can they justify legislation or condone unlawful practices in Europe or elsewhere.

Respect and protection of human dignity and rights, including those of non-nationals, have been defining elements of European states' reconstruction after World War II. The upcoming European Council should show that that spirit remains at the heart of Europe's actions today.

## **HIGH TIME FOR STATES TO INVEST IN ALTERNATIVES TO MIGRANT DETENTION**

*Human Rights Comment published on 31 January 2017*

The use of migrant detention across Europe, whether for the purpose of stopping asylum seekers and other migrants entering a country or for removing them, has long been a serious human rights concern. I have repeatedly spoken out against

the pan-European trend of criminalisation of asylum seekers and migrants, of which detention is a key part. Detention is a far-reaching interference with migrants' right to liberty. Experts have confirmed its very harmful effects on the mental health of migrants, especially children, who often experience detention as shocking, and even traumatising.<sup>29</sup>

For this reason, it is imperative that states work towards the abolition of migrant detention. This does not mean giving up on managing one's borders, including decisions over who enters a country and who can stay. It means investing in alternative measures to manage migration effectively, which are not as far-reaching and harmful as detention. Thanks to the important work of civil society organisations, national human rights structures, the EU Fundamental Rights Agency, the UN and the Council of Europe, the past few years have seen an upsurge in discussions about alternatives to immigration detention.

However, states' reactions to the increased arrival of migrants in Europe are threatening past progress. One of the first actions taken under the 2016 EU-Turkey statement was to close off several reception facilities ("hotspots") on the Greek islands with fences, effectively making them detention centres – a practice which has been partially reversed since then. This month, the Hungarian government said it would make preparations to urgently reinstate mandatory migration detention. In Italy, plans to open sixteen new detention centres were reported. While European states increasingly feel the need to control – and to be seen to control – their borders, this cannot mean falling back on detention as a knee-jerk reaction.

### *The legal and policy imperatives for alternatives to detention*

The European Court of Human Rights has repeatedly stated that states applying immigration detention should not only have a proper basis for this in domestic law, but that it must also be necessary in the particular circumstances of the case. Recently in *Khlaifia and others v. Italy*<sup>30</sup> the Court stressed that detention is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient. In 2010, the Council of Europe Parliamentary Assembly adopted a resolution calling on states to ensure that "the detention of asylum seekers and irregular migrants shall be exceptional and only used after first reviewing all other alternatives and finding that there is no effective alternative."

Importantly, governments have themselves acknowledged the need for alternatives. The Committee of Ministers' Twenty Guidelines on Forced Return only allow detention if "non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems" are found to be ineffective. The 2016 New York Declaration for Migrants and Refugees, adopted by heads of state and government, also commits states to pursuing alternatives. During my own visits to many states, such as Belgium, Bulgaria, Croatia, Cyprus, Denmark, France, Germany,

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29 M. Bosworth, "The Impact of Immigration Detention on Mental Health: A Literature Review", *Criminal Justice, Borders and Citizenship Research Paper* No. 2732892, February 2016.

30 ECtHR judgment, *Khlaifia and Others v. Italy*, application no. 16483/12, 15 December 2016.

Hungary, the Netherlands and the United Kingdom, I have urged governments to include clear alternatives to detention in their legal and policy frameworks.

While there is a need to expand and improve alternatives for all persons involved in immigration proceedings, this is particularly the case for vulnerable persons, including children. For migrant children, detention is not only subject to the requirements mentioned above, but also to an assessment of the best interest of the child, as set out in the UN Convention on the Rights of the Child. It has been my position, however, that there are *no* circumstances in which the detention of a child for immigration purposes, whether unaccompanied or with family, could be in the child's best interest. For this reason, the complete abolition of the detention of migrant children should be a priority for all states.

Alternatives are not only an essential tool in safeguarding the human rights of migrants. They are also helpful for states. If properly implemented, they can help build trust, communication and engagement between the migrant and the state in return procedures, which can actually increase their effectiveness. Also, detention is very costly. Alternatives can provide significant savings, especially now that some states are faced with increasing numbers of new arrivals. Money saved on expanding detention could be more usefully directed towards improving protection systems, reception conditions and, importantly, the long-term integration of those who are allowed to stay.

### *Making alternatives a reality*

Even when states have set up alternatives, these are often ad hoc or open only under very stringent circumstances. It is important that states strive to make alternatives open to as broad a group of migrants as possible. Furthermore, having only one type of alternative, such as bail, is not sufficient. Each person has their own particular circumstances and needs, which have to be accommodated to some extent to ensure that detention is not necessary. A number of extensive reports on the various alternatives that are applied in member states, their effectiveness and their potential drawbacks have been published over the last couple of years, including by the EU Fundamental Rights Agency, academics and civil society networks. This gives states plenty of information to develop a well-stocked toolbox of alternatives, varying also in degrees of restrictiveness, if any restrictions are necessary.

Coaching and case management should always be part of this toolbox. Sometimes, this can be sufficient to keep track of migrants and render detention unnecessary. But they should also be integral components of non-detention measures that impose restrictions, such as regular reporting requirements, financial guarantees or limitations on freedom of movement. In addition, states should ensure that applying an alternative does not simply mean letting migrants fend for themselves. States should ensure they can meet their basic needs. This ensures the protection of their human dignity and also encourages positive engagement with the authorities.

Care must also be taken so that states do not simply make a trade-off between detention conditions and alternatives to detention. Although there is a crucial need to improve the conditions in detention facilities in many European states,

governments should not simply deflect calls for avoiding detention by referring to improvements made in detention conditions. This is particularly important when it comes to children. Both the Belgian and the Dutch governments, for example, have committed to setting up better, more 'child-friendly' detention facilities. While this will possibly reduce some of the hardship faced by children in detention, this cannot be seen as a substitute for categorically prohibiting the detention of children.

Finally, states should ensure that alternatives are applied to *all* forms of detention. In France, for example, I found that adults deprived of their liberty in airport zones cannot access alternatives. Furthermore, across Europe, there is an increasing blurring of lines between 'reception' and 'detention' facilities. I already mentioned the "hotspots" in Greece. In the above-mentioned *Khlaifia* case against Italy, the Court made very clear that what is determinative of 'detention' is whether people are deprived of their liberty, irrespective of the name of the facility where this happens.

### *The way forward*

European states urgently need to step up their work on reducing migrant detention and developing effective alternatives.

A first and crucial step now is that all states ensure that the obligation to provide sufficient alternatives is set out clearly and effectively in domestic law and policy, and that the use of alternatives is always assessed prior to any decision to detain.

Secondly, this should be complemented by setting up comprehensive programmes of viable and accessible alternatives, catering to a range of different needs and circumstances; the well-stocked toolbox I mentioned. Individual case management and coaching should be an integral part of each of these alternatives, as well as assurances that basic needs can be met.

Thirdly, there is a need for a clear path to the abolition of child detention. So far few governments have been willing to follow this path. It is therefore of the utmost importance that all involved, in particular parliamentarians, national human rights structures and domestic civil society organisations, call upon their governments to present roadmaps, including a firm deadline, for the abolition of child detention.

Fourthly, European states should exchange good practices among themselves and with other actors much more systematically. There is no doubt that states often look for each other's guidance in amending their migration policies. Member states should make full use of the opportunities that international fora, such as the Council of Europe, offer to bring together knowledge, to learn from each other as well as from civil society organizations, and to improve the protection of asylum seekers and migrants.

Last but not least, there is a distinct lack of data that needs to be addressed. A 2015 expert report illustrates the lack of consistent data gathering on detention practices.<sup>31</sup> If we are to have honest discussions of what works, for migrants and states, sufficient

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31 Global Detention Project and Access Info Europe, *THE UNCOUNTED: The Detention of Migrants and Asylum Seekers in Europe*, 17 December 2015.

data need to be available about people deprived of their liberty, the situations in which they are offered alternatives, and the outcomes of these processes. This would improve policy making and enhance necessary human rights monitoring.

## **MIGRANTS IN LIMBO HAVE THE RIGHT TO LIVE IN DIGNITY**

*Human Rights Comment published on 15 November 2016*

In some countries, they call them “invisible persons”, in others – “ghosts”. Throughout Europe there are many migrants, primarily rejected asylum seekers, who live in a state of protracted legal and social limbo without any long-term prospects. The authorities refuse to regularize them or to grant them any kind of legal status, but often, they cannot go back to their countries of origin for various reasons, most often, fear of persecution. These desperate persons tend to live in substandard conditions, completely excluded from society, lacking residence permits and the means to meet basic needs such as shelter, food, health or education. In essence, they are deprived of any opportunity to live in dignity.

During my visits I have met some of these persons and was struck by their plight. For example, when in Denmark in 2013, I visited an asylum centre whose long-term residents were mainly rejected asylum seekers whose deportation order could not be implemented, due to a lack of identity documents or other reasons. 29 persons resided there for more than 15 years. During my visit to Cyprus in 2015 I was struck by the situation of 67 refugees and rejected asylum seekers, mostly Kurds from Iraq and Syria, as well as from Sudan and Ethiopia, who have lived in a UK military base for almost 18 years. Neither Cyprus nor the UK has granted them any long-term residency status. In 2014 in the Netherlands I was deeply concerned seeing migrants in a disused church living in extremely difficult conditions. Some of them had been placed in detention several times for several months without this detention resulting in deportation. Similar cases can be found in other European countries. The increased arrival of migrants, including asylum seekers, in Europe has exacerbated this problem.

### *Major human rights issues arising in this context*

Some countries routinely detain migrants, including asylum seekers, often in grim conditions, including in prisons where they are held together with criminal law detainees. I have noted the criticism expressed recently by several Spanish NGOs and politicians, following protests in a migrant detention centre in Madrid, who stressed that conditions in ‘immigrant internment centres’ were a shame for their society and it was time to close them.<sup>32</sup>

As concerns deportation to the country of origin, issues may arise under the European Convention on Human Rights (ECHR) where there are substantial grounds for believing that the person concerned, if deported, would face a real risk of being subjected to inhuman or degrading treatment or punishment. In these cases Article

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32 Patricia Ortega Dolz, “Angry immigrants end mutiny at Madrid detention center”, *El País*, 19 October 2016.



3 ECHR implies an obligation not to deport the person in question to that country. Furthermore, in light of the Strasbourg Court's recent case-law (*B.A.C. v. Greece*<sup>33</sup>), the right to respect for one's private and family life may be legitimately invoked by migrants, including asylum seekers, living in limbo. In the aforementioned case the Court found that Greece violated the asylum seeking applicant's right to respect for his private life due to the authorities' failure to decide upon his asylum application for 12 years, thus leaving him in an extremely precarious situation throughout the period in question.

Studies have shown that such situations, characterized by prolonged uncertainty about one's fate and lack of contacts with the outside world, adversely affect migrants' physical and mental health. A 2013 UNHCR-commissioned psychological assessment found that all the refugees and migrants on the UK military base in Cyprus, including children, suffered from serious psychological problems, including severe depression. A Danish NGO report in 2011 noted that persons living in asylum camps in Denmark for one year showed signs of serious mental problems due to anxiety about the future, untreated trauma, an institutionalized daily life and a lack of meaningful activities. The UK Refugee Council has illustrated why many rejected asylum seekers have an understandable fear of returning to their home countries.<sup>34</sup> Many of them are women who have experienced sexual violence, female genital mutilation or underage marriage in their countries of origin. In the UK, to make ends meet, some of these women were turning to sex work, where they face additional risks of violence and health problems.

Many of these people end up being homeless or squatting in empty buildings without support from the state. The European Committee of Social Rights has emphasized that the minimum guarantees, under the European Social Charter, for the right to housing and emergency shelter apply to irregular migrants too. Shelter must be provided even when migrants have been requested to leave the country and even though they may not require long-term accommodation. The Committee has pointed out that the right to shelter is closely connected to the human dignity of every person, regardless of their residence status. It has also stressed that foreign nationals, whether residing lawfully or not in the country, are entitled to urgent medical assistance and such basic social assistance as is necessary to cope with an immediate state of need (accommodation, food, emergency care and clothing).

#### *Human rights compliant returns are imperative*

In recent years EU member states have attached great importance to effective and expeditious return of irregular migrants, including rejected asylum seekers, to their country of origin. While effective return of persons not in need of international protection is an important aspect of migration law and policies, human rights considerations need to be fully taken into account when implementing them.

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33 ECtHR judgment, *B.A.C. v. Greece*, application no. 11981/15, 13 October 2016.

34 Refugee Council, *Between a rock and a hard place: the dilemma facing refused asylum seekers*, 1 December 2012.

Any type of return, whether voluntary or not, must be consistent with states' obligations under international and European human rights law and in compliance with the principle of *non-refoulement*. It should also be conducted in keeping with the best interests of the child and with due process. Moreover, an important prerequisite to returns are fair and efficient asylum systems. Regrettably, some European countries have adopted legislative measures aimed at restricting access to asylum, such as the introduction of summary asylum procedures at the border, thereby undermining the right to asylum.

### *What should European states do?*

In order to meet current migration challenges in an effective and human rights compliant way, European states should fully abide by their human rights obligations and work together towards common solutions based on inter-state solidarity. They should refrain from undermining existing human rights standards by adopting even more restrictive asylum and immigration laws.

All asylum claims need to be considered on their own merits in fair and efficient asylum procedures taking into account individual circumstances and up-to-date and relevant country of origin information. While waiting for their claims to be processed, asylum seekers need to have access to support and services which would provide them with a possibility to live in dignity.

As noted by ECRI in its General Policy Recommendation No. 16, the effective protection of the human rights of all persons, including migrants irregularly present, requires a strict separation of immigration control and enforcement activities from other state and private services. This requires the creation by states of effective measures ("firewalls") to prevent, both in law and practice, state and private sector actors from effectively denying human rights to irregular migrants by clearly prohibiting the sharing of information about irregular migrants with the immigration authorities for purposes of immigration control and enforcement.

In all actions concerning children, the best interests of the child need to be states' primary consideration. The Council of Europe Twenty Guidelines on Forced Return provide useful guidance in this context. Where return is impossible or particularly difficult authorities should authorise the persons concerned to stay in the country regularly in conditions which meet their basic needs and in full respect of their human rights. Particular attention should be given to ensuring the prohibition of inhuman and degrading treatment and the protection of the right to respect for private and family life. Migrants who are not removable should also be protected from being arrested and placed in administrative detention.

Moreover, they should be protected from labour exploitation and trafficking in human beings in full compliance with the Council of Europe Convention on Action against Trafficking in Human Beings.

Unaccompanied minors who are not granted asylum but cannot be returned should not automatically be returned when they turn 18; a thorough best-interest determination should be made before any return decision is issued.

Lastly, emphasis should be placed on establishing effective voluntary return programmes for persons not in need of international protection. Assisted voluntary return, reintegration programmes and safeguards in return and readmission procedures must be enhanced. Quality procedures, including Best Interest Determinations for unaccompanied children are required.

## **WITHOUT PAPERS BUT NOT WITHOUT RIGHTS: THE BASIC SOCIAL RIGHTS OF IRREGULAR MIGRANTS**

*Human Rights Comment published on 20 August 2015*

Those who think that irregular migrants have no rights because they have no papers are wrong. Everyone is a holder of human rights regardless of their status. It is easy to understand that the prohibition of torture protects all people but we should also be aware of the fact that basic social rights are also universal, because their enjoyment constitutes a prerequisite for human dignity. Therefore, member states of the Council of Europe should stand by their obligations to protect the basic social rights of everyone under their jurisdiction, and this includes irregular migrants.

Migrants can be in an irregular situation because they have entered a country, or stayed in a country, in an unauthorised way. Their situation may become irregular because they overstay an authorised period which can last several years. Due to the very nature of irregular migration, it is difficult to estimate the number of irregular migrants currently living in Europe, though the figure undoubtedly runs into the millions.

### *Barriers placed by states to the exercise of basic social rights*

In my work, I have been confronted with too many situations where the social rights of irregular migrants have been deliberately denied by authorities, in contradiction with international and European law. In other countries where these rights are recognised in national legislation, practical obstacles to their exercise have unfortunately proved to be numerous.

The criminalisation of migration and repressive policies of detention and expulsions of foreigners seriously affect the protection of the basic social rights of irregular migrants, not least because they create a general climate of suspicion and rejection against irregular migrants among those who are supposed to provide social services. Migrants in an irregular situation are too often seen as cheats, liars, social benefits abusers or persons stealing the jobs of nationals. In such a context, law enforcement officials in charge of countering “illegal immigration” often have difficulties in recognising an irregular migrant as a victim of human rights violations and in need of protection. In some instances, the police are placed under official pressure to attain quantified targets of “repatriations” - I noted this to be the case until 2012 in France. This policy can be particularly harmful to irregular migrants’ access to social rights, because it forces them to live clandestinely and avoid contact with social assistance providers for fear of being arrested, detained or deported. According to

a June 2015 study<sup>35</sup> by the European Union Agency for Fundamental Rights, the main reason for victims of exploitation not reporting their cases to the police is the fear of having to leave the country.

The criminalisation of migration through establishing an “offence of solidarity” against those who try to assist migrants by providing minimum access to shelter, food and healthcare is another unacceptable measure taken by some states in recent years. To guarantee access to basic social rights for irregular migrants, basic service providers such as medical staff should never be placed under an obligation to report irregular migrants to law enforcement authorities.

Access to basic social rights can also be impeded by protracted situations of legal limbo such as that experienced by rejected asylum seekers who cannot be expelled in Denmark. I consider that in situations where return is impossible or particularly difficult, states should find solutions to authorise the relevant person to stay in the country under conditions which meet their basic social needs and respect their dignity.

As indicated in a recent study<sup>36</sup> on the impact of the crisis on access to fundamental rights in the EU, undocumented migrants are among the groups disproportionately affected by austerity measures imposed in the field of healthcare. In Spain, access to healthcare for irregular migrants in most regions was significantly reduced in 2012, until the government recently decided to restore primary health care access, mainly because of the disastrous impact the restrictions had on the national healthcare system. It remains to be seen if the right to access to healthcare of irregular migrants will also improve in practice.

#### *Right to basic social assistance, shelter and food*

In some countries, restrictions on access to social rights rest, more or less explicitly, on immigration policies aimed at sending back irregular migrants, including by forcing them into destitution, in order to deter other would-be migrants from coming. States may be tempted to link access to some basic social rights to the residence status of the migrant. In the Netherlands, while the law grants irregular migrants access to emergency healthcare and education, the government has attempted to deny access to shelter, food and water. As noted in my report on the Netherlands, I could witness some of the difficulties experienced by irregular migrants due to this policy during a visit carried out to a disused church in The Hague in 2014, where some 65 irregular immigrants had taken shelter.

As unrestrictedly recognised in many international legal instruments, everyone has the right to an adequate standard of living, including adequate food, clothing and shelter. Under the European Social Charter, as emphasised by the European Committee of Social Rights, the minimum guarantees for the right to housing and emergency shelter apply to irregular migrants too. Shelter must be provided even when immigrants have been requested to leave the country and even though

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35 Fundamental Rights Agency (2015) *Severe labour exploitation: workers moving within or into the European Union. States' obligations and victims' rights*, Publications Office of the European Union.

36 European Parliament, *The Impact of the Crisis on Fundamental Rights across Member States of the EU - Comparative Analysis*, 13 March 2015.

they may not require long-term accommodation. The Committee has pointed out that the right to shelter is closely connected to the human dignity of every person, regardless of their residence status. It has also stated that foreign nationals, whether residing lawfully or not in the country, are entitled to urgent medical assistance and such basic social assistance as is necessary to cope with an immediate state of need (accommodation, food, emergency care and clothing).

### *Protection from exploitation and human trafficking*

Everyone, including irregular immigrants, should be protected from labour exploitation and trafficking in human beings in full compliance with Article 4 of the European Convention on Human Rights prohibiting slavery, forced labour and by extension human trafficking, and with the Council of Europe Convention on Action against Trafficking in Human Beings.

While in many European countries a residence permit can be granted to victims of trafficking or severe forms of exploitative work staying irregularly on the territory, too often, this applies only under the condition of co-operating with the police. In 20 country evaluation reports, the Group of Experts on action against trafficking in human beings (GRETA) has urged the authorities to ensure that in practice access to assistance for victims of trafficking is not made conditional on their co-operation in the investigation and criminal proceedings: Article 14 of the anti-trafficking Convention allows parties to make the issuing of a temporary residence permit conditional on co-operation and it seems that in some cases this blocks unconditional access to assistance for foreign victims.

States have an obligation to sanction employers exploiting the vulnerability of irregular migrants. From a human rights point of view, what matters most is not that a state fights against “illegal work”, but that irregular migrants are protected and compensated for the human rights violations they have suffered as a result of their exploitation. Foreign domestic workers, because of their isolation, are particularly vulnerable to this form of abuse.

### *Right to education of children in an irregular situation*

Many international and European human rights standards, including the European Social Charter and the UN Convention on the Rights of the Child, require that access to education be ensured for children regardless of their immigration status. However, too often, schools or other administrative authorities place barriers to irregular migrant children’s right to education by unlawfully asking for documents such as birth certificates as a condition to enrol the child.

### *Measures to be taken by states*

To create an environment favourable to ensuring irregular migrants’ access to inalienable basic social rights, states should not only refrain from criminalising migration but should go further:

- Consider policies, including regularisation programmes and increased possibilities for legal channels to immigrate for work, so as to avoid or resolve situations whereby migrants are in, or are at risk of falling into, an irregular situation.
- Ratify and implement international and European treaties relevant for the protection of the rights of irregular migrants, including the International Convention on the Rights of Migrant Workers and Members of their Families, the 2011 ILO Convention 189 on Decent Work for Domestic Workers, and the Revised European Social Charter and its collective complaints mechanism.
- Train police officers, labour and immigration officials and basic service providers on the human rights of irregular migrants and victims of trafficking in human beings and exploitative work.
- Inform irregular migrants about their rights and ensure full and equal access to justice for irregular migrants who are victims of exploitation and other human rights abuses by encouraging them to report this without resulting in their prosecution or expulsion.
- Enable NGOs and trade unions to defend the basic social rights of irregular migrants, including before courts with the victims' consent.
- Ensure irregular migrants' equal access to victim support and assistance mechanisms adapted to the needs of each individual and that are confidential and free of charge.
- Never call migrants in an irregular situation "illegal migrants" as this would be inaccurate and harmful as stressed by the Platform for International Cooperation on Undocumented Migrants (PICUM) in its campaign "Words Matter!"; promoting alternative words to this expression in several European languages.

## **IMPROVING PROTECTION FOR VICTIMS OF FORCED LABOUR AND HUMAN TRAFFICKING**

*Human Rights Comment published on 12 November 2015*

Everyone in Europe – children, women and men – should be protected from forced labour and trafficking in human beings, two serious human rights violations. The latest International Labour Organisation (ILO) estimates indicate some 20.9 million people around the world still being subjected to forced labour, and 880 000 in the European Union. Among these victims, 90% are exploited in the private economy, by individuals or private companies. Within this group, 22% are victims of forced sexual exploitation and 68% of forced labour exploitation in economic activities, such as agriculture, construction, domestic work or manufacturing.

An overview of the country reports of the Group of Experts on Action against Trafficking in Human Beings (GRETA) clearly shows that Europe is not immune to human trafficking and that certain groups, including women, children and minorities,

are particularly vulnerable to this phenomenon. As illustrated by a study,<sup>37</sup> the practice of human trafficking has a disproportionate impact on Roma, a group already suffering widespread discrimination and marginalisation.

The figures mentioned above, which are generally considered to be underestimates, are even more striking when we recall that slavery, servitude and human trafficking are clearly prohibited by international and European legal standards. Of particular relevance are Article 4 of the European Convention on Human Rights (ECHR) on the prohibition of slavery and forced labour, and the Council of Europe Convention on Action against Trafficking in Human Beings (anti-trafficking Convention), which celebrated its 10<sup>th</sup> anniversary this year. The latter has now been ratified by 42 out of 47 member states of the Council of Europe – all but the Czech Republic, Liechtenstein, Monaco, the Russian Federation and Turkey – and by one non-member state, Belarus.

It is important to keep in mind some fundamental distinctions. Forced labour is any work or service which is exacted of someone under the menace of a penalty and for which that person has not offered him or herself voluntarily.

A victim of human trafficking is a person who has been recruited, transported, transferred, harboured or received within a country or across borders, by the use of threat, force, fraud, coercion or other illegal means, for the purpose of being exploited. Importantly, a child is considered to be a victim of human trafficking if he has been recruited, transported, transferred, harboured or received within a country or across borders for the purpose of being exploited, regardless of whether any of the aforementioned means were used.

In the context of human trafficking, exploitation is to be understood broadly so as to include: sexual exploitation; forced labour or services; slavery or practices similar to slavery; servitude; the removal of organs.

To give some concrete examples, I was informed by the Austrian authorities that the most frequent human trafficking was for sexual exploitation, forced labour as well as slave-like situations of domestic workers of foreign diplomats. In Belgium, numerous cases of trafficking for labour exploitation have been documented, including the case of several Moroccan workers exploited by a construction company. In Italy and nearly all European countries, Nigerian women have been found to be trafficked for the purpose of prostitution.

Other widespread forms include cases of exploitation where children or persons with disabilities are forced to beg by traffickers. For instance, cases of trafficking of Roma children for forced begging were reported in France. Forced committing of petty offences is another emerging form of exploitation, as in the documented case of Vietnamese youths trafficked in the UK to work in cannabis farms.

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37 European Roma Rights Centre, *Breaking the Silence: Trafficking in Romani Communities*, 19 May 2011.



## *A new international legally binding treaty to protect the rights of victims of forced labour*

The 2014 Protocol to the 1930 ILO Forced Labour Convention provides victims of forced labour with similar rights as the Council of Europe Anti-Trafficking Convention establishes for victims of trafficking. The Protocol, which has so far only been ratified by Niger, requires that states parties take effective measures to prevent and eliminate the use of forced labour; provide protection and access to appropriate and effective remedies to victims, such as compensation, irrespective of legal status in the national territory; and sanction the perpetrators of forced or compulsory labour. All member states of the Council of Europe should swiftly ratify and fully implement this new instrument in addition to the anti-trafficking Convention

## *The importance of distinguishing human trafficking and people smuggling*

Trafficking in human beings is very often closely linked with migration. Migrants, in particular when undocumented, are among the groups at high risk of exploitation. However, the smuggling of migrants and trafficking in human beings should not be confused.

While the aim of people smuggling is unlawful cross-border transport in order to obtain a financial or other material benefit, the purpose of trafficking in human beings is exploitation. Furthermore, trafficking in human beings does not necessarily involve crossing a border. For instance, In Bosnia and Herzegovina, the majority of victims of trafficking identified by the authorities were trafficked within the country.

Now more than ever, the terms “smuggling” and “trafficking” are employed interchangeably in relation to migrants crossing the Mediterranean Sea or using the Western Balkan routes. Many states claim that they are taking measures against networks of “human traffickers” or even against “modern slavery” whereas such measures target in fact people smugglers. This discourse has been severely criticised by over 300 scholars from around the world as an attempt to “twist the ‘lessons of history’ to authorise unjustifiable violence”.<sup>38</sup>

It is also important that measures taken against people smuggling do not have a negative impact on action against human trafficking. Referring to the humanitarian crisis in the Mediterranean region, GRETA recently called upon states parties to “ensure that migration policies and measures to combat migrant smuggling do not put at risk the lives and safety of trafficked people and do not prejudice the application of the protection and assistance measures provided by the anti-trafficking Convention”.

Clearly, military actions against boats used to transport smuggled migrants and the closing and militarising of borders should never be presented as solutions to the problem of human trafficking. On the contrary, in the absence of suitable legal migration solutions, these measures are likely to increase the vulnerability of those fleeing wars to exploitation by traffickers, including because they need to find money

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38 *openDemocracy* “Twisting the ‘lessons of history’ to authorise unjustifiable violence: the Mediterranean crisis”, 20 May 2015, [www.opendemocracy.net](http://www.opendemocracy.net).

to pay smugglers for increasingly dangerous – and therefore expensive – ways to reach Europe.<sup>39</sup> When it comes to preventing trafficking in a migratory context, the real solution is to open channels for legal (labour) migration and always protect the rights of migrants.

*The need for a child-sensitive approach to combating forced labour and human trafficking*

The economic crisis has had dire consequences on vulnerable groups, especially children. During my country visits, in particular to Spain and Portugal, I noted with concern that an increasing number of children are dropping out of school to find employment and support their families. This raises serious human rights issues, including the risk of the re-emergence of child labour, which hinders children's development, potentially leading to lifelong physical or psychological damage.

Children are often considered as perpetrators of petty crime by law enforcement officials, when they are in fact victims of exploitation by the real criminals. Child victims of trafficking should always be identified as such by law enforcement officials, prosecutors and judges. This means that one should look beyond appearances in the field of juvenile justice, in order to be able to apply the non-punishment provision of the anti-trafficking Convention (Article 26) to victims of trafficking who have been compelled to act illegally by their traffickers. Still, this is not sufficient. Child victims of trafficking should also receive adequate assistance tailored to their specific needs. In this respect, I find it disturbing that, as I witnessed in Bulgaria, some trafficked children are placed in juvenile justice institutions instead of being given the full assistance they need. In the current context of migration, it is also worrying to note, as in Denmark, reports of disappearances of children from accommodation centres for unaccompanied migrant children. This is not acceptable. Children without parental care who have been confronted with exploitation must be protected and receive all the support they require in full compliance with the UN Guidelines for the Alternative Care of Children.

*The need to involve all states and non-state actors in the action against forced labour and human trafficking*

Exploiters and traffickers for the purposes of forced labour are mainly private persons (individuals or companies) exploiting other private persons. This means that the prevention of forced labour and trafficking should be geared at all parts of the supply chain in industries at high risk of exploitation, such as in the textile, agriculture or tourism sectors. National and transnational companies should be made accountable in case of human rights abuses, including through effective and appropriate penal sanctions, in line with the UN Guiding Principles on Business and Human Rights, regardless of whether exploitation takes place in Europe or in other parts of the world.

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39 UNHCR news item "UNHCR concerned at reports of sexual violence against refugee women and children", 23 October 2015.

However, the European Court of Human Rights has made it very clear that states have a positive obligation under Article 4 of the ECHR to prevent forced labour and trafficking, to protect the victims and to prosecute the exploiters and traffickers. Member states of the Council of Europe should therefore live up to their crucial responsibility to respect, protect and fulfill the human rights of all victims – or persons at risk of becoming victims – of forced labour and human trafficking.

## **INTERNALLY DISPLACED PERSONS IN EUROPE: ANOTHER LOST GENERATION?**

*Human Rights Comment published on 3 September 2012*

The media have frequently raised the prospect of a “lost generation” appearing in Europe as a result of the economic crisis. However, a different kind of “lost generation” has been struggling to cope in many European countries as the result of past military-political crises. I have in mind Europe’s internally displaced persons (IDPs), some of whom have been facing extremely difficult circumstances for *decades*. These victims of past or on-going conflicts continue to need the help of the European and international community.

*Europe has many IDPs in need of help*

There are an estimated 2.5-2.8 million IDPs in Council of Europe member states. The largest number of IDPs, around 1 million, live in Turkey and are the victims of armed conflict and violence by state and non-state forces in areas inhabited mainly by the Kurdish minority. Elsewhere in Europe, the vast majority of IDPs were displaced by conflicts when the Soviet Union and Yugoslavia disintegrated more than two decades ago, and more recently, as a result of the 2008 conflict in Georgia. Thus, Azerbaijan has about 600 000 IDPs, Georgia – 274 000, Serbia – 225 000, Bosnia and Herzegovina – 113 000, with the remainder in other Balkan states, Armenia and Russia.

*The plight of the typical European IDP is dire*

The people behind the numbers have been thrown out of their homes and remain in a state of limbo, unable to return, utterly powerless, surviving, but not really existing. About 390 000 or 15% of the total number of IDPs live in collective centres (which tend to be located in vast disused buildings), makeshift shelters or informal settlements, often without any security of tenure or access to basic services. In addition to substandard housing, IDPs are often destitute with limited access to health services, education, or employment. Many are traumatised and remain vulnerable to violence and abuse. Most cannot return to their places of origin because the underlying conflict which led to their flight has not been resolved. Those who try to return are faced with a real threat of persecution.

## *Signs of hope*

In a hopeful development, an international donors' conference took place in Sarajevo in April 2012 to muster financial support for the housing needs of 74 000 of the most vulnerable IDPs in Serbia, Bosnia and Herzegovina, Croatia, and Montenegro. If the funds promised are allocated and well-spent, this could mark the end of a long, painful chapter for many IDPs in the region. Georgia, too, has achieved some progress in addressing the situation of IDPs, particularly in the realm of housing, thanks to the elaboration of national policies and the allocation of significant resources, including international assistance.

## *IDPs have rights*

As the Committee of Ministers' Recommendation 2006(6) on internally displaced persons has underlined, IDPs are entitled to enjoy the entire spectrum of human rights, without discrimination. Numerous international instruments, notably the UN Guiding Principles on Internal Displacement, assert in particular the right of IDPs to return to their homes (if they still exist) in safety and dignity on a voluntary basis and/or to receive reparation. These rights have been recognised in a number of judgments of the European Court of Human Rights (e.g. *Loizidou v. Turkey* 1996, *Khamidov v. Russia* 2007, and *Saghinadze and Others v. Georgia* 2010). More often, however, their best hope is for integration into their new places of residence or resettlement elsewhere.

The protection of IDPs is primarily the responsibility of national authorities. However, IDPs often find themselves in situations where national authorities do not or cannot enforce protection measures. This may be due to a lack of authority in conflict areas which are not under government control, a lack of will, a lack of an institutional framework, or a lack of means. The problems of IDPs should not be politically instrumentalised and the protection of their rights should prevail.

The international community, particularly UNHCR and the UN Secretary-General's Special Representative on IDPs, has often played a critical role in providing assistance.

Various Council of Europe bodies have also monitored the human rights of IDPs, as well as developed standards for improving their situation.

## *What needs to be done*

The particular situation of IDPs requires a response by states that addresses all aspects of displacement in a timely and effective manner. While international assistance is essential, national efforts must also be more systematic and vigorous. On 5 July 2012 the UN Human Rights Council adopted an important resolution on the Human Rights of IDPs in which UN member states recognised their own role in promoting and protecting the human rights of IDPs.

There is an urgent need to fill the gaps in the protection of IDPs. States should take measures to prevent internal displacement. They should improve the quality of their response to the situation of IDPs and respect their obligation to ensure access to humanitarian aid, where the states themselves are unable to provide relief.

It is imperative to develop durable and sustainable solutions to displacement.

States and all relevant parties should adopt measures for the return and re-integration of IDPs in their original communities. The precarious situation of the IDPs should not be protracted. Where return is not possible or presents risks for the IDPs, other remedial measures should be provided, without discrimination. Particular attention should be paid to the most vulnerable such as the disabled, the elderly, children and women.

In such cases states should take adequate measures to ensure the integration of IDPs in their new communities. States should ensure, in collaboration with international actors, where needed, that IDPs are consulted and participate as partners in the planning and implementation of return or of any other remedial actions.

When discussing the current economic crisis and its many victims, we cannot forget victims of older crises and on-going conflicts, the IDPs. They too must benefit from the attention and active support of European states to implement their human rights and live in dignity. We cannot let their plight persist, or Europe will be losing not just one generation, but several.







# 3. Freedom of Expression and Media Freedom

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## INTRODUCTION

Freedom of expression, especially media freedom, is a core element of any functioning democracy. Right at the beginning of my mandate, I decided to focus on freedom of expression in both traditional and new, online media. One of the reasons for this is that free expression is critical to the exercise of many other rights, including the right to freedom of association and assembly, the right to free elections, or freedom of religion. Moreover, there was – at the time – no dedicated monitoring mechanism regarding freedom of expression in Council of Europe member states. Finally, journalists are important partners of my Office both because they can relay important human rights messages and because they themselves often act as human rights defenders.

Since I anticipated that the Internet would be an increasingly important focus of the human rights debate, including with respect to freedom of expression, the Internet and human rights rapidly became a priority theme for my work. This topic was covered in a number of country reports and discussed during a round-table with digital rights experts. In a Human Rights Comment on press freedom in the digital age, I suggested that the protection and safety of journalists should be strengthened in a manner that is as inclusive as possible, including not only journalists in the formal sense, but all those reporting in the public interest, bloggers, reporting citizens and others active on the Internet. A major step in this area was the publication in 2014 of the Issue Paper *The rule of law on the Internet and in the wider digital world*, which addresses the pressing question of how to ensure that the rule of law is established and maintained in the digital environment. This Issue Paper brought into sharp focus the threats posed by interfering in Internet activities without complying with international standards, in particular in relation to data protection and freedom of expression.

Soon, however, other pressing – and more traditional – media freedom issues captured my attention. The safety of journalists was one of them. Through my mandate, I have observed a progressive deterioration of the conditions in which media professionals work. The conflict in Ukraine stands out in this context, with six journalists killed while

covering the events there. The rising death toll is the most extreme manifestation of an increasingly difficult working environment for journalists, which also features physical attacks, acts of intimidation, judicial harassment, imprisonment, muzzling legislation, smear campaigns and abuse of financial levers. In a number of country reports, I have focused on physical attacks on journalists and the need for effective investigations. A very widespread threat to media freedom that I have encountered is police violence against journalists who try to cover demonstrations. I also devoted a Human Rights Comment to the protection of journalists, in which I laid out recent trends in Europe and insisted that governments treat violence against journalists with the utmost seriousness, as such attacks aim at the core of our democracies.

The year 2015 marked the launch of the Council of Europe's Internet Platform to promote the protection of journalism and safety of journalists. The Platform is an important tool for ensuring journalists' safety and a useful complement to my work, covering more grounds and situations, strengthening the input of NGOs to the Council of Europe's work, and prompting many governments to respond to the alerts submitted. I have intervened in several cases reported on the Platform and my work has been taken into account in the follow-up to these alerts.

A more subtle way to silence critical journalists is by taking them to court on defamation charges. I have regularly denounced the criminalisation of defamation – putting people in prison for false or untrue communication that harms another person's reputation. I have urged countries to decriminalise defamation and judiciaries to apply only strictly proportionate civil penalties. This and other threats to media freedom, such as government surveillance threatening the confidentiality of sources and challenges to ethical journalism, were reflected in an op-ed on the alarming situation of press freedom in Europe, in which I also recommended eight steps to preserve press freedom.

A critical element of the broader media environment remains the position of public service broadcasting. I have seen efforts in a number of countries to encroach on the independence of public service broadcasters. In a recent Human Rights Comment, I argued that adequately funded and independent public service broadcasters are a key indicator of the state of democracy in a country.

Finally, limitations on free expression can affect media, but also broader segments of society. A recent trend points to restrictions not only on media, but also on academics, opposition politicians and regular social media users. Academics, like journalists and human rights defenders, are among the victims of clampdowns on freedom of expression. Academic freedom is therefore a theme that deserves more attention. I recently wrote some observations on this topic, which are reproduced below.

In the course of my work, I have often repeated that by defending journalists' safety and preserving a free and diverse press we make democracy stronger. In this endeavour, my Office enjoyed especially good collaboration with Dunja Mijatović, whose mandate as the Organization for Security and Co-operation in Europe's Representative on Freedom of the Media largely corresponded with mine, and with whom I published a number of joint statements and op-eds.

We still have a number of tasks ahead of us: how to deal with governments' tendency to outsource responsibility for guaranteeing freedom of expression to private Internet companies and social networks? What would be a satisfactory human rights response to state-sponsored propaganda and deliberate misinformation? How to react to the blocking of websites or the use of new technology to shut down the Internet? These new challenges are all Internet-related and suggest that the work on the Internet that I started at the beginning of my mandate will most probably remain on the human rights agenda in the years to come.

## **PRESS FREEDOM IN THE DIGITAL AGE: NEW THREATS, NEW CHALLENGES**

*Human Rights Comment published on 3 May 2013*

As growing portions of journalistic activity take place on the Internet, Europe has not become a safer place for those expressing critical opinions. Clearly, people reporting can reach out faster and to a broader audience than before. But old and new threats await them when they decide to do so: violence, intimidation, prosecution for lawful speech, judicial harassment and surveillance of those reporting continue unabated in the digital era, including in Europe.

Every day, the Internet carries free expression in the public interest to people around Europe and elsewhere. This is the way in which, for instance, more and more people become aware of corruption, maladministration, unethical behaviour by public officials and businesses, and serious human rights violations. Bloggers, reporting citizens and others have therefore joined traditional journalists in the ranks of those who are at risk of retaliation by state authorities or interest groups (e.g. organized crime, rival ethnic or religious groups).

### *Digital speech, real threats*

These threats are real. While in Baku in November 2012, I visited Vugar Gonagov, executive director of Khayal TV, in pre-trial detention. Together with three others, he had been arrested in March 2012 and charged with mass disorder after he had posted online a video of a regional governor making derogatory remarks about local citizens. Last year in Russia, Dmitry Shipilov was sentenced to 11 months of correctional labour for "insulting a state official in public" following the publication on his blog of articles which were critical of local politicians.

Work to ensure the protection and safety of journalists must be strengthened. But protection must be as inclusive as possible, including not only journalists (in the formal sense), but all those reporting in the public interest. According to the case-law of the Strasbourg Court, the justification for enhanced protection of freedom of expression is the nature of the information imparted, rather than the position of the person imparting this information.

## *Why Human Rights matter online*

The Strasbourg Court has also found that member states are under a positive obligation to create an appropriate regulatory framework to ensure the effective protection of journalists' freedom of expression on the Internet.

However, in many cases member states appear to be doing exactly the opposite. The relatively recent nature of the Internet and the rapid evolution of technology appear to have created a space whereby free speech can in practice be limited further than is allowed by international standards.

Arbitrary filtering and blocking and unjustified surveillance are typical illustrations of this unfortunate trend. Coupled with prosecution for legitimate online speech, these practices jeopardise the status of the Internet as an open space, without which no sustainable protection of journalists and other critical voices can be ensured.

The Strasbourg Court provides an invaluable bulwark to efforts to counter this state of affairs. In its first case<sup>40</sup> on Internet blocking last December, the Court found Turkey in violation of Article 10 (freedom of expression) of the European Convention on Human Rights. It found notably that measures restricting access to Internet content must be based on a law that is precise enough and that offers sufficient opportunities for judicial review. In addition, domestic courts must examine whether the blocking measure is necessary, and in particular whether it is targeted enough so as to impact only on the specific content that requires blocking.

### *What needs to be done*

We should make no artificial distinctions between the exercise of freedom of expression online and offline. The new and diffuse nature of the Internet should never be taken as pretext for introducing new limitations to the exercise of fundamental rights and freedoms, including the right to receive and impart information.

Proportionality and judicial oversight appear as two particularly key principles that should be systematically applied when looking at issues such as restricting access to Internet content or carrying out surveillance on the Internet activities of specific individuals.

We need to reaffirm the State's primary responsibility for protecting these freedoms. At the same time, given the role played by the different stakeholders in governance of the Internet, we must pursue a dialogue with all actors involved, including the industry, to ensure that this is done. Only then can the free flow of Internet news be ensured.

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40 ECtHR judgment, *Ahmet Yildirim v. Turkey*, application no. 3111/10, 18 December 2012.

## CONTINUED ATTACKS IN EUROPE: JOURNALISTS NEED PROTECTION FROM VIOLENCE

*Human Rights Comment published on 5 June 2012*

Journalism is a dangerous profession, including in Europe. Since the beginning of this year, journalists have suffered physical attacks in Azerbaijan on a number of occasions, France, Germany, Greece, Italy, Latvia, Moldova, Montenegro, Romania and Russia. Governments should treat violence against journalists with the utmost seriousness, as such attacks aim at the core of our democracies.

Often, the perpetrators of the attacks are unknown assailants, usually several masked men, but sometimes they have been riot police or state sponsored security guards.

What were these journalist-victims reporting on? In Azerbaijan, the story was the demolition of houses and evictions of residents for government sponsored urban redevelopment. In Romania and Russia, it was anti-government demonstrations. In France and Germany, it was Turkish-language media outlets reporting on the Kurdish minority in Turkey. In Italy, it was stories focusing on Mafia affairs. In Montenegro, it was a journalist probing shady dealings in a tobacco plant.

The attackers knew that their victims were journalists, who were sometimes wearing press badges or held cameras in their hands. In another case, the perpetrators mentioned the employer of the journalist as they beat him. In Latvia, in a brutally symbolic move, the assailants put a knife in the journalist's mouth and sliced his cheek, grossly disfiguring him.

### *Attacks on journalists = censorship*

Attacks on journalists are not like many other assaults, where the motive is frequently materialistic or racism. These are political attacks. As the OSCE Representative on Freedom of the Media, Dunja Mijatović, has recently written, "violence against journalists [...] remains a special category of crime, as it is a direct attack on society and democracy itself".<sup>41</sup>

Violence or threats of violence against journalists are intended to shut them up and make them stop doing their job, which can involve exposing corruption, abuse of power or discrimination against various minorities. Media freedom is the lifeblood of a democracy, as it is an essential prerequisite for other freedoms as well, such as freedom of association or assembly. Those of us who witnessed the end of the Soviet Union remember well how *glasnost*' or increased openness and media liberalisation opened the floodgates for the emergence of civil society and political pluralism.

In a recent guidebook on the safety of journalists by the OSCE, it is stressed that "physical attacks and threats of violence or harm against journalists and members of

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41 "Protection of journalists from violence" by Dunja Mijatović in *Human rights and a changing media landscape*, Council of Europe Commissioner for Human Rights, December 2011.

their family represent an extreme form of censorship".<sup>42</sup> Thus, even if a government does not engage in "old-fashioned" censorship by screening and filtering media content, it can be involved in censorship if it does not take sufficient steps to combat violence against journalists. Impunity encourages repetition, which can be extremely damaging to free expression.

### *What governments should do*

Governments and politicians need to signal very strongly that such attacks are unacceptable and will not go unpunished. They need to initiate prompt, thorough and transparent investigations and bring perpetrators to justice, where punishments should reflect the seriousness of this crime. If journalists have been threatened, the authorities should act quickly to protect them. Moreover, the authorities should promote cooperation between police and journalists.

As the *Dink v. Turkey* judgment of the European Court of Human Rights made clear, states have a positive obligation to create a favourable environment for journalists to express their opinions without fear, no matter how uncomfortable those opinions may sometimes be to those with economic, cultural or political power.

As yet, no journalists have been killed in the member states of the Council of Europe in 2012. It is my sincere hope that, unlike previous years, this will still be the case at the end of this year. A first step is for governments to treat violence targeting journalists as attacks against the core of our democracies.

## **THE ALARMING SITUATION OF PRESS FREEDOM IN EUROPE**

*Article published in The Regent's Report 2014 on 25 November 2014*

A free, diverse and responsible press is a core element of any functioning democracy. The 'fourth estate' is in fact a bulwark of the rule of law and a key source of information necessary for citizens' effective participation in a democratic society. The press also sustains democracy by bringing to light human rights violations, such as torture, discrimination, corruption or the misuse of power. Truth-telling is often the first essential step to redressing human rights violations and holding governments accountable.

This is why press freedom is protected by both national and international law, in particular the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights (ECHR). In more recent times, the Charter of Fundamental Rights of the European Union (EU) further established the duty of EU institutions to protect media freedom and pluralism.

It is particularly within the 47-member Council of Europe that legal norms governing freedom of the press have been elaborated in the 'hard law' of the jurisprudence of the

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42 Organization for Security and Co-operation in Europe, *Safety of Journalists Guidebook*, 5 December 2011.

European Court of Human Rights, and also in the 'soft law' of political recommendations and resolutions. The existing standards put both negative and positive obligations on countries, which means that they have to refrain from unduly interfering with journalists' work while also ensuring pluralism and media diversity. These rights go hand in hand with responsibilities. Irresponsible media coverage or journalists' unethical or illegal behaviour can seriously harm the profession's credibility and undermine its ability to serve the common good.

This may sound obvious, but translating principles into reality remains problematic. Press freedom across the world has been deteriorating in recent years, with a clear acceleration over the last 12 months during which hundreds of journalists, photographers and camera operators have been killed, injured, kidnapped, threatened or sued.

Europe is no exception. Worrying patterns are eroding press freedom here too, where violence against journalists, repressive legislation and ownership concentration put a strain on the safety, freedom and independence of journalism.

### *An Unsafe Environment*

Among the most widespread threats to journalists' safety in Europe today is police violence against journalists covering demonstrations. I raised this issue with the Turkish government right after the Gezi events, when the police used excessive force against demonstrators and journalists, some of whom were injured or had their equipment damaged.

In Ukraine, with tensions heightening during the demonstrations in February, more than one hundred journalists were attacked, including by the use of stun grenades and rubber bullets. While there, I heard stories of severe violence against journalists who had been shot in the eye or face and beaten. Most tragically, a journalist of *Vesti* newspaper was lethally shot in the chest by unknown thugs during the demonstrations, while in May a photographer was killed.

With them, five journalists have been killed in Europe since February 2013.

In Bosnia, too, some journalists and TV operators covering the demonstrations against corruption and austerity have been treated violently by the police.

Policing of demonstrations has also sometimes impinged on press freedom in Spain. At the end of March this year, for example, a group of journalists and photographers were beaten by the police in spite of having identified themselves as members of the press.

As well as the police, journalists are also frequently targeted by non-state actors. As I was told by *Ossigeno per l'informazione*, an observatory that carries out valuable awareness-raising work on press freedom in Italy, 1 900 journalists in the country have been victims of some sort of violence, including arson and threats, since 2006. In the first three months of 2014, 200 cases have been reported, well above the average of previous years.



Lack of journalists' safety and impunity for crimes committed against journalists remain a serious problem in Montenegro, too, as I observed during my visit to the country last March. While several past cases remain unsolved new ones are occurring, such as the recent brutal assault on a journalist by masked assailants wielding a baseball bat.

In Bulgaria at the beginning of April, journalists organised a protest in solidarity with a *bTV* journalist whose company car was set on fire outside her home. Her personal car suffered the same fate in September last year.

Conflicts zones also remain dangerous places for journalists. The case of Crimea is emblematic: press members have been kidnapped, intimidated and denied access, and had their material confiscated by armed people. Tensions between Russia and Ukraine have had further repercussions on the media in both countries. Pressures on independent journalists in Russia have increased, while Ukraine has prevented some Russian journalists from entering the country, thus sparking new tensions after its decision to block a number of Russian television broadcasters. In the east of Ukraine, journalists have recently been detained, ill-treated, threatened and harassed and are increasingly coming under attack from all the sides involved in the tensions.

### *Muzzling Legislation*

Streets are not the sole battleground where press freedom is undermined. Courts are too. In the majority of European countries, defamation or libel are still part of criminal law, a fact that is hardly reconcilable with international standards.

In Azerbaijan, where journalists expressing critical views are often harassed with legal challenges, ten journalists are in prison because of their reporting. Many more are behind bars in Turkey, two in the Russian Federation, while in the Former Yugoslav Republic of Macedonia the detention of Tomsilav Kezarovski, from the newspaper *Nova Makedonija*, has more than other cases exposed the extent of

Lawsuits against journalists are common practice in Italy, too, where defamation is governed by harsh legal provisions, some of which were introduced by the fascist regime more than 70 years ago. It is under this legal framework that many journalists are sued today and sometimes condemned to prison terms.

In Slovenia, another country where defamation is a criminal offence, in April the prosecutors' office indicted a journalist from the newspaper *Delo* for publishing allegedly classified material in 2011 while researching the rise of extremist groups in the country and uncovering the involvement of army and police members with these groups' activities. She may pay with up to three years in prison.

The Greek criminal code also allows the arrest of journalists in cases of libel. Though guidelines require police officers to inform the prosecutor before arresting a journalist for libel, evidence shows that the police often disregard this requirement. Just recently, after a member of parliament sued several journalists for criticising her statements, the police went to their newsrooms to arrest them without prior consent of the prosecutor. The police found only one journalist, but he was kept overnight in police custody before being freed by a judge the following day.

Another EU country where inadequate legislation threatens press freedom is Croatia. Under the country's new penal code, anybody, including journalists, can be convicted for causing humiliation even if what they report is true. This was the case of a journalist for *Jutarnji list* who has been fined €4,000 by a first instance court for disclosing the mishandling of public funds by a private healthcare company.

Such monetary fines, very often disproportionate, are another widespread threat to press freedom. Excessive damages awarded in civil defamation cases have put some European media and journalists under heavy pressure, or even threatened their economic survival.

Troubles do not end here. Legislation on state secrets or terrorism are in fact often used as a sort of overriding legislation invoked to justify pressure on journalists to disclose sources or to hand material to the authorities. This problem came up again in the summer of 2013, when the UK's Government Communications Headquarters ordered *The Guardian* to destroy hard drives containing copies of intelligence files unveiling the National Security Agency's (NSA) snooping programme. Just a few days later, David Miranda, the partner of Glenn Greenwald – the former *Guardian* journalist who revealed the NSA snooping scandal – was detained under counter-terrorism powers at London's Heathrow Airport and had his computer material seized.

A similar case occurred in May this year when two French journalists were detained at the airport in Baku, Azerbaijan, and had their notes and memory cards containing interviews with dissenters confiscated by the authorities.

### *Oligopolistic Powers*

A more subtle threat comes from the concentration of ownership of media companies. When few big and powerful holdings or oligarchs own them, media diversity and pluralism are at risk. This is not a new phenomenon, but has been accelerated further by the economic crisis.

In spite of international standards established to limit this phenomenon, ownership of media companies is highly concentrated in several European countries. The frequent lack of transparency about the different layers of ownership makes it difficult to disentangle the opaque intersection of politics, business and media ownership and discern the influence it exerts on editorial choices.

In addition to this problem, the control of advertising and distribution represents a further constraint on press freedom, as it can be used to prevent competitors investing in a market or to stifle media opponents.

### *Ethical Journalism*

As well as these external threats, there exists a threat from within the press that journalists and their regulatory bodies have to stem. If the press wants to preserve its ability to play its crucial democratic role, it has to counter unethical or illegal journalistic behaviour better. Regrettably, some media outlets have engaged in illegal activities while others have turned into propaganda megaphones for those in power, or into channels propagating xenophobic stereotypes against minorities

and other vulnerable groups of people. This may lead to nefarious political and societal consequences.

In October last year, for example, I felt compelled to publish an open letter to media professionals calling on them to stop irresponsible media reporting on Roma. Back then, the long-standing problem of stereotyped media reporting on minorities vehemently re-emerged with the cases of children found in Roma families in Greece and Ireland whose kinship was questioned. By concentrating on the ethnicity of the families from which the children had been taken by the police, most news reports, all over the world, propagated age-old myths portraying Roma as child-abductors.

Such reporting was not just false but also dangerous as it risked heightening the already tense relations between Roma and the majority population all over Europe.

It also happens that journalists purposely ignore the duty to strike a balance between the right to privacy and the right of the press to investigate and publish. As the News of the World phone-hacking scandal in the United Kingdom revealed, the search for sensationalism can lead to illegal and unethical activity in the newsroom. This is harmful both for people's privacy and for press freedom because it can encourage increased government intrusion in media regulation. This case in fact clearly exposes the failure of self-regulatory bodies to enforce ethical codes of conduct for journalists.

### *Eight Steps to Preserve Press Freedom*

Although press freedom is an acknowledged human right protected by law, the reality, even in Europe, raises serious concerns about the way states uphold it and journalists use it. Violence, repressive legislation, opaque ownership, and pressures of various natures are all factors undermining press freedom. In addition, unethical and illegal behaviour has caused profound harm to the credibility of the profession, thus limiting its ability to perform its necessary democratic function.

If we want to ensure that the press continues playing its crucial role of democracy watchdog, practical, normative and behavioural changes are necessary:

- First of all, governments have to break out of the state of denial behind which they hide the problems faced by the press. Acknowledging the critical situation is a precondition for any solution. I also think that reliable information is needed to assess the state of the press and that the establishment of a pan-European network of national observatories on violence against journalists would greatly help moving forward.
- Another urgent step is to free all journalists imprisoned because of the views they have expressed and to clear the criminal records of those who have been condemned for their reports. This present situation is in fact incompatible with human rights and the rule of law.
- It is also particularly important to eradicate impunity by effectively investigating all cases of violence against journalists, including those involving state actors such as law enforcement officials. Such a move should be reinforced by specific instructions and training for the police on the protection of journalists.
- In addition, legislation must change. Defamation and libel must be fully

decriminalised and dealt with by proportionate civil sanctions only. Moreover, anti-terror and security laws should not unduly interfere with the right of the press to impart information of public interest and the right of people to receive it.

- Protection of sources must also be better ensured. Though this is not an absolute right, the ECHR clearly accords ‘the broadest scope of protection’ to the press. Interference with this right must therefore be narrowly defined and ‘justified by an overriding requirement in the public interest’.
- More efforts have to be made to preserve media diversity and pluralism. This includes providing adequate public resources to support media outlets without compromising editorial independence, and enforcing laws and transparency regulations on media ownership.
- Political attitudes towards journalists must also change. Policy- and opinion-makers, as well as public personalities, must always condemn violence against journalists and accept a higher degree of public criticism and scrutiny, refraining from violent or intimidating reactions. This is crucial to help the press operate freely.
- Finally, the press has to do its bit too. It has to ensure accountability and stamp out unethical and illegal journalistic behaviour. If the press wants to remain free and avoid undue state interference, it has to produce the necessary antidote to media abuses itself, in particular concerning hate speech and violation of privacy. To get there, self-regulatory bodies can build on the different codes of conduct established in almost all countries, but also on the case law of the European Court of Human Rights, which establishes that freedom of expression is not an absolute right and comes with limits.

It is dismaying that 21st-century Europe still needs such recommendations. However, this deplorable situation should not weaken our determination to defend a free press. By defending journalists’ safety and preserving a free, diverse and responsible press we make democracy stronger.

## **PUBLIC SERVICE BROADCASTING UNDER THREAT IN EUROPE**

*Human Rights Comment published on 2 May 2017*

Well-funded and strong public service media are a good indicator that a democracy is healthy – this is the result of a study published last year by the European Broadcasting Union (EBU). The report notably found that countries that have popular, well-funded public service broadcasters encounter less right-wing extremism and corruption and have more press freedom.<sup>43</sup>

However, the situation on the ground gives rise to concerns: an analysis of the alerts submitted to the Council of Europe Platform to promote the protection of journalism and safety of journalists, since its launch in 2015, shows an emerging trend of threats to the independence of public broadcasters or of their regulatory

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43 European Broadcasting Union, *Trust in Media 2016*, 22 March 2016.

bodies. A growing number of alerts concern political interference in the editorial line of public broadcasters, insufficient safeguards in the legislation against political bias, or the lack of appropriate funding to guarantee the independence of the public broadcasters.

### *Independence is key*

One problem that I have encountered in a number of my country visits relates to government efforts to influence the independence and pluralism of public service broadcasting. In Croatia last year, I expressed worries about abrupt and numerous staff changes in public service media, as well as allegations of censorship. The request of the government at the time for the termination of the broadcast regulator's mandate and for the dismissal of its members also raised concerns of political pressure on this body.

In Poland, a reform of public service media took place in 2016, putting public television and radio under the direct control of the government and restricting the constitutional role of the existing media regulator. I had warned the Polish authorities about the lack of safeguards to guarantee the independence of public service media from political influence, in particular with regard to the composition and the selection mechanism of the members of the newly established, parallel regulatory institution, the National Media Council. This reform has already had adverse effects on media freedom, notably on journalists themselves. A list compiled by the Society of Journalists,<sup>44</sup> an independent association, shows that since the beginning of last year, a total of 228 public media journalists have been dismissed, demoted or reassigned, or resigned in protest.

Several alerts registered by the Council of Europe Platform also highlight a number of issues concerning the legislation and practices with regard to the appointment, composition and dismissal of the regulatory bodies or of the management of the public broadcasters, from political appointments in the leadership of public TV channels in Spain to pressure by a political party to replace a member of the Public Broadcaster's Supervisory Board in Ukraine.

### *Securing stable and adequate funding*

The system of financing public broadcasters is also of utmost importance since it has the potential of keeping them politically dependent. In my 2015 report on Bulgaria, where the main source of funding is the state budget subsidy, I deplored that the budget of the Bulgarian National Television was significantly reduced, a cut that was seen as a reaction to the public broadcaster's coverage of the anti-government protests in the summer of 2013.

Financing was an issue in Romania as well, where the Parliament adopted in October 2016 a law eliminating over 100 non-fiscal taxes, including the TV and radio licence fee, which was the main source of funding for public broadcasters. This move was

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44 See *Towarzystwo Dziennikarskie* at [www.towarzystwodziennikarskie.org](http://www.towarzystwodziennikarskie.org).

severely criticised by journalists' organisations, as it would make public service media heavily dependent on the state budget, while the licence fee system was seen as the best way to guarantee the editorial independence of public service media.

The most extreme case was found in Greece, with the government's decision in June 2013 to shut down the public broadcaster ERT, as part of a cost-cutting effort. While ERT kept broadcasting online, it finally reopened in 2015. By eliminating, even temporarily, public service media the Greek authorities dealt a heavy blow to media pluralism in the country. The Radio and Television of Bosnia-Herzegovina (BHRT) is now facing a similar threat and might be shut down in the absence of an agreed plan for sustainable funding of public service media.

### *New environment, new challenges*

The examples above demonstrate that governments' attempts to turn public broadcasting into government broadcasting remain widespread. As stressed by the Recommendation (2012)<sup>1</sup> of the Council of Europe Committee of Ministers, in some circumstances a shift is still needed from being the State broadcaster – with strong links to the government, and weaker accountability to the wider audience or civil society – to becoming genuine public service media, with editorial and operational independence from the State.

But this is not the only challenge; adaptation to and evolution in digital environments is another one. Increasingly, public service *broadcasting* - defined as a service funded by the state or the public with boards appointed by public bodies and which produce and broadcast public interest content - tends to be replaced by the notion of public service *media*, which includes new forms of communication and platforms, such as the Internet, and not just television and radio.

Public service media organisations face serious challenges in reaching their audiences in a changing media environment, marked by a rapid evolution of new digital technologies, which increasingly dominate the information distribution chain. While some public service media organisations are changing their governance model, investing in new technology offerings and deploying social media strategies, others struggle to reach out to people online despite their high profile in offline environments.

### *Information v. disinformation*

In a context characterised by highly polarised societies, where there is a lack of trust in institutions and "the establishment" and where proliferation of one-sided information or outright disinformation is amplified by social media, the existence of a strong and genuinely independent public service broadcasting is all the more important.

The problem of disinformation will not be solved by restricting content or by arbitrary blocking, but by ensuring that the public has access to impartial and accurate information through public broadcasters which enjoy their trust. The real answer to deliberate misinformation is more media freedom and pluralism, notably by developing good quality public service broadcasting, with high professional

standards and by building the trust of audiences through truthful, responsible and ethical reporting.

In a Joint Declaration on freedom of expression and “fake news”, disinformation and propaganda adopted last March, four Special Rapporteurs on freedom of expression have restated the importance of having “strong, independent and adequately resourced public service media, which operate under a clear mandate to serve the overall public interest and to set and maintain high standards of journalism”.

### *A roadmap for public service broadcasting*

On all these issues, the case-law of the European Court of Human Rights gives general guidance. While there is no obligation under Article 10 of the European Convention on Human Rights, guaranteeing freedom of expression, to put in place public service broadcasting, the Court has indicated that such a service is best capable of contributing to the quality and balance of programmes. Moreover, where a State does decide to create a public broadcasting system, “domestic law and practice must guarantee that the system provides a pluralistic service, (...) transmits impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed” (*Manole and Others v. Moldova*<sup>45</sup>).

Member states should draw on existing Council of Europe instruments and implement all of the principles and standards contained in the various recommendations to reinforce public service broadcasting organisations. In particular, they should ensure that:

- legal measures are in place to guarantee their editorial independence and institutional autonomy, and avoid their politicisation;
- they are provided with sustainable funding;
- members of management and supervisory bodies are appointed through a transparent process, taking into account their qualifications and professional skills and their duties related to working for the public service;
- they are provided with the necessary resources to produce quality programmes which reflect cultural and linguistic diversity, paying attention to minority languages.

Public service broadcasting is not only about providing information, education, culture and entertainment, it is also an essential factor of pluralistic communication, one of the main characteristics of a democratic society.

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45 ECtHR judgment, *Manole and Others v. Moldova*, application no. 13936/02, 17 September 2009.



## OBSERVATIONS AND REFLECTIONS ON ACADEMIC FREEDOM

*Extract of the 1st Quarterly Activity Report 2017 (1 January to 31 March 2017), published on 31 May 2017*

An issue with human rights ramifications that has recently received international attention due to current events is academic freedom. Academic freedom derives from the right to education, but is also intimately linked with freedom of thought, freedom of opinion and freedom of expression. Some scholars or students can also be human rights defenders, working from within institutions of higher education, research institutes or law clinics. Academic freedom has an individual dimension, wherein scholars, students and academic personnel should have the right to conduct research, teach, express themselves and participate in public life without fear of repression. It also has an institutional dimension, in that institutions of higher education should not be subjected to pressure or government interference limiting academic freedom.

There are good international standards in this realm, though the case-law of the European Court of Human Rights and other international tribunals is relatively limited. A core reference document is the Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education of 1988 produced by the World University Service. UNESCO adopted a Recommendation concerning the Status of Higher Education Teaching Personnel in 1997. The Committee of Ministers of the Council of Europe adopted a Recommendation on the Research Mission of Universities in 2000 and a Recommendation on the responsibility of public authorities for academic freedom and institutional autonomy in 2012, while the Parliamentary Assembly adopted Recommendation 1762(2006) on Academic Freedom and University Autonomy.

While academic freedom pertains to all disciplines, it appears that scholars in the social sciences and law are particularly vulnerable to restrictive or retaliatory measures from governments. This is not surprising, as social scientists and legal scholars are ideally equipped to critically evaluate the work of governments, parliaments and judiciaries. Moreover, they can provide a historical or comparative perspective, as well as an analysis of how national practice diverges from international human rights standards – information that some decision-makers would like to suppress.

While I have touched on academic freedom in some of my country work, a good source for information on threats to academic freedom worldwide is the Scholars at Risk Network (see [www.scholarsatrisk.org](http://www.scholarsatrisk.org)), which has a broad array of partners, including in Europe. Its Academic Freedom Monitor identifies, assesses, tracks and verifies incidents posing a potential threat to academic freedom under six different headings: 1) killings, violence, disappearances; 2) wrongful imprisonment/ detention; 3) wrongful prosecution; 4) restrictions on travel or movement; 5) retaliatory discharge/ loss of position/expulsion from study; 6) other significant events.

The Academic Freedom Monitor database contains information on threats to academic freedom starting in 2012, thus, roughly coinciding with my mandate as Commissioner. The incident data base (under the sections on “Europe” and “Western Asia”) contains

information on threats in five Council of Europe member states: Azerbaijan, Poland, the Russian Federation, Ukraine and Turkey.

Incidents in Turkey (55), some of which I have analysed in my recent country reports or memoranda, have affected thousands of students and scholars. While early alerts pertain to reprisals against students and scholars following the Gezi events and various student protests, subsequently, the incidents refer to dismissals, arrests, detentions, travel bans and other restrictive measures targeting signatories or supporters of the “Academics for Peace” petition calling for an end to violence in South-East Turkey. The most recent series of alerts concerns scholars and students alleged to have links with the Fethullah Gülen movement.

The most recent incidents in Azerbaijan echo events in Turkey, as 50 Turkish teachers saw their jobs terminated for alleged ties with the Fethullah Gülen movement. Other incidents in Azerbaijan have to do with the arrests of students who participated in protests in 2014 and the 2013 closure of Azad Fikir University (“Free Thought University”), an internationally funded organisation with a focus on human rights to which I also referred in my 2013 report on this country. Many of the incidents in Russia and Ukraine appear to be linked to the conflict between these countries – two Russian scholars dismissed for statements criticising Russian actions in Crimea; the former head of the Moscow Library of Ukrainian literature placed under house arrest for alleged extremism; and investigations into academics from four Ukrainian universities for participating in an event in Crimea.

Poland has two incidents in the database – one concerns the detention and subsequent deportation of an Iraqi PhD student. The second concerns the questioning of Jan Gross, a prominent Polish-American scholar at Princeton University, for allegedly “publicly insulting the nation” following the publication of an article about an instance of Polish violence towards Jews during World War II. If convicted, Prof. Gross could face up to three years in prison.

While not yet included in the incident index as of this writing, the Scholars at Risk webpage features a prominent recent post expressing concern over proposed legislative amendments in Hungary that apparently target the Central European University (CEU). CEU is a top-notch university with highly ranked programmes in the social sciences and law that has taught students from the broader Central and East European region since 1991. The rector of the university is a world-renowned former Canadian politician and human rights scholar, Michael Ignatieff. The founder of CEU happens to be George Soros, a Hungarian-American philanthropist. As I recently noted in a Human Rights Comment on “The Shrinking Space for Human Rights Organisation,” NGO beneficiaries of Soros funding have become targets of Hungarian government rhetoric and proposed policy measures. The targeting of CEU is thus a continuation and expansion of earlier anti-Soros moves.

Thus, like journalists and human rights defenders, academics are among the victims of clampdowns on freedom of expression more broadly, as well as international conflict. Academic freedom is a theme which deserves more attention from all of us in the human rights field.





## 4. Human Rights Defenders

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### INTRODUCTION

The role of human rights defenders cannot be underestimated: they are on the front lines of human rights work, reporting on violations and providing assistance to victims, holding public authorities accountable for their acts or omissions, and advocating for policies that are human rights compliant. I regard human rights defenders as key partners, and always bear in mind my duty to support their work and ensure that they operate freely, in a hospitable environment.

Throughout my mandate I have met regularly with human rights defenders. During my country visits, they are usually my first interlocutors, and I frequently receive defenders in my Office. The round-tables my Office has organised with human rights defenders and experts have not only permitted me to learn more about the environment in which they operate, but also to gain useful insights into specific topics that, in turn, have enriched my subsequent thematic and country work. When the situation requires it, I raise cases of human rights defenders at risk as part of my dialogue with Council of Europe member states. Although Belarus is not a member state of the Council of Europe, I have called for solidarity with human rights defenders who have faced repression in that country, and stressed that the guiding principle above all should be to “do no harm”, that is for other states to refrain from any action that may compromise the safety of Belarusian defenders. Most of my interventions as a third party before the European Court of Human Rights have been in cases involving human rights defenders, including individuals prosecuted on trumped-up charges and the killing of a prominent defender. The most recent interventions concerned groups of applications made against the backdrop of restrictive laws or anti-terrorism operations with a deleterious impact on human rights defenders’ work.

Three of the five Human Rights Comments in this section stem from my discussions with human rights defenders. After publishing an Issue Paper on *Missing persons and victims of enforced disappearances*, I organised a round-table in Strasbourg in June 2016 where the participants highlighted widespread impunity for such crimes, a lack of clarity about the fate of missing persons that can persist for decades, and glaring inadequacies in the provision of redress to victims and their relatives. Human rights defenders undertaking the courageous and difficult work in this area must be given support. At a recent expert meeting in Vienna with human rights defenders on family reunification of refugees in Europe, we explored opportunities for strategic

litigation and advocacy work on family reunification at national level. I learned a great deal from women's rights defenders at a round-table held in Vilnius in July 2015, and some of the ideas this generated continue to contribute to my country and thematic work. For example, in several country visits in recent years I focused on issues relating to gender equality, domestic violence, and women's sexual and reproductive health and rights. One Human Rights Comment highlights the various obstacles that women human rights defenders – even today, well into the 21st century – face in Council of Europe member states.

During my mandate, there has been a marked deterioration of the working environment for human rights defenders in many European countries. Individual defenders and civil society groups have been targeted for their legitimate activities in various ways. Legal and administrative frameworks for the functioning of civil society and human rights organisations have become ever more restrictive, their registration more cumbersome and their access to funding curtailed. There have even been criminal prosecutions of human rights defenders. Depending on the context, this has been due to their refusal to comply with laws that prohibit them from extending assistance to irregular migrants, or require them to self-label in a pejorative manner, or charges have been entirely fabricated as retaliation for legitimate human rights work. Human rights activists defending vulnerable groups are often subjected to stigmatisation, smear campaigns and intimidation. In particularly hostile environments, human rights defenders regularly face threats or experience physical attacks; some, like Natalia Estemirova, have even paid with their lives. The absence of effective investigations into serious crimes against defenders and the impunity of perpetrators are, unfortunately, not uncommon. The resulting climate of impunity contributes to the recurrence of violence and renders human rights work especially dangerous, to the detriment of society at large.

Violations against human rights defenders tend to be indicative of a generalised backsliding in human rights protection in the states concerned. In order to ensure a safe and enabling environment for their activities states should not only refrain from any actions aimed against human rights defenders and their work; they should involve defenders in policy making and raise public awareness about their positive role and contributions. Creating an enabling environment for human rights defenders and protecting them is not only an international obligation, but also a prerequisite for the functioning of a resilient democratic society.

## **RESTRICTIONS ON DEFENDERS OF MIGRANTS' RIGHTS SHOULD STOP**

*Human Rights Comment published on 19 December 2012*

Defamation, threats, verbal and physical attacks, administrative sanctions and judicial harassment are used to deter human rights defenders from working with migrants and from combating the rising xenophobia and racism in Europe. Perpetrators can be both state and non-state actors.

*It is not acceptable to intimidate and attack defenders of migrants' rights*

In several European countries, the rise of xenophobic and anti-migrant discourse has negatively impacted on the work of human rights defenders who protect and promote the rights of migrants. Human rights defenders are even increasingly labelled as traitors who are threatening national identity and security. They are often exposed to intimidation and abuse.

The situation in Greece is particularly worrisome as migrants have become targets of unacceptable, extreme violence notably by members, including MPs, of the far right political party of Golden Dawn. Human rights defenders defending migrants are under threat. There have been several instances of lawyers being threatened and physically attacked in Athens as they were assisting migrants in the course of asylum and other legal procedures.

In some Council of Europe countries the work of defenders working with migrants and their rights is being criminalised. In France, legal provisions corresponding to the so-called *délit de solidarité* (the offence of solidarity) concretely result in law enforcement bodies pressuring and punishing human rights defenders providing assistance to irregular migrants. Persons standing up for the rights of migrants have been detained, prosecuted and/or fined. In Belgium, similar tendencies have been identified and persons who have been demonstrating in favour of the rights of migrants have been arrested.

#### *Access to migrants in detention and provision of assistance should be guaranteed*

Thousands of migrants are kept in detention in Europe. This contributes to stereotyping migrants as criminals. Far too often the conditions and grounds under which they are held breach human rights standards, and can even amount to torture and other forms of ill-treatment.

This is why it is of utmost importance that human rights defenders have unimpeded access to places where migrants are detained in order to assist persons in need and to submit recommendations to national authorities for improving the situation of migrants.

In some instances, defenders, lawyers and national human rights structures such as Ombudspersons are denied the possibility to visit migrant detention facilities. This, in combination with the lack of adequate interpretation and the complexities of asylum and legal procedures, makes it difficult for migrants to challenge detention and human rights abuses. In some countries legal aid to migrants is not provided for by law or it is not effective. This adversely affects migrants' right to a fair trial and to a legal remedy.

#### *Ways to improve the situation*

I encourage all Council of Europe member states to go back to the letter and spirit of the 1998 UN Declaration on human rights defenders which states that everyone has the right to promote and to strive for the protection and realisation of human rights and fundamental freedoms. The Declaration also states that everyone has the right to complain about the policies and actions of individual officials and



governmental bodies with regard to violations of human rights and fundamental freedoms, as well as to offer and provide professionally qualified legal assistance or other relevant advice and assistance in defence of human rights.

The awareness of the human rights dimension of migration should be increased. The public and national authorities need to become aware of the vulnerability of migrants and the harsh reality they face, the shortcomings of national migration systems and the necessity to provide better protection of the human rights of migrants. Media can play a key role in this necessary public awareness process.

National human rights structures such as Ombudspersons can be more supportive of the work of defenders protecting migrants' rights. A closer, systematic co-operation could serve to mutually reinforce and increase the impact of their work.

National authorities should no longer tolerate threats and attacks on defenders protecting migrants. They should put a stop to impunity by carrying out effective investigations into all incidents involving physical or other violence against migrants and defenders, and by prosecuting and imposing adequate punishment on the offenders.

It is high time to abolish the provisions establishing the *délit de solidarité*. I encourage the French authorities to take decisive measures in that direction.

More needs to be done also by the EU – this year's recipient of the Nobel Peace Prize – to address the difficulties that human rights defenders and organisations working in the area of migration and anti-discrimination face in EU member states. The essential work carried out by human rights defenders should be recognised and supported, including by national authorities, in particular when this work is at risk.

## **BELARUSIAN HUMAN RIGHTS DEFENDERS NEED SUPPORT**

*Human Rights Comment published on 12 February 2013*

Belarus is not a member state of the Council of Europe and should not even be considered a candidate until it releases all human rights defenders and opposition activists imprisoned for political motives, abolishes the death penalty and carries out far-reaching democratic reforms. This means that Belarus is not currently subject to the jurisdiction of the European Court of Human Rights or country reports by most monitoring mechanisms and my own office. However, this does not absolve the Council of Europe and its member states from taking an active interest in Belarus, abstaining from actions that can harm Belarusian human rights defenders, and seeking to support human rights in the country.

*“Do No Harm”*

The first principle to remember is “do no harm”. In other words, Council of Europe member states should not cooperate with the Belarusian authorities in any actions that may jeopardise the integrity and security of Belarusian human rights defenders. Unfortunately, various actors in Council of Europe member states have not always

adhered to this principle. It should be recalled that the arrest, prosecution, conviction and detention of prominent defender Ales Bialiatski were possible thanks to information provided by Lithuania and Poland on bank accounts in Bialiatski's name in these countries. It has also been reported that cooperation with Belarus through Interpol could imply risks to civil society actors.

Another way in which the outside world can do harm to the cause of human rights is by speaking inconsistently or in many voices with the Belarusian regime. While some outside powers have called for sanctions, others continue to do a brisk business with Belarus. Clearly, mixed signals and veering from a values-based approach to one based on Realpolitik permits the authorities in Minsk much room for manoeuvre and allows them to play various actors against each other, thereby doing a disservice to human rights defenders in Belarus.

### *Show Solidarity and Give Support*

Council of Europe member states should demonstrate solidarity with human rights defenders who are facing difficulties not only by raising their cases in multilateral and bilateral contexts, but also by providing emergency visas, and if necessary, political asylum, to defenders and their families in need of protection from threats, intimidation and persecution by the Belarusian authorities. Consideration should be given to establishing a central contact point to which Belarusians under threat could turn. Logical locations for such a contact point would be in neighbouring countries.

Many Belarusian NGOs have established offices in the Lithuanian capital Vilnius, which is closer to Minsk than many Belarusian provincial cities. Vilnius is also host to Belarusian Humanitarian University, a centre of free-thinking, whose operation became impossible in repressive Belarus. Students who were expelled from universities for political activity in Minsk have been welcomed in Vilnius. Another good initiative is the Belsat television station, which is based in Poland, but broadcasts uncensored news and information into Belarus.

Other European countries should continue to support Belarusian human rights organisations and defenders by funding their activities and participation in various external events and trainings. Human rights defenders and organisations in other European countries should partner with counterparts in Belarus in joint projects. For example, the Belarusian Human Rights House in exile in Vilnius, which is a network of Belarusian human rights NGOs, represents a good platform for joint activities of support to the work of human rights defenders.

### *The Council of Europe's Role*

The Council of Europe and its member states should intensify efforts to raise awareness about Council of Europe standards, instruments, and mechanisms, including by organising events in country if possible. Belarus wants to step up cooperation with the Council of Europe and some conventions are also open to signature by non-member states. Belarus has already acceded to the Council of Europe's anti-corruption mechanism GRECO and is in the process of becoming a member of GRETA, the mechanism to combat human trafficking. A good place to continue would be

through Belarus' accession to the European Convention on the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, which would allow the experts of the Committee for the Prevention of Torture (CPT) regular access to places of detention in Belarus, including imprisoned human rights defenders.

It is also important that the Council of Europe's expert body on constitutional law, the Venice Commission, continue to be involved in any future cooperation. The Venice Commission has already adopted opinions on Belarusian legislation restricting freedom of association and assembly. If Belarus wants to move forward on cooperation, the Venice Commission could provide additional opinions on Belarusian legislation pertinent to human rights. A good indicator of the seriousness of Belarus' reform intentions would be the extent to which it complied with such opinions.

The Conference of International Non-Governmental Organisations and the Parliamentary Assembly of the Council of Europe have also played a constructive role in bringing the situation of Belarusian human rights defenders to the attention of European civil society and parliaments through hearings, reports and other activities. These initiatives deserve more attention and support from member state governments as well.

### *Looking to the Future*

I look forward to the day when Ales Bialiatski and other unjustly imprisoned human rights defenders and opposition activists will be free not only from prison, but from the threat of re-arrest for merely expressing an opinion and peacefully advocating democracy. I look forward to the day when the human rights situation in Belarus has improved enough that its leadership can bring the country into the Council of Europe. Until that day comes, we still have a responsibility to do no harm and further human rights in Belarus in every way we can.

## **HUMAN RIGHTS DEFENDERS' WORK IS VITAL FOR REDRESS TO VICTIMS OF ENFORCED DISAPPEARANCE**

*Human Rights Comment published on 29 August 2016*

Last March I published an Issue Paper on *Missing persons and victims of enforced disappearance* in Europe, aiming to help Council of Europe member states improve their law and practice. Much remains to be done, considering that thousands of cases of missing persons and enforced disappearance remain unresolved in Europe, perpetuating the suffering of their loved ones, which is passed on from one generation to another. Addressing these questions is often dependent on governments' political agendas, which explains the slow progress made so far. As I learned last June at a round-table I organised in Strasbourg with a group of human rights defenders active on these issues, they face a number of serious obstacles to their work.

### *Persisting obstacles in addressing cases of missing persons and enforced disappearance*

Cases of missing persons and enforced disappearances where the victims remain unaccounted for are not an issue of the past, irrespective of when they occurred. Indeed, besides continuous grief, families face various problems years after their loved ones have gone missing. In many countries, relatives are compelled to declare the death of missing or disappeared persons whose fate is not yet clarified in order to enjoy their rights, such as those related to inheritance and social welfare. This is often very traumatizing for the relatives, as they sometimes feel they are being forced “to kill” their loved ones.

Usually impunity for crimes of enforced disappearance goes hand in hand with impunity for other serious human rights violations and results in the recurrence of violations. Impunity sometimes has old roots, notably when past violations have not been acknowledged by the states concerned. Often it appears that investigations into cases of enforced disappearances are not effective, for a variety of reasons: the qualification of crimes is not adequate (e.g. often investigated as kidnapping or a crime against humanity); the case may be closed due to statutes of limitations after lengthy investigations; there may be a reluctance to punish members of the state executive; the protection of witnesses and victims is inadequate. As a result, perpetrators are not held to account while some of them even continue to serve in law enforcement, security or military structures.

Another concern relates to the lack of or very slow implementation by respondent states of the judgments of the European Court of Human Rights in cases of missing persons and enforced disappearance, thus failing to fulfill their obligations under the European Convention on Human Rights. Even in cases where mass graves have been located and bodies of missing and forcibly disappeared persons have been identified and handed over to their relatives, investigations have not taken place and perpetrators have not been punished.

In several European countries, there are no adequate legal provisions regulating the situation and status of missing or forcibly disappeared persons and their relatives. Even when specific laws are adopted, they do not always serve the purpose and are not adequately implemented, as, for example, in Bosnia and Herzegovina.

### *Situation of human rights defenders working on transitional justice issues*

Civil society actors and other human rights defenders are crucial to human rights, democracy and the rule of law. If they are not able to operate, then these values and standards are under threat. These actors perform essential tasks in: making the human rights systems function by bringing complaints before domestic and international mechanisms; helping victims of human rights violations to access remedies and obtain other forms of support and reparation; advocating for changes in policy and legislative frameworks and their implementation; and raising public awareness on human rights. In some cases, NGOs and individual human rights defenders are the only recourse for victims and vulnerable persons.

However, the situation and the work environment of human rights defenders are negatively affected by various trends in Europe. Depending on the country, I have noted that obstacles to their work may take the form of: legal and administrative restrictions impeding the registration of human rights organisations and their access to funding; burdensome financial and reporting requirements; judicial harassment; smear campaigns; threats and intimidation; abusive control and surveillance; confiscation and destruction of working materials; unlawful arrest or detention; ill-treatment; disappearance and death. The absence of effective investigations into violations committed by state and non-state actors against human rights defenders targeted because of their human rights work remains a major problem in a number of European states.

I have noted with concern that in certain countries, such as in Azerbaijan, Russia and Turkey, increased restrictions in the field of freedoms of association, peaceful assembly and expression have resulted in a sharp deterioration of the working environment for human rights defenders.

Human rights defenders and organisations working on transitional justice issues, including in conflict and post-conflict contexts, face intimidation, pressure, threats and attacks as they challenge the mainstream national narrative in their community or country. Associations of relatives of missing persons or victims of enforced disappearance as well as human rights NGOs play a vital role in establishing the facts and pursuing justice, including by advocating for the adoption of adequate legislation, contributing to the search for and identification of remains, providing legal and psychological aid to victims, and engaging in peace-building processes.

However, they often do so at great personal risk, having been subjected to reprisals, harassment and even enforced disappearance in some cases. For example, the Committee Against Torture and the Joint Mobile Group which are active in combating impunity and in following cases of missing persons and enforced disappearance in the North Caucasus in Russia, in particular in Chechnya, were subjected to numerous physical attacks in recent years. In situations of armed conflict or acute crisis, human rights defenders play an essential role in documenting human rights violations and in helping victims. They also however face difficulties in accessing areas affected by on-going violence, such as South-Eastern Turkey, or by an armed conflict as is currently the case in the east of Ukraine.

### *The way forward*

Further to the recommendations that I made in the Issue Paper on *Missing persons and victims of enforced disappearance* in Europe, I would like to underline some important points drawn from the round-table with human rights defenders on this topic in order to address some of the outstanding issues.

Given the gravity of the human rights violations, clarifying the fate of missing persons and victims of enforced disappearance should be a matter of priority for the governments concerned, especially considering that this task is increasingly difficult with the passing of time. The involvement of international and European actors, including the European Union and the Council of Europe, is crucial for transitional

justice issues and for providing assistance to the states concerned. In addition, National Human Rights Institutions need to be more active on issues related to cases of missing persons and enforced disappearances, notably with regard to the execution of judgments of the European Court of Human Rights.

States should improve judicial mechanisms, notably by defining enforced disappearance as a continuous crime in national law and by ratifying the UN Convention for the Protection of All Persons from Enforced Disappearance. In addition, law enforcement officials, judges and lawyers should be trained on the importance of combating impunity, as well as standards, legal obligations and good practices related to cases of enforced disappearances. The application of the universal jurisdiction principle to international crimes could be considered in relation to cases of enforced disappearance, as it may contribute to identifying and punishing perpetrators, and to recovering remains.

There is also a range of non-judicial mechanisms that could be put into place. For example, a system of reporting cases of missing persons and enforced disappearance and of verification of such reports could usefully be established at national level. The mapping of mass graves and exhumation of remains necessitates close co-operation between various actors, including families of the victims, local communities, judicial and law enforcement authorities as well as civil society organisations. Instead of having to declare the death of their relatives, the families of missing persons and forcibly disappeared persons should be issued a certificate of absence.

Last but not least, the international community needs to engage more in building the capacity and expertise of human rights NGOs active in this area. At the same time, human rights defenders should continue interacting and exchanging experiences in this respect and help each other to work on cases of missing persons and enforced disappearances.

## **REMOVE OBSTACLES TO THE WORK OF WOMEN'S RIGHTS DEFENDERS**

*Human Rights Comment published on 22 September 2015*

Human rights defenders and civil society organisations working to protect the human rights of women and gender equality perform an essential role in Europe. They provide much needed assistance to victims of gender-based violence, combat discrimination against women, contribute to peace-building and hold authorities accountable for fulfilling their human rights obligations. Unfortunately, as I learned at a round-table with a group of women's rights defenders in Vilnius in July, they also face serious obstacles in their work.

*Multiple challenges as human rights defenders and promoters of women's rights*

Along with other human rights activists, the situation and working environment of women's rights defenders are affected by several negative trends in the Council of Europe area. Restrictive legislation and repressive practices against civil society in

Azerbaijan, the Russian Federation and Belarus have also had an impact on those who work to protect the human rights of women and promote gender equality. In Hungary, several women's rights organisations were among the beneficiaries of the Norwegian NGO Fund and have been targeted by smear campaigns, audits and inspections.

In addition, women's rights defenders face specific obstacles when they challenge patriarchal values, sexist stereotypes and the traditional perception of gender roles. They can be portrayed as destroyers of family values and national traditions or as agents of what has pejoratively been labeled "gender ideology". I highlighted this issue in my latest report on Armenia, where women's rights organisations and defenders were violently targeted in 2013 during the discussion and adoption of the Law on Equal Rights and Equal Opportunities between Women and Men.

Women's rights defenders also face intimidation, pressure, threats, attacks, defamation, cyber-attacks and disruption of victims' hotlines. Those working on sexual and reproductive rights or advocating the rights of women victims of domestic violence have often been specifically targeted. For example, in Ireland,<sup>46</sup> defenders working on abortion issues experienced a smear campaign and stigmatisation. In many countries, segments of ultraconservative movements and far-right or extremist religious groups have been the instigators of such attacks. A serious problem lies in impunity for such actions. All too often state authorities do not fulfill their duty to protect human rights defenders by ensuring effective investigations into these violations and adequate punishment for those responsible.

Most defenders of women's rights are women. Women human rights defenders are at a high risk of experiencing gender-based violence, rape and other forms of sexual violence, harassment and verbal abuse as well as attacks on their reputation on-line and off-line. A worrying phenomenon which has been identified recently is the increasing use of hate speech targeting women human rights defenders. In Serbia, for example, members of the NGO Women in Black have faced gender-motivated attacks because of their human rights work.

National authorities often fail to consult or listen to women's rights defenders on relevant policies and laws. In some countries, independent activists feel overshadowed by NGOs which are close to the government – the so-called "GONGOs" (Government-Organised Non-Governmental Organisations). Another disturbing element is that women's rights defenders are not considered as equals by some fellow human rights defenders, who mistakenly consider women's rights and gender equality as a soft or secondary human rights issue.

The current period of austerity has made it particularly difficult for civil society organisations to find sustainable and long-term funding. NGOs running shelters for women victims of violence, for example, have been weakened by cuts in public services at the local level.

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46 Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, on Mission to Ireland (19–23 November 2012), A/HRC/22/47/Add.3, 26 February 2013.



### *Ways to improve the working environment of women's rights defenders*

The difficult situation of defenders of women's rights highlights the fact that progress achieved towards gender equality has not yet been fully consolidated. As most defenders of gender equality are women themselves, the enduring discrimination of women can affect their work directly. Therefore even today it is essential to stress that equality between women and men is a fundamental right and a crucial element of the human rights agenda.

I urge Council of Europe member states to reaffirm and implement the national and international obligations they have undertaken to end discrimination and human rights violations based on sex and gender. In particular, I call upon all member states to ratify and implement the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention).

States must also meet their obligations to protect human rights defenders and ensure an enabling environment for their work free from intimidation and pressure. These obligations are recalled in the 1998 UN Declaration on human rights defenders and the 2008 Declaration of the Council of Europe Committee of Ministers to improve the protection of human rights defenders and promote their activities. States should notably refrain from putting in place policies, legislation and practices which run contrary to freedom of association, assembly and expression. In 2013, the UN General Assembly adopted a specific resolution on the protection of women human rights defenders, expressing concern about the discrimination and violence faced by them and urging states to protect them and support their work. In July 2015, the UN Committee on the Elimination of Discrimination against Women called on States parties to ensure that women human rights defenders are able to access justice and receive protection from harassment, threats, retaliation and violence.

At the national level, I urge member states to adopt and implement laws prohibiting discrimination on the basis of sex and gender as well as legal provisions specifically aiming to combat gender-based hate crimes and hate speech. I also encourage member states to develop national guidelines and other measures to support and protect human rights defenders and to integrate a gender perspective in this work. It is time to put an end to impunity for violations that human rights defenders face because of their work. Expressions of support from the government and state institutions for the work of women's rights defenders are of great importance and should also extend to the effective inclusion of women's rights defenders in official consultations on relevant issues.

Solidarity and cooperation among human rights defenders are necessary for the protection of defenders and promotion of their work. International, regional and national networks of human rights defenders are instrumental in assisting those defenders who face difficulties in their work and threats to their personal security. It is therefore essential for the wider community of human rights defenders to support women's rights defenders and fully cooperate with them.

Human rights defenders work closely with national human rights structures (NHRs) on many issues of mutual interest. However, in many cases ombudspersons, human rights commissions and equality bodies have not yet acquired sufficient trust among

defenders of women's rights so that they would turn to these institutions for help when they are under threat. We need more intense co-operation and joint action between NHRs and human rights defenders to advance human rights agendas and to assist those who are at risk. I encourage NHRs to fully take on board issues related to the human rights of women and gender equality, and to work together with women's rights defenders in this field.

In several instances, women's rights defenders have successfully partnered with the media in countering attacks, including smear campaigns, and in raising public awareness of their work and the importance of protecting the human rights of women and of promoting gender equality. I find it extremely useful to build on such experiences and to foster a culture of human rights and strengthen the defender's interaction with the public.

It is time that women's rights defenders receive the acknowledgment, support and protection they deserve for their committed work for human rights.

## **THE SHRINKING SPACE FOR HUMAN RIGHTS ORGANISATIONS**

*Human Rights Comment published on 4 April 2017*

In recent years I have noticed a clear trend of backsliding in several European countries in the area of freedom of association, particularly in respect of human rights organisations and defenders. The growing pressure and increased obstacles can take a variety of forms: legal and administrative restrictions; judicial harassment and sanctions, including criminal prosecution for failure to comply with new restrictive regulations; smear campaigns and orchestrated ostracism of independent groups; and threats, intimidation and even physical violence against their members. In some cases, the climate is so negative that it forces human rights work to the margins or even underground.

*Efforts to control, clampdowns on funding and requirements for pejorative self-labelling*

Since 2012, more than 60 countries across the globe have either passed or drafted laws restricting the activities of civil society organisations. Restrictive provisions have been enacted in various parts of Europe as well, posing ever-greater obstacles to the work of NGOs operating in the continent.

In Azerbaijan the already highly bureaucratic requirements for NGO registration, which gave the Ministry of Justice near-total discretion in the process, were encumbered by additional administrative barriers to NGOs and their funders enacted in 2013, with increased administrative sanctions for the failure to comply with those regulations. Despite recent initiatives aimed at simplifying grant registration, the procedures for receipt and use of grants – as well as reporting obligations for NGOs – remain so cumbersome that most independent advocacy NGOs have either scaled down, discontinued their work or moved operations abroad. The extremely restrictive legislative environment, combined with a broad government crackdown on critical

voices (see below), has made Azerbaijan a very difficult country in which to do human rights work.

Since 2012, the authorities in the Russian Federation have progressively made the country less hospitable for human rights defenders. That year the Russian Parliament adopted the “Law on Foreign Agents”, requiring NGOs that receive donations from abroad to register as “foreign agents” (a label which, in the Russian-speaking context, is a synonym for an enemy, a spy or someone who serves foreign hostile interests, as a result of its use as a standard accusation against thousands of individuals during the political repressions of the 1930s and 40s) if they engage in “political activity,” which in the official understanding can encompass any activity by NGOs aimed at influencing public opinion or making proposals for changes to any governmental policies. The implementation of the Foreign Agent Law has further placed NGOs declared as “foreign agents” in a clear disadvantage vis-à-vis other organisations, and in many cases has led them to curb their activities, self-censor or initiate their own dissolution. Last year, a criminal prosecution was launched against the leader of “Women of Don” – an NGO known for its human rights, humanitarian and charity activities – because of failure to register in the roster of “foreign agents”. Additionally, legislation was enacted in 2015 permitting the executive branch to declare as “undesirable” any NGO deemed to imperil the constitutional order, national security and defence.

In Hungary, in a context where members of the ruling coalition have publicly questioned the legitimacy of foreign-funded NGOs to carry out what they consider “political activities”, the government has recently announced plans to amend the law on non-governmental organisations and clarify who is required to make public asset declarations. Meanwhile, in Poland, some politicians and the state TV broadcaster labeled certain civil society organisations as self-serving, working against Polish interests, or ‘subordinate to the previous ruling system’. In this context, the government’s latest proposal to establish a National Centre for the Development of Civil Society – a centralised institution to be supervised by the Prime Minister and tasked with coordination as well as overseeing distribution of public funds to NGOs – has raised suspicions that the new structure may be used to funnel funding to government-friendly NGOs while starving critics.

#### *Administrative and judicial harassment, abusive inspections, and mass closures*

Mass inspections of NGOs suspected of being “Foreign Agents” by government agencies were under way during my country visit to the Russian Federation in 2013. These had a distinctly chilling effect on civil society and forced many NGO leaders to devote huge amounts of time and energy towards preparing documents the authorities already had at their disposal. Inspections, albeit on a smaller scale, also took place in Hungary in 2014 as a result of publication by the Government of a list of those which had received financial support from Norwegian grants. Those NGOs were named “paid political activists” aiming to “enforce foreign interests” in Hungary. The government cited national sovereignty and security as justification for the measures targeting civil society groups. Remarkably, the UN Special Rapporteur on the situation of human rights defenders indicated that Hungarian government

officials had acknowledged that the investigation was “political”, and that the enormous amount of time and resources spent on futile scrutiny of civil society could have been put to better use.

Following the failed attempt of a coup d'état in Turkey in July last year, executive decrees issued under the state of emergency have led to the closure or liquidation of some 1 400 associations, including NGOs, under a simplified administrative procedure for the disbanding of such groups and the transfer of their assets to the state treasury. As I have stressed, closing NGOs without judicial proceedings is unacceptable under international human rights law. While the state authorities have justified those drastic measures by the alleged links of the organisations concerned with coup plotters and terrorist networks, Amnesty International has pointed out that many of the targeted groups were working on human rights issues such as prevention of torture, women's rights, humanitarian assistance, providing aid to refugees, and children's rights.

### *Not “enemies of the people” but human rights watchdogs*

Several countries in the Council of Europe have witnessed smear campaigns orchestrated by the government or actors close to the government against NGOs, particularly human rights and anti-corruption NGOs. In the summer of 2014 the authorities in Azerbaijan began a wide-ranging crackdown against the most prominent human rights defenders and civil activists, many of whom were criminally prosecuted on trumped-up charges and sentenced to prison. The human rights defenders concerned were openly labeled as “traitors” and “foreign agents”. Whereas several activists were released in 2016, others are still in prison and many criminal cases remain open. In 2016 the European Court of Human Rights concluded that the actual purpose of the criminal prosecution of Rasul Jafarov – head of the “Human Rights Club” NGO – was to silence and punish him for his activities in the area of human rights.<sup>47</sup>

During my visit to Turkey in 2016, human rights NGOs informed me that following statements at the highest political level challenging their monitoring role, human rights groups were prevented from interviewing locals about security operations in the southeast and visiting affected areas. Recently, particular targets of negative official rhetoric in Hungary, Poland, and “the former Yugoslav Republic of Macedonia” have been NGOs funded by the Hungarian-American philanthropist George Soros, whose Open Society Foundations were among the main funders for all human rights NGOs in Central and Eastern Europe in the 1990s and continue to operate in some countries in the region today.\* Regrettably, harsh stigmatising of NGOs can be observed in several other European countries as well, including Bulgaria, Romania, Serbia, and Slovakia.

Restrictive measures against civil society groups are often justified with reference to ensuring accountability and transparency. On closer examination, this justification does not hold water, as NGOs must submit regular financial and other reports to the authorities anyway. Another justification invoked by governments relates to

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47 ECtHR judgment, *Rasul Jafarov v. Azerbaijan*, application no. 69981/14, 17 March 2016.

national sovereignty and the need to counteract alleged interference by hostile foreign powers into political decision-making or to promote unrest. Portraying advocacy NGOs as masked “political parties” is a false justification for restricting their legitimate watchdog function in a democratic society as NGOs do not participate in elections, though they can conduct election monitoring.

Underlying the often-hostile reactions by authorities to the work of human rights organisations as watchdogs is the recognition that a state’s human rights record is an important matter, and criticism in this respect can be particularly sensitive. It is precisely the activities that are the natural domain of civil society institutions – those relating to human rights, the transparency of government, or possible official misconduct – that in a climate of intimidation and hostility, tend to be designated as “political” and “against state interests”.

However, international human rights law explicitly recognises the right to participate in public affairs. The watchdog role of NGOs involves imparting information and ideas on all matters of public interest and is considered to be similar to the role of the press. The European Court of Human Rights has pointed out that the use of the term “political” in respect of activities of NGOs could lead to diverse interpretations and include any goals which relate to the normal functioning of a democratic society. Council of Europe standards explicitly acknowledge that the contributions of NGOs to society are made through a varied body of activities, ranging from acting as a vehicle for communication between different segments of society and public authorities, to advocacy for changes in law and public policy.

### *The way forward*

We have to be clear: a constructive dialogue on matters of public interest, based on facts, is to the benefit of all. Instead of stigmatising NGOs, governments should facilitate their participation in mechanisms for dialogue and consultations on public policy, with the objective of identifying solutions to society’s needs.

In particular, governments should treat NGOs equally irrespectively of their sources of funding and should always retain the presumption of lawfulness of an NGO’s activities according to the states’ international obligation to create an enabling environment conducive to the work of human rights defenders.

In order to effectively perform their legitimate functions NGOs should be free to solicit and receive funds not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies. Many human rights and anti-corruption NGOs have no other choice but to look abroad for funding, as government funding for NGOs in some countries is rarely allocated to advocacy NGOs addressing sensitive topics.

Furthermore, states should refrain from imposing burdensome administrative requirements on NGOs and should always limit interference with the right to freedom of association according to the necessity and proportionality requirements. Sanctions can only be applied in exceptional circumstances as a last resort and only in cases of serious misconduct by an NGO.

To cite the European Court of Human Rights, “the way in which national legislation enshrines [...] freedom [of association] and its practical application by the authorities reveal the state of democracy in the country concerned”. Human rights NGOs and defenders play a key role in the development and maintenance of human rights, democratic governance, and the rule of law, and in promoting awareness about those issues. Societies need them to become resilient, enrich public debate and pluralism, involve the populace in public life, contribute proposals that can address the major challenges facing the continent today, preserve peace and better the lives of everyone. Therefore, their freedom to associate must be protected. The space in which they operate must be expanded.

\*Full disclosure: I ran an NGO in Latvia that received grants from the Soros network in the 1990s, worked part-time as a programme manager at the Soros Foundation – Latvia, then served as a member of its board in the late 2000’s.







## 5. Children's Rights

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### INTRODUCTION

Children's rights have been a priority of my mandate: as of this writing, I have dealt with different aspects of this issue in 28 of my country reports. When taking office, I felt that I had a special duty to focus on this subject as there was no specialised monitoring mechanism devoted to children's rights in the Council of Europe, although the Organisation has for a decade been very active in this regard.

In practice, children's rights can also work as a constructive entry point in my dialogue with member states to address certain sensitive issues of a broader nature as existing international standards, especially the UN Convention on the Rights of the Child, provide a solid basis to do this.

Statelessness is one such issue. I have been raising the problem of stateless children in my home country for 20 years, but transmission of statelessness from one generation to the next remains an issue of concern in a number of member states. I was determined to tackle this as Commissioner for Human Rights. Over the last five years, we have witnessed some positive developments. At international level, momentum was created with the setting up of the European Network on Statelessness, an alliance of NGOs working towards ending statelessness, and with the launching by the United Nations High Commissioner for Refugees (UNHCR) of a global campaign to eradicate statelessness by 2024. At national level, a number of governments took legal and practical measures to limit the risks of statelessness at birth and ease access to nationality for stateless children and their parents. It is important to sustain these positive trends as substantial progress remains to be made. At the same time, we must remain vigilant and anticipate the emergence of situations that can generate new problems of statelessness, notably among migrant and refugee children.

Immigration policies that are not human rights compliant are another issue of concern in respect of which I chose to focus specifically on the situation of children. I have in particular emphasised that children should be considered full bearers of rights in all migration and asylum proceedings. Immigration detention of children has been an area of special concern, as this practice results in serious infringements on children's rights. Together with UN bodies and a range of civil society organisations, I have been calling for member states to end all forms of detention of children on grounds of their and their parents' immigration status. Immigration detention is never in a child's best interests. In a context of increasing criminalisation of migrants

and refugees and growing use of detention, it is important to remind states of the detrimental impact of detention on children and of the need to make non-custodial alternatives available.

When assessing the impact of the economic crisis and austerity measures on human rights, I also paid specific attention to children. The crisis has had long-lasting negative consequences for children in several ways. Budgetary allocations for childhood and family policies were among the first to be cut. While some of the countries that were hard hit by the crisis seem to be now recovering, only limited measures have been taken to reinvest in such policies. Child poverty does not appear to be decreasing and a large number of children still live in destitute families, are victims of housing evictions and are sometimes obliged to work to help their families make ends meet. The negative impact of budgetary restrictions on juvenile justice, child protection and other key services also continues to be felt. In the longer term, child poverty and other violations of children's rights will have very negative consequences for European societies. It is high time that states take children's rights more seriously and adopt resolute measures to repair the damage caused by the crisis and combat child poverty.

Inclusive education is another area where substantial progress remains to be made. I have paid particular attention to school segregation affecting Roma children (see chapter below on the human rights of Roma and Travellers), children with disabilities, and migrant and refugee children. Being educated in separate settings is often the starting point of a life of exclusion. In the countries of the Western Balkans, ethnic or linguistic divides in society are reproduced in schools, which can only feed intolerance and threaten the social cohesion of these countries. Building more inclusive education systems is key to fighting segregation and discrimination against entire groups of children, but it goes far beyond that. It benefits all children by developing their life skills and can make societies more open to sharing and learning from diversity. This is all the more important now that European education systems have to integrate substantial numbers of newcomers as a result of the recent increase in the arrivals of migrants and refugees. In 2017, I issued a Position Paper on *Fighting school segregation through inclusive education*, which provides a set of recommendations for member states and other stakeholders.

A majority of member states now prohibit all forms of violence against children. However, in practice, violence against children remains widespread in Europe. In my work, I have raised concerns about violence against children in institutions, violence faced by refugee children on the road, sexual abuse and domestic violence. In several countries, there is still a tendency to consider all issues surrounding the upbringing of children, including the use of violence, as matters that are better left to families to address. Thus, children are not considered rights holders, nor is violence against them considered a rights violation. In this context, I have used the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) as a tool to address violence against women and children, as the two phenomena are often intertwined. Combating violence against children also implies more efforts to raise awareness about children's rights, as enshrined in the UN Convention on the Rights of the Child, to which all member states are parties but whose provisions are in practice often overlooked.

Lastly, an issue of concern that I highlighted during several country visits is the persistently high number of children who live in institutions, because they are in state care or have a disability, or for other reasons. Children in institutions are often victims of abuses for which no remedies are available. Life in an institution is in most cases a life with limited social interactions, leading to marginalisation and rights violations, including later in life. I believe that member states should take far more resolute steps to provide all children with a protective and caring environment in which they can grow and develop while their rights are respected.

## **GOVERNMENTS SHOULD ACT IN THE BEST INTEREST OF STATELESS CHILDREN**

*Human Rights Comment published on 15 January 2013*

Citizenship is the “right to have rights”. Without citizenship, one lacks not only political rights, but often social and economic rights as well. On a symbolic level, citizenship implies being a full member of a national community, and even further, of humanity.

Hundreds of thousands of persons in Europe do not have citizenship of any state. Statelessness is not disappearing with time, but being transmitted over generations. Governments should act more vigorously to break this cycle by targeting measures to end statelessness, especially among children.

*The best interest of the child is to have citizenship*

There should be no stateless children in Europe. The UN Convention on the Rights of the Child, ratified by every Council of Europe member state, provides that all children have a right to a nationality. The Convention’s overarching principle is that “In all actions concerning children [...] the best interests of the child shall be a primary consideration.” It is clearly in the best interest of the child to have citizenship from birth.

While children are vulnerable, the risk of statelessness is greatest among the poorest and most excluded – minorities, the displaced, refugees, orphans, and the illiterate. Statelessness increases the vulnerability of children to serious human rights violations, such as trafficking, labour and sexual exploitation, as well as illegal adoption. This means that stateless children often face multiple, mutually reinforcing forms of marginalization.

*Stateless children can be found all over Europe*

The origins of statelessness in Europe are diverse. In some cases, statelessness derives from migration and conflicting nationality legislation. In others, it is a consequence of state succession or state restoration. Many Roma face obstacles in proving or acquiring a nationality due to a lack of personal identity documents, especially birth certificates.

While data broken down by age are rare, UNHCR estimates that the successor states of the former Yugoslavia have about 22 000 stateless persons. Another 22 000 to

50 000 persons in these countries are at risk of statelessness, which often means they lack identity documents. Though some are from other former Yugoslav republics, most are local Roma, Ashkali, and Egyptians. Over the last 20 years NGOs estimate that about 15 000 stateless Roma from former Yugoslavia settled in Italy, where they do not possess citizenship of Italy or any other state.

Another significant population of stateless children lives in Latvia and Estonia. Legislation in Latvia grants a special status to 304 000 “non-citizens” while Estonia has some 92 000 “aliens” or “persons of undetermined citizenship”. Among them, at the end of 2011, there were about 1 500 stateless children under the age of 15 in Estonia and approximately 9 000 in Latvia. While parents have the right to register these children as citizens, many do not, either because they are unaware of this opportunity or are so alienated that they opt to leave their children stateless. The Estonian and Latvian governments have allowed this situation to persist, permitting parents to choose a status that is not in the best interests of the child.

Two other European countries with a significant number of stateless persons are Russia and Ukraine, where the primary risk groups include Roma and persons belonging to minorities deported under Stalin. A recent census put the number of self-identified stateless persons in the Russian Federation at 178 000. In Ukraine, the figure is believed to be around 40 000, which includes almost 7 000 formerly deported persons who returned to Crimea.

#### *What governments should do*

States should reach out to vulnerable groups, such as the Roma, and ensure that all children are registered in birth registry books immediately after their birth. States should grant citizenship automatically at birth to children born in their territory who would otherwise be stateless and not permit parents to choose an option that is clearly not in the child’s interest. States should also establish effective and accessible administrative procedures for all persons to acquire nationality, prioritising access for children and their guardians. NGOs and bar associations that provide counselling and free legal aid may play a key role in these processes.

Effective policy must be based on reliable data. States should collect disaggregated statelessness data on a regular basis. They should also cooperate more effectively in order to solve cases of statelessness in regions affected by state succession, such as the former Yugoslavia, where persons need to access documents from different countries in order to establish their nationality. Finally, states should accede to the relevant international conventions on statelessness (the 1954 and 1961 UN Conventions and the 1997 and 2006 Council of Europe Conventions).

Governments should stop foisting the blame on history, other states or on “irresponsible parents,” but rather take the initiative to address statelessness and prioritise the best interests of the child.

## CHILD LABOUR IN EUROPE: A PERSISTING CHALLENGE

*Human Rights Comment published on 20 August 2013*

Many observers thought that child labour was a thing of the past in Europe. However, there are strong indications that child labour remains a serious problem and that it might be growing in the wake of the economic crisis. Governments need to monitor this situation and to use the UN Convention on the Rights of the Child and the European Social Charter as guidance for preventive and remedial action.

Vulnerable people are always disproportionately affected in times of economic downturn. The link between declining economic growth and increasing child labour is therefore no surprise. With the recession many European countries have drastically cut social aid. As unemployment soars, many families have found no other solution than sending their children to work.

### *Hazardous and dangerous jobs*

The prevalence of child labour in developing countries is a well-known problem – according to the International Labour Organisation today more than 250 million children between the ages of 5 and 14 work. In trying to map the situation in Europe, however, my Office has found that information is very sparse. In fact, it seems to be a taboo subject. But we have been able to accumulate enough information to see a grim picture.

According to UN research, in Georgia 29% of children aged 7-14 are working. In Albania the figure is 19%. The government of the Russian Federation has estimated that up to 1 million children may be working in the country. In Italy, a study of June 2013 indicates that 5.2% of children younger than 16 are working. But from most other countries no data are yet available.

Many of the children working across Europe have extremely hazardous occupations in agriculture, construction, small factories or on the street. This has been reported for example in Albania, Bulgaria, Georgia, Moldova, Montenegro, Romania, Serbia, Turkey and Ukraine. Work in agriculture may involve using dangerous machinery and tools, carrying heavy loads and applying harmful pesticides. Working in the streets leaves children vulnerable to abuse and exploitation.

In Bulgaria child labour is apparently very common in the tobacco industry, with some children working up to 10 hours a day. In Moldova reports indicate that school directors, farms and agricultural cooperatives have signed contracts that require students to help with the harvest.

Other countries at risk are those that were badly affected by austerity measures: Cyprus, Greece, Italy and Portugal. Many children reportedly work long hours also in the United Kingdom.

Throughout Europe Roma children are especially at risk. Another particularly vulnerable group are unaccompanied migrants under 18, originating from developing countries.



### *What should be done*

Governments urgently need to pay specific attention to the problems of child labour, to investigate, collect data and monitor. Most countries have adequate legislation but fail to monitor actual practices.

- The best interests of the child should be the guiding principle, as stated in the UN Convention on the Rights of the Child and the standards of the European Social Charter.
- The authorities should carefully evaluate the potential impact on child labour caused by budgetary cuts in the field of education and training.
- They should also evaluate the impact on child labour of cuts in social policies and support to families: the main cause for children having to work is poverty.
- Labour inspection agencies should be in a position to do their work adequately.
- States should vigorously combat trafficking of children for work and exploitation. The seven Council of Europe member states who have not yet ratified the Convention on Action Against Trafficking in Human Beings should do so, and all member states should cooperate with the monitoring group GRETA.

### *What future for these children?*

I am deeply concerned that limited attention is being paid to the risks of child labour in Europe. In most countries officials are aware of the problem, but few are willing to tackle it. That data and figures are almost non-existent or highly approximate is a point of worry in itself. One cannot fight a problem without information about its extent, character and effects.

A particularly worrying aspect is that work interferes with children's schooling: their results are soon affected and many eventually drop out of school. This only perpetuates the cycle of poverty. Choosing education over work for children is the only way for a country to develop.

Many concrete measures need to be taken. Last year we saw one such action in Turkey when the government passed a law that raised the age of compulsory education to 17 in order to minimise the risk of labour exploitation. More such initiatives are needed.

Letting the problem of child labour go unaddressed not only puts the future of these children at risk. It also raises the question of what our societies will look like in the future when these children grow up having missed the chance to play and to learn at school, but having been exposed to various health risks at an early age. We need to act now for the future of these children and our own societies.



## DECISIONS CONCERNING MIGRANT CHILDREN MUST ALWAYS BE BASED ON THEIR BEST INTERESTS

*Human Rights Comment published on 19 September 2013*

Migrant children are particularly vulnerable – especially if they are unaccompanied, travelling without parents or relatives. Many have been traumatised and abused before arriving in Europe. They must be met with care and with respect for their rights. Yet, there are many accounts of harsh treatment.

State authorities must never forget that migrant children, including those who are asylum seekers, are first of all children. Children's rights must always have priority and all actions should be based on the best interests of the child. In other words: immigration control should never override the UN Convention on the Rights of the Child.

### *Return houses: high risk projects*

Several European governments are currently considering a solution to facilitate the return of unaccompanied children. Authorities in the Netherlands, Norway, Sweden and the United Kingdom, with Denmark as an observer, are trying to set up an institution in Afghanistan with the name "Welcoming Centre". The coordinator, Sweden, is currently negotiating with authorities in Afghanistan for specific premises. The idea is that the children shall stay at the centre until they can be reunited with their families.

Local and international NGOs as well as bodies within the UN and the Council of Europe have expressed concern about the plan. An experts report<sup>48</sup> concerning this issue underlines that family tracing in Afghanistan is all but impossible. The – so far limited – experience of sending children to return houses in war-torn countries has also shown that such procedures place children at a very high risk of trafficking for sexual and military purposes and in general at a risk of persecution in the return country. Most of the children have disappeared a few days after return.

The principle of *non-refoulement* proscribes the forced return to places where one's life or freedom is threatened. It is a core principle that children should never be returned to places where their safety and well-being are at risk. Returning states are thus responsible for the further fate of the returned children.

### *Deportations are often traumatising*

Forced return decisions concerning migrant children often fail to fully take into account the best interests of the child. Some deportation proceedings involve the use of force – even if force is used in respect of adult members of the family, it is traumatising for the children.

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48 Refugee Studies Centre, *The deportation of unaccompanied minors from the EU: Family tracing and government accountability in the European Return Platform for Unaccompanied Minors (ERPUM) project*, 3 May 2013.

These decisions also frequently lead to a period of detention of minors, with or without family. Thousands of migrant children are detained every year in Europe, although they have not committed any crime. This practice continues to occur in many countries, even where it has been banned. France is an example of this, although cases of detention of migrant minors are no longer routine as used to be the case before a ban in 2012.

Forced returns can lead to the separation of families, for instance when parents have different nationalities and are sent back to different countries, or when one or both parents are expelled, but not the child.

Deportation decisions are sometimes taken even if an unaccompanied migrant child does not have adequate access to asylum procedures – especially in countries without an effective guardianship system, such as Greece. A guardian who can represent the interest of the child in the asylum procedure must always, and rapidly, be designated.

### *Sent to unknown countries*

Several thousand persons have been forcibly returned to Kosovo\* and other Balkan countries by western European states in recent years, mainly from Austria, Germany, Sweden and Switzerland. Some of the children involved were born in the host country and have no ties whatsoever to the place their parents fled from.

They end up in a country whose language they do not speak, where they face substandard living conditions and often have limited opportunities for schooling. Many of the returnees belong to minorities, in particular Roma. It is easy to imagine the tragedy for a child to be uprooted from country, school and friends.

### *Best interests of the child*

Detention, separation, the use of the contested method of X-ray tests to determine age, hasty deportation decisions. Migrant children are indeed exposed to a heightened risk of violations of their human rights. Those who are separated from their families are obviously at particular risk.

It is time to review the policies towards migrant children. Children are first of all children and state authorities in Europe should always act with their best interests at heart. Forced returns to countries where the child's best interests may not be served should end.

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\* All reference to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.

## PROTECTING CHILDREN'S RIGHTS IN THE DIGITAL WORLD: AN EVER-GROWING CHALLENGE

*Human Rights Comment published on 29 April 2014*

Most teenagers spend a substantial share of their time on Internet, often using social media, which have become a major means of socialising. Growing access to the Internet has brought about almost unlimited possibilities for children to access content and exercise their rights, including the right to receive and impart information. However, these benefits go hand in hand with growing risks for children of violations of their rights.

### *Children's rights threatened in multiple ways*

One important danger relates to the private life of children. Many teenagers use social media to post extensive information and photos of a personal nature, which will remain online for potentially long periods of time. This information can have harmful effects on their lives as it can be used by educational institutions or even potential employers in the future. The profiling of information and retention of data regarding children's activities on Internet for commercial purposes also raises privacy concerns, to which children are mostly not sensitized.

Children also risk coming into contact with illegal or harmful content, which is increasingly available online, including pornography, but also racist and violent material, and content inciting substance abuse, suicide and other forms of self-harm.

Children can themselves become perpetrators and inflict harm on others through the Internet. Harmful activities include bullying of other children on social media, which is increasingly reported to helplines for children. This can lead to tragic consequences, as illustrated by recent cases where a number of teenagers took their lives after allegedly having been bullied and incited to commit suicide on ask. fm social media. Some children also circulate demeaning images (for instance of a sexual or violent nature) of other children, sometimes after forcing the latter to generate such images themselves.

The Internet is also used by predators to contact children under a false identity with a view to abusing them, including sexually (a practice referred to as "grooming"), and even to recruit them for trafficking purposes.

Identity theft is another danger, which was dealt with by the European Court of Human Rights in 2008 (in *KU v. Finland*).<sup>49</sup> In this case, an advertisement of a sexual nature was posted on a dating site on behalf of the applicant, a 12 year old boy, without his knowledge. The Court held that, by failing to require the Internet Service Provider (ISP) to provide the identity of the person responsible for posting the ad, the respondent state had violated the boy's right to respect for his private life.

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49 ECtHR judgement, *K.U. v. Finland*, application no. 2872/02, 2 December 2008.

### *What should be done?*

Responses to these threats require efforts by parents and educators, the authorities of member states as well as private companies such as ISPs. These responses should include a mix of legal and practical measures respectful of the best interests of children and of their right to participate in debates on these issues and to be heard.

#### *Empowering children:*

Giving children the tools to protect themselves against threats on the Internet and become more aware of their responsibilities is probably the most effective way of safeguarding children's rights on the Internet. The right for children to remove their traces on the Internet and to be "forgotten" has been widely advocated. It is of course important that children are able to remedy the consequences of imprudent sharing of personal information, but it is even more important to act preventatively by raising their awareness about potential risks and long-term consequences of sharing personal information on the Internet. Many texts adopted by the Council of Europe and other international organisations over the last decade emphasise the crucial need for empowerment of children through education, including digital literacy. Children should also be able to identify, understand and deal with harmful content. Moreover, they should become more knowledgeable about human rights, including the right to freedom of expression and the right to privacy, but also the rights of others which they need to respect and be careful not to harm.

Educational programmes must target children, including at an early age, but also parents and other educators. More importance should be given to digital literacy in school curricula. Initiatives such as Insafe, a network supported by the European Commission to implement awareness-raising campaigns on e-safety at national level, are of crucial importance. The Council of Europe has also published an Internet Literacy Handbook. Research on children's vulnerabilities on the net should be further supported in order to increase the effectiveness of education tools.

#### *Creating a safe environment for children on the Internet:*

Dealing with the dissemination of harmful and illegal material is a complex task. Deleting illegal material at the source is in practice very difficult because websites hosting such content can be located anywhere in the world, usually outside the scope of European cooperation.

Therefore, other tools are used in various countries to combat the dissemination of illegal material, notably child abuse material, often through blocking lists and filtering. The use of such tools is, however, controversial as it can lead to disproportionate restrictions to freedom of expression, in the absence of a clear legal basis, sufficient transparency and effective safeguards against misuse, including judicial oversight. Indeed, blocking imposed through ISPs has sometimes been extended to sites unrelated to child abuse, such as sites dealing with sexual and reproductive health. Some member states, under the pretext of protecting children, are blocking content related to LGBT issues, even though the European Court of Human Rights found that

there is no scientific evidence that such materials have a deleterious impact on the well-being of children.

Moreover, blocking and filtering can detract the authorities from their duty to tackle child abuses as such. Perpetrators of child abuse, including those producing and disseminating illegal content and child abuse material on the Internet, are real persons that must be tracked and sanctioned, in application of international conventions such as the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and the Convention on Cybercrime. Practices such as “grooming” should therefore be criminalised. Victims of abuses must be identified and rescued. States should also step up action against trafficking of children, in line with guidance provided in the European Convention on Action against Trafficking in Human Beings.

It seems more appropriate to use blocking and filtering tools at the level of private and school computers, using parental control, safe spaces for children on Internet and trustmarks and labels allowing for distinction between harmful and non-harmful contents. The German site “Netz für Kinder” is a good example of a website on which children can safely surf, learn and play.

#### *Developing human rights education online:*

Despite the existence of risks, Internet offers almost endless possibilities for children to learn, share, create and socialise. Therefore, it is necessary to generate more content aimed at imparting knowledge about human rights, which are attractive and adapted to different age-groups. International human rights institutions have taken initiatives in this respect, such as the UN Cyber School Bus or the UNESCO-led D@dalos Education Server for Democracy, Peace and Human Rights Education. More needs to be done to prepare generations of active citizens committed to promoting and respecting human rights.

## **CHILD-FRIENDLY JUSTICE: WHAT IT MEANS AND HOW IT IS REALIZED**

*Keynote speech at the Conference on the occasion of the 25th anniversary of the adoption of the Convention on the Rights of the Child, Stockholm, Sweden, 16 May 2014*

I am very pleased to take part in this conference among such distinguished participants. Children’s rights are high on my agenda as Council of Europe’s Commissioner for Human Rights. Since the beginning of my mandate (April 2012), the main angles from which I have looked at children’s rights are: the impact of the economic crisis on children’s rights and the situation of children whose human rights are particularly threatened: migrant children, stateless children, Roma children and children with disabilities. I have so far dealt with issues pertaining to children’s rights in nine country visits, and subsequent reports (Portugal, Czech Republic, Greece, Estonia, Spain, “the former Yugoslav Republic of Macedonia”, Denmark, Montenegro and Romania).

While tackling the human rights problems to which these children are confronted, I have come across various shortcomings affecting juvenile justice generally including: lack of access to justice; lack of child-friendly judicial procedures; lack of programmes of crime prevention; and the weakening of non-judicial remedies (such as Ombudsmen). Moreover, in a number of countries I have dealt with the topic of administration of justice as a whole, paying particular attention to the issues independence, impartiality and effectiveness. It is clear that gaps affecting justice systems as a whole also have a substantial impact on juvenile justice.

I have gladly agreed to writing a paper for this Conference, where I will provide a slightly more detailed analysis, based on my experience so far, of barriers in achieving truly effective and human-rights compliant juvenile justice systems. I will also reiterate some key recommendations on how member states can overcome such barriers.

But today, I would like to insist on two points: 1) the need to develop/strengthen human-rights based juvenile justice systems, that are firmly anchored to the rights protected under the UN Convention on the Rights of the Child (UN CRC); 2) the connections between the economic crisis and juvenile justice.

### *1. The need for a more human-rights based approach to juvenile justice*

Over the last 35-40 years, a wide range of international standards have been developed regarding juvenile justice (by the UN and the Council of Europe notably). The adoption in 1989 of the UN CRC constituted a milestone as it anchored some of the key principles of juvenile justice into international human rights law.

However, in stark contrast to this solid international legal basis, there are still a few countries in Europe in which there is no juvenile justice system in place. In many others, existing systems do not fully protect the rights of children, due to ill-conceived or incomplete policies, to the lack of means allocated to juvenile justice but also to a prevailing punitive approach to real or perceived “youth crime”.

Why is there still such a resistance to the idea of a dedicated juvenile justice? I believe that it is rooted in a still widespread lack of awareness of children’s rights, as protected under the UN CRC and Council of Europe instruments. That children, just like adults, are full bearers of rights is a fact that is not yet genuinely acknowledged, even though all Council of Europe member states are parties to the UN CRC. In some countries, this results in a stark reluctance of society to accept the very idea that justice should be adapted to take into account children’s rights and needs. Juvenile justice is widely perceived as undue state interference with parents’ rights to educate their children. In other countries, it is seen as an unduly weak response to youth crime instead of a means of providing justice without violating the rights of children at the same time.

Consequently, the protection of children’s rights in several areas of life remains sometimes conceived as a matter of goodwill, or positive practice, rather than as the implementation of a state obligation. Many systems lack a rights-based approach, firmly anchored around the key CRC rights, and first and foremost, the right of children to have their best interests treated as a primary consideration in all measures and decisions affecting them.

Against this background, monitoring by international human rights institutions takes on an additional dimension: not only is it crucial to improve the protection of children's rights, but, as a precondition to that, it is also an essential tool to remind states that protecting children's rights is an international obligation and to raise their awareness about what those obligations actually mean in practice. I see this as part and parcel of my work.

Indeed, in the framework of both my country and thematic work, the lack of adequate safeguards of children's rights is unfortunately a regular finding. This is particularly the case in certain areas, such as migration and asylum proceedings, in which children are all too often considered as "luggage of their parents" rather than holders of rights, including the right to seek asylum on grounds of child-specific persecutions. Unaccompanied minor migrants are also often left unprotected in asylum and migration proceedings, due to ineffective guardianship systems, but also to a general lack of consideration for their extreme vulnerability and the high risks of violation of their rights that they face.

I have also witnessed that children belonging to socially-excluded groups, such as the Roma, and their families often completely lack information and awareness about their rights and existing remedies. Yet, such children are highly vulnerable to a wide range of human rights violations, which are left unattended. Roma children living in large slums are for instance particularly exposed to the risk of violence, sexual and labour exploitation and trafficking in human beings. They would require easy access to and protection from the justice system. However, justice is for most of them out-of-reach. Moreover, they often suffer from the rights violations committed against their parents, without any consideration being given to their best interests. The lack of identity and civil registration documents affecting entire Roma communities, which results in many Roma children being automatically stateless or at risk of statelessness, is one such example.

Children with intellectual and psycho-social disabilities, particularly those living in institutions, also frequently face obstacles in accessing justice. They often lack adequate information and advice. Ineffective guardianship systems and, in general, restrictive legal capacity legislations, constitute additional serious barriers. In September 2013, I intervened as a third party before the European Court of Human Rights in a case concerning the treatment of a young man of Roma origin, Mr Valentin Campeanu, who suffered from a severe mental disability and was HIV positive. He was an orphan and had no legal representative. He died in a Romanian psychiatric institution. Although Mr Campeanu was 18 at the time of his death, this case raises important questions for the access to justice of children detained in psychiatric institutions. The fact that these children are often abandoned by their families and relatives and the absence of effective guardianship systems deprives them of access to any remedy, even though they are highly vulnerable to a wide range of abuses, including violations of their right to life and not to be subjected to inhuman and degrading treatment.

If a right cannot be enforced, it is little more than rhetoric. Awareness-raising about children's rights must therefore go hand-in-hand with proactive information on existing remedies, first and foremost at national level, but also at international



level. I warmly welcome the entry into force of the Additional Protocol to the CRC on individual communications. Similarly, it is of key importance to continue to raise awareness about the possibility of using remedies at European level, such as the ECtHR and the collective complaints procedure established under the European Social Charter, in order to uphold children's rights.

## *2. Connections between the economic crisis and juvenile justice*

Austerity measures taken as a result of the global economic and financial crisis provide further illustrations of how children's rights continue to be denied due consideration and protection. I have found that the best interests of children have frequently been neglected by decision-makers in charge of designing and implementing budget cuts. In fact, in several countries, such cuts have disproportionately hit social, educational, health and other policies and programmes targeting children, resulting in children becoming one of the groups most harshly affected by the impact of austerity.

Juvenile justice as such has also been hit by budgetary restrictions. Prevention and reintegration programmes, involving social work, mental health and substance abuse programmes, community policing work, and inter-agency work, have been cut. NGOs which are playing an important role in implementing such programmes have had their capacity significantly diminished. Budgetary restrictions have also resulted in limited services offered in institutions in which children are detained. In countries like Romania, which I recently visited, lack of resources result in unequal geographical distribution of specialised juvenile justice services.

Additionally, it is worrying that some non-judicial remedies, such as children's ombudsmen and other national human rights institutions, have had their budgets tightened while at the same time they have witnessed a steep increase in complaints connected with the impact of austerity measures. Some institutions have even been closed down. However, these institutions constitute valuable alternatives to judicial proceedings. They often prove more accessible to children than courts and can provide adequate responses to certain categories of rights violations, notably social and economic rights. They also act as early-warning mechanisms. The member states should empower them by strengthening further their independence and capacity.

Since the beginning of my mandate I have worked towards promoting a human-rights compliant response to the economic crisis. At the end of last year, I published an Issue Paper on how to safeguard human rights in times of economic crisis. Governments often tend to argue that the economic crisis is a major factor preventing action in favour of human rights protection. However, the very same policies that are left unaddressed because of lack of resources to change them have often proven to be costly and, in many cases, also ineffective. Governments may be spending huge amounts of money to preserve systems that violate human rights without achieving tangible long-term results.

Against this background, the economic crisis should be used as a catalyst to review policies in place with a view to making them both more cost-effective and more respectful of human rights. Juvenile justice might be one of these areas. The authorities of the member states should therefore firmly anchor their juvenile justice policies

on evidence-based approaches. Objective evaluation of past policies, both in terms of enjoyment of rights and cost-effectiveness, is crucial. Measures that have not brought about the expected results, including as regards crime prevention, should be abandoned. The widespread policy of detention of children is one such policy. The member states should make use of the good practices regarding juvenile justice which have been identified throughout Europe, including prevention, reintegration and diversion policies, in order to build more effective and human-rights compliant policies.

In conclusion, it is my intention to continue to pay particular attention in my monitoring work to children's rights violations, including in the sphere of justice. In addition to evaluating the implementation of human rights standards in the member states, my mandate includes a duty to raise awareness about these standards and their practical implications. They are all too often ignored when it comes to their implementation with regard to the voiceless and powerless groups of society, such as children.

## **PROTECTING CHILDREN'S RIGHTS: EUROPE SHOULD DO MORE**

*Human Rights Comment published on 18 November 2014*

### *25 years of child rights protection*

Twenty-five years ago, on 20 November 1989, the UN General Assembly adopted the Convention on the Rights of the Child (UNCRC). It was a landmark development: for the first time, states recognised children as fully-fledged bearers of a range of human rights, just like adults. Today, the Convention is still the most important international text for the protection of children's rights globally. The monitoring system it established is a crucial tool to assess achievements and gaps at the national level. What is more, the mechanism allowing for individual complaints before the Committee on the Rights of the Child has opened a new avenue for children to have their voice heard and their rights recognised.

Substantial progress has been achieved since 1989 in Council of Europe member states. Legislation has been amended to improve compliance with the Convention's provisions, justice systems have been reformed to better address children's needs, national strategies for children have been designed in several member states and specific institutions have been set up to monitor respect for children's rights.

At the same time, member states still appear too ready to neglect their obligations in the field of children's rights. During my country visits, I have often heard that measures to protect children's rights cannot be implemented due to financial constraints, especially in times of austerity. I have also heard arguments against the enforcement of children's rights, in particular in the area of juvenile justice, on grounds that they allegedly unduly interfere with the right of parents to educate their children as they wish. Considerations relating to security or immigration control tend to routinely outweigh the child's best interests in many national contexts.

The main reason behind this lack of compliance with the provisions of the UNCRC is that children are still often not considered full bearers of rights by politicians, decision-makers, sometimes by professionals working with them and even by their parents. This results in persisting violations of their rights throughout the continent.

#### *Four key challenges regarding children's rights in Europe*

There are four areas in particular where member states can and must do better to ensure compliance with the provisions of the UNCRC and effective protection of children's rights.

Firstly, migrant children can still be detained in several member states, on the sole basis of their migration status or that of their parents. As recently highlighted by the Parliamentary Assembly of the Council of Europe, politicians are often pandering to rhetoric criminalising irregular migrants, including children, and immigration detention is therefore increasingly used in the member states. Although some countries prohibit the detention of migrant children, the ban is not always implemented in practice. Detention has long-standing harmful effects on children. It undermines their physical and psychological well-being and development, even more so when they are separated from their parents. However, children should also not be detained with their family in order to keep the family together, a practice still in force in several states, which the European Court of Human Rights (ECtHR) said the authorities should limit.<sup>50</sup> I strongly believe that migrant children, whether travelling alone or with their families, should never be detained.

Secondly, it is of deep concern that large numbers of children, especially Roma children and children with disabilities, are still barred from education in mainstream schools throughout Europe. They are kept in separate and/or remedial classes or schools, with very limited opportunities for integration into ordinary schools. Segregation of children in education is in my view one of the worst forms of discrimination. Sadly it is still widespread, as confirmed by various judgments of the ECtHR. It is a violation of the child's right to education on the basis of equal opportunities, and to develop his/her personality, talent and abilities to the fullest potential, as prescribed by the UNCRC. I have raised this concern with the authorities of various countries, including the Czech Republic, France, Hungary, Italy, Montenegro, Portugal, the Netherlands, Romania, Spain and "the former Yugoslav Republic of Macedonia". I have also highlighted that the chances for these children to integrate successfully in society at a later stage are very slim. They are in most cases likely to face a grim future of marginalisation and poverty.

Another issue I have dealt with in several countries is the persisting and self-perpetuating problem of statelessness among children. Around 680 000 persons are still stateless in Europe, a large number of whom are children. In some countries they are at risk of statelessness because of the lack of a birth certificate. This is often the case for children belonging to excluded and discriminated ethnic minority groups, such as the Roma. In other countries, children "inherit" the statelessness from their

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50 ECtHR judgment, *Popov v. France*, applications nos. 39472/07 and 39474/07, 19 January 2012.

parents. They can also be born stateless as a result of their parents' migration and of a conflict between the nationality law of their country of birth and that of their parents' country of origin. The UNCRC guarantees the right for every child to acquire a nationality. This should happen at birth or as soon as possible after birth because stateless children are rightless children and they run a higher risk of human rights violations, such as trafficking and exploitation, detention, lack of access to education, health and social care and justice.

The fourth and last challenge that deserves to be highlighted is poverty, which is affecting a growing number of children. According to the European Union,<sup>51</sup> 28% of children were at risk of poverty or social exclusion in the 28 EU member states in 2012 (against 24.8% for the overall population). Higher levels of child poverty are reported in several non-EU member states. The economic crisis and subsequent austerity measures adopted by many European governments, including the dismantling of social safety nets and cuts in programmes supporting families, have had a highly detrimental impact on the life of many children. Consequently, opportunities to access adequate health and social services, adequate housing and quality education have been shrinking. Children growing in poverty are also more vulnerable to child labour and other forms of exploitation; they are at times taken away from their family on the grounds of poor socio-economic conditions, a practice the ECtHR has found to be incompatible with the right to private and family life; and they have limited chances of accessing justice to seek redress and protection. This situation has a potentially devastating long-term impact for European societies, given that chronic poverty in childhood is one of the major root causes of poverty and social exclusion in adulthood.

#### *What should be done to improve protection of children's rights?*

These violations of children's rights can and must be remedied. It is crucial to raise awareness among decision-makers, but also the population at large, that children are full bearers of rights and that enforcing their rights in practice is not optional but an obligation of states.

States should expeditiously and completely end immigration detention of children, as advocated by the UN Committee on the Rights of the Child and the International Detention Coalition. Alternatives to detention should be put in place, on the model of existing good practices. Some states, such as Belgium or Sweden, have developed alternatives which are more respectful of human rights, less costly, and which have also proven effective in ensuring compliance of the persons concerned with migration-related decisions. They include accommodation in open facilities in the community, supported by a system of individual supervision, possibly in conjunction with reporting or registration obligations.

States must prohibit segregation in education, in all settings. They should actively pursue education of all children in inclusive schools, where adequate support is provided to children who need it. This requires that the authorities take active steps

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51 Eurobarometer, *People at risk of poverty or social exclusion*, 2015.

to convince the majority of the population and educators that ending segregation and promoting inclusion is in the best interest of all children, including of children without disabilities and those belonging to the majority population. States should also draw up ambitious plans for desegregation with targets and timelines, provide adequate support to the children and educational staff concerned by desegregation and promote integration activities at the local level.

States should ensure that no child born on their territory is left stateless and eliminate discriminatory laws and practices regarding access to nationality. They should in particular grant nationality to children born on their soil who would otherwise be stateless, in line with UN and Council of Europe relevant standards, in order to break the vicious circle of perpetuation of statelessness. The birth of all children should always be adequately registered, as a prerequisite for access to a legal identity and ultimately to a nationality.

States should acknowledge that child poverty is a major human rights challenge, assess on a regular basis the extent of the problem and take vigorous measures to reverse the trend. They should in particular evaluate the impact of austerity measures on the enjoyment by children of their rights, including their rights to adequate living standards, to the highest attainable standard of health, to education and leisure and to participation in society. The strategies elaborated by a number of member states to mitigate the negative impact of austerity measures on children are necessary, but not sufficient: governments must devise long term policies to tackle the root causes of child poverty. Further efforts should also be made to enable children in a situation of social exclusion to access justice and other remedies in case of violations of their rights.

## **INCLUSIVE EDUCATION VITAL FOR SOCIAL COHESION IN DIVERSE SOCIETIES**

*Human Rights Comment published on 5 May 2015*

Public debates on the need to ensure more inclusive education for children and young adults who face social exclusion in diverse societies have recently rekindled in Europe. Evidence<sup>52</sup> shows that in many European states the dropout rate of children coming from migrant families or minority groups, such as Roma, is at least twice as high as that of native or ethnic majority students. In many countries, children with disabilities and Roma continue to be educated separately, though adequate support would permit their full integration into mainstream education. Poverty, persistent discrimination and social marginalisation are the main underlying reasons for this inclusive education deficit, which needs to be reversed by determined and systematic action by all European states.

Exclusion from or divisions in education along ethnic and language lines have a devastating impact on social cohesion and reconciliation in multi-ethnic societies

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52 Council of the European Union Recommendation of 28 June 2011 on policies to reduce early school leaving (2011/C 191/01).

struggling to come to terms with a violent past. In Bosnia and Herzegovina generations of young people have been educated in mono-ethnic schools or in segregated “two schools under one roof”. Regrettably, there appears to exist no political will to change this system despite a national court ruling that found it discriminatory. Segregated education is also a reality for many Serb and Croat children in Vukovar, Croatia. I have also been concerned at the adverse effects of segregated education in “the former Yugoslav Republic of Macedonia” on pupils’ life and relationships as well as on this country’s social cohesion.

### *Everyone has a right to quality education*

Inclusive education, as defined by UNESCO, is a process that addresses and responds to the diversity of needs of all children, youth and adults through increasing participation in learning, cultures and communities, and reducing and eliminating exclusion within and from education. It is a principle that places the responsibility (a ‘positive obligation’) on states to educate all children without any discrimination within the mainstream system. As noted in 2014 by the Council of Europe Parliamentary Assembly, schools must become places where priority is given to teaching young people to live in harmony in an environment which respects freedom of thought and conscience, encourages learners to open up to others and develop a critical mind, while providing adequate support to those who need it.

Every child’s right to quality education ‘on the basis of equal opportunity’ is firmly enshrined in the UN Convention on the Rights of the Child. It is intrinsically linked to inclusive education and consists not only of one’s cognitive development but also of the inculcation of values and attitudes of responsible citizenship, and is a fundamental pillar of democratic societies. In addition, the UN Convention on the Rights of Persons with Disabilities requires the provision of quality education in a mainstream, inclusive environment to children with disabilities, establishing this as an international legal obligation. In fact, it has been estimated<sup>53</sup> that non-inclusion of persons with disabilities in Europe and Central Asia has cost a loss of 35.8% of these regions’ GDP.

In its landmark 2007 judgment in *D.H. and others v. the Czech Republic*<sup>54</sup> the Strasbourg Court’s Grand Chamber concluded that segregation of Roma in education was discriminatory and noted that discriminatory barriers to access to education for Roma children are present in a number of European countries. Similar judgments have been rendered in respect of Greece<sup>55</sup> and Hungary.<sup>56</sup> Regarding minority education more generally, the Framework Convention for the Protection of National Minorities requires states to promote equal opportunities for access to education at all levels for persons belonging to national minorities.

The Revised European Social Charter guarantees the right of persons with disabilities to independence, social integration and participation in the life of the community,

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53 UNESCO, *Policy Guidelines on Inclusion in Education*, 2009.

54 ECtHR judgment, *D.H. and others v. The Czech Republic*, application no. 57325/00, 12 November 2007.

55 ECtHR judgment, *Sampanis and Others v. Greece*, application no. 32526/05, 6 May 2008.

56 ECtHR judgment, *Horváth and Kiss v. Hungary*, application no. 11146/11, 29 January 2013.

including in education. The European Committee of Social Rights has upheld these principles in decisions on collective complaints concerning the lack of access to inclusive education, for example those concerning France and Belgium.

Inclusive education benefits all learners. It is not limited to integrating children with specific needs into mainstream education, but has a positive impact on all children, the school institutions and the community at large, as noted in a 2006 General Comment by the UN Committee on the Rights of the Child.

Inclusive, inter-cultural education is supported by the Council of Europe programme on Education for Democratic Citizenship and Human Rights Education, which includes a specific programme on South East Europe: "Regional Support for Inclusive Education". This project promotes the concept of inclusive education as a reform principle that respects and caters for diversity among all learners, with a specific focus on those who are at higher risk of marginalisation and exclusion, such as members of national minority groups.

### *Ways forward*

Inclusive education requires a mentality shift at state level, from seeing children or adults as a problem to identifying the existing inadequacies and improving the education systems themselves. It should target any child who may be excluded from mainstream education programmes. Particular attention needs to be given to members of vulnerable groups, such as migrants and national minorities, especially Roma, who often find themselves, or risk ending up, in situations of poverty and social exclusion.

Drawing upon Article 30 of the European Social Charter, effective measures are required in order to promote these persons' access to quality education. These should include positive measures to increase children's presence in all education levels, as well as the recruitment and promotion of education professionals with migrant or national minority backgrounds. There are good practice examples, like the Czech and Slovak Roma pupils who have been successfully integrated in primary or secondary mainstream education in the United Kingdom, after having attended special or *de facto* segregated (Roma-only) schools in the Czech Republic or Slovakia.<sup>57</sup>

As regards in particular Roma and Travellers, school mediators and/or assistants recruited from Roma and Traveller communities should be employed to facilitate the relations between these communities and the teachers and schools. They should be provided with adequate training and support and be accepted as far as possible as full members of the schools' professional teams.

Much needs to be done for the true inclusion of children with disabilities as well. In my country reports, for example those on the Czech Republic and Romania, I have often highlighted the need for accepting inclusion as a fundamental principle and as an enforceable obligation on mainstream schools which must become accessible and, where necessary, provide the individual support needed. A worrying tendency I

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57 Equality and the Roma Education Fund, *From Segregation to Inclusion. Roma Pupils in the United Kingdom. A Pilot Research Project*, November 2011.



encountered in this respect in some countries is the perpetuation of segregation while using nicer-sounding concepts such as “appropriate education” (the Netherlands) or even by labelling special schools “inclusive education centres” (Romania). True inclusion requires adequate resources – austerity budgets can never justify sub-standard education for children with disabilities, as I have stressed in respect of Spain.

Inclusive education needs to be clarified in national contexts and its principles promoted and reflected in national legislation and education policies and practices all over Europe. To this end, the schools’ capacity to create an inclusive environment needs to be increased, notably by improving teaching practices to prepare teachers for diversity in the classrooms. Inter-sectorial and inter-institutional cooperation in this field must be strengthened in particular between education, health and social protection bodies. Furthermore, it is necessary to develop systems of support in inclusive education including by making enrolment policy flexible and inclusive for all disadvantaged students. Monitoring and evaluation of school inclusiveness also need to be developed. Last but not least, parents’ involvement in these processes should be increased and their capacities strengthened.

Data indicate that each additional year of schooling raises the average annual GDP growth by 0.37%, thus helping to alleviate poverty and to eradicate social exclusion and marginalisation.<sup>58</sup> European states can no longer afford to ignore modern societies’ need for inclusive education. Equitable and efficient budgetary allocations to promote inclusive education are needed. It is a necessary investment for the long-term development and social cohesion of all European states.

## **NO VIOLENCE AGAINST CHILDREN IS ACCEPTABLE, ALL VIOLENCE IS PREVENTABLE**

*Human Rights Comment published on 20 September 2016*

This was the main conclusion of the 2006 UN Global study on violence against children. In 2015, the UN Special Representative on Violence against Children published the results of a worldwide consultation of children,<sup>59</sup> which highlighted that protection from violence was their second highest priority, right after education.

*Children have the right to a life free from violence*

States have an obligation, enshrined in international law, to protect children from violence. The United Nations Convention on the Rights of the Child guarantees the right for children to be free from violence, including “physical and mental violence, injury and abuse, neglect and negligent treatment, maltreatment or exploitation, including sexual abuse”. The European Convention on Human Rights (ECHR), which prohibits all forms of torture, inhuman and degrading treatment (Article 3), applies to children as well as to adults. The case-law of the European Court of Human

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58 UNESCO, *Education Counts. Towards the Millennium Development Goals*, 2011.

59 Unicef, *Why Children’s Protection from Violence should be at the Heart of the Post-2015 Development Agenda*, October 2014.

Rights (ECtHR) regarding violence against children clearly establishes that states have a positive duty to take effective measures to protect children from abuse.

The Council of Europe also adopted the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence and the Lanzarote Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

### *Violence against children remains widespread*

Violence against children is still too often considered socially acceptable and tolerated in Europe today.

After escaping violence in their home countries, in 2016 refugee children have again had to face physical and psychological violence in Europe's refugee camps, detention facilities or next to closed borders. Migrant children, especially those who travel unaccompanied, are also particularly vulnerable to sexual abuse, trafficking and exploitation. Yet they are often left insufficiently protected by child protection and other public services in countries of transit or refuge.

Perhaps less known is the fate of children affected by the conflict in Eastern Ukraine. During my visit to this country in March 2016, I learnt that in 2015 more than 20 children were killed and 40 were injured as a result of the conflict. About 200 000 of the 580 000 children living in non-government controlled areas, close to the front line, are in need of psychosocial support to alleviate post-traumatic stress disorders. Mines and unexploded ordnance represent a major threat for the safety of these children. More than 215 000 children have also been displaced to other parts of the country and many live in precarious conditions.

In my work over the last four years, I also found that children in state care, especially those in institutions, can be exposed to high levels of violence. In a report I published in 2014 following a visit to Romania, I referred to reported abuses of institutionalised children with disabilities, including “slapping; choking; beatings with fists, knees and a cane; crushing the children’s fingers using a door; sexual abuse; and no access to toilets at night time.”

Children with disabilities, in particular those with intellectual or psychosocial disabilities, whether institutionalised or not, are three to four times more likely to experience physical and sexual violence or neglect according to 2014 UNICEF research. It is clearly an under-reported problem, and children who complain face the risk of seeing their claims not taken seriously because of their disability, as highlighted by the European Union Fundamental Rights Agency in a 2015 report.<sup>60</sup>

Racism and social exclusion also result in higher levels of violence against children belonging to minority groups, such as Roma children. The beating and humiliation to which a young Bulgarian Roma boy was subjected in April 2016, for having stated to his aggressor that he was an equal citizen, is a striking example of this. Moreover, forced housing evictions of Roma in various countries are often carried out with

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60 European Union Fundamental Rights Agency Report *Violence against children with disabilities: legislation, policies and programmes in the EU*, December 2015.

violence and leave children homeless and vulnerable to abuse, as I noted in letters addressed to seven member states in 2016. Rejection also affects LGBTI children who are bullied and subjected to violence at home, in schools and other contexts.

Austerity measures have also worsened the situation. During my visits to Portugal (2012), Estonia (2012), and the Netherlands (2014), I noted that increasingly difficult socio-economic circumstances and massive cuts in budgets allocated to supporting children and their families had led to higher risks of domestic violence towards children. They have also jeopardised the capacity of child protection services to detect and prevent violence. Additionally, in several countries children are left behind by parents who go to work abroad. These children are at high risk of neglect and abuse.

Patterns of widespread abuse of children, notably in schools, have been uncovered in several countries. However, victims are still too often in need of adequate reparation and recognition of the harm done to them. In 2014 for example, the ECtHR found Ireland in breach of the ECHR for having failed to protect the applicant from sexual abuse at school but also for the fact that she was unable to have this failure recognised at national level.<sup>61</sup>

#### *Violence in the circle of trust*

Armed conflicts, displacement and poverty are far from being the only context for the occurrence of violence. In fact, most violence occurs in different settings of children's daily life, including their families and close social environment. Thus, the Lanzarote Committee, in charge of monitoring the implementation of the above-mentioned Lanzarote Convention, has focused its first round of monitoring precisely on sexual abuse of children in the circle of trust. In 70-85% of cases of sexual violence on children, perpetrators are known to the child victim.

Moreover, it is still considered in parts of Europe that violence is required to educate children. As of 2016, 18 member states of the Council of Europe still had to achieve full prohibition of corporal punishment in all settings, including the home. In 2015, the European Committee of Social Rights found five member states to be in violation of the European Social Charter for failing to achieve such a prohibition.

#### *Violence in the digital environment*

Children are increasingly exposed to violence through the Internet. They risk coming into contact with illegal or harmful content, including pornography, and content inciting substance abuse, suicide and other forms of self-harm. The Internet is also used by predators to contact children under false identities with a view to abusing them. Moreover, children can themselves become perpetrators and inflict harm on others, notably by bullying other children on social media.

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61 ECtHR judgment, *O'Keeffe v. Ireland*, application no. 35810/09, 28 January 2014.

### *Violence against children has a high cost for society*

It has multiple consequences on the lives of children, including on their social development, health status – present and future – and education level. Moreover, children exposed to violence are more likely to adopt violent behaviour, thus perpetuating violence across generations.

It is therefore important that ending violence against children is included among the United Nations 2030 sustainable development goals, an acknowledgment that this phenomenon is a serious factor hindering development that requires resolute action by governments. In 2016, the UN initiated a global partnership against violence. Tackling violence against children is also one of the priorities in the Council of Europe Strategy for the rights of the child (2016-2021).

Recognition of the problem is a necessary first step but a stronger political commitment by member states is necessary to protect children from violence in all settings.

#### *What should states do to protect children from violence?*

- ratify the Lanzarote and Istanbul conventions.
- improve collection of data on violence against children, including through regular qualitative and quantitative research.
- promote a culture of respect for children's rights.
- provide adequate support to families so as to prevent domestic violence, the separation of families and the institutionalisation of children.
- adopt a response to violence that reflects its multidimensional nature. The Council of Europe has elaborated Policy guidelines which provide detailed guidance on the type of policies and mechanisms that should be put in place to effectively protect children from violence. They include:
- adopting national strategies with effective monitoring and evaluation mechanisms;
  - adopting and enforcing legislation prohibiting all forms of violence against children in all settings;
  - establishing child-friendly mechanisms where children can report violence safely and in confidence;
  - ensuring that effective and child-friendly remedies are available to children victims of violence, including child-friendly justice and institutions such as children's rights ombudspersons.
  - boosting the capacity of child protection services to detect and deal with violence; imposing a duty on professionals in contact with children to report suspected abuse.

Moreover, member states should:

- take effective action to stop the use of violence against migrant and refugee children and their families, notably at borders; provide protection to children at risk of trafficking, in line with the Council of Europe Convention on Action against Trafficking in Human Beings; ensure the availability for unaccompanied migrant children of guardianship; stop detaining migrant children.

- provide children in care with effective complaint mechanisms and accessible remedies; ensure that independent monitoring of all institutions is regularly carried out; implement deinstitutionalisation strategies.
- take steps to improve the protection of children on the Internet, by enhancing their knowledge about risks for their safety on the Internet and providing them with human rights education.
- provide reparation and justice to victims of large-scale child abuse.
- set up tools to provide victims of violence with rehabilitation. Positive practices exist, such as the Children's houses model in which children victims of sexual violence can get a multi-disciplinary response that meets their needs.

If we want children to become peaceful citizens who are respectful of human rights and democratic values, we must stop tolerating violations of their rights and create conditions for them to grow free from violence.

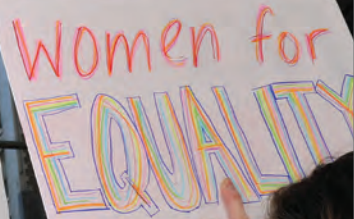
WOMEN'S  
RIGHTS  
ARE  
HUMAN  
RIGHTS



UNITED  
AGAINST

TRANSPHOBIA  
DISCRIMINATION  
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INEQUALITY  
RACISM  
WHITE SUPREMACY  
SEXISM  
MISOGYNY  
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HATE

Women for  
EQUALITY



## 6. Women's Rights and Gender Equality

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### INTRODUCTION

During my mandate, there have been two important advances in women's rights and gender equality at the European level: the entry into force of the Istanbul Convention and the adoption of the first Council of Europe Gender Equality Strategy. Despite these advances, my sense is that a certain complacency set in after the progress made in recent decades. Moreover, in some countries, there has even been a backlash against equality. Thus, I decided to use the platform of the Commissioner's Office to support human rights defenders working in this area, to add my voice to the debate in order to raise public awareness, and to provide country-based analyses of issues pertaining to women's rights and gender equality, particularly on violence against women, women's sexual health and reproductive rights, and women's participation.

Sadly, I have learned that the fulfilment of the human rights of women is still lagging in Europe. Despite all the measures taken and the words in favour of equality pronounced every 8 March to celebrate International Women's Day, discrimination on the grounds of gender and sex remains widespread and in recent years it has even been exacerbated by several factors.

Firstly, the economic crisis and ensuing austerity measures in some European countries have affected women disproportionately, as I have stressed in a Human Rights Comment dealing with this subject (see the chapter above on social rights, austerity and preserving Europe's *acquis*).

Furthermore, women's rights have been threatened by the reappearance of backward-looking trends targeting women who try to move out from the subordinated role in which they have been kept for centuries. I have also noticed the intensification of hate speech against women in Europe, especially on the Internet. Clearly, more needs to be done to combat sexism and sexist hate speech and I fully support the current efforts within the Council of Europe in that direction.

I was surprised at the strong objections I encountered to the very use of the word "gender" in several member states, especially in the context of my promoting ratification of the Istanbul Convention. An argument often used is that it could endanger



“traditional families”. I have had to stress repeatedly that it is violence that endangers families, not the fight against gender role stereotyping, which is one of the measures mandated by the Istanbul Convention. I have also emphasised that any vision of society limiting women to the stereotypical role of mothers, giving birth and staying at home to rear children is not compatible with a human rights-based approach.

During my mandate I was also struck by a resurgence of attacks against women’s sexual and reproductive health and rights – an area in which many of us thought that gains were definitive and irreversible, including in the field of contraception and access to safe and legal abortion. These attacks also largely explain why I have devoted an Issue Paper to *Women’s sexual and reproductive health and rights*, which is being finalised as of this writing.

I have also realised that apart from that concerning domestic violence, the case law of the European Court of Human Rights on women’s rights and gender equality is not very extensive. This may be linked with the numerous obstacles impeding women’s access to national courts, which applicants to the European Court must use first. More needs to be done to understand and address the limited case law on violation of women’s rights in domestic and supranational courts. I discussed this issue with European women’s rights defenders during a round-table held in 2015 and started to cover it in my country work. I also welcome the work on improving access to justice for women accomplished in the context of the Council of Europe Gender Equality Strategy. No doubt the recently established GREVIO, the group of experts in charge of monitoring the Istanbul Convention, will add useful reflections and recommendations on the subject.

In the specific field of domestic violence and violence against women, the response of national authorities, including the police, prosecutors and judges, remains inadequate in a great number of cases, as I have repeatedly noted in my country reports. Regrettably, measures taken to criminalise domestic violence have even been softened in the name of defending traditional family values.

Finally, I have noted that women and girl refugee and asylum seekers are particularly vulnerable to human rights violations not only in their country of origin, but also on their way to Europe and even once they have arrived here. As in all fields of life, the need to ensure a gender perspective in all measures taken in the field of migration cannot be overstated.

For all the reasons above, I have put the human rights of women and the fight against discrimination on the grounds of gender and sex firmly on my agenda. I call upon all states and members of society, men and women alike, to join efforts to make Europe a place where all women live the life they want, free from gender-based violence and sexism. I invite everyone to add their voice to the call for laws, policies and behaviour that finally respect women’s dignity. This is a struggle we have to engage in every day, not only once a year, on 8 March.

## FIGHTING VIOLENCE AGAINST WOMEN MUST BECOME A TOP PRIORITY

*Human Rights Comment published on 29 July 2014*

On August 1, the Istanbul Convention, a landmark treaty of the Council of Europe dedicated to preventing and combating violence against women and domestic violence, will enter into force. It could not come at a better time. Violence against women remains one of the most widespread human rights violations which takes place every day in Europe; intimate partner violence is still among the major causes of non-accidental death, injury and disability for women. This tragic situation stems from a variety of social, economic and cultural reasons, but a common background condition is glaring inequality between men and women. The Convention has the potential to become a powerful driver in making progress on this pressing human rights issue.

If we look at available data, we can better grasp the urgency of the situation. It is estimated that at least 12 women are killed by gender-related violence in Europe every day. In 2013, available statistics showed that domestic violence claimed the lives of 121 women in France,<sup>62</sup> 134 in Italy,<sup>63</sup> 37 in Portugal,<sup>64</sup> 54 in Spain.<sup>65</sup> In the United Kingdom, between 1 April 2012 and 31 March 2013, 84 women were killed by a partner or ex-partner.<sup>66</sup> In Azerbaijan, 83 women were killed and 98 committed suicide following cases of domestic violence,<sup>67</sup> while data collected by the media in Turkey reported that at least 214 women were killed by men last year, mainly because of domestic violence and often despite these women having asked the authorities for protection.<sup>68</sup> Available data covering the first six months of 2014 in many European countries continue to show such alarming figures.

A recent UN study indicates that lethal domestic violence accounts for almost 28% of all intentional homicides in Europe.<sup>69</sup> Women are more likely than men to be killed by people close to them: while intimate partner or family-related violence is responsible for 18% of all male homicides, the number rises to 55% when it comes to women. These rates vary from country to country, but the phenomenon is present across Europe, with 89% of women killed being murdered by a partner or family member in Albania, 80% in Sweden and 74% in Finland.<sup>70</sup> If we look at non-lethal

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62 Franceinfo « Violences conjugales : 121 femmes tuées sous les coups de leur conjoint en 2013 », 7 May 2014, [www.francetvinfo.fr](http://www.francetvinfo.fr).

63 Femicidio 2013, [www.femicidiocasadonne.wordpress.com](http://www.femicidiocasadonne.wordpress.com).

64 A União de Mulheres Alternativa e Resposta, *Observatório de Mulheres Assassinadas da UMAR: Dados de 2013*, 8 March 2014.

65 Gobierno d'España, Delegación del Gobierno para la Violencia de Género, Portal Estadístico, "Víctimas de violencia de género 2014".

66 UK Government Office for National Statistics, Homicide Index, [www.ons.gov.uk](http://www.ons.gov.uk).

67 Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo on Mission to Azerbaijan, A/HRC/26/38/Add.3, 2 June 2014.

68 Çiçek Tahaoğlu "Men Kill 214 Women in 2013", *BIA News Desk*, 9 January 2014, [www.bianet.org](http://www.bianet.org)

69 United Nations Office on Drugs and Crime, *Global Study on Homicide 2013*, 10 April 2014

70 United Nations Office on Drugs and Crime, *Global Study on Homicide 2013*, 10 April 2014

domestic violence, the picture is equally grim: in Ukraine,<sup>71</sup> for example, 160 000 cases of domestic violence were registered in 2013 and a survey showed that 68% of women suffered abuse in the family. In Ireland, in 2012 almost 15 000 cases of domestic violence were registered.<sup>72</sup>

Violence against women is not limited to inter-partner and family relationships, a fact largely recognised by the Istanbul Convention, which also addresses forms of gender-based violence such as stalking, sexual harassment, sexual violence and rape. As shown by a representative survey published last March by the EU Fundamental Rights Agency (FRA), one in five women (22%) has experienced physical violence by someone other than their partner since the age of 15. As concerns stalking, which nowadays includes cyber-stalking, in the EU-28, 18% of women have experienced stalking since the age of 15, and 5% of women have experienced it in the 12 months before the survey interview. This corresponds to about 9 million women in the EU-28 experiencing stalking within a period of 12 months. 45% of women in the EU have experienced sexual harassment at least once during their lifetime.<sup>73</sup>

The entry into force of the Istanbul Convention is to be welcomed also because it will contribute to ending forced marriage, female genital mutilation, and forced abortion and sterilisation. Europe is not immune to these forms of violence: in its 2012 Resolution, the European Parliament estimates that around 500 000 women and girls live with female genital mutilation in the European Union while 180 000 others are at risk of being subjected to the practice every year.

However huge, these are only conservative numbers as women tend to underreport cases of violence, mainly because of little trust in law enforcement bodies. This is understandable as all too often state institutions have been unresponsive to those women who find the courage to report. As the case-law of the European Court of Human Rights shows, states not only often fail to protect them, but they also fall short of their obligations to duly investigate cases of gender-based violence, to offer effective remedies and to adopt adequate measures to prevent further violence. An illustration of this failure is a recent case where the French state was ordered by a national court to pay compensation to the family of a young woman killed by her ex-partner because the “wrongful and repeated failure of the gendarmerie (constituted) gross negligence directly and unquestionably linked with the murder”.<sup>74</sup>

This lack of sensitivity to victims among the police is illustrative of states’ neglect of women victims of violence. A recent analytical study carried out by the Council of Europe shows that, although initial vocational training on violence against women is provided to the police in 44 of its 47 member states, only 29 of them offer further specific training to their police officers. This lack of training may well be one of the

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71 Office of the Ombudsperson and UNDP study, *Monitoring National Court Practice in the Criminal, Civil and Administrative Cases of Domestic Violence*, 26 May 2014

72 National Women’s Council of Ireland, National Observatory on Violence against Women, [www.nwci.ie](http://www.nwci.ie).

73 Fundamental Rights Agency (2014) *Violence against women: an EU-wide survey. Main results report*, Publications Office of the European Union.

74 Pascale Robert-Diard, « L’Etat condamné pour « faute lourde » après le meurtre d’une femme victime de violences conjugales », 9 mai 2014.

reasons for the poor record of the police in many countries in dealing with victims of domestic violence. Reports show that in some cases police officers tried to persuade women not to file a complaint. In other cases, their behaviour showed both contempt for human dignity and their own sense of impunity. A telling example is what happened in the United Kingdom, where two police officers offended in a vulgar manner a 19-year old woman who intended to lodge a complaint for domestic violence. The case prompted public outrage and political condemnation and the officers are currently under investigation.<sup>75</sup> But the damage remains and an unfortunate signal has been sent to women by the police. Moreover, a report shows that the lack of police responsiveness to victims of domestic violence in the UK is far from being confined to this individual case.<sup>76</sup>

This lack of responsiveness is further compounded by inadequate victim support. Places in women's shelters are largely insufficient and the austerity measures adopted in many countries have further reduced them, thus increasing women's vulnerability. In Sweden, statistics show that 60% of abused women are denied a place in shelters. In the UK, too, funding cuts risk exposing thousands of victims to new or repeated cases of violence.<sup>77</sup>

Reduced resources also translate into more threats to the health of women who are victims of violence. As the World Health Organisation (WHO) warned, "violence has a range of adverse physical, including sexual and reproductive health, and mental health outcomes for women and girls". This evidence-based assessment led the WHO member states to adopt a resolution<sup>78</sup> aimed at strengthening the response of health systems to violence against women last May.

All this evidence points to the need for more resolute state action in combating violence against women and domestic violence from a victim's perspective. Responding to this need, the Istanbul Convention offers a holistic set of measures to take action where it is needed, and in this sense, it is truly unique. Specifically dedicated to several forms of violence against women, it is victim-centred and contains a comprehensive array of practical tools to help improve the response of all relevant actors. It clearly states that Parties have an obligation to prevent violence, protect victims and punish the perpetrators, and measures in these regards need to form part of a set of integrated policies. This is crucial, because we can hope to end violence against women only if gender stereotypes and roles are deconstructed, attitudes are changed, laws are amended, women are empowered and justice is within reach. Crucially, the Convention also establishes a specific monitoring mechanism in order to ensure the effective implementation of its provisions by the Parties.

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75 Heather Saul "Police officers 'called teenager a 'f\*\*\*\*\* slag' after she made a domestic violence complaint", *The Independent*, 19 February 2014.

76 Sandra Laville "Police failures over domestic violence exposed in damning report", *The Guardian*, 27 March 2014.

77 Owen Jones "Britain is going backwards on violence against women". *The Guardian*, 30 March 2014.

78 WHO resolution "Strengthening the role of the health system in addressing violence, in particular against women and girls, and against children" A67/A/CONF.1/Rev.1, 24 May 2014.

To date, 13 Council of Europe member states have ratified the Istanbul Convention.<sup>79</sup> In addition 23 indicated their political will by signing it, leaving 11 member states with no action on this at all.<sup>80</sup> It is my hope that this important Convention will not only be ratified by all Council of Europe member states, but by many other countries around the world and by the EU.

This will not increase women's safety overnight, but it would definitely mark a turn in the right direction, giving a strong signal of commitment to millions of women.

## **HATE SPEECH AGAINST WOMEN SHOULD BE SPECIFICALLY TACKLED**

*Human Rights Comment published on 6 March 2014*

In May 2013, a campaign led notably by Women, Action and the Media and the Everyday Sexism Project attracted global public attention to the issue of social media content promoting violence against women. Such content included the photograph of a well-known singer with a bloodied and beaten face with a caption celebrating her boyfriend's assault. The campaign prompted Facebook to react and update its policies on hate speech, which now take better account of an often neglected type of hate speech, that targeting women.

Such hate speech is proliferating, notably on the Internet, with daily calls for violence against women and threats of murder, sexual assault or rape.

Arguably, the most famous case is that of Malala Yousafzai, the young Pakistani girl who, after surviving an assassination attempt prompted by her stance for women's rights, had to withstand a hostile campaign on the Internet. Malala is now a symbol of women's struggle worldwide, including in Europe. Recent cases, in fact, remind us that if we believe that hate speech against women is not a European problem, we are profoundly wrong.

A few days ago, for example, an investigation<sup>81</sup> was opened in the UK against two police officers who used denigrating language against a 19-year old woman who intended to lodge a complaint for domestic violence.

In Italy, the speaker of Parliament, Laura Boldrini, has been the target of repeated hate speech since she was sworn in, including recently when the leader of the 5-Star Movement, a political group which obtained a quarter of the votes in last year's legislative elections, published a clearly misogynistic post on his blog, which was picked up by his social media account and those used by his MPs, and which generated violent, insulting comments against her.

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79 Albania, Andorra, Austria, Bosnia and Herzegovina, Denmark, France, Italy, Montenegro, Portugal, Serbia, Spain, Sweden and Turkey.

80 Armenia, Azerbaijan, Bulgaria, Cyprus, Czech Republic, Estonia, Ireland, Latvia, Liechtenstein, the Republic of Moldova and the Russian Federation.

81 Heather Saul, op. cit.

Numerous are also the cases of female journalists all over Europe who have been the target of explicit gender-based threats. Many of them felt obliged to leave the blogosphere.

These are just few examples of a much broader, underestimated phenomenon that needs to be urgently tackled.

### *International standards*

Provisions against hate speech in international human rights law usually cover grounds related to racial, ethnic and religious hatred, as is the case in the International Covenant on Civil and Political Rights.

At European level, hate speech, as defined by the Council of Europe, covers all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin. Although the definition refers to a number of groups which are frequently seen to be the targets of hate speech, the list should be read as open-ended, and not limiting the possible targets to these groups alone.

This was made clear in 2011 when the Council of Europe opened for signature the Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) which binds state parties to prohibit sexual harassment, including “verbal, non-verbal or physical conduct of a sexual nature unwanted by the victim.” The Convention also highlights the participation of the private sector and the media and establishes the obligation of state parties to find ways to encourage private companies and the media to set themselves self-regulatory standards for example to limit any form of verbal or physical abuse of women. This would include hate speech on the grounds of gender, as well as any incitement to violence against women. The obligation on the government here is to set incentives or otherwise encourage the private sector actors to do whatever they can to make sure none of their products, services or advertisements exhibit misogynistic tendencies or gives them a platform to develop.

Three years after its opening for signature, the Istanbul Convention has been ratified by only eight member states (Albania, Austria, Bosnia and Herzegovina, Italy, Montenegro, Portugal, Serbia and Turkey), an insufficient number to have it enter into force.

An additional standard are guidelines adopted in 2013 by the Committee of Ministers of the Council of Europe on gender equality and media. They specifically recommend that “unless already in place, member states should adopt an appropriate legal framework intended to ensure that there is respect for the principle of human dignity and the prohibition of all discrimination on grounds of sex, as well as of incitement to hatred and to any form of gender-based violence within the media.”

### *National actions*

A first step member states should take is to ratify the Istanbul Convention and use its provisions to better frame the work of national and local authorities, including police and health officials, around four key principles of the fight against violence: prevention, protection, prosecution and integrated policies.

In addition, member states should also prohibit by law any advocacy of gender hatred that constitutes incitement to discrimination, hostility or violence, as foreseen by the ICCPR for other grounds.

Another tool at their disposal is the Council of Europe campaign “No Hate Speech Movement” which provides means to raise awareness about this problem and help fight back, including through its report page where hate content is monitored and collected by internet users. Member states should participate in and implement this campaign as part of their efforts to tackle hate speech.

Several other measures can be taken. For example, both traditional and online media could better engage in exposing and marginalising sexist discourse.

In reaction to the abovementioned campaign, Facebook<sup>82</sup> promised to review its guidelines, improve the training of its moderators, establish more formal and direct lines of communication with advocacy groups and increase the accountability of the creators of content which is cruel or insensitive but does not qualify as hate speech. Education is another field where action can be taken. In his 2012 Report focusing on hate speech, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue observed that the first critical step was “to address and redress the indirect censorship, powerlessness and/or alienation felt by many groups and individuals. For example, in many countries, women or women’s groups that publicly criticize discriminatory religious tenets have frequently been the targets of severe harassment and intimidation, both by the State and by non-State actors. (...) By allowing voices that have been marginalized and perspectives that generally find little expression to come to the fore, such initiatives play a vital role in fostering debate and greater understanding in society.”

### *A clear signal*

Freedom of expression is a fundamental right which must be protected, but it is not an absolute right. There are limits which apply, in particular with regard to hate speech.

Hate speech against women is a long-standing, though underreported problem in Europe that member states have the duty to fight more resolutely.

It is necessary that legal and political tools be in place to firmly condemn it and prosecute the perpetrators. As the world celebrates International Women’s Day on March 8, political and opinion leaders in Europe should send a signal to the

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82 Marne Levine, “Controversial, Harmful and Hateful Speech on Facebook”, statement on *Facebook*, 28 May 2013.



public which clearly shows that violent discourse against women has no place in a democratic society and will not be tolerated.

## **HUMAN RIGHTS OF REFUGEE AND MIGRANT WOMEN AND GIRLS NEED TO BE BETTER PROTECTED**

*Human Rights Comment published on 7 March 2016*

For the first time since the beginning of the refugee and migrant crisis in Europe, women and children on the move outnumber adult men. While in 2015 about 70% of the population on the move were men, women and children now make up nearly 60% of refugees and other migrants crossing into Europe. This also means that more women and children risk and lose their lives in the Mediterranean Sea and on the land routes to Europe. Of more than 360 persons who died in the Mediterranean in January 2016, one third were women and children. In February this year a woman and an adolescent girl were found dead from the cold in the Bulgarian mountains close to the border with Turkey.

Female migration is not a new phenomenon but it is increasing, as is female refugees' and migrants' vulnerability to human trafficking, exploitation, discrimination and abuse. Single women travelling alone or with children, pregnant and nursing women, adolescent girls, and elderly women are among those who are particularly at risk and require a coordinated and effective protection response. Estimating that the current response to refugee and migrant women and children's needs by governments, humanitarian actors and EU institutions has been insufficient, human rights organisations, including the United Nations High Commissioner for Refugees (UNHCR) and women's rights organisations, have called for immediate action.

### *The hardship facing refugee and migrant women and girls*

Many of these women and girls flee countries such as Syria and Afghanistan, where they were subject to persecution and sexual and gender-based violence, including war-related violence. Once uprooted, they hope to find safety and protection in neighbouring countries. However, in some of those countries they continue to experience human rights violations and discrimination. Amnesty International has reported<sup>83</sup> on sexual violence and the exploitation of Syrian refugee women in Lebanon. It noted that refugee women who were the heads of their households and without an adult male relative were particularly at risk and had little or no protection or access to justice.

UNHCR, the United Nations Population Fund (UNFPA) and Women's Refugee Commission recently assessed protection risks for women and girls on their journey to Greece and onwards in Europe. They established that women and girls, especially those travelling alone, face particularly high risks of certain forms of violence, including sexual violence by smugglers, criminal groups and individuals in countries along

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83 Amnesty International, *I want a safe place: Refugee women from Syria uprooted and unprotected in Lebanon*, 2 February 2016.

the route. Concerns were expressed about the lack of awareness on the part of the authorities and humanitarian actors of the occurrence of sexual and gender-based violence affecting this group. This is also due to the lack of data on these crimes and the victims' reluctance to speak out about their experiences. Cases of sexual violence committed by guards in refugee reception/transit centres have also been reported,<sup>84</sup> including on European soil.

The detention of migrant women, including pregnant women, is also of serious concern. It is deplorable that the use of immigration detention in Europe has increased. Women are often held in detention together with men who are not members of their family. 'Hotspots' in Greece and Italy, envisaged initially as reception and registration centres for migrants, may in fact become detention centres with all the risks they carry for the female migrant population. The Strasbourg Court has found violations of the European Convention on Human Rights in several cases due to the substandard detention conditions in which migrant women, including pregnant women, were held.

There are increasing concerns about the lack of adequate reception conditions for refugees and migrants and its serious negative impact on refugee and migrant women's physical safety, dignity and health. I was informed about this problem at the Centre for Temporary Accommodation of migrants in Melilla (Spain) which I visited in 2014. There are efforts in Germany<sup>85</sup> to provide separate housing and sufficient medical care for vulnerable groups, such as pregnant women and traumatised women, but in practice, this is not always possible due to the large numbers of persons in need. It is of serious concern that these unsatisfactory reception conditions generate violence, including sexual violence, against migrant women. The situation is particularly difficult in the Greek islands where reports suggest that reception conditions often fail to meet minimum standards.

The number of refugee and migrant women living in appalling conditions in shanty towns or squats in Calais in France and its region has been rising since 2009. They now represent about 14% of the mobile population present in the region. Doctors and volunteers from Gynécologie Sans Frontières who carry out visits<sup>86</sup> to these places have witnessed the hardship that refugee and migrant women endure there, lacking basic living conditions and access to adequate health care, including reproductive health care. Cases of sexual violence against women including rape, in some cases causing pregnancy, were noted. However, most of these crimes go unreported for different reasons, including the victim's fear of reprisal. Médecins Sans Frontières<sup>87</sup> has also reported inhuman living conditions for many pregnant migrant women in Greece.

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84 Amnesty International new item "Female refugees face physical assault, exploitation and sexual harassment on their journey through Europe", 18 January 2016.

85 European Parliament *Reception of Female Refugees and Asylum Seekers in the EU - Case Study Germany*, 15 January 2016.

86 See mission reports on the Gynécologie Sans Frontières web-site at [www.gynsf.org](http://www.gynsf.org).

87 Médecins Sans Frontières Special Report, *Obstacle Course to Europe: A Policy-Made Humanitarian Crisis at EU Borders*, 19 January 2016.

## *Female refugee and migrants' access to justice and asylum*

One important aspect of the protection of the human rights of refugee and migrant women, notably women victims of violence, is ensuring that they have effective access to justice. It is also crucial to reach out to those victims in need who are not in a position to report the crimes. Refugee and migrant women in an irregular situation who are victims of violence or other abuse are in a particularly difficult situation as they may be reluctant to lodge a complaint. Particular attention should be paid to Roma migrant women and women with disabilities who may face additional barriers (including cultural ones) preventing them from reporting violence to the police and receiving adequate protection.

Asylum procedures need to be gender sensitive. This requires, *inter alia*, engaging more female interviewers and interpreters for asylum procedures. Useful practical guidance for national authorities and humanitarian workers in this field can be found in the UNHCR Handbook for the Protection of Women and Girls (2008) as well as in the IASC Gender Handbook.

The Parliamentary Assembly of the Council of Europe has recommended that member states take due account of gender-based violence and gender-related persecution in their asylum systems, beginning with the collection, analysis and publication of statistics and information on the issue.

In this context one should note that the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) expressly provides for the protection of refugee women against violence. It requires that the parties to the Convention provide the legislative framework to recognise gender-based violence as a form of persecution in line with the UN Refugee Convention. Furthermore, states must develop gender-sensitive reception procedures and support services for asylum seekers. Also, the Convention provides that necessary legislative or other measures must ensure that migrant women victims of domestic violence whose residence status depends on that of the spouse or partner are granted an autonomous residence permit, irrespective of the duration of the marriage or the relationship, in the event of its dissolution.

### *What needs to be done?*

In general, more humane migration policies should be prioritised by all states. European countries have to facilitate safe passage and access to asylum, improve reception conditions, foster effective integration into host societies and ensure a fairer distribution of asylum seekers.

In developing and implementing these policies, particular attention should be paid to the situation of women, girls and children, notably the victims of sexual and gender-based violence. UNHCR, UNFPA and the Women's Refugee Commission have put forward a number of recommendations in this regard. They call for the establishment by states of a coordinated response system within and across borders that protects women and girls. States and EU agencies need to acknowledge the protection risks and put personnel and procedures in place specifically to prevent,

identify, and respond to sexual and gender-based violence. In this regard, particular attention should be paid to female refugees and migrants' reluctance to report violence or to access services. Reception centres and accommodation facilities need to be safe, accessible and responsive to women and girls. Last but not least, it is crucial to prioritise women, children and survivors' of sexual and gender-based violence in family reunification procedures, as well as in relocation and resettlement schemes. Doing so would reduce incentives for these women and girls to move on by dangerous irregular means and reduce their exposure to sexual and gender-based violence.

## **PROTECT WOMEN'S SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS**

*Human Rights Comment published on 21 July 2016*

In these times of resurgent threats to women's rights and gender equality, we must redouble our efforts to protect women's sexual and reproductive health and rights. Among the international and European legal instruments that protect these rights, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) guarantees women's rights to decide freely and responsibly about the number and spacing of their children and to have access to information, education and means to enable them to exercise these rights.

Sexual and reproductive health and rights are fundamentally linked to the enjoyment of many other human rights, as recently stated<sup>88</sup> by the UN Committee on Economic, Social and Cultural Rights. As widely illustrated by the case-law and guidelines of human rights bodies, sexual and reproductive health is often the context in which human rights are violated, including the right to the highest attainable standard of physical and mental health, but also the prohibition of torture and inhuman or degrading treatment and the right to private life. The right to be free from discrimination on grounds of sex or gender is also at stake, as this right is breached when reproductive health services that only women require are not provided.

Access to sexual and reproductive rights is a precondition for the realisation of other human rights, including in the fields of education and employment. At the same time, impediments in access to sexual and reproductive health services are the result of violations of other human rights, not least the long-standing discrimination and harmful gender stereotyping against women that still need to be fully eradicated in Europe. I have expressed concern at the development in recent years of regressive trends and attempts to exert control over women's bodies and sexuality which could further hamper women's access to these rights and endanger progress achieved so far in the field of gender equality.

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88 Office of the High Commissioner for Human Rights news item, "Right to sexual and reproductive health indivisible from other human rights - UN experts", 8 March 2016, [www.ohchr.org](http://www.ohchr.org).

### *The pivotal role of access to sexuality education*

Teaching sexuality education to all boys and girls in schools is essential to guarantee women's sexual and reproductive rights and is a full component of the rights to education and to health. Both the European Committee of Social Rights and the UN Committee on the Rights of the Child have stressed that adolescents should have access to appropriate and objective information on sexual and reproductive issues, including family planning, contraception and the prevention of sexually transmitted diseases, as part of the ordinary school curriculum and provided without discrimination on any ground.

However, sexuality education at school has been met with strong resistance from some parents and other stakeholders. In some places, parents can decide to exempt their children from sexuality education classes. Those teaching sexuality education sometimes lack the necessary training and knowledge. In other cases, sexuality education teaching can contain misleading information and value judgements, with problems including the stigmatisation of homosexuality or abortion by young girls. In some countries, including Lithuania,<sup>89</sup> Romania<sup>90</sup> and Russia,<sup>91</sup> there is currently an absence of age-appropriate sexual and reproductive health and rights education with a gender perspective, in the curricula of basic and secondary schools.

### *The need to further remove barriers in access to contraception*

As stressed by World Health Organization (WHO),<sup>92</sup> meeting the need for contraception is an important strategy for reducing unintended pregnancies, abortions and unplanned births. However, despite significant medical progress in this field, recent studies<sup>93</sup> have shown that access to contraception is hindered by several factors in Europe, including misinformation about the safety of contraceptives and stigma hindering women from discussing contraceptives with medical professionals. Persons in dire economic situations encounter difficulties in accessing contraceptive methods tailored to their needs due to lack of reimbursement by public health services in some countries.

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89 Eurobarometer *Women's Access to Modern Contraceptive Choice in 16 EU Countries*, 22 September 2015.

90 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the combined third to fifth periodic reports of Romania*, E/C.12/ROU/CO/3-5, 9 December 2014.

91 UN Committee on the Elimination of Discrimination against Women *Concluding observations on the eighth periodic report of the Russian Federation*, CEDAW/C/RUS/CO/8, 20 November 2015.

92 World Health Organization, Sexual and reproductive health Fact sheet, *Facts on induced abortion worldwide*, January 2012.

93 Eurobarometer *Women's Access to Modern Contraceptive Choice in 16 EU Countries*, 22 September 2015.

## *Ensuring women's rights, dignity and autonomy in maternity health care*

I have received disturbing reports of human rights violations in the context of maternity health care, as illustrated by recent NGO-led research on Slovakia.<sup>94</sup> Patterns of segregation against Roma women in maternity hospitals in several countries are also an issue of concern. In recent conclusions concerning Croatia, the Czech Republic and Slovakia, the CEDAW Committee stressed the need to ensure adequate standards of care and respect for women's rights, dignity and autonomy during deliveries, expressing concerns in particular at reports that childbirth conditions and obstetric services unduly curtail women's reproductive health choices. The European Court of Human Rights has also made it clear that "private life" incorporates the right to choose the circumstances of giving birth.<sup>95</sup>

### *The need to ensure access to safe and legal abortion*

As noted by WHO, highly restrictive abortion laws are not associated with lower abortion rates.<sup>96</sup> The Parliamentary Assembly of the Council of Europe also recalled that "the lawfulness of abortion does not have an effect on a woman's need for an abortion, but only on her access to a safe abortion". A ban on abortions does not result in fewer abortions, but only leads to clandestine abortions, which are more traumatic and increase maternal mortality.

While most countries in Europe ensure access to abortion without restrictions in law as to the reasons, some have kept restrictive abortion laws in contradiction with the case-law and guidelines of international human rights treaty bodies. In a case concerning Ireland, the UN Human Rights Committee concluded last month that a woman who was forced to choose between carrying her foetus to term, knowing it would not survive, or seeking an abortion abroad was subjected to discrimination and cruel, inhuman or degrading treatment as a result of Ireland's legal prohibition of abortion. The Committee stated that to prevent similar violations from occurring, " (...) the State party should amend its law on voluntary termination of pregnancy, including if necessary its Constitution, to ensure compliance with the [International] Covenant [on civil and Political Rights], including effective, timely and accessible procedures for pregnancy termination in Ireland, and take measures to ensure that health-care providers are in a position to supply full information on safe abortion services without fearing being subjected to criminal sanctions".

In my country work, I have also recently called on San Marino and Andorra to move towards decriminalisation of abortion. I expressed concern at a bill prepared in Poland introducing a total ban on abortion except to save a pregnant woman's life. Criminalisation of abortion, often combined with the societal pressure on women and doctors, has a chilling effect on pregnant women and doctors who would be ready to perform a legal abortion. Women afraid of seeking an abortion, for fear

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94 Janka Debrecéniová (ed.), *Women's Human Rights in Obstetric Care in Healthcare Facilities in Slovakia*, 29 April 2014.

95 ECtHR judgment, *Ternovszky v. Hungary*, application no. 67545/09, 14 December 2010.

96 World Health Organization, Sexual and reproductive health Fact sheet, *Facts on induced abortion worldwide*, January 2012.

of a backlash and harassment on the part of certain segments of society, resort to clandestine abortions or, when they can afford it, travel abroad to get an abortion.

Even when access to abortion is provided for by law, there can be barriers. In the *P. and S. v. Poland* case, a 14-year old girl, who was pregnant as a result of a rape, was seeking an abortion that would have been available under Polish law.<sup>97</sup> She was confronted with such deplorable treatment on the part of the authorities that the European Court of Human Rights held that her right to private life and her right to be free from torture and inhuman or degrading treatment was violated.

Mandatory counselling and medically unnecessary waiting periods for abortion are not in line with WHO's recommendations and have been repeatedly criticised for impinging on women's rights. Recent trends towards introducing such requirements are therefore of concern. In several European countries, under the conscientious objection clause or clause of conscience, health care practitioners may refuse to perform abortion on the grounds that it is against their conscience. The European Committee of Social Rights has recently concluded that Italy was in violation of the right to health of the Revised European Social Charter as the authorities did not take the necessary measures in order to ensure that, as provided by law, abortions requested in accordance with the applicable rules are performed in all cases, even when the number of objecting medical practitioners and other health personnel is high.

#### *Groups of women particularly vulnerable to violations of sexual and reproductive health and rights*

Multiple discrimination related to sexual and reproductive health and rights is also an issue of concern. In times of continuing austerity measures, poor women are disproportionately affected by budgetary cuts in reproductive health services. Women living in rural areas and migrant women in an irregular situation may also find it more difficult to receive appropriate and timely sexual and reproductive health care.

In several European countries, women, in particular Roma women and women with intellectual and psycho-social disabilities, have been involuntarily sterilised. Such cases have been documented in the Czech Republic, Norway, Slovakia, Sweden and Switzerland. According to the case-law of the European Court of Human Rights, such practices constitute serious human rights violations. Governments are therefore obliged to establish accessible and effective mechanisms to obtain reparations. This is why I recently urged the Czech authorities to adopt the bill on reparations for involuntary sterilisation of Roma women.

#### *The way forward in enhancing women's sexual and reproductive health and rights*

All member states of the Council of Europe should take the necessary steps to ensure women full and equal access to sexual and reproductive health and rights including the following measures:

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97 ECtHR judgment, *P. and S. v. Poland*, application no. 57375/08, 30 October 2012.



States should ensure that sexual and reproductive health services, goods and facilities are available to all women throughout the country, physically and economically accessible, culturally appropriate, and of good quality in line with the Committee on Economic, Social and Cultural Rights General Comment No. 22 (2016) on the Right to sexual and reproductive health;

All women, including adolescent girls, should have access to sexual and reproductive health information that is evidenced-based, non-discriminatory, and respectful of their dignity and autonomy. Mandatory, comprehensive sexuality education that is age-appropriate, evidence-based, scientifically accurate and non-judgmental should be taught in all schools;

States should take all necessary measures to remove barriers in access to contraception for all women; giving them access to modern contraceptives, including emergency contraception and making them affordable by covering their costs under public health insurance mechanisms;

States should put in place adequate safeguards, including oversight procedures and mechanisms, to ensure that women have access to appropriate and safe child birth procedures which are in line with adequate standards of care, respect women's autonomy and the requirement of free, prior and informed consent;

Where it is not already the case, states should make lawful, at a minimum, abortions performed to preserve the physical and mental health of women, or in cases of fatal foetal abnormality, rape or incest. All states are strongly encouraged to decriminalise abortion within reasonable gestational limits. In addition, all necessary measures should be taken to ensure that access to safe and legal abortion as provided by law is fully implemented in practice by removing all existing barriers;

States should protect all women and in particular Roma women, women belonging to minorities, migrant women in regular or irregular situations, women with disabilities, LBT women, poor women or rural women, and young or older women against multiple forms of discrimination in the field of sexual and reproductive health and rights.

## **OBSERVATIONS AND REFLECTIONS ON ATTACKS ON THE CONCEPT OF GENDER**

*Extract of 3rd Quarterly Activity Report 2016 (1 July to 30 September 2016), published on 16 November 2016*

In recent years, both religious and secular critics of so-called “gender ideology” and “gender theory” have mounted a growing challenge against generally accepted human rights terminology and principles. During my country visits, I have even encountered objections to the very use of the word “gender”, particularly in the context of promoting the ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). What should we in the human rights world make of this criticism?

Before turning to the criticism, it is useful to recall that over the years the word “gender” has acquired different meanings depending on the context. The definition contained in the Gender Equality Glossary, recently published by the Council of Europe Gender Equality Commission, represents the mainstream understanding: while the term “sex” refers to the biological characteristics that define humans as female or male, “gender shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”. This definition is also used by the Committee on the Elimination of Discrimination against Women and other UN mechanisms. It is this meaning that enters into play in the use of the expression “gender stereotypes”.

The expression “gender equality” is increasingly replacing “equality between women and men”, be it at the UN, the Council of Europe or the European Union. Gender equality not only requires the elimination of all forms of discrimination on the basis of sex but also the achievement of substantive or de facto equality between women and men. The same meaning of gender prevails in terms such as “gender mainstreaming” or “gender gap”.

As we can see, the word “gender” in its different meanings has for many years permeated international human rights texts and policy discourse. What manner of ills do critics associate with the term “gender”, “gender theory” or “gender ideology”? What could be so dangerous to work for the full achievement of gender equality? What could be so objectionable to examining the broader social context in which men and women interact?

It seems that one core objection has to do with fears for the fate of a traditional society based on a cultural affirmation that gender is strictly and always binary and that men and women play (and should play) very different roles in public life and within the family. The first problem here is that some adherents of this vision of society justify limiting women to the stereotypical role of mothers, giving birth and staying at home to rear children. This vision cannot be reconciled with a human rights based approach that sees women (and men) as autonomous members of society who should be able to choose on an equal basis their own role in society and within the family. One of the five objectives of the Council of Europe Gender Equality Strategy 2014-2017 is to combat gender stereotyping that presents “a serious obstacle to the achievement of real gender equality and feed into gender discrimination”.

Another problem with the traditionalist approach to society is that it is often used to justify sexism, which is the supposition, belief or assertion that one sex is superior to the other. Often, those critics defend, even if implicitly, the idea of the superiority of men over women. Sexist attitudes result in discrimination against members of the supposedly inferior sex, just as racist attitudes do with members of the supposedly inferior “race”. Therefore, all states have international human rights obligations to take appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. The European Court of Human Rights (“the Court”) has also stressed that “gender stereotypes, such as the perception of women as primary child-carers and men as

primary breadwinners cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation.”

It seems that another fundamental objection has to do with diverging understandings of what constitutes a family. The jurisprudence of the Court as to what constitutes “private and family life” and deserves protection under Article 8 has evolved considerably in recent years. For many, this is the crux of the matter. The Court has progressively recognised that same-sex partners living in a stable relationship merit legal protection in the form of civil unions or registered partnerships, not necessarily “gay marriage”. Most recently, in *Oliari and Others v. Italy*, the Court concluded that granting such protection is a trend, as 24 of 47 Council of Europe member states have legislated on legal recognition of same-sex couples. Here, it seems that the human rights world and defenders of traditional family models will have to agree to disagree.

Another criticism has to do with recognition of gender diversity. Critics invoking “traditional values” mistakenly reduce the world into men and women alone, ignoring, for example, the existence of “intersex persons” – those who do not fit neatly into male or female categories because of their anatomy (earlier, such persons were sometimes called “hermaphrodites”). As I noted in a recently published Issue Paper, outside Europe recognition of indeterminate or third gender persons is in many places unremarkable.

A particular object of criticism appears to be a growing recognition of the rights of transgender persons – those whose gender self-identification does not match the gender assigned at birth and who occasionally may choose to undergo gender reassignment surgery or hormonal treatment. A human rights based approach insists that such persons should not be pathologised and that states should not make official recognition of the new gender subject to requirements such as divorce and/or sterilisation. As far back as 2002, the Court found that there was a trend towards increased social acceptance of transsexuals and the legal recognition of their post-operative sexual identity.

A particular target of some defenders of traditional values has become the Istanbul Convention, which seems to crystallise in their view all the above-mentioned evils. Some ultraconservative critics try to justify or condone domestic violence (against women and children) by relabeling it private family “quarrels” or just punishment for disobedient children. In this conception, any attempt to prevent domestic violence constitutes external interference violating the sanctity of marriage and the family. To such unacceptable views, there can be only one answer: it is not measures taken to prevent and combat domestic violence that destroy marriages and families, but domestic violence itself.

Other critics try to claim that violence in the family affects men as much as women and that a focus on women victims is in some way misleading or “discriminatory”. This flies in the face of data in every European country suggesting that women are the victims of family violence in the vast majority of cases. Some critics may even acknowledge that violence against women is a problem, but do not want governments challenging traditional gender roles and stereotypes through education and awareness raising, which the Istanbul Convention envisages. However, it is only

logical that the above-mentioned general human rights obligation to combat gender stereotypes has become part of the measures required by the Istanbul Convention to prevent gender-based violence against women and domestic violence. The Convention rests on the presumption that violence against women is a manifestation of a broader pattern of inequality in power relations that must be addressed if the issue of violence is to be effectively tackled. This view is based on much scholarly research that critics would like to ignore.

Other critics latch on to the list of non-discrimination grounds of the Convention, which includes sexual orientation and gender identity. Ratifying the Convention, in the eyes of these critics, would represent recognition of unacceptable identities. This ignores the fact that the Istanbul Convention is about combating violence against women and domestic violence and these provisions are listed among other non-discrimination grounds such as race, disability and age, in order to extend additional safeguards to LGBTI victims of gender-based violence, who may face particular difficulties to access justice and receive support.

I am concerned that all this criticism of the word “gender” is having an increasingly harmful effect on the protection of human rights, in particular on women’s and LGBTI persons’ rights in Europe. The human rights world must engage more actively with critics and use evidence and scholarly research to debunk myths, distortions and fears. Secular and religious critics of so-called “gender ideology” or “gender theory” have the right to hold and express their own views, but they should not be allowed to impair individual rights in the name of their beliefs. Nor should they be allowed to stop progress in recognising and addressing gender inequality and ignore the reality of gender diversity or the evolution of European human rights law. In the end, it is not human rights that are transforming people’s understanding of their identities – human rights law is slowly adapting to the reality on the ground and the practical needs of diverse individuals and rainbow families. This does not mean that men, women and traditional families are being displaced; they are only being complemented by a rich tapestry of individual identities and partnerships that have gone unrecognised for a very long time.





## 7. Human rights of Roma and Travellers

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### INTRODUCTION

After a decade marked by the adoption of national strategies and intense international co-operation to improve the situation of the Roma in Europe, the issue has almost vanished from the political agenda of many governments in recent years. This, however, was dictated by the emergence of other concerns (mainly connected with the arrival of refugees or with terrorism) and not by a demonstrable improvement of the situation of Roma on the ground, in spite of significant investments in policies and projects in this area. School and housing segregation in particular have not been eliminated. The situation might even have deteriorated, partly as a result of the economic crisis. The rise of xenophobic movements in Europe has also had a negative impact as Roma have been targeted by virulent hate speech, including sometimes at the highest political level, hate crime and even mob violence.

My predecessor carried out extensive work on Roma and Travellers. Other Council of Europe monitoring bodies, such as the European Commission against Racism and Intolerance (ECRI) and the Advisory Committee on the Framework Convention for the Protection of National Minorities, continue to devote particular attention to the issue. Therefore, I decided to focus on a few selected topics, which are reflected in the Human Rights Comments that follow.

Tackling anti-Gypsyism was my first priority as it lies at the root of many of the human rights violations the Roma face. It is fed by widespread societal ignorance of Roma history and of their current situation. It reveals itself in the ease with which many rationalise the utter poverty of many Roma by blaming the victims, ignoring it or distancing themselves from it. Anti-Gypsyism manifests itself particularly through bans on begging and on sleeping rough and forced evictions, which often take place in the context of local elections. Moreover, some states have taken measures that are at odds with human rights standards to prevent Roma from travelling to the EU, including ethnic profiling and exit denials at the borders of some countries neighbouring the EU. Intra-EU movements of Roma have also triggered uninformed and inflammatory public debates and led to repatriation programmes. Raising the

awareness of society about the history of discrimination and violence against Roma in Europe is key to stop the perpetuation of human rights violations against them.

Segregation of Roma children in education has been another focus of my mandate, partly because improvements in this area would leverage progress in many other areas. However, I found that strong vested interests perpetuate segregation or stand in the way of efforts to promote inclusive education (see chapter above on children's rights). While some countries have undertaken reforms so as to make education more inclusive, in other countries the issue seems to be almost intractable. Desegregation requires a strong signal from the highest political level as well as a mentality shift. As mentioned, the Position Paper I released in 2017 on fighting school segregation in Europe through inclusive education contains a series of useful recommendations in this area. The European Court of Human Rights has developed important case law on discrimination in education and the European Commission has initiated infringement proceedings against some member states in this area. More needs to be done now by the member states to combat this particularly serious form of discrimination.

Forced evictions of Roma became epidemic in the course of my mandate, prompting me to send letters to seven governments to remind them that international human rights standards prohibit forced evictions without adequate housing alternatives. In some countries, forced evictions seem to be the main tool used by the authorities to address Roma issues. Evictions are traumatic: they disrupt schooling and access to a range of essential services and generate high levels of violence against the persons concerned, who are often caught in a cycle of repeated evictions. During one of my country visits, I met a Roma person who had been evicted 40 times. This is a clearly counterproductive trend, which results in serious human rights violations and renders all integration measures useless.

Statelessness, or the risk of becoming stateless due to the lack of identity documents, is another persistent problem affecting many Roma in Europe (see chapter above on children's rights). While difficulties persist, significant progress has recently been achieved in a number of countries. This includes concrete legal and practical measures to lift obstacles in the way of Roma children acquiring a nationality at birth and to address a lack of identity documents. Positive developments have in general been achieved through the combined action of governments, national human rights institutions and non-governmental organisations (NGOs), often with the support of UNHCR. This demonstrates that with political will, concrete solutions can be found.

Travellers are a unique facet of European culture. However, European states have so far not been able to create the conditions for the survival and flourishing of this culture and way of life. Although Travellers represent a numerically small group and are present in a limited number of countries, prejudices against them run as deep as those against Roma. Many of the difficulties they face could be solved with limited investments, notably the provision of a sufficient number of encampment sites and a flexible approach to the education of their children. Nonetheless, they continue to face widespread discrimination in access to basic rights and services in both law and practice. Steps have been taken in some countries to amend outdated and discriminatory laws but this is not enough to transform outright rejection into acceptance and support and to promote equality.



It is time for the member states to take the lead again and ensure that national strategies for the inclusion of Roma and Travellers are effectively implemented and bring about sustainable results. Governments should stop relinquishing their responsibilities to local authorities. While the latter hold the key to resolving many problems, they also need strong guidance and support from the national level, as well as a nationwide commitment to promote respect for human rights and equal opportunities for all, including Roma and Travellers. Resources to do so are available, in particular at EU level, and they should be used.

## **TIME TO CURE AMNESIA ABOUT THE HISTORY OF ROMA IN EUROPE**

*Human Rights Comment published on 30 July 2015*

In a few days, we will commemorate the liquidation 71 years ago of the so-called “Gypsy family camp” at Auschwitz-Birkenau. On 2 August 1944, 2 897 persons were taken to the gas chambers and exterminated. Only a few months earlier, on 16 May 1944, the detainees of the “Gypsy camp” had refused to obey the orders of the SS soldiers who had come to kill them. Knowledge about both the Roma uprising and the liquidation of the “Gypsy camp” remains limited in European societies today.

*A black hole in European history that prevents full understanding of the present*

Knowledge of Roma history in Europe is crucial to understanding their current situation. Although many people I have encountered have views about Roma, few know anything about their history. Most people do not know, for instance, that Roma were banned from the Holy Roman Empire in 1501 and, as of this date, could be caught and killed by any citizen. In France, Louis XIV decreed in 1666 that all Gypsy males should be sent for life to galleys without trial, that women should be sterilised and children put into poorhouses. In Spain, it was decided in 1749 to detain all Roma in an operation known as the “Great Gypsy Round-Up”. In part of what is now Romania (Wallachia and Moldova), Roma were enslaved between the 14th century and 1856. The Austro-Hungarian Empress Maria Theresia imposed a fierce assimilation policy involving the removal of children from the care of their parents.

In more recent times, Roma and Yenish children were forcibly removed from their families in Switzerland, on grounds that their parents would not be able to educate them as good citizens. Similarly, it remains largely unknown in France that Roma who had been detained in camps on French territory during the Second World War were in some cases kept in detention in miserable conditions until the end of 1946, or that Roma survivors of the Nazi concentration camps were left without any support and deprived of nationality long after 1945.

The Roma “Pharrajimos” – the Roma Holocaust – carried out during the Second World War was a culmination of these policies of exclusion, elimination and forced assimilation. About 90% of the Roma population of some countries disappeared as a result of massacres and deportations to concentration camps. However, 70 years after the end of the Second World War, memory work regarding the fate of the Roma

is still incomplete. In my report on the Czech Republic (2013) for example, I recalled that a pig farm is still present on the site of the former Lety labour camp, in which Roma were detained during the Second World War and then deported to Auschwitz.

It is also deeply worrying that some mainstream politicians, in a context of growing populism in Europe, have publicly allowed themselves to condone the Roma Holocaust. In addition to trivialising some of the most horrendous human rights violations of the past, such discourse strengthens and legitimises present-day anti-Roma racism.

Keeping in mind this tragic past helps to understand why some Roma may find it difficult to trust majority societies and public institutions today. One cannot disregard the heavy legacy of past practices of forced sterilisation, removal of children and ethnic profiling in current relations between Roma communities and the police or state administrations in general.

### *Ignorance of the past allows for the perpetuation of human rights violations*

The forced sterilisation of Romani women has long been a practice in several countries, with eugenic rhetoric around a supposed “threat of Roma population growth” providing the bedrock for this gross human rights violation. Cases are still sporadically reported in the 21<sup>st</sup> century. Sweden and Norway have recently established commissions in order to investigate past abuses, including forced sterilisation, and to promote redress and reconciliation. The Czech government presented apologies to forced sterilisation victims in 2009. However, other countries have not yet acknowledged their responsibilities, provided adequate redress to victims or sanctioned those responsible for this human rights violation.

A certain continuity from past to present can also be discerned in relation to the removal of Roma children from their families, a long-standing practice aimed at eradicating Roma culture. While various countries have recognised that this was wrong, the number of Roma children placed in state care remains disproportionately high in many others. During my visits to Romania, Bulgaria and Norway, I found that Roma children often appear to be placed in care on grounds of the socio-economic situation of their family, a practice that is at variance with the case-law of the European Court of Human Rights.

Moreover, Roma have in many countries been subjected to constant ethnic profiling by the police for alleged purposes of crime prevention, protection of health and safety or migration control. Since the Second World War, the practice of recording Roma in special files has had a particularly negative undertone for the Roma. However, it has often resurfaced. In Italy, for instance, a census of Roma living in camps for so-called “nomads”, which included the taking of fingerprints, was carried out in 2008. In 2014, the keeping by the police in Southern Sweden of a file with the names of more than 4 000 Roma raised considerable alarm. Ethnic profiling has also been used to impose undue freedom of movement restrictions on Roma, as highlighted in the Issue Paper I published in 2013 on *The right to leave a country*. This document reports exit denials and passport confiscation practices targeting citizens of alleged Roma ethnic origin in some Western Balkan countries in order to prevent them from travelling abroad.

Long-standing practices of police control also have enduring consequences on the legal situation of Roma. During my visit to France, I expressed concerns about the fact that French Travellers were still subjected to exceptional legal arrangements and the obligation to carry an internal travel permit, as a consequence of policies dating back to the beginning of the 20<sup>th</sup> century. I welcome the ongoing process of legislative reform aimed at eliminating these travel permits and other discriminatory provisions. The persistence in several countries of statelessness among Roma communities also carries disturbing echoes of earlier bans depriving Roma of all rights.

Lastly, it is important to remember that the widespread policies of evictions, expulsions and segregation to which Roma are routinely subjected in many European countries are also a continuation of past policies aimed at getting rid of them or at keeping them under tight control. I raised these major human rights concerns in the Czech Republic, France, Italy, Portugal, Romania and “the former Yugoslav Republic of Macedonia”.

### *The way forward*

This history of exclusion and persecution of the Roma in Europe, but also their contribution to European history and culture, must be brought to light so as to replace age-old myths and deeply-rooted prejudices with a narrative grounded on sound knowledge and understanding of the past. It is not only a matter of respect and justice, but also an essential tool to combat growing anti-Gypsyism.

Important moves have been made by policy-makers in several member states: in 2015 the Norwegian Prime Minister offered an apology to the Oslo Roma for Second World War policies; and in May 2015, the French President honoured the memory of the Roma detainees of the Struthof concentration camp situated near Strasbourg. Memorials for Roma victims of the Second World War have been erected in various places. Several German *Länder* have signed cooperation agreements with the Sinti and Roma community in which the Roma Holocaust is specifically mentioned. The Swiss Government offered apologies to victims who were forcibly placed as children and has recently expressed its readiness to provide them with reparation. The European Parliament adopted a resolution in April 2015 acknowledging “the historical fact of the genocide of Roma that took place during World War II” and proposed to recognise the 2<sup>nd</sup> of August as the European Roma Holocaust Memorial Day, a step already taken by some member states.

The truth and reconciliation commissions recently established in Sweden and Norway could show other countries the way forward for the recognition of historical crimes and help promote reconciliation between communities. The views of the Roma communities themselves on their own history should at long last be heard.

The Council of Europe has elaborated Factsheets on Roma history aimed at improving reflection of Roma history into the wider teaching of European history. They should be used more widely in the educational systems of member states.

The proposed establishment of a European Roma Institute could also contribute to making sure the past is not forgotten and increasing knowledge about history and culture. As highlighted by Vaclav Havel, the late Czech President, in his 1995

speech at the ceremony of unveiling of a memorial to the Roma victims of the Lety camp, “this is not about a separate history of the Roma. This is the history of all the occupants of this territory, our shared history. It must be identified, understood, and then never forgotten.”

## TIME TO DEBUNK MYTHS AND PREJUDICES ABOUT ROMA MIGRANTS IN EUROPE

*Human Rights Comment published on 16 July 2015*

Political and media debates on Roma migration have become recurrent in several European countries. Since the eastward expansion of the European Union in 2004 and 2007, and the lifting of employment restrictions regarding Romanian and Bulgarian citizens in a number of EU member states in 2014, fears of Roma migration have often triggered uninformed and inflammatory discourse.

### *No “invasion” by Roma*

Media in the United Kingdom, Germany, Switzerland, Italy and other countries have often put forward unfounded figures about actual or potential arrivals of Roma. However, I found out that in some places, the number of Roma migrants has remained stable over the years. In France, for example, it is estimated that the number of Roma migrants is around 15-20 000, a stable figure since the beginning of the 2000s. Last year, during a visit to a Roma migrant settlement in Strasbourg, I was informed that the overall number of Roma there has remained at around 400 persons over the last few years. Numbers might have been more variable elsewhere but, in general, there is no research-based evidence indicating that Roma form a larger share of those emigrating than their respective share of the population in their countries of origin. A 2013 study<sup>98</sup> on Roma in Romania found that they were not more inclined to emigrate than non-Roma.

Roma migrants have often been depicted in political discourse and the media as abusing social welfare and refusing any form of integration in the host societies. However, these perceptions are not supported by facts. In a 2013 study, the European Commission found that intra-EU migrants, which include Roma migrants, make a net contribution to their host countries, by paying more in taxes than they receive in benefits. Moreover, they are in general less likely to request assistance from unemployment services and to receive family and child-related benefits than their native born counterparts. Studies carried out in the UK (2014)<sup>99</sup> and Sweden (2014)<sup>100</sup> provided similar findings. During my 2015 visit to Germany, the German authorities

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98 S. Cace, R. Toader and A. Vizireanu, *The Roma in Romania. From Scapegoat to Development Engine*, July 2013.

99 C. Dustmann and T. Frattini, “The Fiscal Effects of Immigration to the UK”, *The Economic Journal*, 4 November 2014, Volume 124, Feature Issue, Pages F593–F64.

100 J. Ruist “The Fiscal Consequences of Unrestricted Immigration from Romania and Bulgaria” University of Gothenburg - School of Business, Economics and Law, Working papers in Economics no. 584, January 2014.

also confirmed that migrants from central and Eastern European countries, including Roma, constituted a net fiscal benefit for the country. Importantly, the diversity of situations among Roma immigrants is often overlooked. Many Roma are working and have integrated well in their new host countries.

### *Why do Roma emigrate?*

Research indicates that the motives for Roma to emigrate do not fundamentally differ from those of non-Roma: they look for employment, better living conditions and a better education for their children. However, Roma are exposed to a much higher degree of extreme poverty, discrimination and exclusion in their countries of origin. Romanian Roma immigrants in Spain and Italy surveyed as part of the Migrom research project reported that their main reason for migrating westward was to find a job to improve their housing conditions back home, including better-quality accommodation but also moving out of segregated settlements. Unfortunately, discrimination and rejection do not stop at the borders of the countries of origin of Roma migrants. In the countries of immigration, many are compelled to live in substandard and segregated conditions and face frequent and violent evictions by the police. The authorities in several countries are increasingly taking or discussing measures to criminalise the presence of Roma in public spaces, by enacting bans on begging or sleeping rough. I have criticised this approach in my recent reports on France and Norway. I also found that Roma children are sometimes denied enrolment in schools and that when they do attend school, frequent evictions seriously disrupt their education. Politicians in several countries have used aggressive and racist rhetoric regarding Roma migrants, turning them into scapegoats for a wide range of problems. The media in these countries have also disseminated stereotypes amounting at times to hate speech. This has in turn led to cases of mob violence against Roma, such as the lynching of a migrant Roma teenager in France in 2014 or violent attacks against Roma camps in Italy.

However, the presence of Roma migrants does not always necessarily turn into a major issue for public debate. This is the case for example in Spain, which hosts a significant number of Roma migrants and where violent forced evictions and hate crimes have rarely been reported.

I have also come across more positive ways of handling the situation of Roma migrants. During my visit of May 2015 to Germany, for example, I was informed of positive local initiatives, such as an integration project for Roma migrant families in Duisburg. German local governments have intervened quickly to find housing solutions for Roma migrants at risk of homelessness, thereby preventing the emergence of shantytowns. In December 2014 I visited a site for Roma migrants in Strasbourg who had previously been living in shanty towns. The aim is to support them in finding adequate accommodation and employment by providing them with temporary accommodation in decent conditions. I also noted with interest the results of a UK study (2011)<sup>101</sup> on school inclusion of migrant Roma children of Czech and Slovak

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101 Equality and the Roma Education Fund, *From Segregation to Inclusion. Roma Pupils in the United Kingdom. A Pilot Research Project*, November 2011.

origin who had previously been enrolled in remedial classes in these countries. The study showed that these children, to whom adequate support was provided in the UK, were not performing worse than their fellow students.

### *Roma migrants from non-EU member states*

Many Roma have emigrated since the 1990s because of the armed conflicts in the Western Balkans, together with their fellow citizens from the region. Roma have continued to leave the region years after the conflicts ended, notably from Kosovo\*, because of widespread hostility threatening their safety. While many persons originating from Kosovo have in recent years been sent back because the situation was improving, Roma have sometimes been returned from several Western and Northern European countries without consideration of the fact that they would not be able to re-integrate there or that their safety would be at risk.

Several EU countries have included Western Balkan countries on their lists of “safe countries of origin”, and apply fast-track procedures to asylum seekers originating from these countries, leading in most cases to protection refusals. Collective expulsions of entire groups of Roma migrants, which are prohibited under the European Convention on Human Rights, have been reported. However, Roma originating from such countries have at times been granted refugee status in EU member states on grounds of widespread discrimination in their countries of origin. In October 2014 the French authorities removed Kosovo from France’s list of safe countries of origin, on grounds that Kosovo could not offer adequate guarantees of protection against violence to some categories of the population.

Following the liberalisation of the visa regime between EU member states and five countries of the Western Balkans in 2009–2010, the number of citizens from these countries seeking asylum in EU member states has been on the rise. The fact that Roma have frequently been identified as forming the bulk of these asylum seekers has led to attempts to prevent them from leaving their countries through ethnic profiling practices by law enforcement authorities at the borders and measures limiting their freedom of movement. Such measures include exit denials and passport confiscations. In 2013, I published an Issue Paper on *The right to leave a country* in which I criticised these measures which led to serious infringements of the human rights of the persons concerned.

### *What should be done?*

No “invasion” of Roma migrants from Bulgaria and Romania has happened since the lifting of the employment restrictions regarding citizens from these countries in other EU member states. It is time that politicians and media stop playing on fears of massive inflows of migrants and stigmatising Roma in this context. They should instead use objective demographic and economic data. Racist rhetoric should be firmly condemned at the highest level and ethical journalism should be promoted.

\* All reference to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.

Journalists should also report on positive examples of integration among Roma migrants, so as to provide a more balanced picture of the situation.

More should be done to provide Roma migrants with effective support for durable solutions, based on existing good practices, instead of repressive measures and stigmatisation. Forced evictions with no accommodation alternatives should be stopped. They prevent any form of integration and have particularly negative consequences on children.

Discriminatory practices aimed at preventing Roma from leaving a country should stop as they are in violation of various fundamental rights, including the right to be free from discrimination and the right to seek asylum. It is also essential to continue to consider adequately the merits of all asylum applications on an individual basis.

## **STATES MUST TAKE RESOLUTE MEASURES TO END SCHOOL SEGREGATION OF ROMA**

*Human Rights Comment published on 8 November 2012*

Roma children are experiencing segregated and substandard education in the school systems in the majority of the 47 Council of Europe member states. The consequences are devastating. It makes it very hard for these children to escape poverty and marginalisation later on in life. Non-integration also generates large – and unnecessary – costs for society at large.

Segregation takes several forms: Roma children are overrepresented in special remedial schools for children with intellectual and other disabilities – based on biased tests. Roma children are sent to Roma-only schools, schools with a majority of Roma pupils, or they are put in separate Roma-only classes. They are often also segregated outside classrooms, being prevented from using common playgrounds or dining halls. In Hungary, Roma children can even be physically excluded from schools through systems of “private” schooling at home. Also, teachers in segregated education reportedly have lower expectations for Roma pupils and set accordingly lower goals for them to achieve.

Schools or classes with a majority of Roma pupils can be found throughout Europe, from Portugal to Russia, but the problem is especially acute in Central and Eastern European countries, particularly in Slovakia, the Czech Republic and Serbia.

### *Putting the blame on the Roma themselves*

Most “explanations” imply that Roma parents do not value education. However, pressure from non-Roma parents to not enroll Roma pupils in mainstream classes plays a substantial role in segregation. In September, for example, 40 adults reportedly stopped more than 50 Roma children from entering their new preschool facility in Gornji Hrascan in Croatia. Local police were present, but did not intervene.

UNICEF argues that inclusive education is a strategy of addressing all forms of exclusion and discrimination. A report prepared by an NGO in the UK shows the



positive results of inclusive teaching. It reviews the situation of Roma pupils whose families have emigrated to the UK.<sup>102</sup> Most of them had previously been enrolled in special education in the Czech Republic and Slovakia. The main conclusion is that their educational achievements are the same as those of the other pupils in the average and that they rapidly catch up, even though they face linguistic barriers at the start of their education in the UK. These positive results are achieved with specific support in the classroom and always within the framework of mainstream education.

### *Discrimination is expensive*

The correlation between segregated education and high levels of unemployment has been clearly established. In a report from the World Bank, for example, annual productivity losses because of segregated education are estimated at 231 million euros in Serbia, 367 million euros in the Czech Republic, 526 million euros in Bulgaria, and 887 million euros in Romania.<sup>103</sup>

The report also shows that annual fiscal gains from bridging the employment gap are much higher than the total cost of investing in public education for all Roma children, since special education is significantly more expensive per pupil than education in mainstream classes.

### *States' positive action is needed*

There are many actions authorities should take – here is a selection of urgent measures:

- Combat anti-Gypsyism, especially at school. General Policy Recommendation No 13 from the European Commission against Racism and Intolerance provides useful guidance on this.
- Clear and unequivocal commitment by policy-makers and high level officials towards desegregation as part of social inclusion.
- Adopt legislation that clearly prohibits segregation in education – and in all settings.
- Support comprehensive plans for desegregation, transportation to school, specific support for the Roma children, specialised training for the teachers and educational staff and integration activities at the local level.
- Provide universal access to inclusive pre-school education and, in general, promote inclusive educational policies.
- Undertake a critical review of the school entry testing and other forms of testing that have a discriminatory impact on Roma children.
- Improve information to the Roma parents on the choices that are available and the consequences of placement in remedial education.

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102 Equality and the Roma Education Fund, op. cit.

103 The World Bank, *Economic Costs of Roma Exclusion*, April 2011.

## *Separate is not equal*

On 13 November 2007 the European Court of Human Rights found that 18 Roma children from the city of Ostrava, Czech Republic had been the victims of discrimination.<sup>104</sup> Statistics showed that they were 27 times more likely than non-Roma children to be educated in special schools designed for persons with intellectual disabilities. Five years have now elapsed and whilst the Czech authorities have taken some measures, major progress remains to be done.

Segregation is one of the worst forms of discrimination and a serious violation of the rights of the children concerned. This situation perpetuates the marginalisation of the Roma in Europe. Separate is not equal – in the case of the Roma it means lower quality education and fertile ground for anti-Roma prejudice.

States have a positive obligation to end school segregation of Roma. Getting – and keeping – Roma children in mainstream schools is a key to Roma advancement. This will benefit all of society.

## **STOP CHASING ROMA. START INCLUDING THEM**

*Human Rights Comment published on 22 November 2012*

### *Evictions of Roma are on the rise in Europe*

In recent years, the situation of Roma has been largely debated in Europe. However, this attention for the situation of the most discriminated minority in Europe has not been matched by much concrete action by governments. European countries continue too often to resort to old methods of dealing with this pressing human rights issue, as the increasing evictions of thousands of Roma throughout Europe show.

In France close to 5 000 Roma have reportedly been evicted from their settlements between July and September 2012. The inter-ministerial circular released last August requesting that authorities provide the evicted persons with adequate alternative housing has in most cases not brought any relief to the families concerned, who are often left to sleep rough in Paris, Marseille and other French cities.

In Italy, forced evictions continued, despite the government's commitment to stopping the "nomad emergency" policy. Only last September in Rome, 250 persons were evicted without being offered any alternative other than moving to ethnically segregated settlements.

In the Czech Republic, Roma families were evicted in the summer of 2012 from run-down buildings in Ostrava in which they had lived for many years. They were relocated to residential hotels considered by social services to be unsuitable for children. The frequent evictions of Roma from public housing in some Czech regions have led many Roma families to lead a de facto itinerant life against their will.

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104 ECtHR judgment, *D.H. and others v. The Czech Republic*, application no. 57325/00, 12 November 2007.

In Belgrade, Serbia, 1 000 Roma were forcibly evicted in April 2012 from the settlement of Belvil. Some of them had to move to other cities, and others were relocated into containers in the periphery of Belgrade, with no access to work, health and other basic services.

In the United Kingdom, Travellers who were evicted from their own land in Dale Farm, Essex, in October 2011 have again been served with eviction notices. They are now being asked to leave the private roadside settlement they have been occupying since their eviction. They say that they have nowhere else to go and fear the approaching winter.

### *The vicious circle of evictions should stop*

Evictions disassociated from any integration and social protection plan are ineffective. Chasing away Roma does not bring a long-term solution to the exclusion and abject poverty in which many of them live. Many of these evictions are contrary to international human rights standards, which provide for specific safeguards in cases of evictions, including adequate alternative accommodation and access to legal remedies. In particular, the European Social Charter sets precise obligations for state parties with regard to housing, access to health care and social services and, in this context, protection of the rights of children.

Moreover, evictions are counter-productive as they often seriously disrupt the schooling of Roma children, which is an essential element for integration. They also hamper the efforts of those who provide basic health care to the Roma, for instance through vaccination campaigns.

The excessive use of force by police has been reported in many evictions. Moreover, some media and politicians have used evictions to fuel prejudices and anti-Roma feelings in the population. Groups of evicted Roma have faced demonstrations of hostility, and sometimes violence, from neighbours in places where they have been displaced.

### *Time to move away from repressive policies*

Combating deep-rooted anti-Roma prejudice and discrimination should be a priority, as it is a major obstacle to any progress towards Roma inclusion. Politicians and decision-makers should in particular stop using rhetoric that stigmatises Roma, including Roma migrants.

European countries should shift their focus from repressive measures to integration strategies. Good practices that exist in certain European states should be further developed and shared.

One of the most urgent steps to be undertaken is to find adequate solutions to the housing needs of Roma. The right to adequate housing is indeed a precondition for the enjoyment of many other human rights. States should therefore invest in the development of safe and affordable housing solutions for Roma, in close consultation with them.

Housing programmes and practices that result in forced segregation are in violation of the principle of non-discrimination and can never be regarded as a viable solution, as past experiences have shown.

Evictions should never happen if there is no adequate and affordable alternative accommodation.

The root causes of Roma migration, which include institutionalised discrimination, segregation, repression and poverty in their countries of origin, should also be addressed. These goals concern us all: local and national governments, international organisations and civil society.

These evictions are not only costly and ineffective, but they are above all inhumane. They should be ended and replaced by effective integration policies, which would have beneficial consequences not only for the Roma families concerned, but for society as a whole.

## **TRAVELLERS – TIME TO COUNTER DEEP-ROOTED HOSTILITY**

*Human Rights Comment published on 4 February 2016*

In October 2015, 10 persons died in a fire which broke in a Travellers' site near Dublin. Following this tragic event, neighbours prevented the authorities from providing alternative accommodation to the surviving members of the group on a nearby site by blocking roads leading to the new site. Sadly, this episode illustrates well how deep-rooted hostility against those identified as Travellers, Gypsies, Roma, Manouches, Sinti, Romani/Taters or Yenish, still affects the lives of these persons in many countries where they live, including Belgium, France, Ireland, Norway, the UK and Switzerland. Due to strong assimilation policies of the past aimed at settling them down, these groups often no longer travel, or they do so only part of the year. However, they favour living in a trailer to "brick and mortar" housing and want to retain the possibility of travelling on a seasonal basis. This way of life is seriously hampered and endangered by the lack of halting sites, increasingly frequent evictions, hostility and rejection of the majority population and widespread discrimination. This has been so for decades.

### *Legacy of the past*

The history of Travellers in Europe is marked by persecutions, expulsions and rights violations aimed at forced sedentarisation and at eradicating their culture and way of life. Measures targeting Travellers have included the removal of children from the custody of their parents, limitations to freedom of movement and confiscations of caravans. The effects of past policies are still felt today. In various countries, the authorities continue to implement policies that force Travellers to move to settled accommodation, often in poor conditions. They also fail to acknowledge the specific identity and culture of Travellers, including those who have adopted a sedentary way of life. Travellers' contribution to the history and culture of European countries is overlooked.

### *Shortage of sites, evictions and discrimination*

When doing research on Travellers in the UK on the Internet, one of the top links that appeared on my screen was an advertisement for “Immediate Gypsy-Traveller-Itinerant evictions” starting with these words: “No landlord or owner of land wants Gypsy, traveller or itinerant encampments on their land...” Unfortunately, this is not an isolated view. I am concerned about persisting hostility and the reluctance of local authorities to provide accommodation to Travellers. Disturbing instances of hate speech by local politicians are also often reported.

In all the countries where Travellers live, there is a dire lack of sites for temporary and long-term stay. In Ireland for example, about 800 Travellers are reportedly living on the roadside with no sewage facilities.<sup>105</sup> In the UK, a 2012 study<sup>106</sup> indicated that about 20% of the Travellers were living on unauthorised sites. In Brussels, there is currently no halting site. In France, where municipalities with more than 5 000 inhabitants are required by law to provide sites, only 69% of these municipalities currently comply with the law. When public sites are built, they are often located in isolated and/or environmentally hazardous areas and they fail to meet basic conditions for adequate housing, even though residents pay a rent for their stay. Travellers who own their own land are frequently prevented from living on it due to planning permission denials. This situation obliges many Travellers to stop on sites without authorisation or to live “by the roadside”. As trespassing is a criminal offence in several countries, they may therefore find themselves in breach of the law, which in turn reinforces stereotypes depicting them as criminals. It also triggers tensions with the neighbourhood. In this context, I found it disconcerting that in various countries, funding available for the setting up of sites is largely underused by local authorities.

In my recent report on Belgium, I point to the difficulties Travellers often face when requesting registration with local authorities. The lack of registration makes it difficult for them to obtain identity documents, register on voting lists and access essential services such as opening a bank account and subscribing car insurance. In France, a law of 1969 which requires Travellers to hold a special circulation permit and to regularly report to the police is currently being amended. It was long criticised on grounds that it limited French Travellers to a status of second-class citizens and hampered their enjoyment of basic human rights. In several countries, caravans are not recognised as housing, which prevents caravan dwellers from having access to housing benefits, planning permissions or from seeking a loan for housing improvement and deprives them of protection in case of eviction.

Worrying information I received from different countries indicates that Travellers are increasingly subjected to forced evictions without adequate alternative being provided to them. Some evictions are carried out during wintertime, others concern families which have resided for years on the same site. It is worrying that international standards regarding the conduct of evictions are frequently violated. Both the

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105 Pavee Point Traveller and Roma Centre, “Factsheet on Accommodation”, April 2015, [www.paveepoint.ie](http://www.paveepoint.ie).

106 Department for Communities and Local Government “Progress report by the ministerial working group on tackling inequalities experienced by Gypsies and Travellers”, UK Government, April 2012.

European Court of Human Rights and the European Committee of Social Rights have found that evictions resulted in violations by several member states of both the European Convention on Human Rights and the European Social Charter, respectively. Many families are reported to be constantly on the move as a result of frequent evictions. The instability generated by this situation is particularly harmful to children. A report of 2014 prepared by the Flemish Parliamentary Ombudsman for Children's Rights underlines that about 100 Traveller children in Flanders had no access to school due to repeated evictions. Moreover, evictions are costly. Local authorities should more carefully consider the benefits of investing in long-term, human rights compliant solutions rather than spending huge sums on evictions, which do not bring about lasting solutions.

Tense relations with the police are also a common feature of the life of Travellers everywhere. The police has historically been in charge of monitoring nomadic groups who were perceived by the authorities as suspicious by nature. Nowadays, ethnic profiling of Travellers by the police continues to be frequently reported, as does police violence during evictions.

Against this background, existing data on Travellers' well-being and access to rights, while shocking, are perhaps not surprising: in the UK, it is estimated<sup>107</sup> that their life expectancy is at least 10% lower than the national average, while infant mortality is much higher. The suicide rate among Travellers in Ireland is reported to be six times the national average. Also in Ireland in 2010, 84% of the Travellers were unemployed. In all the countries concerned, Traveller children are often denied access to education and when they attend school, they experience very high dropout rates. Few of them reach secondary education.<sup>108</sup>

### *What should we do?*

Firstly, it is crucial to eliminate all discriminatory provisions regulating the life of persons living in caravans. In the 21st century, Travellers must no longer be prevented from enjoying all their rights on an equal footing with other citizens.

All instances of racist statements against Travellers should be firmly condemned by the authorities, and hate speech directed against them should be adequately prosecuted and sanctioned.

There is a need for more research and awareness-raising concerning the history of Travellers; it can help to dispel long-standing prejudices and, therefore, to stop the perpetuation of human rights violations against the members of these groups.

The specific culture, identity and way of life of Travellers should be fully acknowledged. The debate initiated by the Irish Parliament in 2015 with a view to granting Irish Travellers the status of ethnic minority is a promising example. In general, Travellers should be provided with increased possibilities to preserve and promote their culture as part of European cultural heritage, as underlined by the Council of Europe

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107 Ibid.

108 Pavee Point Traveller and Roma Centre, "Factsheet on Accommodation", April 2015, [www.paveepoint.ie](http://www.paveepoint.ie)

Committee of Ministers in its Recommendation Rec(2004)14 on the movement and encampment of Travellers in Europe.

Resolute steps should be taken to increase the number and quality of sites available to Travellers, whether transient or long-term. Local authorities should be strongly incentivised, and if necessary compelled, to allow temporary stay of Travellers. States should ensure that such obligations are enforced. They should not relinquish their responsibility for providing adequate accommodation on local authorities.

Good practices exist, as highlighted by the Council of Europe.<sup>109</sup> Mediation work between Travellers, local authorities and local communities is an effective way of finding concerted solutions to the shortage of sites. Such practices, involving active participation of the Travellers, should be supported and replicated.

The authorities should avoid evictions, and seek human rights compliant alternatives, as evictions are traumatic, disrupt children's education and hinder social integration.

Initiatives aimed at improving access to education for Traveller children should be supported and disseminated, rather than prevented as is often the case.

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109 Council of Europe Database of policies and good practices, [www.goodpracticeroma.ppa.coe.int](http://www.goodpracticeroma.ppa.coe.int)







## 8. Human Rights of LGBTI people

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### INTRODUCTION

In a short period of time there has been immense progress in the recognition and realisation of equal human rights for LGBTI persons. Recently, we have seen the appointment of the first ever UN Independent Expert on sexual orientation and gender identity, new domestic laws on family rights and legal gender recognition, and a sea change in many countries in public attitudes towards LGBTI persons. Yet, while acceptance of diversity is gaining momentum, LGBTI persons continue to face discrimination and prejudice, and remain frequent targets of hate speech and sometimes violence.

My predecessor issued a comprehensive study on human rights and gender identity and a survey on discrimination on grounds of sexual orientation and gender identity in Council of Europe member states. In the course of my mandate, a specific Sexual Orientation and Gender Identity Unit was created in the Council of Europe Secretariat, and ECRI began incorporating the topic of discrimination against LGBTI persons into its country monitoring work. The Human Rights Comments and the speech in this section reflect my observations and some of the most significant recent developments in the area of LGBTI rights.

Right around the time I took office, there was a major setback to the human rights of LGBTI people with the discussion and, in a few cases, adoption of domestic laws banning “propaganda” or “promotion” of homosexuality. The justifications for such laws have been highly dubious and often accompanied by direct or tacit support of discrimination and homophobia in the guise of “moral” or “religious” considerations. As affirmed by the European Court in its *Bayev and Others v. Russia* judgment of June 2017, curtailing freedom of expression and assembly of LGBTI persons violates the European Convention on Human Rights (ECHR).

While opponents invoked a purported need to protect children as an excuse to silence voices against homophobia, I sought to shed light on the specific vulnerability of LGBTI children. These children, like any others, are entitled to enjoy human rights and a safe environment. Instead, they are often faced with prejudices and rejection, including in their own families, and many endure years of bullying in school. Because

of this, LGBTI children are at a higher risk of becoming homeless, and are more likely to drop out of school, experience depression or contemplate suicide. Governments should ensure that all children have access to factual information about sexuality and gender diversity, and that LGBTI children are protected in all areas of life.

Intersex persons cannot be clearly classified as male or female because of differences in the development of chromosomes, hormones or genital organs, and prejudice and ignorance about them remain widespread. Social expectations and norms have allowed for routine medical and surgical interventions that have not always been medically necessary, in violation of the right of intersex persons to self-determination and physical integrity. The lack of laws enabling legal gender recognition at a later stage in life may result in intersex persons having to live with a sex marker that does not correspond to their experienced gender identity. I have recommended the provision of information and support to parents and medical practitioners, and urged member states to review legislation and medical practices in order to correct gaps in the protection of intersex persons.

Over the past two decades, there has been a growing trend in Europe and elsewhere to legally recognise the family rights of LGBTI persons. Registered partnerships providing the same rights and benefits as those for different-sex couples are critically important to address the many problems faced by same-sex couples and their children. Today, 27 out of 47 member states provide some form of legal arrangement for same-sex couples, and more than a dozen recognise same-sex marriage. However, there has also been a reaction against this process, with some countries holding referenda and adopting constitutional amendments that specify that marriage can only be the union of a man and a woman.

With regard to the rights of transgender persons, I focused on pressing for national legislation that permits legal gender recognition without abusive conditions, such as sterilisation, divorce and medical diagnoses of mental disorder. The Court played a critical role in this area with its *Christine Goodwin v. the United Kingdom* judgment in 2002. Several member states have amended their national legislation in a positive direction. Nevertheless, transphobia remains a widespread problem.

Despite the considerable advances in LGBTI rights over the past few years, I am concerned about the parallel backlash, which is resulting in a widening gap between those member states where LGBTI persons enjoy strong acceptance and protection and those where they are kept or driven back into the closet. There is an urgent need for member states to continue to strengthen their anti-discrimination and hate crime legislation and to educate the police, the judiciary and the public at large about the rights of LGBTI persons – which, and this bears repeating, are the same human rights as those of any other people – and to combat homophobia and transphobia.

## **SILENCING VOICES AGAINST HOMOPHOBIA VIOLATES HUMAN RIGHTS**

*Human Rights Comment published on 21 June 2012*

Recent months have seen renewed efforts in some Council of Europe member states to silence voices against homophobia and transphobia. Laws banning information about lesbian, gay, bisexual, transgender and inter-sex (LGBTI) issues mark a worrying step back towards a bygone era when homosexuals were treated like criminals. These efforts to curtail freedom of expression and assembly run starkly against international and European human rights standards.

The targets of these measures have not only been LGBTI activists, but also those expressing solidarity with their struggle for equality and others who have sought to disseminate factual information about sexual orientation and gender identity.

### *Backwards trend towards criminalisation*

Laws banning “propaganda”, “spreading” or “promotion of homosexuality” have been adopted at national or local level in several member states and have been under consideration in many others. These laws are often so vaguely worded that they may outlaw any public discussion or public activity surrounding LGBTI issues.

In 2009 political groups in Lithuania seeking to prohibit information on homosexuality in schools pushed through the adoption of a Law on the Protection of Minors against the Detrimental Effects of Public Information. While the initial version of the law prohibited “propagation of homosexual, bisexual and polygamous relationships”, it was amended in 2010 and the situation remains legally ambiguous. In Moldova several cities and local districts recently adopted laws prohibiting the “aggressive propaganda of non-traditional sexual orientations”. In one case, a local bill was declared unconstitutional.

In Russia criminal and administrative laws against “propaganda of homosexuality” were enacted in Ryazan region in 2006, in Arkhangelsk in 2011 and Kostroma and Saint Petersburg in 2012. Several other regions are discussing such laws, as is the State Duma at the national level. These laws provide for very harsh fines – up to EUR 12 700 for associations.

In Ukraine two draft laws were put forward in parliament in 2011 and 2012 making it an offence to “spread homosexuality”, including by “holding meetings, parades, actions, demonstrations and mass events aiming at intentional distribution of any positive information about homosexuality”. Similar initiatives have been proposed at local or national level in Hungary, Latvia, and earlier, in Poland as well.

### *European standards protect LGBTI rights*

All the major international and European instruments provide that freedom of expression, association and assembly should be applied without discrimination, including on grounds of sexual orientation and gender identity. In *Alekseyev v.*

*Russia*<sup>110</sup> the European Court of Human Rights ruled that the repeated ban on pride demonstrations in Moscow violated the convention and stated that there was no scientific evidence that open public debate about sexual orientation has an adverse effect on children. In last week's judgment *Genderdoc-M v. Moldova*,<sup>111</sup> the Court found a violation with respect to the ban of an LGBT demonstration in Chişinău which the authorities had considered to "promote homosexuality".

States should combat homophobic and transphobic hate speech. Indeed, the European Court of Human Rights recently ruled in the case of *Vejdeland and Others v. Sweden*<sup>112</sup> that homophobic speech did not fall under the protection of Article 10 guarantees of free expression. In the case, the Court found justified the criminal conviction of individuals who distributed leaflets in an upper secondary school calling homosexuality a "deviant sexual proclivity" with a "morally destructive effect on the substance of society".

### *What governments should do*

Frequently, governments have sought to justify restrictions on the freedoms of LGBTI persons with reference to public opinion, moral or religious considerations. This is clearly unacceptable from the perspective of human rights. Prides must be permitted, and governments must protect them, as well as allow the peaceful expression of opposing views, if they do not constitute hate speech.

If public opinion is hostile to LGBTI rights, governments have a responsibility to raise awareness and educate the public. A good opportunity for doing so was recently provided by the Council of Europe, which has launched a programme of awareness-raising and educational activities on LGBT issues available to states on a voluntary basis. Albania, Italy, Latvia, Montenegro, Poland and Serbia have already joined the programme, which is a good first step towards overcoming prejudice in society.

Rather than seeking to keep or drive LGBTI issues back into the closet, states must fulfill their human rights obligations to all and help counter public prejudice.

## **LGBTI CHILDREN HAVE THE RIGHT TO SAFETY AND EQUALITY**

*Human Rights Comment published on 2 October 2014*

Lesbian, gay, bisexual, trans and intersex (LGBTI) children are often victims of bullying and violence in schools, at home and via social media. This has a serious effect on their well-being and prevents openness about their personal identity. Like all children,

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110 ECtHR judgment, *Alekseyev v. Russia*, applications nos. 4916/07, 25924/08 and 14599/09, 21 October 2010.

111 ECtHR judgment, *Genderdoc-M v. Republic of Moldova*, application no. 9106/06, 12 June 2012.

112 ECtHR judgment, *Vejdeland and Others v. Sweden*, application no. 1813/07, 9 February 2012.

LGBTI<sup>113</sup> children are entitled to enjoy human rights and require a safe environment in order to participate fully in society.

### *Responses to bullying*

According to a survey carried out by the EU Agency for Fundamental Rights (FRA), at least 60% of LGBT respondents had personally experienced negative comments or conduct at school because of their sexual orientation or gender identity. 80% had witnessed negative comments or conduct as a result of a schoolmate being perceived as LGBT. Given the frequency of negative behaviour directed at LGBT students, it is not surprising that the survey also found that two out of three LGBT children hid their LGBT identity while at school.<sup>114</sup>

This situation is unacceptable. It puts a heavy burden on LGBTI children, many of whom are at high risk of suicidal behaviour. According to an Irish study,<sup>115</sup> over half of LGBT respondents aged 25 or younger had given serious consideration to ending their lives. It is clear that bullying affects LGBTI children's educational achievement and impedes their right to education without discrimination, in addition to their right to enjoy the highest attainable standard of health.

School should be a safe environment for all students. The European Court of Human Rights<sup>116</sup> has made it clear that homophobic speech in educational settings is not protected by the European Convention's guarantees of free expression. Confronting homophobic and transphobic intimidation requires continuous and focused attention from schools and educational authorities. UNESCO<sup>117</sup> and the International Lesbian, Gay, Bisexual, Transgender and Queer Youth and Student Organisation (IGLYO) have provided detailed guidance on effective responses. Ireland has introduced legal requirements and a mandatory policy for addressing homophobic and transphobic bullying in schools, along with a concrete action plan.

### *Right to information*

Children have the right to receive factual information about sexuality and gender diversity. Anti-bullying efforts should be supported by education on equality, gender and sexuality. The UN Special Rapporteur on the right to education has highlighted children's right to comprehensive sexual education without discrimination on grounds of sexual orientation and gender identity.<sup>118</sup> It is necessary to question stereotypes about gender and sexuality in schools. The European Committee of Social Rights

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113 This Human Rights Comment is inclusive of lesbian, gay, bisexual, trans and intersex (LGBTI) children under 18 years of age. The acronym "LGBT" is used when reference is made to research which does not explicitly include intersex people.

114 Fundamental Rights Agency (2013) *EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey - Results at a glance*, Publications Office of the European Union.

115 N. Carr, K. Kitching, and A. Bryan, *Supporting LGBT Lives: A Study of the Mental Health and Well-Being of Lesbian, Gay, Bisexual and Transgender people*, 2009.

116 ECtHR judgment, *Vejdeland and Others v. Sweden*, application no. 1813/07, 9 February 2012.

117 UNESCO, *Education Sector Responses to Homophobic Bullying*, 2012.

118 United Nations, *Report of the United Nations Special Rapporteur on the right to education*, A/65/162, 23 July 2010.



has found a violation of the European Social Charter with reference to teaching materials which were “manifestly biased, discriminatory and demeaning, notably in how persons of non-heterosexual orientation are described and depicted”.

The protection of children is sometimes evoked as an argument to block the availability of information about LGBTI people to children. The Venice Commission has stressed that such arguments fail to pass the essential necessity and proportionality tests required by the European Court. There is no evidence that dissemination of information advocating a positive attitude towards LGBTI people would adversely affect children. Rather, it is in the best interests of children to be informed about sexuality and gender diversity.

### *Family and homelessness*

Many LGBTI children experience prejudice and violence within their own families. The acceptance of LGBTI children is still difficult for many parents and other family members. The FRA survey found out that 35% of young adults were not open about being LGBT within their family. In Montenegro, I visited a shelter and a social centre for LGBTI persons where I met young people who had been rejected by their families and forced to leave their homes. The NGO running the facility was engaged in mediating between the families and LGBTI persons, and had achieved family reconciliation in some cases.

When they are forced to leave their families, young LGBTI people are at high risk of becoming homeless. Research from the UK suggests that up to 25% of homeless youth are LGBT.<sup>119</sup> The current economic crisis makes it even harder for homeless young people to find a job and shelter. When LGBTI youth cannot rely on the support of their families, the result can be long-term marginalisation with a high cost to individual health and well-being. The Albert Kennedy Trust in the UK runs both temporary shelters and more permanent accommodation options for young LGBTI persons along with social and vocational support. Municipal and state-funded services for homeless people should also strive to welcome homeless LGBTI youth.

### *Right to self-determination*

Trans and intersex children encounter specific obstacles when exercising their right to self-determination. As minors, trans adolescents can find it difficult to access trans-specific health and support services while intersex children are often subjected to irreversible “normalising” treatments soon after birth without their consent. The legal recognition of trans and intersex children’s sex or gender remains a huge hurdle in most countries. Children are rights-holders and they must be listened to in decision-making that concerns them. Sex or gender assigning treatment should be based on fully informed consent.

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119 European Federation of National Organisations Working with the Homeless ( FEANTSA), *Homeless in Europe Magazine: Children, Families, Young People*, Autumn/Winter 2010.

LGBTI children share many common problems. In their “Vision for 2020”, trans and intersex youth in Finland gave high priority to the right to grow up in a safe environment, as well as the right to information. They also stressed “the right to a legally secured life as an equal member of society” and called for inclusive equal treatment legislation.

### *Empowerment and protection*

This vision for the future should be today’s reality. Governments already have a duty to empower and protect LGBTI children. Respect for children’s views and the protection of the best interests of the child are clearly laid out in the UN Convention on the Rights of the Child. Human rights apply equally to LGBTI children without discrimination.

LGBTI children should be able to exercise their participatory rights in all areas of life. Access to information is a basic condition enabling participation and decision-making. At the same time, LGBTI children must be protected from violence and bullying at home, in schools, on the internet, in sports and in public spaces. Child protection services, children’s ombudspersons and the police should make particular efforts to include LGBTI children in their outreach. Governments need to take systematic action to improve the safety and equality of LGBTI children.

## **A BOY OR A GIRL OR A PERSON – INTERSEX PEOPLE LACK RECOGNITION IN EUROPE**

*Human Rights Comment published on 9 May 2014*

On 1 March, Fox News presenter Clayton Morris had to apologise for his ‘ignorant and stupid’ comments mocking the new gender options for Facebook profiles which allow users to register as intersex. The TV presenter had ridiculed the move of the social media company referring to intersex by saying “whatever that is”. This case illustrates the prejudice and ignorance surrounding the reality of individuals who cannot be clearly classified as male or female at birth. Most countries worldwide still neglect this human rights problem and intersex people remain invisible to the majority.

The International Day against Homophobia and Transphobia of 17 May is also aimed at highlighting the struggle against the discrimination and prejudice suffered by intersex people. The word “intersex” has replaced “hermaphrodite”, which was widely used by medical practitioners during the 18<sup>th</sup> and 19<sup>th</sup> centuries. The social expectations for either a girl or a boy at birth, or a woman or a man in society, are the source of the problems intersex people face. Society does not usually recognise a person without reference to their sex. Yet intersex individuals’ chromosomal, anatomical or gonadal characteristics do not belong exclusively to either sex. This is why intersex persons encounter huge barriers to the enjoyment of their human rights.

## *Surgeries without consent*

The situation of intersex persons is not well known. Recent research<sup>120</sup> has demonstrated that the parents of intersex babies are often ill-informed and baffled. Medical professionals may be quick to propose “corrective” surgeries and treatments aiming to “normalise” the sex of the child. Such surgeries, which are cosmetic rather than medically necessary, are often performed on intersex babies and toddlers. This can result in irreversible sex assignment and sterilisation performed without the fully informed consent of the parents and, even more importantly, without the consent of intersex persons themselves.

“Corrective” operations and treatment are usually traumatising and humiliating. They can take a long time and post-operative complications are common. There are long-term effects on intersex individuals’ mental health and well-being. The sex assigned to children at an early age may not correspond with their identity and feelings later on.

In addition, medical services are rarely transparent about the statistics of operations performed on intersex individuals and even the people treated experience difficulties in accessing their own medical records, as pointed out in a study published by the Heinrich Böll Foundation last year.<sup>121</sup>

## *Rights to self-determination and physical integrity*

The early “normalising” treatments do not respect intersex persons’ rights to self-determination and physical integrity. Intersex babies and younger children are not in a position to give their consent. The proxy consent given by parents may not be free and fully informed and can hardly take into account the best interests of the child in the long-run.

The UN special rapporteur on torture, Juan E. Méndez, has called on all states to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalising surgery, when carried out without the free and informed consent of the person concerned. Intersex individuals’ choice not to undergo sex assignment treatment must be respected.

When operations are not necessary on medical grounds, they should only take place at an age when intersex persons can give their consent and participate actively in decisions about treatment and sex assignment. This position has been advocated by the Swiss National Advisory Commission on Biomedical Ethics which acknowledged the past suffering of intersex persons in November 2012 and called for an end to surgery for sociocultural reasons.

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120 J.C. Streuli, E. Vayena, Y. Cavicchia-Balmer, Y. J. Huber, “Shaping parents: impact of contrasting professional counselling on parents’ decision making for children with disorders of sex development.” *Journal of Sexual Medicine*, August 2013, pp. 1953-60.

121 Heinrich Böll Foundation (ed.) and Dr. Dan Christian Ghattas (author), *Human Rights between the sexes. A preliminary study on the life situations of inter\* individuals*, Volume 34 of the Publication Series on Democracy, 2013.

### *Information and support*

Intersex children, their parents and families need adequate counselling and support, as highlighted by the Parliamentary Assembly of the Council of Europe, among others. Civil society advocates of intersex people should be able to participate in the provision of information and services to intersex families in addition to medical and social professionals. There is also a need to improve training about intersex issues and their human rights implications among health and social services.

### *Legal recognition*

Birth certificates and many other official documents almost always require the identification of the sex of the individual concerned. It is usually impossible to differentiate the official recognition of the person from the definition of that individual's sex. Therefore a person without a clearly identifiable sex can easily fall into a limbo of unrecognised personal status without official documentation.

Since November 2013 in Germany,<sup>122</sup> it has been possible to choose "blank" in addition to "female" and "male" on birth certificates. Therefore it is no longer necessary to identify the sex of children at birth. The practical consequences of this legal change remain to be seen and it is not yet possible to exercise similar choices when issuing identity cards and passports.

### *Raise awareness and review legislation*

There is a need to raise awareness of and collect more data on the situation of intersex persons in society and the discrimination and prejudice they encounter in daily life also as adults. The reform of the Sex Discrimination Act in Australia last year introduced the ground of "intersex status" among other prohibited grounds of discrimination. This is a powerful tool to foster the equality of intersex people.

I urge governments in Europe to review their current legislation and medical practices to identify gaps in the protection of intersex people and take measures to address the problems. Policy makers should involve civil society advocates of intersex persons such as the OII Europe and ILGA-Europe in these efforts. The enjoyment of human rights is universal and it cannot depend on the sex of the person. Intersex individuals must be granted full legal recognition from birth and amendments to their sex or gender classification should be facilitated to reflect their individual choices.

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122 Spiegel Online, "Third Gender. A Step Toward Ending Intersex Discrimination" commentary by S. Agius, *Der Spiegel*, 22 August 2013.

## ACCESS TO REGISTERED SAME-SEX PARTNERSHIPS: IT'S A QUESTION OF EQUALITY

*Human Rights Comment published on 21 February 2017*

There is a growing trend in Europe and beyond towards granting same-sex couples legal recognition for their relationships, which confers certain specific protections. The first country to provide “registered partnerships” was Denmark in 1989,<sup>123</sup> while The Netherlands was first to adopt same-sex marriage in 2001. Today, 47 countries in the world, 27 of which are in the Council of Europe, provide some form of legal recognition for same-sex couples.

Emotions often run high around this issue. In 2015, joyful crowds waved rainbow flags at Dublin Castle in Ireland to celebrate the dramatic victory of the yes-vote for same-sex marriage. Before that, in 2013, demonstrations and counter-demonstrations polarised French society during parliamentary debates on same-sex marriage.

The strongest disagreements seem to crystallise around the notion of “marriage,” but the arguments around the recognition of same-sex couples often reveal deeply rooted homophobia and discrimination against lesbians and gay people. Many Council of Europe member states still do not provide any form of legal recognition for same-sex couples at all – with significant negative consequences for the persons concerned and their loved ones.

Providing access to legal recognition to same-sex couples boils down to a simple concept: equality before the law. Civil marriage, civil unions, or registered partnerships represent benefits, rights and obligations that the state grants to a couple in a stable relationship. There is a growing consensus that a government may not discriminate against same-sex couples and exclude them from the protections attendant to a formally-recognised different-sex union.

### *Legal recognition of same-sex couples in Europe*

The movement towards legal recognition of same-sex couples has developed rapidly in Europe over the past two decades. This has been a bottom-up development and not something imposed by regional organisations and courts. States have led the way through the adoption of national legislation by parliamentary or popular votes. At this writing, a majority – 27<sup>124</sup> out of 47 – of the member states of the Council of Europe provide some form of legal arrangement recognising same-sex partnerships. Thirteen<sup>125</sup> of these have introduced same-sex marriage laws. Draft legislation on registered same-sex partnerships is currently under discussion in San Marino and Monaco. Polls show that public opinion in many European countries is increasingly in

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123 Sheila Rule, “Rights for Gay Couples in Denmark”, *The New York Times*, 2 October 1989.

124 Andorra, Austria, Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, The Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.

125 Belgium, Denmark, Finland -- to come into effect on 1 March 2017, France, Ireland, Iceland, Luxembourg, Norway, Portugal, Spain, Sweden, The Netherlands, and the United Kingdom.

favour of recognising the rights of same-sex couples – much more so than politicians sometimes seem to believe.

There has been backlash to the trend too. In December 2015, a same-sex marriage referendum in Slovenia failed. Several European states have reacted by amending their constitutions to specify that marriage is exclusively the union of a man and a woman. Some of the states which have done so, however, such as Croatia and Hungary, provide registered partnerships for same-sex couples.

*It's not just symbolic: the real problems faced by "rainbow" families*

In my recent visits to San Marino, Slovakia and Latvia, I met with lesbian and gay activists who gave me vivid examples of the specific problems engendered by the absence of legal recognition of same-sex stable relationships.

Same-sex couples may lack inheritance rights, even after a lifetime of sharing and acquiring property. Having no legal recognition as next-of-kin means that a person may not be entitled to a survivor's pension, to a living partner's health insurance or to continue living in the home of a deceased partner. If someone is hospitalised after a serious accident and not in a position to explain one's personal relationship, the person's partner may be denied visitation rights or access to the medical file. The children of same-sex couples may be left without the care of the person whom they have always known as a parent. Generally, where there is no legal recognition for same-sex partnerships, there is also no possibility for joint adoption. Problems are sure to arise if the couple separates, if the birth or adoptive parent dies, or if there is a need for the legally unrecognised parent to take leave from work, for example in cases of serious illness or disability of the child. If a same-sex couple chooses to separate, there is no framework to regulate maintenance rights and duties toward each other or for the children. Stable same-sex couples also have no access to tax advantages provided by the state to other couples.

Like marriage, a registered partnership brings rights and obligations to the relationship of committed couples. Same-sex couples in this situation have the same needs and problems as any other couple.

*Council of Europe standards: end discrimination against same-sex couples*

In 2000, the Parliamentary Assembly of the Council of Europe (PACE) issued its Recommendation 1474 on the situation of lesbians and gays in the Council of Europe, recommending that the Committee of Ministers call upon member states to "adopt legislation making provision for registered partnerships." In a 2010 Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity, the Committee of Ministers recommended that member states take steps to provide legal recognition to stable couples, without discrimination between different-sex and same-sex couples.

The recent jurisprudence of the European Court of Human Rights (the Court or ECtHR) gives solid ground for recognising the existing needs of stable same-sex couples, who must be able to enjoy the same rights as stable different-sex couples. Initially,

the Court showed caution in addressing the issue, expressing deference to states in assessing the readiness of their respective societies on this matter. However, it is undisputed that the relationship of a same-sex couple falls within the notion of “private life” as protected in article 8 of the European Convention on Human Rights (ECHR). In the *Schalk and Kopf* (2010)<sup>126</sup> and *Vallianatos* (2013)<sup>127</sup> cases, the ECtHR further held that the relationship of a same-sex couple living in a stable de facto partnership also falls within the notion of “family life” pursuant to article 8.

In 2015, the Court issued a judgment in the *Oliari*<sup>128</sup> case, where three same-sex couples had complained that they had no option to obtain legal recognition of their relationship in Italy, either through marriage or a registered partnership. The ECtHR found that Italy had violated article 8 of the ECHR by failing to make registered partnerships available to same-sex couples. In making this finding, the court also cited the rapid development in Europe towards legal recognition of same-sex couples, as described above.

It is difficult to read the *Oliari* judgment, and concurring opinion, as anything else than placing a positive obligation on states parties to the ECHR to provide legal recognition to same-sex couples as a way to protect their right to family life.

#### *And what about same-sex civil marriage?*

The considerations I offer in this section are strictly about *civil* marriage and not religious marriage.

International human rights law currently does not create an obligation on states to allow same-sex couples to marry. In the *Schalk and Kopf* case, the ECtHR declined to recognise a right to marry for same-sex couples under Article 12 of the ECHR (the right to marry). However, in that decision, the Court held that it would no longer consider marriage as exclusively reserved to a woman and a man. It was for states parties to the ECHR to decide how to regulate access to marriage. The Court added that this approach may change if a consensus were to emerge amongst the states parties to the ECHR.

There are arguments in favour of providing access to civil marriage to same-sex couples. One is to ensure that the rights available to same-sex and to different-sex couples are truly equal. Indeed, more often than not, registered partnerships offer a pared-down selection of rights, leaving aside more controversial issues such as adoption of children or medically assisted procreation. My opinion is that genuine commitment to full equality would at least require states to seriously consider opening up civil marriage to same-sex couples.

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126 ECtHR judgment, *Schalk and Kopf v. Austria*, application no. 30141/04, 24 June 2010.

127 ECtHR judgment, *Vallianatos and Others v. Greece*, applications nos. 29381/09 and 32684/09, 7 November 2013.

128 ECtHR judgment, *Case of Oliari and Others v. Italy*, applications nos. 18766/11 and 36030/11, 21 July 2015.



### *The way forward: step by step toward equality*

States should continue to work towards eliminating discrimination based on sexual orientation in the area of family rights. This requires several measures:

- The 20 member states of the Council of Europe that still do not provide any legal recognition to same-sex couples should enact legislation to create – at the very least – registered partnerships that ensure that privileges, obligations or benefits available to married or registered different-sex partners are equally available to same-sex partners.
- All states should ensure that legislation exists to provide registered same-sex couples with the same rights and benefits as married or registered different-sex couples, for example in the areas of social security, taxes, employment and pension benefits, freedom of movement, family reunification, parental rights and inheritance.
- States should promote respect for lesbian, gay and bisexual persons and combat discrimination based on sexual orientation through human rights education and awareness-raising campaigns.

Granting rights and benefits to same-sex couples does not take anything away from different-sex couples who already have access to them. These rights are not weaker or less valuable simply because more people receive them. The trend toward legal recognition of same-sex couples is responding to the daily reality and needs of relationships that have gone unrecognised for a very long time. Our societies are made up of a rich diversity of individuals, relationships and families. It's time we see this as an asset.

## **EUROPEAN SOCIETIES SHOULD RECOGNISE THE FULL DIVERSITY OF GENDER IDENTITIES**

*Keynote address at the European Transgender Council (“Transforming Europe – 10 years of movement building”), Bologna, 3 June 2016*

European societies need to recognise the full diversity of gender identities among their members. Trans people have the right to determine and express their individual gender identity and be fully included in their societies. Recent years have demonstrated that real progress can be made in fulfilling trans people's human rights.

The European Court of Human Rights was instrumental in establishing the right to legal gender recognition in its landmark judgment in the case of *Christine Goodwin v. the United Kingdom* in 2002. Since then, the focus of discussion and reforms has been put on the conditions for the official recognition of gender identity. The abusive conditions of sterilisation, divorce, and diagnosis of mental disorder have been obstacles to realising the right to self-determination by trans people. In recent years, I have urged legislative reforms through my country monitoring in Croatia, Finland, Ireland, Poland, San Marino, Serbia, Slovakia and Ukraine.

Fortunately, many countries in Europe have already taken measures to eradicate obstacles to legal gender recognition. A few have taken the further step of providing

a simple procedure which is fully based on self-determination. In Denmark, Malta and Ireland even the condition of a medical diagnosis has been abolished. I encourage other member states to follow their example and I know that further reforms are already under way. In its 2015 Resolution on discrimination against transgender people, the Parliamentary Assembly of the Council of Europe welcomed the emergence of a right to gender identity which gives every individual the right to be treated and identified according to one's gender identity.

Along with the progress achieved, there are also widening gaps among member states. Abusive conditions for legal gender recognition are still a fact of life for trans people in many countries. For this reason it is important to clarify the current European standards in this area. Strategic litigation on the condition of sterilisation is already taking place in the European Court with three communicated cases from France. Last year's judgment in the case of *Y.Y. v. Turkey* was a positive step but it did not yet resolve the issue about sterilisation as a condition to legal recognition but rather as a condition to accessing gender reassignment treatment.

The European Committee of Social Rights is also considering a collective complaint about sterilisation in the Czech Republic with reference to the right to protection of health under the European Social Charter. Transgender Europe is one of the parties which brought this case before the Committee.

The extension of the right to marry to same sex couples has made the divorce requirement obsolete in a growing number of countries. In others, the authorities should take measures to respect the will of the couple to continue in their existing marriage after legal gender recognition. The debate about the condition of a medical diagnosis is now centred on the process of revising the WHO International Classification of Diseases. The current emphasis on self-determination is signalling a shift away from the medical model in official recognition.

While we should celebrate the steps forward taken in the recognition of gender identity, we should not forget that discrimination and hate crime remain a grim reality for many trans people in Europe. 117 killings of trans people in 16 European countries have been documented by the Transrespect versus Transphobia project since data collection started in 2008. Turkey holds the highest figure in Europe followed by Italy. All cases of killings and violence against trans people should be promptly investigated, prosecuted and sanctioned. I highlighted the need for this in a statement regarding Turkey last year. The authorities should also send an unequivocal message in condemning such crimes.

The 2012 LGBT Survey by the EU Agency for Fundamental Rights reported that more than half of all trans respondents felt personally discriminated against or harassed because they were perceived as trans. Over one in three respondents felt discriminated against when looking for a job and a quarter reported discrimination at work. Almost a third of trans students had experienced discrimination in school or university.

Legislative changes are still needed in many countries to protect trans people. Gender identity and expression should be explicitly protected grounds against discrimination in comprehensive equal treatment legislation. Transphobic hatred

should be included as a possible motive in national hate crime legislation. Hate crimes require a specific response as they have a greater impact on victims than crimes without a bias-motive by putting into question the very identity of the victim. We need to send a clear message that bias-motivated crime and discrimination against trans people will be sanctioned effectively.

The low level of reporting of hate crimes and discrimination by trans people is another challenge highlighted by the FRA. This reflects unawareness of available remedies and mistrust in law enforcement officials in upholding trans people's human rights. It is obvious that the police and equality bodies have to be active in facilitating reporting. During my visit to Serbia last year, I learned about a promising practice of regional LGBTI liaison officers among the police with the aim of improving contacts and helping build trust between the police and LGBTI people. Trans people who are victims of transphobic violence also need victim support and the police should be adequately trained to treat trans people with respect.

Naturally, we should not forget to address the root causes of intolerance and violence against trans people. If public opinion is hostile towards trans people, governments have a responsibility to raise awareness of gender diversity and the respect for all persons' gender identity. Education plays a central role in changing attitudes and schools should be a safe environment for all students. Confronting intimidation against trans people requires continuous and focused attention from schools and educational authorities. All school children have the right to receive factual information about gender diversity so that they can question the stereotypes often rehearsed in this area.

Trans youth encounter specific obstacles when exercising their right to self-determination. As minors, trans adolescents can find it difficult to access trans-specific health and support services. Legal gender recognition is not usually available to minors. In this area we can discern some parallels with intersex children who are often subject to medical treatment without informed consent to fit in rigid classifications of sex and gender. In an Issue Paper on *Human rights and intersex people* published last year, I urged governments to end medically unnecessary 'normalising' treatment of intersex persons without their free and fully informed consent. I also proposed measures to protect them against discrimination and to facilitate the legal recognition of sex and gender.

The current refugee movements in the world also involve trans people. Many trans people are on the move fleeing conflict and also persecution on the ground of their gender identity. It is essential that trans people are recognised as a social group deserving protection under the UN Refugee Convention. European governments should follow UNHCR guidelines in this area in their refugee determination procedures. The specific needs of trans refugees should also be taken into account in the provision of accommodation to prevent abuse and violence. The city of Berlin in Germany has been a pioneer in providing LGBTI specific refugee shelters. This practice should be replicated in other places in Europe as well.

The first European Transgender Council was held in November 2005 in Vienna. For more than ten years TGEU has provided leadership for a truly European trans movement. TGEU's current 97 member organisations in 42 countries demonstrate

the remarkable strength of the European trans movement. TGEU has become a force to be reckoned with and its advocacy work with European and international organisations has been essential for putting the human rights of trans people on the European agenda. It has been a privilege for myself and my Office to cooperate with TGEU over the years in pushing this agenda forward. We have good reasons for celebrating in Bologna today.

The direction of the movement for trans equality and the recognition of gender diversity is quite clear. We already have living examples of our goals in a number of countries. The current challenge is to bridge the widening gaps between different countries. We cannot afford to leave so many trans people behind others. We have to fulfil the human rights of all trans people in every country in Europe. I wish all the best to your deliberations during this conference. I remain an ally with the movement for the full equality of trans people and will continue to uphold the human rights of trans persons in my work.

## **THE LONG MARCH AGAINST HOMOPHOBIA AND TRANSPHOBIA**

*Human Rights Comment published on 31 August 2017*

Summer is the time of Pride marches. The numerous marches<sup>129</sup> in Europe are a testament to the ground-breaking progress toward acceptance of the equal rights of lesbians, gay, bisexual, transgender and intersex (LGBTI) persons. In the vast majority of European countries, and elsewhere in the world, crowds have been rallying to celebrate - or claim - recognition and increased respect for the human rights of persons who do not fit the prevailing paradigms on sexual orientation and gender identity, and to show solidarity with them.

However, obstacles remain on the road ahead. In parallel with the increased visibility and equality wins for LGBTI persons, there has been a backlash in recent years. Across Europe, we still see discrimination, intimidation and persecution.

While LGBTI persons enjoy greater protection in many European countries than ever before, they still struggle to enjoy basic freedoms and rights in environments where homophobia and transphobia are widespread. The situation is exacerbated when intolerant attitudes among the population seem to receive official sanction. The human rights compliant approach would be to enact explicit prohibitions against discrimination on grounds of sexual orientation and gender identity and to take effective action to identify, investigate and punish hate crimes and hate speech. Instead, we have seen some cases where laws actually restrict the rights to freedom of expression and assembly of LGBT persons.

In the June 2017 *Bayev and Others v. Russia* judgment concerning the Russian law prohibiting “propaganda of homosexuality”, the European Court of Human Rights (ECtHR) found that “*by adopting such laws, the authorities reinforce stigma and prejudice*

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129 See Pride Event Calendar at [www.ilga-europe.org](http://www.ilga-europe.org)

*and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society".*

### *Disturbing reports of persecution*

This year some very disturbing reports surfaced about persecution of gay men in Chechnya in the Russian Federation, a place where impunity for serious human rights violations such as enforced disappearances and torture is a long-standing problem. According to NGOs and the Russian newspaper *Novaya Gazeta*, a number of gay men (or men perceived to be gay) were arrested or abducted and detained in the Chechen Republic between February and April 2017. The persons concerned were reportedly held in unofficial places of detention and allegedly subjected to severe ill-treatment and humiliation. As soon as I learned about the foregoing reports, I established contact with the Russian Federal Ombudsman and addressed a letter to the Head of the Russian Federal Investigative Committee on 5 April 2017, requesting information about steps taken to investigate both the alleged crimes and the statements made by Chechen public figures that may have constituted incitement to hatred, as well as to protect victims who may come forward.

Subsequently, the Russian Federal Ombudsman raised the matter with the Russian President. It is crucial that decisive and effective action be taken to ensure that the persecution stops and that those responsible for it are investigated, prosecuted and punished. Failing to do so will only prolong the deplorable patterns of impunity in this region.

### *Intolerance on the rise*

Even in countries where the recognition of LGBTI human rights has made considerable progress in recent years, homophobia and transphobia persist. Experience shows that the hatred can be easily revived, sometimes by unscrupulous populist politicians who employ toxic discourse and scapegoat minorities for political gain.

Ethnic minorities and foreign nationals were not the only targets of the post-Brexit referendum spate of violent attacks in the United Kingdom (UK); there were also reports of a dramatic rise in homophobic and transphobic hate crimes committed by private individuals in the summer of 2016.<sup>130</sup> In its 2017 report on homophobia in France, the NGO "SOS homophobie" observed a correlation between advances in the recognition of LGBTI rights and increases in hate crimes and hate speech.<sup>131</sup> The organisation recorded a spike in homophobic incidents in 2013 after a national debate on same-sex marriage, and a 76% increase in transphobic incidents in 2016 after the adoption of the law on legal gender recognition. In Greece, I recently urged the authorities to take swift action against an increase in homophobic hate crimes, noting with concern that some incidents involved law enforcement agents.

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130 D. Isaac and R. A letter to all political parties in Westminster, *Equality and Human Rights Commission*, 25 November 2016.

131 SOS homophobie, *Rapport sur l'homophobie 2017*, May 2017.

It is worth noting that transgender persons continue to pay a particularly high price, with over 110 transgender persons murdered in Europe since 2009, according to the Transgender Europe Murder Monitoring Project, including 43 in Turkey and 30 in Italy. The 2016 murder of 23-year old trans activist Hande Kader<sup>132</sup> in Turkey, whose body was found mutilated and burned, was a sad reminder that violence motivated by homophobia and transphobia is often particularly brutal and cruel. Violent acts have included deep knife cuts, anal rape, genital mutilation, as well as stoning, and burning.

Urgent action is needed to counter this alarming trend and to overcome the hatred against LGBT persons that still plagues our societies.

### *The starting point: LGBT rights are human rights*

Many people still react aggressively to people whose sexuality and gender identity is perceived as a challenge to traditional norms. As Commissioner for Human Rights, I must firmly restate that neither cultural, traditional nor religious values, nor the dominant views of the majority, can ever justify violent crimes or discrimination against LGBTI persons

LGBTI persons do not ask for special or additional rights – but simply to enjoy the same human rights as anybody else. Numerous UN Treaty Bodies as well as the ECtHR have clearly stated that the major international and European human rights treaties apply to all human beings equally and without discrimination based on any grounds, including those of sexual orientation and gender identity. In the *Identoba and Others v. Georgia* case, the ECtHR established that acts of violence that had been committed against LGBTI persons during a gay pride constituted a violation of the right not to be subjected to torture or inhumane and degrading treatment (Article 3 of the European Convention on Human Rights) and found that states parties to the Convention have an obligation to protect LGBTI persons and to effectively investigate and prosecute those responsible for these acts. In the *Vejdeland and Others v. Sweden* case, the Court made clear that homophobic speech cannot be protected as free speech.

### *A comprehensive approach for tackling homophobia*

First, states should ensure they have a robust law enforcement framework to eliminate discrimination and combat violence and hate speech motivated by bias against a person's sexual orientation and gender identity. In 2016, about half of the member countries of the Council of Europe had criminalised acts of violence motivated by the victims' sexual orientation. This is a step in the right direction. All member countries should adopt laws that clearly prohibit discrimination based on sexual orientation and gender identity in all areas of life, as well as laws that criminalise offences committed on the basis of homophobic and transphobic hatred, and make such motivation an aggravating circumstance.

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132 BBC news item "Hande Kader: Outcry in Turkey over transgender woman's murder", *BBC*, 21 August 2016.

Next, it is critical that national authorities effectively implement these laws. In the *Identoba and Others v. Georgia* case, the ECtHR found that states have the “duty to take all reasonable steps to unmask possible discriminatory motives” when investigating violence against LGBTI persons. This can be difficult to do and several measures are required. Member countries should provide specific training to law enforcement and members of the judiciary on dealing with homophobic/transphobic hate crimes and hate speech. They should also take steps to ensure that victims feel sufficiently safe and comfortable to report crimes. In this regard, I find it interesting that some countries have established special contact units in the police to improve relationships with the LGBT community. Holding perpetrators of hate crimes to account sends a strong signal that the authorities will not tolerate hate, violence and discrimination against LGBTI persons.

Effective laws and criminal justice systems are essential, but not enough. Member countries should proactively work to bring about broader changes in societal attitudes towards LGBTI persons. This requires outreach campaigns and education in schools to promote understanding and respect of the human rights of LGBTI persons. Member states’ authorities should demonstrate positive political leadership on this issue. Some states have adopted comprehensive action plans to advance LGBT rights. Building alliances involving civil society, governments, national human rights institutions, faith-based communities and the private sector can help build more inclusive societies where LGBTI persons can live freely, safely and be treated equally. Also, equality bodies can play an important role against discrimination based on sexual orientation and gender identity by registering and reviewing complaints, providing legal advice to complainants, commissioning research and advising on policies.

As long as LGBTI persons suffer persecution and gross human rights violations in some countries because of their sexual orientation and gender identity, member states should ensure that they are equipped to grant asylum on these grounds, as recommended by the UN High Commissioner for Refugees.<sup>133</sup> In the context of the reports of persecution in Chechnya, I have called on member countries to provide visas and refugee status to bring survivors and threatened persons to safety.

We have seen in the past couple of decades that profound political and social change toward more diverse and accepting societies is possible. According to a 2015 Eurobarometer survey in the European Union, 71% of respondents agreed that LGBT persons should enjoy the same rights as heterosexual people. This is cause for hope and inspiration. Promising practices show us how to get to a place where LGBTI persons can live free from fear and hate. We need to keep moving forward.

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133 UNHCR, *Guidelines on international protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugee*, HCR/GIP/12/09, 23 October 2012.





MINORITY WORLD  
IF YOU JUDGE PEOPLE, YOU HAVE NO T

RESPECT

HUMAN RIGHTS

LIVING TOGETHER

RACISM

LOVE ONE ANOTHER

PEACE

"I HAVE A DREAM"

"I REFUSE TO ALLOW PREJUDICE TO DEFEAT ME"

"RACISM IS THE ENEMY OF FREEDOM AND DESERVES TO BE ERADICATED"

"LOVE IS THE ONLY FORCE THAT CAN TRANSFORM OUR WORLD"

"TRUTH SHALL SET US FREE"

"NATIONALITY IS MANKIND"

"CHILD OF IGNORANCE"

"GOOD THAT LIES BEYOND APPEARANCES"

"NUM OF REASON"

"E JUSTICE"

"MULTIPL"

# 9. Intolerance

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## INTRODUCTION

When I took up my duties as Commissioner, I was already familiar with issues related to discrimination, racism and intolerance through my previous work at ECRI.

Yet, during my country visits as Commissioner I discovered that despite the numerous international instruments combating racism and intolerance and the standards developed by the Council of Europe, stereotypes, prejudices and discrimination remained widespread. Therefore, I paid particular attention to the fight against racism, xenophobia and other related forms of intolerance.

I have met with national authorities and civil society and learned that the work of ECRI, especially its General Policy Recommendations, was not well known. Given the complementarity of the role of the Commissioner in the broader Council of Europe landscape, I sought to promote ECRI's work without duplicating it. I looked at discrimination on different grounds and addressed it more flexibly, especially when it affected not only one member state but many.

I repeatedly tried to make the case that there was a void in the political discourse about migration in the liberal and left-wing parts of the political spectrum and that the discussion was being monopolised by the far right. I also tried to make the point that migration policies that are not human rights oriented, such as the criminalisation of irregular migration and inadequate integration policies, fed into racist discourse and fuelled racism.

Moreover, I decided to focus on a few selected topics, reflected in the Human Rights Comments that follow, where I explore deeply ingrained stereotypes and prejudices throughout Europe. The feeling of growing hostility and intolerance towards minorities and vulnerable social groups underpins all these topics. It prompted me to speak out and urge member states to reverse the negative spiral of intolerance that has been developing in Europe.

The fear early in my mandate was that racist extremism was on the march and that governments either did not know how to face it down or were indirectly or directly facilitating its rise. I feared that Golden Dawn in Greece, which has posed the most serious threat to a European democracy that I have witnessed in recent years, might not be an exception, but a model for other movements. I felt there was a need to

address a broader potential audience and particularly law enforcement authorities and media about the need to cope with the upsurge of neo-Nazi ideology in Europe.

Continuing my predecessor's work, I also sought to address prejudices that affect Muslim communities. Before the spike in terrorist attacks and in migration that took place in 2015 and 2016, we were all still optimistic in the aftermath of the Arab Spring. The hope of overcoming negative stereotypes was dashed as the region drifted into trouble. Despite no concrete evidence that migration was systematically used by terrorists to enter Europe, Muslim communities were held responsible for these attacks and fear of Muslim migrants manipulated for political purposes to influence the way people vote. Moreover, restrictive legislation targeting Muslims reinforced social exclusion and renewed debates about integration, especially through inclusive education (see chapter above on children's rights).

Since the beginning of my mandate, antisemitism has become an even greater challenge facing Council of Europe member states: we have seen a number of physical attacks on Jews, gained access to new data from the European Union Agency for Fundamental Rights revealing the persistence of prejudice, and witnessed an increasing number of Jews leaving Europe. Subsequently, terrorist attacks specifically targeting Europe's Jews and the rise of the populist right have heightened the urgency of strengthening my work on combating antisemitism. Therefore, I met with Jewish communities during many of my country visits, learned about their concerns, tried to convey these to the authorities and sought to make them aware of how my Office might help. I have also stressed the need for better methods of teaching the Holocaust as key to combating antisemitism, especially among young people vulnerable to conspiracy theories disseminated online.

I sought to address Afrophobia and human rights violations against Black people as a way of promoting the International Decade for People of African Descent in Council of Europe member states. During my country visits I discovered that the history and the cultural heritage of People of African Descent in Europe and its former colonies are largely ignored. Centuries-old Black populations in Europe and more recent arrivals are victims of long-standing inequalities in employment, education, housing, health care, public representation and the criminal justice system.

I have also devoted attention to several other issues, notably the human rights of minority groups, including Roma, people with disabilities and LGBTI persons. Concerns identified in this regard have usually related to discrimination and intolerance (see chapters above on Roma rights and LGBTI rights).

Some countries that I have visited have taken effective measures to enforce legislation against discrimination. However, I believe that intolerance cannot be fought only through law. An appropriate response requires preventive measures that address its breeding grounds, as well as the major channels, such as media and political leadership, through which stereotypes and prejudices are conveyed.

To a large extent, discrimination suffered by minority groups in Europe is due to their marginalisation and lack of visibility in public life, which breed negative stereotypes. For this, states should pay particular attention to all forms of segregation and step up measures promoting inclusive education for children and adults. There is also a need

for more ambitious integration policies that involve the public, combat intolerance and create opportunities for significant interaction with migrants. States should draw upon the knowledge and rich expertise of national human rights structures (NHRs), especially equality bodies, and enhance their crucial role in these domains.

Words and images, which easily go viral online, can convey prejudices and hatred. They can fuel a toxic atmosphere in which discrimination and violence are legitimised and become socially acceptable. Political leaders, as well as political parties and the media, have a significant responsibility to promote solidarity, tolerance and respect for the human rights of all members of society. They should act resolutely against all forms of hate speech and be guided by the standards developed by the Council of Europe, notably those of the European Court and ECRI.

## **EUROPE MUST COMBAT RACIST EXTREMISM AND UPHOLD HUMAN RIGHTS**

*Human Rights Comment published on 13 May 2013*

Europe has been experiencing a worrying intensification of activities of racist extremist organisations, including political parties. According to some commentators, the upsurge has even reached the point of “an early form of far right terror”.

It worries me deeply that the European community and national political leaders appear not to be fully aware of the serious threat that these organisations pose to the rule of law and human rights.

The philosophy of racist extremist organisations is centred on denying the entitlement of “others” – mainly migrants and members of national, ethnic and religious minorities – to human rights and fundamental freedoms. They invent “enemies” who have to be fought and eliminated.

In Greece, for example, between October 2011 and December 2012 around 220 racist attacks were reported to the Racist Violence Recording Network headed by UNHCR and the National Commission for Human Rights. That is about one attack every other day. In my recent report concerning Greece I underlined the need to curb hate crime and combat impunity for hate crimes.

### *Influencing national parliaments*

The phenomenon is all the more serious as it is paired with an increased influence of racist extremist political parties in national parliaments and governments, and endeavours by these parties to strengthen their position at European level through alliances.

For example in Hungary, Jobbik, self-described as “radically patriotic”, entered the parliament in 2010 as the third largest party. In Sweden polls show a rise in popularity for the Sweden Democrats (SD), a party with neo-Nazi roots, and the same goes for the neo-Nazi Golden Dawn in Greece.

This political presence lends legitimacy and credibility to political extremism that is often linked to racist and other hate crimes. The main targets are migrants and Muslims, as well as particularly vulnerable social groups such as Roma and other minorities. Many such cases are recorded, for example in Hungary<sup>134</sup>, Italy<sup>135</sup> and Serbia.<sup>136</sup>

#### *Low awareness among politicians and law-enforcement*

European political parties and national parliaments should be more aware of this trend. Instead, on many occasions political leaders, through their statements and policies, add force to racist extremism expressed by xenophobic and intolerant far-right political organisations.

Some serious cases also point to failures on the part of the police and intelligence services to adequately address racist extremism. For example in Germany members of the National Socialist Underground murdered 10 persons between 2000 and 2007 without the police connecting the dots.<sup>137</sup> The same thing happened in Sweden where a man shot seven persons, two of them fatally, in 2009-10.<sup>138</sup> For a long time the murders were described as “gang-related” by the police.

#### *What should be done*

- European states must fully abide by and give effect to the standards contained in the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, especially its core provision of Article 4 concerning the sanctioning of racist organisations.
- In this context, states should revise their legislation to effectively penalise participation in racist extremist groups.
- Existing national legislation concerning racist extremism needs to be updated and strengthened along the lines of Framework Decision 2008/913/JHA of the Council of the European Union concerning the combating of racism and xenophobia.
- The use of hate speech and participation in racist activities should be a basis for serious, dissuasive disciplinary measures to be imposed on MPs by parliaments and political parties.
- Countries should take measures to provide systematic, continuous anti-racism training of all law enforcement officials, prosecutors and judges involved in the investigation and prosecution of racist crimes.

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134 Institute of Race Relations, Briefing Paper No.6 “State intelligence agencies and the far Right A review of developments in Germany, Hungary and Austria”, April 2013.

135 European Roma Rights Centre new item “Far Right Groups Target Roma with Violent Protests in Italy” 19 April 2013, [www.errc.org](http://www.errc.org)

136 European Roma Rights Centre news item “Roma Killed, Attacked in Serbia – ERRC Urges Full Investigation” 27 March 2013, [www.errc.org](http://www.errc.org)

137 Institute of Race Relations, Briefing Paper No.6 “State intelligence agencies and the far Right. A review of developments in Germany, Hungary and Austria”, April 2013, [www.irrr.org.uk](http://www.irrr.org.uk)

138 Swedish Radio “Peter Mangs appeals trial ends”, 21 March 2013, [www.sverigesradio.se](http://www.sverigesradio.se)

- States should ensure that victims of extremism have unimpeded access to national justice and effective protection. Particular attention should be paid to migrant victims without residence status.
- National authorities should be particularly vigilant concerning racist extremism within law enforcement authorities and eradicate impunity notably through independent and effective complaint mechanisms.
- Human rights education should be systematically included and emphasised in schools.

#### *A human rights based approach necessary*

Racist violence, as opposed to other forms of violence, has a broader destructive impact on human dignity and social cohesion. This is why it should be treated more seriously than other forms of violence and extremism.

Individuals and organisations involved in such acts are a threat to the pillars of democracy. They erode human rights to which democratic countries adhere, and undermine the rule of law. States have to ensure the protection of human rights through the eradication of impunity, effective protection of victims, and systematic, on-going awareness work notably through education.

National authorities need to be vigilant and combat racism and extremism at all levels of society.

## **ANTI-MUSLIM PREJUDICE HINDERS INTEGRATION**

*Human Rights Comment published on, 24 July 2012*

Muslims in Europe want to interact with other Europeans and participate as full and equal members of society, but regularly face various forms of prejudice, discrimination and violence that reinforce their social exclusion. This is the conclusion of recent research by various international organisations and NGOs. Unfortunately, commentators on the Arab Spring missed the historic opportunity to deconstruct harmful stereotypes about the alleged incompatibility of Islam and democracy, instead exaggerating the risk of migration to Europe.

#### *Muslims as the primary “other” in European political discourse*

Muslims have become the primary “other” in right-wing populist discourse in Europe. Political parties in Austria, Bulgaria, Belgium, Denmark, France, Italy, the Netherlands, Norway and Switzerland have employed anti-Muslim rhetoric for political gain. Politicians frequently refer to Muslims when discussing the alleged “failure of multiculturalism”. However, multiculturalism as a strategy of promoting intercultural dialogue while at the same time preserving cultural identities has hardly been tried in most countries.



Since the terrorist attacks on 9/11 and thereafter, Muslims have become inextricably linked in the public mind with terrorism. However, some of the most horrific attacks in Europe of recent years – the string of racist murders in Germany and the ruthless, premeditated murder of scores of innocent people by an extremist in Norway – serve as a wake-up call to the dangers of the far-right and as a reminder that terrorists have various ideological persuasions.

### *Muslims targeted by restrictive legislation and policy*

Some mainstream parties have exploited anti-Muslim sentiment by supporting restrictive legislative measures that target Muslims. Since 2011 Belgium and France have enacted laws subjecting women who wear full face veils to fines or “citizenship training”. In Italy, some local authorities have resorted to an old anti-terrorist law against concealing the face for security reasons to punish women with full-face veils. Similar initiatives have been discussed in Austria, Bosnia and Herzegovina, Denmark, the Netherlands, Spain and Switzerland.

After a campaign marked by anti-Muslim rhetoric, the Swiss electorate voted in late 2009 to ban the construction of minarets. This prompted the European Commission against Racism and Intolerance (ECRI) to issue a rare statement condemning discrimination against Muslims and their freedom of religion in Switzerland. Local authorities in many European cities regularly find reasons to delay building permits for mosques, but not for other houses of worship.

### *Muslims subjected to discrimination and abusive stops*

A recent study by the EU’s Fundamental Rights Agency (FRA) found that 1 in 3 Muslims in the EU had experienced discrimination in the past 12 months, with youth being the most frequent victims. According to a report just published by Amnesty International, many Muslim women feel discouraged from seeking employment because of policies restricting the wearing of religious and cultural symbols and dress.

A particularly pernicious form of discrimination is when police, customs or border guards engage in ethnic or religious profiling against Muslims by stopping them only because of their appearance. The aforementioned FRA study found that 1 in 4 Muslim respondents were stopped by the police in the previous year, while more than a third had been stopped by customs or border control. Ethnic or religious profiling is not only discriminatory, it is counterproductive, as it misdirects attention from suspicious behaviour to appearance and alienates the communities with whom law enforcement agencies need to cooperate.

### *What governments should do*

Governments should stop targetting Muslims through legislation or policy, and instead enshrine the ground of religion or belief as a prohibited ground of discrimination in all realms. They should also empower independent equality bodies or ombudsmen to review complaints, provide legal assistance and representation in court, provide policy advice, and conduct research on discrimination against Muslims and other



religious groups. Monitoring discrimination against Muslims should involve collecting data disaggregated by ethnicity, religion and gender.

In parallel, governments should combat popular prejudice and intolerance against Muslims. Here, useful guidance is provided by ECRI's general policy recommendation No. 5 "Combatting intolerance and discrimination against Muslims". In 2011 the OSCE, UNESCO and the Council of Europe issued helpful "Guidelines for Educators on Countering Intolerance and Discrimination against Muslims".

It is time to accept Muslims as an integral part of European societies, entitled to equality and dignity. Prejudice, discrimination and violence only hinder integration. We need our own "European Spring" to overcome old and emerging forms of racism and intolerance.

## **EUROPE STILL HAUNTED BY ANTISEMITISM**

*Human Rights Comment published on 23 January 2014*

More than 70 years after the Holocaust, antisemitism is growing in Europe. While official statistics are missing in many countries, research shows that deeply ingrained hostility continues to threaten Jewish people's security and human dignity across Europe.

Today's antisemitism finds its way into "traditional" as well as modern venues. Just over a year ago, a call in the Hungarian parliament for making lists of Jews who "posed a threat to national security" brought back haunting memories of Nazi policies. In December the Romanian authorities fined a public television channel in Romania after it aired a Christmas carol with antisemitic lyrics. However, more "contemporary" manifestations of antisemitism also abound. Last July, Twitter provided the prosecutors in Paris with data that may enable the identification of users who posted antisemitic messages on line. The French authorities also recently took a strong stand against incitement to hatred targeting Jewish people by a former comedian turned militant. A growing problem in many European countries is the use of antisemitic chants or salutes at football games.

*States must combat the trivialisation of antisemitism*

Last year the European Union's Fundamental Rights Agency (FRA) published the results of a survey undertaken in late 2012 in eight EU Member States (Belgium, France, Germany, Hungary, Italy, Latvia, Sweden and the United Kingdom). It showed that 76% of the Jewish respondents perceived that antisemitism has become more acute in their countries over the past five years. However, the majority did not report on the experienced antisemitic incidents, many considering that nothing would have changed or that such incidents happen all the time. In addition, only half of the EU member states collect data on reported antisemitic incidents.

State authorities must guard themselves against the trivialisation of such manifestations and be fully aware of the danger posed to democracy by actions aimed at denying equality, freedom of thought, conscience and religion. They should not forget that

antisemitism has served and still serves as a pretext and justification for discrimination and the use of violence, including murder. The attack against the Jewish Ozar Hatorah School in the French city of Toulouse in March 2012, which is one of the most violent antisemitic attacks to have happened in Europe in recent years, is a striking example.

### *An effective response is needed*

European countries must genuinely address and combat antisemitism. In the absence of effective measures individuals subjected to antisemitic attacks will continue to suffer without turning to the authorities and such offences will remain uninvestigated and unpunished.

Most importantly, national political leaders should vigorously condemn antisemitic speech and attacks when they occur, sending a clear signal that such hatred is unacceptable and will be resolutely punished.

National authorities should systematically collect and analyse data on antisemitic incidents. They need to ensure that the antisemitic motive of hate crimes, including hate speech, is recorded and taken into account throughout proceedings, in line with the case-law of the European Court of Human Rights.<sup>139</sup> The special protection needs of victims of antisemitic crimes must be adequately responded to.

States which have not done so yet should reinforce their legislation to ensure that the intentional, public condoning, denying or trivialisation of the Holocaust are punishable by effective, proportionate and dissuasive penalties, including in the case of acts perpetrated by legal persons. As the Strasbourg Court noted in 2003 in the case of *Garaudy v. France*, “[d]enying crimes against humanity is...one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order”.<sup>140</sup>

In this context, EU member states are encouraged to transpose and effectively apply the Council of the European Union Framework Decision 2008/913/JHA of 28 November 2008 “on combating certain forms and expressions of racism and xenophobia by means of criminal law”. National authorities should prosecute and effectively sanction any political party or group which puts forward antisemitic arguments in its discourse and activities.

### *States should take a comprehensive approach*

European countries should abandon piecemeal approaches to combating antisemitism and focus on measures which can have wide-ranging and lasting effects. State institutions, representatives of the Jewish communities, and other civil society organisations should be involved together in identifying these measures, which

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139 See, inter alia, *Nachova and Others v. Bulgaria*, judgment of the Grand Chamber of 6 July 2005, §160.

140 ECtHR decision, *Garaudy v. France*, application no. 65831/01, 24 June 2003.

should be integrated into national strategies and action plans aimed at combating intolerance, racism, xenophobia and antisemitism.

In light of new technological developments, states should address the growing concerns posed by online antisemitism. The Council of Europe “No hate speech” campaign represents a valuable opportunity to prepare young people for dealing with this phenomenon. In this context, member states could also usefully be reminded of and check to what extent they have effectively implemented the Council of Europe Committee of Ministers Recommendation No. R (97) 20 on “hate speech”.

Last but not least, national authorities must intensify their efforts to fight ignorance and intolerance within current and future generations through systematic, on-going education, which should include the accurate teaching of the Holocaust. The Holocaust prompted many to vow “Never again”. Recent antisemitic incidents should evoke not only a dismayed “Not again!”, but vigorous action by states to combat the prejudice, discrimination and violence affecting Jewish people.

## **AFROPHOBIA: EUROPE SHOULD CONFRONT THIS LEGACY OF COLONIALISM AND THE SLAVE TRADE**

*Human Rights Comment published on 25 July 2017*

Human enslavement and the slave trade were appalling tragedies in the history of humanity which still cast a shadow on Europe. Colonialism scarred the destiny of millions of men, women and children and left an indelible mark on our world. It shaped European societies for centuries and led to deeply rooted prejudices and inequalities. Its consequences are still largely ignored or denied today.

In a number of my country visits I have been worried by manifestations of both old and emerging forms of racism and discrimination against minorities. Black people are particularly exposed to racism and intolerance in many areas of their daily life.

### *Incitement to hatred against Black persons still plagues Europe*

It is disturbing to note that in several European countries, rhetoric used by certain parties and politicians may be qualified as hate speech. There are, sadly, a number of examples where politicians have targeted their Black colleagues with racist abuse. The 2013 cases of former ministers Ms Kyenge and Ms Taubira, in Italy and France respectively, were among the most shocking. Such instances of abuse affect not only the politicians involved, but also have devastating effects on social cohesion more broadly. The rejection of diversity also has a potential deterrent effect on those who might engage in politics, thus perpetuating the underrepresentation of Black people in politics at national and European level.

Politicians, journalists and opinion-makers have a particularly important role to play by not allowing such intolerance and hate to proliferate. They should be encouraged to abstain from negative stereotyping and to promote rights-based values.

Sports play an important role in the development of positive values in our society and have a strong impact on young people. Earlier this year, I expressed my solidarity with the football player in Italy Sulley Muntari who was a victim of racist insults from the supporters of the opposing team. Instead of being protected, he was sent off the pitch by the referee after reporting racist abuse. This example, far from being isolated, shows that regrettably racism still plagues sports, and football in particular.

Insults, slogans, symbols, gestures and chants of a racist nature have no place in and around stadiums. European countries must prevent and combat these phenomena, protect the victims and sanction the perpetrators. They should draw upon the useful guidance contained notably in the Council of Europe Committee of Ministers' Recommendation on the prevention of racism, xenophobia and racial intolerance in sport (2001).

### *Widespread racism and discrimination in the context of migration*

Migrants have often been portrayed by media and politicians as a menace to security in Europe and, in the long term, a direct threat to our cultures and societies. African migrants as a group have often been described as "economic migrants" to whom states should deny international protection. Fuelling public anxiety about migration combined with the absence of a serious debate on the causes of migratory flows from Africa, which is the home of some of the biggest humanitarian crises in the world, cannot but reinforce the negative stereotypes associated with Black minorities in Europe. The practice of the Spanish authorities of summarily returning Sub-Saharan Africans to Morocco from the Spanish cities of Ceuta and Melilla illustrates some of the dangers of this approach.

Many European politicians call for closing the migration route from Libya and the immediate return of asylum-seekers from sub-Saharan Africa in the mistaken belief that their claims are always manifestly unfounded. They are ignoring that migrant flows from sub-Saharan Africa are multi-faceted and include people who are in need of protection and should be granted refugee or subsidiary protection status when they arrive in Europe.

### *Racial profiling in policing requires particular attention*

I am particularly concerned about the racial profiling of Black people and other visible ethnic minorities by law enforcement forces. Members of such minorities are subject to a disproportionately high number of identity checks. They are more often stopped, interrogated and searched by the police on the sole grounds of race or colour.

In the report on my 2014 visit to France, I condemned the fact that certain conduct by law enforcement agents seems to contribute to discrimination against minority groups. I very much regret to learn that little has changed. According to a survey carried out in 2016, the French Defender of Rights (ombudsman) found that identity checks affect mostly a limited minority group within the general population.<sup>141</sup> Young

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141 Défenseur de Droits, *Enquête sur l'accès aux droits. Relations police/population : le cas des contrôles d'identité*, 01/2017.

men perceived as Black or Arab are twenty times more likely to be stopped by the police than the rest of the population. Police often do not explain the reasons for identity checks. Brutality, insults and lack of politeness have on occasion accompanied such stops.

Despite underreporting and difficulties in some countries in collecting disaggregated data on race, descent or ethnic origin, similar experiences of discriminatory policing have been reported by the UN Working Group of Experts on People of African Descent in Italy, Germany, Sweden, the Netherlands and the United Kingdom. Counter-terrorism measures and the crackdown against irregular migrants over the last few years have accentuated these phenomena.

Differences in the treatment of Black people and other minorities in the law enforcement and criminal justice system are not only contrary to human rights standards, but are also ineffective and generate social tensions. When police engage in racial profiling, they decrease the likelihood that members of the target communities will cooperate with them in combatting crime and violent extremism. Anger and resentment towards the police due to abusive practices, combined with unemployment and poor housing, have also contributed to the regular eruption of riots in some European cities.

In order to counter arbitrariness and abuse, European states should be guided by European Commission against Racism and Intolerance (ECRI) General Policy Recommendation N°11 on combating racism and racial discrimination on policing. In particular, they should clearly define and prohibit racial profiling by law, carry out research on racial profiling and monitor police activities, notably through the collection of statistics broken down by grounds such as ethnic origin, introduce a reasonable suspicion standard for police activities and train the police on the issue of racial profiling and on the use of the reasonable suspicion standard.

Given the difficulties complainants face in practice in proving that they were victims of racial profiling by the police, consideration should also be given to shifting the burden of proof when racial profiling is alleged; in this respect, reliable statistics are key in establishing the presumption of discrimination, upon which the burden of proof shifts on the law enforcement authorities to show that their control activities were carried out on non-discriminatory grounds.

Moreover, the existence of an independent and effective complaint mechanism against police officers for alleged discriminatory practices is essential for preventing ill-treatment and building confidence in law enforcement officers.

#### *Social and economic inequalities suffered by Black people in Europe*

It is obvious that ethnic origin is one of the main sources of discrimination. In its 2014 and 2015 annual reports, ECRI noted that discrimination testing has shown that Black people across Europe are often far less likely to obtain employment or housing rental contracts due to their skin colour.

National Human Rights Structures (NHRS) play a crucial role in protecting the human rights of vulnerable minority groups. Their expertise should be used by states to

collect disaggregated data and translate it into baseline studies in order to establish a comprehensive picture of the situation of Black minorities. The collection of sensitive data should be voluntary and coupled with proper safeguards to preserve the right to respect for private life of individuals belonging to minority groups.

It is noteworthy that the European Court of Human Rights has consistently stressed the importance of statistics based on disaggregated data when it comes to demonstrating that visible minorities are disproportionately affected by discriminatory practices. Disaggregated data would facilitate the preparation of effective national action plans and strategies to address the specific challenge of Afrophobia in Europe. Research and data collection are also essential for strategic litigation before national and international courts.

At the same time, more inclusive education systems are key for tackling stereotypes and the perpetuation of discriminatory practices. Such systems would help eliminate school segregation that children still experience in several member states. They can also provide an effective tool to cater to the needs of schools in poor neighborhoods where socially disadvantaged students, including Black and other students, are likely to be the majority. By developing an inclusive education approach, the authorities would tackle the root causes that lead to low educational attainment and school segregation, thus upholding the right to quality education for everyone.

In parallel, national authorities must intensify their efforts to fight Afrophobia and the stereotypes which are associated with it by better including the teaching of the history of People of African Descent in the curricula with a focus on their important contribution to European societies.

#### *European states must adopt a proactive approach*

The position of Black people in Europe needs to be strengthened, irrespective of whether it concerns recent migrants from Africa or already established Black communities.

European states must first come to terms with their own past. To this end, those that have not done so should publicly acknowledge that slavery, the slave trade and colonialism are among the major sources of current discrimination against Black people. This is a sine qua non for overcoming Afrophobia.

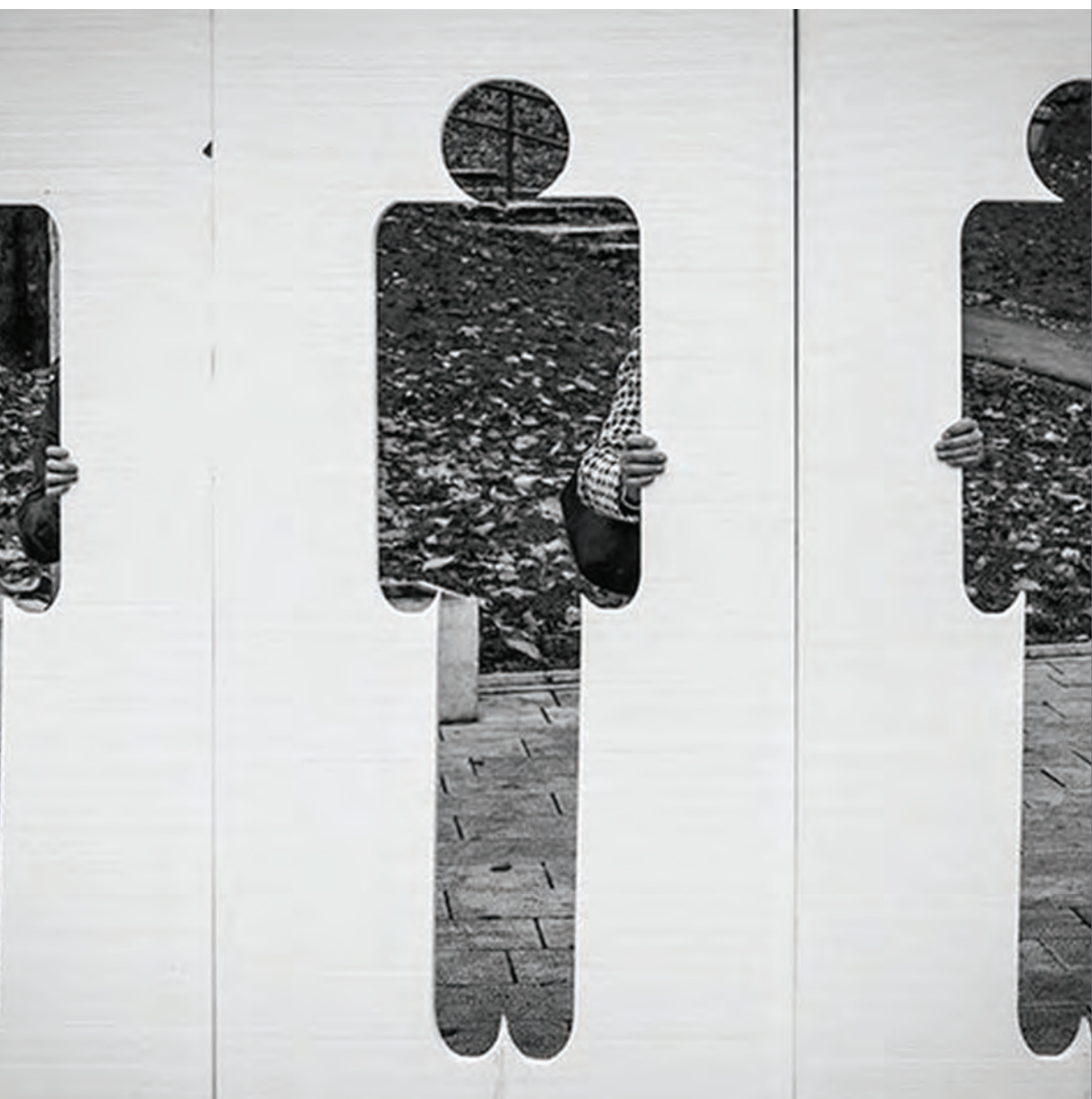
The current UN-initiated International Decade for People of African Descent is a timely opportunity for all countries to take proactive measures to promote equality and place stronger emphasis on combating Afrophobia in their national anti-discrimination policies.

Only a few states so far have envisaged to develop specific policies. It is high time to pay more attention to and invest more in advancing the social inclusion, equality and empowerment of Black people in Europe. In particular, European states should:

- Promote Black people's positive contributions to Europe which is an inherently pluralistic continent;

- Act resolutely against all forms of incitement to hatred against Black people and pay special attention to combating racism in politics and sports and the online hate speech;
- Collect disaggregated national data on ethnic and racial groups based upon voluntary self-identification;
- Prohibit all forms of school segregation and address the existing over-representation of Black children in certain schools;
- Prohibit all forms of racial profiling in policing and establish an effective and transparent mechanism for complaints;
- Strengthen the legislation prohibiting discrimination in access to health care, housing and employment and use “discrimination testing” as a tool to demonstrate and eliminate discriminatory conduct that its victims have difficulty in proving by themselves;
- Create opportunities to increase the participation of Black people and other ethnic minorities in national and local political life, administration and decision-making processes.





# 10. Transitional Justice and Human Rights

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## INTRODUCTION

Europe has a troubled past, not all of which has been faced up to. There is no single blueprint for dealing with past injustices and human rights violations on a mass scale. Transitional justice is a difficult area of human rights work, be it in the immediate aftermath of war or repression, or later, when relations between countries, communities and individuals remain embittered despite the passage of time. For solutions to be sustainable, they should be based on the four key pillars of transitional justice: punishing perpetrators through the criminal justice system, truth-seeking, reparations, and guarantees of non-repetition. It is also of fundamental importance to put survivors of human rights abuses and their families and loved ones at the centre of all actions aimed at achieving justice and reconciliation.

The right to truth is the main focus of my Human Rights Comment on missing persons that, together with the Issue Paper I published on the same subject in 2016, shows that the fate of thousands of such persons across Europe remains unknown. Despite the growing number of accessions to the International Convention for the Protection of all Persons from Enforced Disappearance (an increase from 14 to 20 European countries in the last three years), much still needs to be accomplished in practical terms. Lack of political will remains the most significant stumbling block to progress in clarifying the fate of missing persons. This is largely because once facts come to light indicative of an enforced disappearance – a crime under international law and a violation of multiple human rights – further questions about accountability become much more difficult to ignore.

While major efforts have been made to address the devastating effects of the wars and massive human rights violations that accompanied the breakup of Yugoslavia, the future of the region remains mired in uncertainty. Based on my recent country visits, I find that the situation today is stagnating, if not altogether regressing, with serious risks for democracy, the rule of law and relations between the different communities. With regional co-operation disrupted by resurgent animosities and tensions, various cross-border efforts – in war crime prosecution, legal assistance, accessing archives, identification of missing persons and reconciliation – have been suspended. Assistance

for refugees and the internally displaced has seen some improvement, but many concerns remain. War crimes are frequently denied in national discourse, and there are only half-hearted attempts to bring those responsible to account; meanwhile, glorification of convicted war criminals is commonplace. Segregated education systems and one-sided school curricula have entrenched divisions even further and are perpetuating inter-ethnic mistrust.

As mentioned earlier (see chapter above on children's rights), the importance of inclusive and integrated education for social cohesion in post-conflict societies cannot be overstated. Unfortunately, debates on education tend to be politicised and reduced to a zero-sum approach to community rights, depriving children and young persons of valuable opportunities to learn from and about one another. There is a vital need to teach history without resorting to a single interpretation of events, and engage in an open dialogue and reflection instead of withdrawing into defensive identity politics.

The politics of memory in the post-Soviet context is an issue I had tackled prior to taking up office as Commissioner. Since then I have observed, and not only in the Balkans, that transitional justice and past human rights abuse can be instrumentalised in a reckless manner by opportunistic politicians. On the other hand, we have seen some positive examples of civil society initiatives towards reconciliation and the reconstruction of a shared history even when officialdom remains deeply divided. In my comment on Armenian-Turkish reconnections and human rights, I highlighted such encouraging initiatives as an example of how people-to-people diplomacy can offer a way out where governments are unable or unwilling to bridge the divide.

As illustrated elsewhere in this volume, intolerance is on the rise in today's Europe. Roma remain among the most marginalised and maligned people on our continent and this is due in no small part to a near-total ignorance about their history and the gross injustices inflicted upon them. It is crucial to replace the ingrained prejudices with study and awareness raising about Roma history. The Council of Europe has an excellent resource on the topic, the Roma history factsheets, which merit much wider dissemination.

States should make use of the considerable expertise and good practices that exist in the teaching of the Holocaust, the remembrance of which is a human rights imperative. During my time in office I have met with Jewish communities and learned more about how the Holocaust affected particular countries and regions by visiting memorial centres and museums. While the Shoah did indeed shape the collective consciousness among post-war generations, antisemitism among younger people, including in countries from where Jewish populations were decimated during the Second World War, can in some respects be linked to a lack of education offering an honest account of the heinous crimes committed against Jewish people.

It has been said that stability is fragile without some form of accountability. Sweeping past abuses under the carpet tends to make grievances fester and is unlikely to lead to lasting peace, reconciliation, or cohesive societies. However, reckoning honestly with the past requires empathy, mutual understanding and courage. Gestures like public apologies by leaders are symbolically significant and can attenuate the feeling of injustice, and reparations help victims regain their livelihood and restore their

dignity. I believe that investment in teaching and awareness raising is especially important, but it is equally important to do so well – that is, responsibly, soberly and in an inclusive manner. The aim of remembering should not be to cultivate resentment. It is also about “committing to the hard work of forgiveness” and working towards reconciliation and constructive interaction between different communities.

## **MISSING PERSONS IN EUROPE: THE TRUTH IS YET TO BE TOLD**

*Human Rights Comment published on 28 August 2014*

Tens of thousands of persons remain missing and still haunt Europe decades after the demise of dictatorships and the end of armed conflicts. For example, Spain has yet to come to terms with its past and shed light on the fate of more than 150 000 persons who remain missing as a result of the Spanish Civil War and Franco’s dictatorship. About 20 000 persons remain missing following the armed conflicts in Cyprus, the former Yugoslavia and the North and South Caucasus. Hundreds of enforced disappearances were documented in Turkey in particular following the 1980 military coup, as well as in early 1990s primarily in the south-eastern part of the country, many of which have not yet been elucidated. Of 16 persons who have been reported as gone missing during the conflict in Northern Ireland seven persons remain unaccounted for. While these cases remain unresolved, more cases of enforced disappearances have been reported in the ongoing conflict in Ukraine.

30 August, the International Day of the Victims of Enforced Disappearance, is an appropriate day not only to reflect on these cases, but to renew our commitment to overcome the remaining obstacles in establishing the fate of missing persons. Thousands of families live in anguish, waiting and hoping to find out the truth about their loved ones. .

### *The ordeal of missing persons’ families*

Families of missing persons often face serious obstacles in accessing social and economic rights, including social benefits and pensions. The issue also has a gender aspect, since most of the missing persons are men. Discriminatory laws sometimes make it impossible for women to access family assets, thus undermining their efforts to look after their families on their own. Measures of reparation to the families of missing persons are sporadic or non-existent. The disappearance of a loved one takes a heavy emotional toll and causes serious trauma even if the truth is finally established. The provision of long-term psychological and psychosocial assistance to the families of missing persons is vital in order to help them overcome their emotional pain.

### *States have positive human rights obligations*

States are obliged to carry out effective investigations and provide information to families about the fate of persons missing as a result of the use of force, including armed conflicts. These obligations derive from the Geneva Conventions and from the European Convention on Human Rights (ECHR). As the Council of Europe

Committee of Ministers stressed in the 2011 Guidelines on eradicating impunity for serious human rights violations, states have an *absolute duty* to investigate cases concerning notably Article 2 ECHR that provides for states' duty to secure every person's right to life. States are also bound by Article 3 ECHR which stipulates that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The European Court of Human Rights has held in many cases that the suffering that families of missing persons endure due to the silence of authorities constitutes inhuman treatment.

Furthermore, under the International Convention for the Protection of All Persons from Enforced Disappearance states are responsible for fighting impunity for the crime of enforced disappearance, preventing new cases of enforced disappearance and guaranteeing the right to the truth and reparation to the families. By Resolution 1566 (2013) concerning missing persons from Europe's conflicts the Parliamentary Assembly of the Council of Europe called on the member states to accede to this convention which has so far been ratified by only 14 countries in the region.

#### *Major obstacles to the application of human rights standards*

Considerable progress has been made in resolving cases of missing persons in Cyprus and in the region of the former Yugoslavia. However, this has not yet been the case in Armenia, Azerbaijan, Georgia and the Russian Federation. Lack of political will appears to be one of the principal reasons for the slow progress in establishing the fate of missing persons in Europe. Limited national capacity and lack of qualified forensic experts in the countries concerned, compounded by economic constraints due to the costly process of DNA identification, are additional obstacles. Moreover, relevant information about new gravesites is often not available either due to witnesses' fear of testifying, or the lack of co-operation between former rival parties.

The UN Working Group on Enforced or Involuntary Disappearances has voiced its concern about the safety of human rights defenders and lawyers working on enforced disappearance issues, who are often targets of threats, intimidation and reprisals. It has also noted the patterns of impunity in particular with the use of amnesty laws to preclude investigation into crimes of enforced disappearances.

In Spain, it is considered that the 1977 amnesty law prevents any investigation into the fate of persons who went missing between 1936 and 1975. Ineffective judicial proceedings often hampered efforts to shed light on disappearances. In Turkey, statutes of limitation posed additional challenges in recent years, while many missing persons still remain unaccounted for. In my dialogue with the Georgian authorities I have stressed the need to proceed with effective investigations into the cases of missing persons with a view to clarifying their fate and ensuring the accountability of perpetrators, including law enforcement agents.

#### *Steps to be taken*

The Parliamentary Assembly of the Council of Europe has listed five priorities that have to be tackled by member states and *de facto* authorities in Europe: First, putting

families of missing persons at the centre of all actions concerning missing persons, in particular by promoting multidisciplinary assessment of their needs.

Secondly, it is necessary to set up an efficient national legislative framework. Member states should in particular ensure that the criminal offence of enforced disappearance is introduced in national legislation, and that perpetrators do not benefit from amnesty or similar measures that may exempt them from criminal responsibility and sanctioning.

Thirdly, there is a need to support the functioning of national and regional mechanisms working on missing persons and to ensure independence and impartiality of such mechanisms. Non-governmental organisations should also be involved and supported, as they play an important role in this field working on cases of missing persons and supporting families.

Fourthly, information on missing persons should be collected, protected and managed by specialised national authorities able to ensure that the identity, location, fate and circumstances of the disappearance are established and that this information is lawfully available to the interested persons.

Lastly, European states concerned need to take all feasible measures to enhance their expertise concerning the management, identification and recovery of human remains of missing persons.

In addition, national and regional mechanisms and international organisations working on missing persons should be provided by states with the necessary financial and human resources so that they can continue and conclude their important work in this field.

These steps are of pivotal importance. Ratification and application by European states of the International Convention for the Protection of All Persons from Enforced Disappearance would be an additional step in the right direction.

The passage of time makes finding and identifying remains harder. However, experience suggests that time will not make this issue go away. We should act now – we owe it to the memory of the victims and we owe it to the families, who need to know the truth.

## **JUSTICE AND RECONCILIATION LONG OVERDUE IN THE BALKANS**

*Human Rights Comment published on 9 July 2013*

More than 20 years after the first war in connection with the dissolution of Yugoslavia the legacy of the violence still lingers across the region. 12 200 persons are still missing, 423 000 refugees and displaced persons still cannot return to their homes, about 20 000 persons remain stateless or at risk of statelessness and at least 20 000 women subjected to wartime sexual violence still need stronger support.

All this, combined with impunity for wartime crimes, hampers reconciliation and endangers the full enjoyment of human rights, democracy and the rule of law.

### *Measures to eliminate impunity*

A fundamental requirement for reconciliation is to bring to justice those who committed war-related crimes, not least war-crimes of sexual violence. Justice is needed not only to ensure the accountability of those who have committed the violations; it is also necessary for providing reparation to victims who suffer additionally from the lack of support and acknowledgement of their suffering.

The work of the International Criminal Tribunal for the former Yugoslavia, the ICTY, has made the prosecution and trial of senior leaders involved in war-related crimes possible. But the countries of the region have to step up their efforts to continue this work at national level.

National judicial systems, including witness protection systems, should be strengthened to enable them to work more effectively.

Another fundamental point is that amnesty, which leads to impunity for serious human rights violations, is not acceptable, as stressed by the Council of Europe Committee of Ministers in 2011 and the European Court of Human Rights in the 2012 judgment *Marguš v. Croatia*.

### *Many still missing, others displaced*

There are, according to the International Committee of the Red Cross, still 12 200 persons missing after the wars in the former Yugoslavia. States in the region have a moral and legal obligation to enhance their efforts to resolve these cases, in order to provide relief to missing persons' families and friends.

To achieve this, effective cooperation between countries in the region is necessary. Recently such cooperation has led to important results: in the city of Zadar, Croatia, bodies of Serb civilians were exhumed from a mass grave<sup>142</sup> and in Sotin, Croatia, civilian victims from the Serbian occupation have been exhumed.<sup>143</sup>

According to the UNHCR there are still about 423 000 refugees and internally displaced persons in the region. Solutions must be found for them, especially for those living in collective centres. Some important steps forward have been taken in the context of the Sarajevo Process, which relates to finding durable solutions for refugees. New housing units are being built with the help of the Council of Europe Development Bank.

Solutions must also be found for the 20 000 persons, inside and outside the region, who are stateless or at risk of statelessness, especially Roma.

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142 Balkan Insight news item, "Serb War Graves Exhumed in Croatia", 29 April 2013, [www.balkaninsight.com](http://www.balkaninsight.com)

143 Balkan Insight news item, "Croatia Finds More Bodies in Mass Grave", 25 April 2013, [www.balkaninsight.com](http://www.balkaninsight.com)



## *Access to the truth*

The truth is essential to reconciliation. The NGO-driven RECOM initiative that aims to determine and disclose the facts about war crimes has enhanced the understanding by the region's peoples of the importance of the reconciliation process. During the final years of the ICTY's mandate much effort will go to the tribunal's outreach programme, which is aimed at raising transitional justice awareness among citizens in the region, not least young people. Some have expressed their concern that this process is belated and that a sense of injustice, as a result of some parts of the work of the ICTY, is embedded in the minds of peoples in the region. It is crucial that these concerns are openly addressed and discussed through the tribunal's outreach programme.

The educational systems in the region's countries play a pivotal role in this context. However, across the Balkans there are divisions in education along ethnic lines, which represent a serious obstacle to reconciliation. The Council of Europe regional project *Inclusive education – Human rights, vulnerable groups and minorities*, presents an avenue to address this problem.

## *Regional dialogue and co-operation*

Recently some very important steps have been made towards effective inter-state dialogue and reconciliation. Last April Serbian President Nikolić presented an unequivocal apology for war crimes committed by Serb forces in Srebrenica, saying: "I am on my knees and begging for a pardon in the name of my people for the crime committed in Srebrenica."

Also last January Bosnia and Herzegovina signed a protocol<sup>144</sup> with Serbia on co-operation in the prosecution of war-crimes and in April Kosovo\* and Serbia signed a political agreement<sup>145</sup> on North Kosovo.

## *A common responsibility*

One of the key challenges for societies emerging from conflicts is to deal with the past. Some important steps forward have been taken, but much remains to be done. Reconciliation in the Balkans must come through justice, that is, the effective investigation and prosecution of war-related crimes and the provision of adequate reparation to all war victims. This cannot be delayed further – it is up to national governments to increase their efforts.

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144 Balkan Insight news item, "Serbia and Bosnia Sign War Crimes Deal", 31 January 2013, [www.balkaninsight.com](http://www.balkaninsight.com)

\* All reference to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.

145 European Commission Press Release "Serbia and Kosovo\*: historic agreement paves the way for decisive progress in their EU perspectives", 22 April 2013.

## ADDRESSING THE NEEDS OF THE VICTIMS OF THE SREBRENICA GENOCIDE MUST BE THE PRIORITY

*Article published in Oslobodjenje and others on 7 July 2015*

The Srebrenica genocide is one of the vilest episodes of Europe's contemporary history. In just a few days in July 1995, around 8 300 boys and men were executed while 30 000 women, children and elderly persons were forcibly displaced. Twenty years on, the victims of that genocide are still haunted by the political failures which have left them without redress.

Some progress has been achieved in establishing accountability and bringing war criminals to trial. The work of the International Criminal Tribunal for the former Yugoslavia has been instrumental in this sense, in spite of initial strong resistance. This process must continue, as justice represents a crucial element in coming to terms with the past. But as we commemorate the victims of the Srebrenica genocide, we must not forget about the other needs of the victims.

When I first went to Srebrenica two years ago for a commemoration of the victims of the genocide, I could observe how badly the survivors and the victims' relatives were lacking full access to social and economic rights as well as the necessary recognition required to begin rebuilding their lives. That situation rendered them more vulnerable and cultivated feelings of insecurity and despair. Regrettably, little has improved since then, and a stalemate has prolonged and deepened the suffering of the victims. Worse still, political discourse in Serbia and in the Republika Srpska which demeans or blatantly denies the Srebrenica genocide twists the knife in the wound and hinders the process of much needed reconciliation in Bosnia and Herzegovina and the Balkans in general.

This unacceptable situation breeds contempt for the victims' human rights and dignity and must be addressed. Political leaders in Bosnia and Herzegovina and in Serbia should embrace the victims' cause once and for all and move forward with more resolve. There are in particular three areas in which Bosnia and Herzegovina and Serbia must improve their response to the victims' needs.

First of all, justice must be pursued. We all know that it takes time to identify, try and punish war criminals. However, this cannot be used as a pretext to shirk the obligation to establish accountability and confront the past. Good examples exist and must be used as a catalyst for further progress. Last March, for example, Serbia's police arrested eight men suspected of involvement in the killing of more than 1 000 Muslims on the outskirts of Srebrenica. This came as the result of co-operation between Bosnian and Serbian prosecutors, whose work represents one of the few glints of hope for the victims, and as such must be sustained and shielded from political interference.

Secondly, victims must be supported. Bosnia and Herzegovina must finally provide civilian victims of the Srebrenica genocide with adequate social protection, eliminating unequal treatment between civilian and military victims of war. Improved legal assistance should also be provided, so as to ensure that victims can assert their rights and obtain reparation.

To alleviate the prolonged suffering of the victims' families, it is of paramount importance to speed up the identification of all genocide victims and the clarification of the fate of those who remain missing. Many mass graves containing the corpses of people executed in Srebrenica have not yet been exhumed, partly because they lie in areas which are still peppered with landmines. There must be a stronger commitment to resolving these issues. Serbia in particular should open its military and police archives to disclose the information necessary to identify the mass graves, and it should play a more positive role in facilitating the demining efforts and in sustaining the activities to find and identify the bodily remains of those executed in and around Srebrenica.

Thirdly, education must be more inclusive. Mono-ethnic schools and the "two-schools-under-one-roof" system which characterise Bosnian education constitute an anachronistic approach which only serves to perpetrate the ethnic divisions which lie at the root of current and past tensions and heavily undermine reconciliation and peace. The education system must promote a genuine knowledge of history in order to facilitate understanding, tolerance and trust between individuals, especially the younger generations. To this end, school books in Serbia and Bosnia and Herzegovina must include an objective testimony of the Srebrenica genocide, portraying it without political or ethnic connotations. Such an impartial teaching of history serves as a powerful antidote to future tensions and represents a fundamental element of any cohesive society.

The Srebrenica genocide has become a symbol of the serious human rights violations that occurred during the wars that dissolved the former Yugoslavia in the '90s. Unfortunately, progress in confronting the genocide's legacy has been too slow, hijacked by political tensions. Bosnia and Herzegovina and Serbia must overcome this politicisation of the genocide, take a step back and refocus their energies on the victims' needs for justice, decent living conditions, and recognition.

## **ARMENIAN-TURKISH RECONNECTIONS AND HUMAN RIGHTS**

*Human Rights Comment published on 17 April 2015*

History continues to divide Armenian and Turkish officialdom, but there are many civil society, cultural and academic initiatives aiming to reconnect the two societies. April 24 marks the centennial of the beginning of the mass killings, deportations and dispossession of Armenians in the Ottoman Empire in 1915, which resulted in the near-total elimination of Armenians from Anatolia. These massive human rights violations and their painful legacy left a major rift between two societies, which has crystallised around the issue of their political and legal designation as genocide. However, it is heartening to see that today many people are seeking to overcome this difficult legacy and to promote mutual understanding, reconciliation and the reconstruction of a shared history, demonstrating a true human rights ethos.

## *The Emergence of a Thaw*

Discussion in Turkey of what was sometimes euphemistically called the “1915 Events” was long taboo or even subject to criminal prosecution under the offense of “insulting Turkishness”. In recent years, prosecutions under this article have become more infrequent and a space for discussion has emerged. This space has been created by a number of concurrent developments, particularly increased contacts between Turks and Armenians and domestic Turkish political and cultural evolution.

Though the land border remains closed, nationals of both countries have enjoyed relatively free travel to the neighbouring country. As a result, the number of Armenian nationals entering Turkey increased from less than 5 500 in 2000 to more than 73 000 in 2013. In 2011 the Turkish authorities even granted special permission for migrant children of Armenian nationality to attend the schools of the Turkish Armenian minority. While many Armenians seek informal work in the Turkish economy, others (from both Armenia and the diaspora) have increasingly travelled to Turkey to reconnect with their roots by visiting their ancestors’ places of origin and the descendants of family members who stayed during and after World War I.

At the same time, the debate within Turkey about the past has evolved considerably. While an academic conference in Istanbul was a watershed in 2005, since then, a plethora of scholarly work about the Armenian legacy in Turkey has been published. A turning point in the Turkish debate appeared to come with the tragic assassination of Turkish-Armenian journalist Hrant Dink in 2007, which led to further calls for a reassessment of the past, more open public discussion and a more compassionate tone of discourse. In a sign of this new tone, intellectuals in Turkey organised a petition campaign in 2008, in which thousands signed an apology to Armenians for the “Great Catastrophe”.

## *Recent Civil Society Initiatives*

In recent years, a host of civil society initiatives have been implemented, suggesting that people-to-people diplomacy has far outstripped official relations, which remain deadlocked. Starting in 2009, the Hrant Dink Foundation in Turkey began to organise journalistic exchanges to foster better coverage of issues affecting the neighbouring country. On the Armenian side, early initiatives sought to document, acknowledge and publicise the role of “righteous Turks” who saved the lives of Armenians.

In early 2014 a consortium of 8 NGOs from Turkey and Armenia launched a programme entitled “Support to the Armenia-Turkey normalisation process” with support from the European Union. The programme includes exchanges and study visits of journalists, artists and environmental activists, summer schools for teachers, oral history projects, exhibitions, support for a joint Turkish-Armenian youth orchestra, and academic talks. The private sector is also seeking to foster business ties, which now take place primarily in a circuitous manner via Georgia or Iran, and to promote bilateral economic partnerships.

These are encouraging steps which, if continued, could form the basis for effectively dealing with a painful past and addressing the legacy of 1915. They have already

contributed to an evolution within Turkish society, from opposing the suffering of the ancestors of the majority population during the fall of the Ottoman Empire against that of the Armenians, towards an acknowledgement of the suffering of the other side and its integration into the collective consciousness. Dealing with the past requires empathy and mutual understanding, and these initiatives are precisely furthering that aim. This could then in turn serve as a basis for an evolution of the position of the national authorities. The latter should refrain from impeding or seeking to gain political advantage from such initiatives and seek to support those actors aiming at seeking the truth and fostering contacts and understanding.

### *A Human Rights Framework?*

The deportation and massacre of Armenians by the Ottoman authorities was a massive violation of human rights. The first rule of international human rights might be summarised as “no impunity for perpetrators.” However, since the tragedy took place 100 years ago, the perpetrators are no longer among the living and cannot be held to account. One indicator of progress in dealing with the past in Turkey will be the evolution of the official stance towards these past human rights violations. By official stance, I mean not only political statements by Turkey’s leaders, but also the institutional stance as reflected notably in officially approved school history textbooks, state-funded museum exhibitions and other cultural output. Are perpetrators condemned and crimes acknowledged? Or are they ignored, downplayed, justified, or even glorified?

A second element of a human rights approach might be summarised as “address the needs of victims and their families.” While few survivors are still with us after 100 years, many of their descendants also suffered from what happened. A human rights approach foresees various ways to provide redress and reparation to victims of human rights violations. One of these ways is the recognition of the tragedy through commemorative dates, rituals and monuments. There have been instances where property was returned to Armenians in Turkey and some parts of the Armenian cultural heritage in Turkey have been rehabilitated, such as the Surp Giragos church in Diyarbakir and the Surp Khach church on Akdamar Island. The significance of these initiatives, including for Turkish society, should not be underestimated. Recently, the Van municipal council also restored Armenian (and Kurdish) toponyms. However, much more could be done in this area.

### *Commemorations and Solidarity*

In Armenia, the centennial will be marked on April 24 with solemn ceremonies and a major international conference on genocide. Twice during recent visits I paid homage to the victims at the Armenian Genocide Memorial Monument in Yerevan. As the centennial approaches, my thoughts and solidarity are again with the victims and their descendants, but also with the civil society activists, scholars, journalists and artists from both Armenia and Turkey who are seeking to promote mutual understanding and foster an honest reckoning with a heavy historical legacy.

## WHY REMEMBERING THE HOLOCAUST IS A HUMAN RIGHTS IMPERATIVE

*Human Rights Comment published on 18 October 2016*

The Shoah stands out as one of the defining moments of history that has shaped the conscience of mankind. It is unique in its roots, implementation and envisioned totality. During my mandate as Commissioner for Human Rights, I have attended a number of ceremonies of commemoration of the victims of the Shoah, not only in Strasbourg, but also in Albania and Greece, to highlight that it is our duty to remember the past in order to remain vigilant for the future. Teaching remembrance of the Holocaust is a crucial safeguard against history and serious human rights violations repeating themselves.

Remembrance lies at the roots of the Council of Europe. It was founded out of a collective determination to overcome past hatred and conflict and to promote peace, democracy and human rights. Acknowledging and coming to terms with the past is essential. Worrying trends in antisemitic hate speech and hate crime are important issues which I have raised with member states during my country monitoring missions and in my visit reports (see, for example, my report to France in 2015; to Hungary in 2014; to Georgia in 2014 and to Greece, in 2013). Since 2015 I have tried to meet with representatives from Jewish communities during these monitoring visits to listen to their concerns and get a clearer picture of contemporary antisemitism in Europe.

When I wrote in my 2012 address in Tirana that antisemitism was still very much alive in Europe, I had in mind, of course, the horrendous attack against the Jewish Ozar Hatorah School in Toulouse in March 2012. Little did I know then that 2014 would see the murder of four people during an attack on the Belgian Jewish museum and the killing of four hostages in a Paris kosher supermarket and a young Jewish security guard at a Copenhagen synagogue in 2015.

According to the European Union's Fundamental Rights Agency survey of data published in October 2015, antisemitism remains an issue of serious concern which demands decisive and targeted policy responses.<sup>146</sup> The Internet and the explosion of on-line hate speech have only exacerbated an existing problem.

Contemporary manifestations of antisemitism do not just include violent crime and hate speech. Contemporary antisemitism also revolves around the Holocaust, with some blaming the Holocaust on Jews or suggesting that Jews focus on this tragedy to gain advantage.

Outright denial of the Holocaust still exists in Europe. Under the International Convention on the Elimination of all Forms of Discrimination (Article 4) states are bound to sanction racist hatred and violence. Moreover, according to the European Union's Framework Decision from 2008 publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes should be punishable as criminal offences. I noted in my 2013 report on Greece that regrettably

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<sup>146</sup> Fundamental Rights Agency (2015) *Antisemitism - Overview of data available in the European Union 2004-2014*, Publications Office of the European Union.

the Greek courts did not manage to do this in an important case concerning the publication in 2006 of a book by Kostas Plevris, a politician with an openly Nazi ideology, which was manifestly antisemitic and incited to hatred and violence against Jews. Despite the *ex officio* prosecution and the author's first instance conviction the Athens Appeal Court and the Court of Cassation acquitted him. I was dismayed to read last month that the Slovak MP, Milan Mazurek, will not be prosecuted for saying that the Holocaust is a "fairy tale and a lie".

### *Negationism and Revisionism before the European Court of Human Rights*

The Strasbourg Court has taken a robust approach to Holocaust denial. On a number of occasions it has excluded Holocaust denial from the protection of Article 10 using the 'abuse of rights' clause under Article 17. Under this clause an applicant is not entitled to rely on the protection of the European Convention on Human Rights because his acts are deemed to be incompatible with the fundamental values which the Convention seeks to promote.

In the case of *Garaudy v. France*,<sup>147</sup> the applicant, an author of a book entitled 'The Founding Myths of Modern Israel' was convicted of disputing the existence of crimes against humanity, defamation of the Jewish community and incitement to racial hatred. He argued that his right to freedom of expression had been infringed. The Court declared his application inadmissible. It considered that the content of his remarks had amounted to Holocaust denial and pointed out that denying crimes against humanity was one of the most serious forms of racial defamation of Jews and incitement to hatred of them.

### *The multiple facets of Holocaust denial in Europe*

Yet denial has many facets, and also includes minimization, trivialisation or distortion of the Holocaust. Last year, the European Court of Human Rights rejected as inadmissible a claim brought by a comedian and political activist, known by the stage name "Dieudonné" (*M'Bala M'Bala v. France*).<sup>148</sup> Under cover of a comedy show, the applicant invited one of the best known French negationists, Robert Faurisson, who had been convicted a year earlier for denying crimes against humanity, in order to pay tribute to him and give him a platform. In the context of a preposterously grotesque *mise en scène* he arranged for an actor playing the role of a Jewish inmate of a Nazi concentration camp, dressed in striped pyjamas with a star of David, to award Robert Faurisson a prize. The Strasbourg Court was of the view that the purported show was a demonstration of hatred and antisemitism, supportive of Holocaust denial.

Some examples of distortion of the Holocaust were given in the "Working Definition of Holocaust Denial and Distortion" at the International Holocaust Remembrance Alliance's Plenary meeting in Toronto in 2013. These include intentional efforts to excuse or minimize the impact of the Holocaust or its principal elements, including

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147 ECtHR decision, *Garaudy v. France*, application no. 65831/01, 24 June 2003.

148 ECtHR decision, *M'Bala M'Bala v. France*, application no. 25239/13, 20 October 2015.



by collaborators and allies of Nazi Germany and attempts to blur the responsibility for the establishment of concentration and death camps by putting blame on other nations or ethnic groups.

During my recent visits and continuous monitoring of some post-Communist Eastern European states, I have been confronted with a number of nuances of Holocaust distortion in the form of revisiting or rewriting history. A number of States are struggling to come to terms with the role that local populations played in relations with the Jews.

During my visit to Croatia this year I was made aware of attempts by some nationalist politicians to relativize the crimes committed by the Ustasha regime. For example, the number of victims of the Jasenovac concentration camp has been officially called into question.

During my June 2015 visit to Slovakia I was alarmed to hear about attempts in some quarters to rehabilitate the Slovak fascist wartime state (a satellite of Nazi Germany during World War II) and its leading politicians, with the deportation of 70 000 Slovak Jews to death camps being called a historical lie.

I was concerned at the comments of the Polish Education Minister who in a recent interview refused to acknowledge that Polish citizens were responsible for killing their Jewish neighbours during antisemitic pogroms in Jedwabne and Kielce during and after World War II. The remarks came shortly after the 75th anniversary of the massacre at Jedwabne, where, on July 10, 1941, about 350 Jews were murdered by their Polish neighbours while the town was under Nazi occupation.

### *European states must act resolutely against all forms of antisemitism*

Europeans ignore the evidence of rising antisemitic hate speech, violence and Holocaust denial at their peril. The hate that begins with Jews never ends with Jews. This was the message of the former chief Rabbi of the UK to a group of MEPs and representatives from Jewish communities gathered in the European Parliament last month. The public denial, trivialisation, justification or praise of the Holocaust, of crimes of genocide and of crimes against humanity should be made a criminal offence, where this is not yet the case. An informed and honest discussion of past co-operation and collusion in the execution of Jews committed on national soil is necessary for coming to terms with a violent past. Political figures and political parties should also be prosecuted for antisemitic statements and incitement to hatred.

States should encourage Internet service providers and social media to take specific action to prevent and combat online hate speech. Moreover, States that have not done so should accede to the 2003 Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

The teaching of the Holocaust should be made an integral part of the curriculum at secondary level with teachers given specific training. Educational programmes should emphasise the link between current manifestations of hatred and intolerance and the Holocaust.

Antisemitism is a threat to our European continent built on freedom and the rule of law. It is only by facing up to the past that we can look with hope and confidence to the future.



# 11. Counter-Terrorism and Human Rights

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## INTRODUCTION

The protection of human rights while countering terrorism was an issue area that I was not very familiar with at the beginning of my mandate. Therefore I learned a lot about it as Commissioner, particularly in the context of the many developments in this area: Edward Snowden's revelations showing the large scale of unlawful mass surveillance, the recent spike in terrorist attacks, and the derogations to the ECHR and states of emergency in France and Turkey.

My first Human Rights Comment in this field, in 2013, focused on "extraordinary renditions" involving the abduction, detention and ill-treatment of suspected terrorists, which were carried out by the Central Intelligence Agency (US) in collaboration with European governments between 2002 and 2006. It reflected my serious concerns about the effectiveness of the investigations into the "extraordinary renditions", following up on earlier work that had been carried out by my predecessor as well as the Council of Europe Parliamentary Assembly and the well-known "Dick Marty report" of 2011. At the same time, cases against several European countries were brought successfully to the European Court of Human Rights, showing a pattern of abuse of the state secret privilege that had hampered judiciary and parliamentary initiatives towards accountability and eradication of impunity.

In response to the attacks in various European countries in 2015, the knee-jerk reaction by states was to enhance the powers of intelligence services to give them more powers to forestall threats to security by terrorism and organised crime. Several major European countries adopted laws on surveillance and counter-terrorism that caught my attention due to their potentially detrimental impact on the protection of human rights, in particular the right to privacy.

As new technologies have offered more avenues to increase surveillance and data collection, the Strasbourg Court has stressed in a number of important judgments against several countries that private and family life encompasses "the physical and psychological integrity of a person." European states that have introduced or envisage new legislation would benefit from considering the Strasbourg Court's 2015 judgment in *Zakharov v. Russia*, where the Court stressed that the risk of abuse is

inherent in any system of secret surveillance and that domestic law should provide for adequate and effective guarantees against arbitrariness and abusiveness.

During my mandate I outlined certain minimum safeguards that should be in place in this context: laws should be precise and clear as to the offences, activities and people subjected to surveillance, and must set out strict limits to its duration, as well as clear rules on the disclosure and destruction of data. Moreover, there should be effective remedies for those whose rights have been violated, while security services should be subject to independent scrutiny and judicial review. Effective oversight is first of all democratic. This requires primarily the involvement of parliaments, which must be granted intrusive overseeing powers and the ability to influence decision making and operations. In order to provide guidance to states, I published in 2015 an Issue Paper on *Democratic and effective oversight of national security services*.

Despite the polarising debates between snooping on the one hand and terror threats on the other, we must not forget that security services exist to protect our democracies. Their work is fundamental to ensuring that we can all live in peace and security. Nevertheless, the legality and human rights compliance of regulations, policies and security service operations are equally crucial, if we want to continue living in a Europe that protects individuals' privacy. Over the last few years, I have actively promoted these ideas.

The vital role played by NHRs in safeguarding the rule of law and human rights should never be ignored by states. Because of their nature, competencies and experience, as well as the respect and confidence they command, NHRs constitute the interface between national authorities and the public and are able to help both in keeping a cool head and efficiently combating terrorism without giving in to fear or undermining human rights. The advisory role of NHRs allows them to use their valuable expertise to carry out in-depth human rights impact assessments of draft counter-terrorism laws and policies.

I continue to be particularly worried by certain states' counter-terrorism initiatives, which raise serious issues of compatibility with the ECHR, but also by prolonged states of emergency and the "normalisation" of emergency measures by embedding them in ordinary legislation.

Particular attention should be paid by states to safeguarding freedom of expression and media freedom while countering terrorism. Laws criminalising offences such as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism have been adopted by many European countries. Apology of terrorism is widespread, especially online, and must be combatted. But these offences are not always clearly defined and may lead to unnecessary or disproportionate interference with freedom of expression.

Another major side effect of counter-terrorism policies and laws has been police misconduct, a long-standing matter of concern to me. In this context, institutionalised racism continues to play a major role in ethnic profiling, resulting in abusive stops and searches by police forces in Europe, targeting in particular Muslims and migrants. States must draw upon the Council of Europe standards in order to eradicate police

agents' excessively violent or racist conduct. This is an essential requirement for restoring the public's trust in the rule of law and human rights principles.

I would also like to note that another challenge that European states will continue to face is the radicalisation and deradicalisation of terrorists, including returning foreign terrorist fighters. To date, we have very little proof that coercive security measures have much impact on the reduction of terrorist violence. State responses will have to take primarily the form of prevention based on the effective social integration of members of social groups that tend to be marginalised. For this the major root causes of social exclusion should be effectively tackled: ethnic discrimination and intolerance; xenophobia; poverty and economic inequalities; high youth unemployment; and political exclusion.

The protection of human rights should cease being presented as an obstacle to effective counter-terrorism work when, in fact, it is essential to preventing and decreasing the incidence of terror around the world. In fact, states need to realise that national security and human rights protection are not mutually exclusive but complementary to each other.

## **TIME FOR ACCOUNTABILITY IN CIA TORTURE CASES**

*Human Rights Comment published on 11 September 2013*

Twelve years ago, almost three thousand people were killed by the terrorist attacks in New York and Washington. Commemorative events provide an occasion to pay respects to the innocent victims, but also to reflect on the anti-terrorist response adopted by the USA and Europe. By allowing unlawful detentions and interrogation techniques amounting to torture, this response caused further suffering and violated human rights law.

To date, governments have been unwilling to establish the truth and ensure accountability for their complicity in the unlawful programme of "extraordinary renditions" – involving abduction, detention and ill-treatment of suspected terrorists – carried out by the CIA in Europe between 2002 and 2006. In many cases, an abuse of the state secrets privilege hampered judiciary and parliamentary initiatives to determine responsibility. Though secrecy is sometimes necessary to protect the State, it should never serve as an excuse to conceal serious human rights violations

### *Legal challenges*

On 13 December 2012 the European Court of Human Rights shook this secret world. In its judgment *El-Masri v. "the former Yugoslav Republic of Macedonia"*, the first concerning the conduct of a member State in the sordid CIA programme, the Court not only held this country responsible for the torture of the applicant performed by a CIA rendition team in the presence of Macedonian officials and for inhuman and degrading treatment during his arbitrary detention. It also found that the State had failed to comply with its obligation to carry out an effective investigation into the

allegations of ill-treatment and arbitrary detention, as well as to provide an effective remedy to the complainant.

In the near future the Court could further expose the lawlessness that has characterised the CIA programme if it decides to examine the complaints lodged by Abu Zubaydah against Poland and Lithuania, and by Al Nashiri against Poland and Romania. The two suspected terrorists, now held in Guantanamo, complain that these countries have failed to conduct effective investigations into the circumstances surrounding their ill-treatment, detention and transfer to the USA.

*A thick veil of secrecy, leading to impunity*

A detailed report published by the Open Society Justice Initiative in February 2013 reminds us that 25 European countries have co-operated with the US agency.<sup>149</sup>

So far, the only country to have handed down sentences against people involved in the CIA programme is Italy, where in 2009 a criminal court convicted *in absentia*, twenty-three US citizens, all but one CIA agents, as well as five Italian secret service agents for the kidnapping and rendition to Egypt of a Muslim cleric, Hassan Mustafa Osama Nasr, also known as Abu Omar, from the streets of Milan in 2003.

The judiciary has also performed well in Germany and the United Kingdom. In the first case, Munich prosecutors in 2007 issued arrest warrants against thirteen CIA agents and transmitted them to Interpol. However, the German Government, pressed by its US ally, has so far refused to demand extradition. In the UK, judges have compelled the Government to award very costly compensation to sixteen people who accused the British security forces of facilitating their transfer abroad, where they had been subjected to torture. The UK Government has so far denied any liability.

Sweden too decided to pay compensation for its involvement in the extraordinary rendition of two Egyptian asylum seekers.

In all other countries, little has been achieved or even initiated.

In Poland the investigations only started a full three years after credible information emerged and have been dragging on for five years, mainly because of undue political interference in the work of the prosecutors and the unwillingness of the US to co-operate with the investigations. Concerns about the effectiveness of the investigations have been expressed on several occasions, including by the third Dick Marty report on the CIA detention and rendition programme adopted by the Council of Europe Parliamentary Assembly in 2011.

Lithuania, which now holds the Presidency of the Council of the European Union, has done much less. In 2011 the Prosecutor general closed a year-long criminal inquiry, without pressing any charges. Despite additional information provided by international human rights NGOs and a 2012 Resolution of the European Parliament calling Lithuania to reopen the criminal investigation into its involvement in the CIA programme, nothing has happened so far. Concerns about the promptness,

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149 Open Society Justice Initiative Report, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, February 2013.



comprehensiveness and thoroughness of the investigations were also expressed by the Committee for the Prevention of Torture in a report of 2011, in which it also pointed out that Lithuania had not provided the specific information requested to determine whether the Prosecutor had conducted the investigation in an effective manner.

In Romania, both the government and parliament (which has conducted only a superficial inquiry) have constantly denied the existence of any secret detention, in spite of reliable material provided in particular by Dick Marty's 2007 report and the Memorandum sent by my predecessor, Thomas Hammarberg, to the Prosecutor General of Romania in March 2012.

Other countries, including Austria, Azerbaijan, Belgium, Bosnia, Croatia, Cyprus, the Czech Republic, Georgia, Greece, Iceland, Ireland, Portugal, Spain, Turkey and the United Kingdom still have to fully account for their co-operation with the unlawful US programme, in particular as concerns the use of their airspace and airports for suspected rendition flights, capture and transfer of individuals to U.S. custody and participation in interrogation, as well as knowledge of the secret detention and extraordinary rendition operations.

### *Ensuring accountability*

It is imperative to take urgent political and judicial initiatives in member States to lift the veil of secrecy Governments have drawn over their responsibilities.

In particular, Poland has to complete the investigations, make its findings public and try those responsible, even if this implicates high-level State officials.

Lithuania, Romania and the other countries that have yet to clarify their role, should ensure serious, independent and effective investigations.

Germany should pursue its requests for extradition made in 2007, while the United Kingdom should clarify its role, including by publishing Sir Peter Gibson's report on the country's involvement in rendition and torture operations.

European countries should not be left alone. The European Union must put its weight behind them and persuade the US to fully cooperate in the investigations, including by ensuring that relevant investigative and judicial authorities in Europe can hear Al Nashiri and Abu Zubaydah.

Finally, all Council of Europe member states must ensure that security agencies operate under independent scrutiny and judicial review.

The CIA programme of rendition and secret detention is not simply a grave political mistake: it is above all a serious violation of fundamental human rights. The continued impunity breeds contempt for democracy and the rule of law, as well as disrespect for the victims and values in whose name the fight against terrorism was carried out. It is high time to set the record straight.

## **HUMAN RIGHTS IN EUROPE SHOULD NOT BUCKLE UNDER MASS SURVEILLANCE**

*Article published in openDemocracy on 12 February 2016*

Privacy is a fundamental human right essential for living in dignity and security. This is why it is necessary that European countries pause and get back on the right track.

European countries have made remarkable progress in the last decades to ensure individual freedoms and shield people from undue state interference. The European system of human rights protection is today among the most advanced in the world. However, there is little room for complacency: a number of cracks have appeared in this system and are widening. A number of cracks have appeared in this system and are widening.

One of the biggest comes from counter-terrorism measures considered or enacted across Europe, in particular those which increase mass surveillance. Many of these measures grant more intrusive powers to security services to snoop on our lives and centralise powers in the hands of the executive, thus circumventing judicial safeguards necessary in any democracy rooted in the rule of law.

A number of countries are very active on this front. For example, France is discussing a criminal law reform which would enable the police to use very intrusive surveillance tools in criminal cases. This occurs a few months after it adopted two other highly controversial laws which permit major intrusions, without prior judicial authorisation, into the private lives not only of suspects but also of persons who communicate with them, live or work in the same place or even just happen to be near them.

The Austrian Parliament has adopted a law which allows a new security agency to operate with reduced external control and to collect and store communication data for up to six years.

The Netherlands too is considering a set of draft laws introducing intrusive measures, including dragnet surveillance of all telecommunications, indiscriminate gathering of metadata, decryption and intrusion into the computers of non-suspects. And in the United Kingdom the government intends to increase the authorities' powers to carry out mass surveillance and bulk collection of intercepted data, despite criticism by civil society and warnings from the UK Independent Reviewer of Terrorism Legislation.

In Finland, the government is even considering changing the constitution to weaken the protection it affords to the privacy of communications so as to ease the adoption of a recently announced bill which intends to grant the military and civil intelligence services the power to conduct electronic mass surveillance with little oversight.

More recently, Poland's president signed a new law which will allow greater digital surveillance of its residents and fewer restrictions to the use police can make of the digital information gathered through electronic surveillance.

These are just a few of the cases that illustrate well the security trend which is spreading all over Europe on the assumption that to guarantee our security we have to renounce some human rights. This assumption is deeply wrong. Both the CIA rendition programme and the massive surveillance unveiled by Edward Snowden

should have made us understand that forfeiting human rights to fight terrorism is an ineffective approach.

Moreover, many of the surveillance measures contradict international human rights law. As established by the European Court of Human Rights, in fact, surveillance is – by its very nature an interference with the right to privacy, as reiterated last December in case of *Zakharov* against Russia.<sup>150</sup> Although the use of private communication information is essential in combating terrorist violence and threats, states can collect, use and store such information only under exceptional and precise conditions,<sup>151</sup> while offering adequate legal safeguards and independent supervision.

The Court of Justice of the EU also set limits to telecommunication data retention when it invalidated the EU data retention directive for its unnecessary “wide-ranging and particularly serious interference with the fundamental right to respect for private life” and personal data.<sup>152</sup> This judgment echoed the concerns expressed some years earlier by the German Constitutional Court, which ruled<sup>153</sup> against computerised searches by German police of potential terrorist sleepers as this breaches the individual right to self-determination and human dignity.

Nonetheless, decision-makers do not seem to have learnt the lessons of past counter-terrorism operations, nor to pay much attention to these legal arguments. They are pressing ahead with intrusive measures which would be applied without any prior judicial review establishing their legality, proportionality and necessity, thus opening the door to potential abuses and arbitrariness.

The disrespect that a number of governments and parliaments are showing to fundamental principles and legal obligations risks rendering our lives much less private and government activities much less transparent. This situation also adversely affects every person’s ability to participate effectively in public life because the measures under discussion impinge upon our freedom of speech and our right to receive and impart information - including that of public interest.

Indiscriminate, mass surveillance can also impinge on attorney-client privilege and medical confidentiality. You might find yourself thinking twice next time you need to see a lawyer or a doctor, knowing that the security services – and private companies – can know with whom, when and where you communicate. Journalists could lose valuable sources of disclosure of wrongdoing and unlawful conduct in both the public and private spheres.

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150 ECtHR judgment, *Roman Zakharov v. Russia* [GC], application no. 47143/06, 4 December 2015.

151 Council of Europe, *Human rights and the fight against terrorism. The Council of Europe Guidelines*, March 2005.

152 Court of Justice of the European Union, Press Release no 54 “The Court of Justice declares the Data Retention Directive to be invalid” Luxembourg, 8 April 2014.

153 EDRI news item, “German Constitutional Court has outlawed preventive data screening”, 24 May 2006, [www.edri.org](http://www.edri.org)

### *Minimum safeguards*

Compared to the tangible violations perpetrated during the CIA programme of secret detention, surveillance may seem like a small issue. But it is not. Privacy is in fact a fundamental human right which is essential if we wish to live in dignity and security. This is why it is necessary that European countries pause and get back on the right track. They cannot do whatever they want to defend national security, but have to design their counter-terrorism policies based on human rights standards. As a minimum, five parameters should be respected.

- First of all, legislation should limit surveillance and the use of data in a way which strictly respects the right to privacy in accordance with European data protection standards, the case law of the European Court of Human Rights and that of the Court of Justice of the EU. These norms oblige states to respect human rights when they gather and store information relating to our private lives and to protect individuals from unlawful surveillance, including when carried out by foreign agencies.
- Second, rigorous procedures should be in place to order the examination, use and storage of the data obtained, and those subjected to surveillance should be given a chance to exercise their right to an effective remedy.
- Third, security agencies must operate under independent scrutiny and judicial review. Effective oversight is first of all democratic. This requires primarily the involvement of parliaments, which must be granted intrusive overseeing powers and the ability to influence decision-making and operations.
- A fourth requirement is the need for prior authorisation of the most intrusive measures, including surveillance, and establishment of a body able to issue legally-binding decisions over complaints by individuals affected by security activities, with access to all intelligence-related information.
- Lastly, the judiciary must be involved in the decision-making process of highly intrusive measures and must be free to play its *ex post* role to ensure accountability.

These are basic parameters that should shape European countries' counter-terrorism laws and practice. States which have adopted controversial surveillance laws should implement legislation with caution and possibly amend it. Those considering introducing new surveillance legislation should do so within these parameters.

### *Choosing the future of our democracy*

The way we respond today to the challenges posed by terrorist threats will either destroy or strengthen our democracies. We have to make a choice between targeted surveillance measures aimed at tracking potential terrorists on the basis of a reasonable suspicion, and mass surveillance which will make all of us potential suspects.

It is clear to me that only by upholding human rights can Europe really hold true to its democratic values. European states must resist the temptation to fall into the narrative that reducing rights will make us safer. Terrorism is a real threat and it requires an effective response. But adopting surveillance measures that undermine human rights and the rule of law is not the solution.

Terrorists feed on fears. They want us to believe that we must choose between freedom and security. But Europe does not have to make that choice. European democracies must counter the barbarity of terrorism with action which is fully aligned with the rule of law and human rights.

By upholding human rights – including privacy – states are more likely to increase public support for their actions and to weaken that for anti-democratic causes. In the long run, this will make us safer.

## **SECURITY SERVICES SHOULD NOT HAVE CARTE BLANCHE**

*Article published in openDemocracy, on 5 June 2015*

It seems obvious that human rights must be compromised to guarantee security in the face of armed violence. Obvious but wrong.

Myths die hard, in particular when they play on fears. One of the most common myths of recent years is that we have to forfeit some of our rights to live in safety. It might be counter-intuitive to say so but this is indeed a myth. The best way to ensure our safety is to have security services comply with the rule of law, not violate it.

The activities of such services are certainly of paramount importance to ensure our safety. They therefore require the necessary powers to carry out their operations. If their work goes unchecked, however, their operations can profoundly affect our lives. They can put us at risk of death, deprive us of our liberty, inflict torture, intrude on our private sphere, and reduce our freedom to speak and our right to receive and impart information.

‘Extraordinary renditions’, mass surveillance and extra-judicial executions are just some of the most well-known security operations which have violated human rights, without making us safer. This has happened for several reasons but one stands out: current systems of oversight of security services were and remain largely ineffective.

In Europe, states have relied on different agencies for oversight: parliamentary committees, independent oversight bodies and institutions with broader jurisdictions such as ombudspersons, data commissioners and judicial bodies. If some systems present interesting features on paper, none seems fully to guarantee a robust defence of the rule of law. In the US it took years of scandal before timid safeguards were introduced to put a check on abuses in the struggle against terrorism.

*Highly controversial*

We could consider such steps as progress and in a way they are. But current discussions in a number of countries are undermining it. Take France. The Senate there has discussed this week a highly controversial bill on surveillance and is scheduled to adopt it next Tuesday. The bill was hastily introduced by the government in April to streamline the work of the security services and grant them more powers, at the expense of important safeguards.

The law would in fact permit surveillance methods which might lead to arbitrary intrusions into private lives—not only of suspects but also of persons who communicate with them, live or work in the same place or even just happen to be near them. More worryingly, these intrusive measures would be applied without any judicial authority verifying beforehand their legality, expediency and proportionality. This would give excessive powers to the executive, with clear risks of abuse.

'Extraordinary renditions', mass surveillance and extra-judicial executions are just some of the most well-known security operations which have violated human rights, without making us safer.

The French case is emblematic of an underlying, fallacious reasoning among governmental authorities. They say that the fight against terrorism cannot be slowed by procedures which might compromise security operations. This might apply to certain very urgent and specific cases but it cannot justify mass surveillance or unfettered powers. Here the European Court of Human Rights has set the record straight.

A year ago the court condemned Poland for violating its human-rights obligations in relation to the conditions of detention, interrogation and transfer to the US of two terrorist suspects. It reaffirmed the principle that governments cannot bypass fundamental democratic checks and balances—not even while fighting terrorism. If a degree of secrecy is sometimes necessary, this can never be used to cloak serious human-rights violations.

This legal boundary is supported by a more empirical lesson—that forfeiting human rights in the fight against terrorism is a grave mistake, is ineffective and has far-reaching consequences. By trampling on our values, unchecked security operations breed contempt for the rule of law and play into the hands of undemocratic movements.

### *More, not less*

If states really want to ensure our safety, they must inject more human rights into their security operations. Arguably, the most urgent measure is to ensure that security agencies operate under independent scrutiny and judicial review. Effective oversight is first of all democratic. This requires primarily the involvement of parliaments, which must be granted intrusive overseeing powers and the ability really to influence decision-making and operations.

A second requirement is prior authorisation of the most intrusive measures, including surveillance, and establishment of a body able to issue legally-binding decisions over complaints by individuals affected by security activities, with access to all intelligence-related information. Thirdly, the judiciary must be involved in the decision-making process of intrusive measures and must be free to play its *ex post* role to ensure accountability.

Only if these criteria are met can we ensure that what security services do does not come at the expense of human rights. Yet this will help them enjoy the necessary public support and trust indispensable to successful operations, as security leaders know.

There is no contradiction between security and human rights—they go hand in hand. Less human-rights protection means less security and vice versa. By reinforcing democratic oversight of security structures, governments would increase their credibility among the public and weaken support for anti-democratic causes. Eventually, this will make our societies safer and stronger.

## **HUMAN RIGHTS AT RISK WHEN SECRET SURVEILLANCE SPREADS**

*Human Rights Comment published on 24 October 2013*

The fear of terrorism, technology that is developing at the speed of light, private companies and state security agencies compiling personal information – this topical mix has become a severe threat to the right to privacy. Despite the intentions, secret surveillance to counter terrorism can destroy democracy, rather than defend it.

Recent revelations, many of them based on files from the whistle-blower Edward Snowden, have showed the stunning scale and sophistication of the surveillance to which we can all be subjected. The US intelligence agency, the NSA, and its British counterpart, GCHQ, target encryption techniques that are used by Internet services such as Google, Facebook and Yahoo, making them vulnerable to surveillance. There is extensive co-operation between different security agencies – but also between such agencies and private companies. All this leaves us open to abuse of our fundamental human right to privacy.

In an Op-ed published in the Guardian in late June I mentioned Google CEO Eric Schmidt, who sees no risk for people sharing information with Google and argues that if you've nothing to hide, you shouldn't worry.

At this point it has become obvious that this is not advice to live by.

*Co-operation between the NSA and European countries*

Surveillance is not an unknown phenomenon in the UK; security cameras are mounted on virtually every street corner. But the extent of the co-operation between GCHQ and the NSA came as a shock. After the Guardian published a large number of revealing articles, the matter took yet another unexpected turn when the newspaper, after strong pressure from GCHQ, destroyed hard drives containing Edward Snowden's leaked NSA files. The decision was, according to the Guardian's editors,<sup>154</sup> taken following the threat of legal action by the government that could have stopped further reporting on these matters.

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154 Julian Borger "NSA files: why the Guardian in London destroyed hard drives of leaked files", *The Guardian*, 20 August 2013.



The documents from Edward Snowden also show that the NSA has been spying on the EU<sup>155</sup> in New York and that GCHQ was behind a cyber-attack against Belgacom,<sup>156</sup> a Belgian telecom company whose major customers include institutions like the European Commission, the European Council and the European Parliament.

In Germany, the documents revealed that “the intelligence service, BND, sends massive amounts of intercepted data to the NSA.”<sup>157</sup> And investigative journalist Duncan Campbell said<sup>158</sup> while testifying before an EU parliamentary committee charged with investigating electronic surveillance, that the Swedish National Defence Radio Establishment, FRA, has shared access to communication cables in the Baltic Sea with the NSA. This has allowed both agencies to circumvent legislation banning domestic surveillance – despite the fact that European states are obliged to protect individuals from unlawful surveillance carried out by any other state and should not actively support, participate or collude in such surveillance.

In France the authorities’ reaction to the Snowden files was quite different to those in Britain or Sweden. First, the chief of staff of the Prime Minister’s private office sent a letter to government ministers warning them that they and their staff should only use approved smartphones to discuss sensitive matters and dedicated secured means to convey classified information. Then, following new revelations published by *Le Monde*<sup>159</sup> reporting extensive electronic surveillance carried out by the NSA and massive collection of data concerning not only suspected terrorists but also stakeholders of economic and political circles as well as civil servants, the French president called these practices totally unacceptable and spoke with his American counterpart to obtain explanations.

### *Effective guarantees against abuse needed*

The European Convention on Human Rights, by which all 47 member states of the Council of Europe are bound, spells out the right to respect for private life, and access to an effective remedy to challenge intrusions into our private lives.

States, of course, have a duty to ensure security within their borders and in doing so they can undertake secret surveillance of individuals who can pose a threat. But adequate and effective guarantees against abuse are needed. This can be achieved through legislation that strictly abides by the case-law of the European Court of Human Rights.

The Court has delivered many rulings concerning the protection of privacy and personal data. In order for surveillance to be in line with the Convention, as a minimum, three main safeguards should be provided.

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155 Ewen MacAskill and Julian Borger “New NSA leaks show how US is bugging its European allies”, *The Guardian*, 30 June 2013.

156 Spiegel Online “Britain’s GCHQ Hacked Belgian Telecoms Firm”, *Der Spiegel*, 20 September 2013.

157 Hubert Gude, Laura Poitras and Marcel Rosenbach “Transfers from Germany Aid US Surveillance” *Spiegel Online*, 5 August 2013.

158 Swedish Radio “Sweden identified as US spy partner”, 6 September 2013, [www.sverigesradio.se](http://www.sverigesradio.se).

159 Jacques Follorou “France in the NSA’s crosshair: phone networks under surveillance”, *Le Monde*, 21 October 2013.

- First of all, the law must be precise and clear as to the offences, activities and people subjected to surveillance, and must set out strict limits on its duration, as well as rules on the disclosure and destruction of surveillance data.
- Secondly, rigorous procedures should be in place to order the examination, use and storage of the data obtained, and those subjected to surveillance should be given a chance to exercise their right to an effective remedy.
- Thirdly, the bodies supervising the use of surveillance should be independent, and appointed by and accountable to parliament, rather than the executive.

### *Indiscriminate mining of data must stop*

Private companies and states alike must be more cautious in using data relating to our private life and must avoid any abuses that could arise from indiscriminate mining. For this they must develop surveillance and data collection policies that respect human rights. *Necessary & Proportionate* is the name of a set of international principles, put together by a large number of civil society groups, industry and international experts, which can be helpful in this regard. Also, the Global Network Initiative, GNI, has set out practical steps to protect human rights online in the report *Digital Freedoms in International Law*. In this regard, the adoption, on 21 October, by the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, of a text strictly regulating the transfer of personal data from Europe to third countries and providing very heavy financial penalties for companies that do not comply with the rules is an encouraging signal.

As the Strasbourg Court has clearly stated,<sup>160</sup> secret surveillance activities cannot be allowed to undermine democracy under the cloak of defending it. Privacy is a fundamental human right and is essential if we wish to live in dignity and security.

## **NATIONAL HUMAN RIGHTS STRUCTURES: PROTECTING HUMAN RIGHTS WHILE COUNTERING TERRORISM**

*Human Rights Comment published on 7 December 2016*

A series of terrorist attacks has deeply traumatised Europe. In Brussels, Paris, Copenhagen, Ankara and beyond, shock was followed by fear of further attacks and a sense of urgency about preventing them. Preventing and combating terrorism is a clear duty of all states, which must respect and protect every one's life and security. However, states' duty to prevent and combat terrorism should in no way be fulfilled at the expense of human rights standards and the common values in which European societies are grounded. This would be a mistake, since laws and policies that are human rights compliant preserve the values the terrorists are trying to destroy, weaken the pull of radicalisation, and strengthen the public's confidence in the rule of law and democratic institutions.

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160 ECtHR judgment, *Klass and others v. Germany*, application no. 5029/71, 6 September 1978.

In this context, national human rights structures (NHRs) have a vital role to play. Because of their nature, competencies and experience, as well as the respect and confidence they command, NHRs constitute the interface between national authorities and the public and are able to help both in keeping a cool head and efficiently combating terrorism without giving in to fear or undermining human rights.

### *Raising human rights awareness and fostering trust in democracy*

Promotion of human rights standards and awareness-raising are very important in the aftermath of terrorist attacks. In a context in which some are willing to forfeit human rights for the sake of presumed security, NHRs have the possibility and the duty to be vocal and to stress that there cannot be security without human rights, the protection of which is part of the solution rather than of the problem.

Press interventions, public events, online campaigns and other means of communication are important in this context. For example, the French National Consultative Human Rights Commission (CNCDH) organised a conference last February entitled “Terrorism: permanent state of emergency?”, and the German Institute for Human Rights hosted a symposium last May on the oversight of the German Federal Intelligence Service (BND). As stressed by the European Commission against Racism and Intolerance in its General Policy Recommendation No. 8, counter-narratives developed by NHRs can highlight the need to avoid pernicious stereotyping and to combat racism and intolerance while fighting terrorism. The Greek National Commission for Human Rights did exactly this in a statement of 23 November 2015.

NHRs are also particularly well-placed to raise awareness among youth, who are particularly targeted by terrorist recruiters. As underlined by the United Nations High Commissioner for Human Rights in his July 2016 Report on how protecting and promoting human rights contribute to preventing and countering violent extremism, “programmes involving youth should feature prominently in efforts to prevent and counter terrorism” and national human rights structures can play “a central role in developing human rights education and training tailored to youth”.

### *Advising national authorities*

The advisory role of NHRs allows them to use their valuable expertise in order to carry out in-depth human rights impact assessments of draft counter-terrorism laws and policies. Among the most common shortcomings pointed out in NHRs’ opinions and recommendation are inadequate respect for the principles of legal certainty and legality in broadly worded draft laws, imprecise definitions of terrorism and terrorism-related offenses, and the lack of solid human rights safeguards such as access to effective remedies and oversight. Good examples of work in this field include the French CNCDH opinion of 17 March 2016 on the draft law on fighting organised crime and terrorism, or the Austrian Ombudsman Board’s position of 11 May 2015 on the draft law on state’s protection. In addition to legal advice, NHRs can also provide practical guidance to national authorities, as the Danish Institute for Human Rights did in a 2012 paper on counter-terrorism and human rights.

These inputs by NHRs are taken into account by governments. For example, this year, in the context of a public consultation launched by the Dutch government on the draft bill on the Intelligence and Security Services Act, the Netherlands Institute for Human Rights issued recommendations according to which prior consent of untargeted interception of telecommunications and other means of data transfer should be given by a court or an independent organisation rather than by the minister as provided for in the initial draft law. As a consequence of this public consultation, the government decided to add provisions setting up a new Review Board for reviewing the lawfulness of authorisations prior to the actual exercise of special powers.

International institutions may also benefit from the expertise of NHRs. For instance, in the context of the supervision by the Council of Europe Committee of Ministers of the execution by the UK of the Strasbourg Court judgments in the McKerr group of cases, the Northern Ireland Human Rights Commission assessed the 'package of measures' presented by the UK government after it was found in breach of the European Convention on Human Rights due to failure to conduct effective investigations into the circumstances of deaths in the context of security force operations in Northern Ireland.

#### *Handling individual complaints and overseeing counter-terrorism activities*

Many NHRs, especially ombudsmen, are entitled to receive individual complaints, part of which may concern the implementation of counter-terrorism measures. This is, for example, the case in France, where the 'Defender of Rights' has dealt with more than 80 complaints directly or indirectly related to the state of emergency since its entry into force in November 2015.

Furthermore, NHRs report on the protection of human rights, including in the context of the fight against terrorism, to national authorities as well as to international human rights bodies, such as the Committee Against Torture or the Human Rights Committee of the United Nations, which contributes to enhanced scrutiny of counter-terrorism measures.

NHRs may also have oversight competences of specific and particularly sensitive counter-terrorism-related activities, such as the Serbian 'Protector of Citizens', who constitutes a unique example in Europe. He investigates complaints relating to security services, takes a proactive role in launching own-initiative investigations of security service activity and has successfully challenged security service laws before the national constitutional court. Other NHRs are tasked with overseeing counter-terrorism activities conducted in specific circumstances, such as the state of emergency, in the context of which the French 'Defender of Rights' and the CNCDH cooperate with the parliament's mechanism overseeing the implementation of the state of emergency.

In a context in which administrative counter-terrorism measures are on the rise and the judiciary is often bypassed, these different forms of oversight operated by NHRs are extremely valuable.

### *The need to enhance NHRs' role in the fight against terrorism*

Despite this long, although not exhaustive, list of activities conducted by NHRs there is room and need for improvement. The diversity of domestic backgrounds, levels of exposure to the terrorist threat, as well as of mandates and resources, has led to different levels of NHRs' involvement in this field. Their crucial added value requires making sure that they have all means necessary for performing their role.

The responsibility lies primarily with states, which should enlarge, when necessary, the mandate of NHRs to allow them to perform the abovementioned activities, allocate sufficient financial and human resources, and fully respect the independence of these structures.

States should also renounce discussing and adopting counter-terrorism measures in a hasty manner and take sufficient time to consult with NHRs. As mentioned in my recent memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, states derogating from the European Convention on Human Rights in emergency situations should involve NHRs, as they are best placed to assess the proportionality of the measures taken in this context. Also, their participation in the monitoring process of these derogations would significantly contribute to establishing checks and balances to avoid arbitrariness and human rights violations.

As for NHRs themselves, they would benefit from increased contacts with specialised bodies, such as national security service oversight bodies and expert bodies such as the UK Independent Reviewer of Terrorism Legislation. Enhancing cooperation between NHRs is also essential in order to share experiences and good practices, show support to the most exposed, and build capacities. To this end, they can benefit from the support of various well-established networks, including the European Network of National Human Rights Institutions (ENNHRI), the Global Alliance of National Human Rights Institutions (GANHRI, previously known as International Coordinating Committee of NHRIs), the European Network of Equality Bodies, and the International Ombudsman Institute.

NHRs can also count on the Council of Europe's aid and support. The Guidelines of the Committee of Ministers on human rights and the fight against terrorism, the case-law of the European Court of Human Rights as well as my work in this field are useful tools available to NHRs in order to fulfil their vital role in protecting human rights while countering terrorism.







# 12. Law Enforcement, the Judiciary and Human Rights

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## INTRODUCTION

Police misconduct and a dysfunctional justice system can shatter public confidence in the institutions responsible for upholding the law, and have polarising and destabilising effects upon society as a whole. Impunity for officials who order, authorise, condone or perpetrate torture and ill-treatment exemplifies some of the most negative aspects of both of those phenomena.

The Council of Europe has considerable expertise regarding the conduct of law enforcement officials and the functioning of judicial systems. For over 25 years, the European Committee for the Prevention of Torture (CPT) has been monitoring places of deprivation of liberty throughout the continent and in overseas territories as a means of preventing ill-treatment and strengthening safeguards against it. The European Commission for Democracy through Law (the Venice Commission), the European Commission for the Efficiency of Justice (CEPEJ), and the Group of States against Corruption (GRECO) have amassed large bodies of work on constitutional matters, the functioning of judicial systems, and corruption prevention in relation to judges and prosecutors. My flexible mandate has permitted me to build on the work of those mechanisms and highlight specific issues in my thematic and country work, as well as to intervene rapidly through ad hoc fact-finding visits such as that in Ukraine in response to the crisis that began unfolding in late 2013.

Law enforcement officials are the most visible part of the justice system. Their work brings them into contact with members of the public, and often with disadvantaged groups such as Roma, migrants and minorities; this can – and frequently does – result in human rights violations. The job of a law enforcement official is undoubtedly challenging and often highly stressful, and my experience has led me to conclude that – given the hierarchical nature of police forces – messages transmitted by the minister or the leadership are of the utmost importance. The imperative must be to inculcate a police culture where it is regarded as unprofessional to belong to a team that resorts to ill-treatment, instead of codes – which are, unfortunately, not

uncommon – whereby solidarity towards one’s “own” means covering up misconduct by colleagues. That is why, throughout my mandate, I have emphasised the need for effective investigations into violations by law enforcement officials. Much of this has been in contexts marked by mass protests and social upheaval in a number of Council of Europe member states.

Survivors of torture and armed hostilities have an acute need to be made whole again. In the course of my work in Ukraine, I met people traumatised by severe ill-treatment on both sides of the conflict – many missing teeth, some with disconnected speech, virtually all with disrupted sleep, chronic pain and other long-term somatic and psychological consequences. Elsewhere, I encountered shell-shocked refugees fleeing war, people who could not stop crying, hid their faces or remained in a dazed state. It became clear to me that in addition to decisive action to end conflict and combat torture, we should urgently address the major gaps when it comes to the provision of holistic rehabilitation services to individuals who have survived horrors.

Upholding the rule of law in a democratic society is not possible without an independent, impartial, competent and efficient judicial system. The judiciary should be shielded from, and resilient enough to withstand, any attempts to exercise political and economic pressure on the court system as a whole, or on individual judges. Despite the fact that those basic principles are widely acknowledged, in several countries we have been witnessing a growing tendency towards bringing the judiciary under the control of executive and legislative powers. Emboldened by the seeming success of populist rhetoric, some governments and politicians are casting doubt on the very legitimacy of the judiciary either by calling into question the independence of judges or by portraying them as not being accountable to the population in general.

Prolonged delays or non-implementation of the decisions of national or supranational judicial bodies, including open challenges to the authority of the European Court of Human Rights, seriously jeopardise the rule of law and the protection of human rights and fundamental freedoms throughout our continent. Apart from the outright refusal to implement the Court’s judgments and efforts to subvert the Court by granting national courts supremacy, there are also indirect threats to the system resulting from delays in execution of the Court’s judgments in several countries.

Experience shows that while strong and well-functioning institutions are built through painstaking efforts over a long period, they can erode very rapidly in the wake of a crisis. I firmly believe that stoking an atmosphere of fear and insecurity and applying repressive measures and policies ultimately does not contribute to peace and stability. Even in difficult times, I have always been impressed that there are those who choose principles over short-term political gains and work hard to uphold them, although doing so may be more complex and challenging than ever before.

## POLICE ABUSE – A SERIOUS THREAT TO THE RULE OF LAW

*Human Rights Comment published on 25 February 2014*

Far too often, police officers in many European countries resort to excessive use of force against protesters, mistreat persons in detention, target minorities and otherwise engage in misconduct. This undermines public trust in the state, social cohesion, and effective law enforcement, which rests on cooperation between police and local communities.

It is difficult to ascertain whether police misconduct has become more common in some countries or whether the problem has become more visible and recognised. Clearly, demonstrations have become more commonplace in Europe, generating new challenges for law enforcement. Moreover, European societies have become more diverse and police forces have sometimes been slow to adapt. In other cases, political elites share much of the blame, as they have given the green light for bad policing through direct orders or rhetoric stigmatising certain groups.

### *A multifaceted phenomenon*

In recent months, Europe has witnessed several glaring instances in which policing of demonstrations has gone beyond what is legally and ethically acceptable. In Ukraine, excessive use of force by police against peaceful demonstrators in late November 2013 fueled a massive growth in protests, which have since resulted in a growing number of deaths among both protesters and police. After interviewing numerous victims and examining many medical records, I detected a clear pattern of targeting the head and face, which is completely unnecessary and disproportionate. In the context of the 2013 Gezi events in Turkey, I received numerous and particularly serious allegations of excessive use of force by the police, including excessive and improper use of tear gas and the use of gas canisters as projectiles. In both Ukraine and Turkey, police repeatedly targeted both journalists and medical personnel, who could be clearly identified by their clothing.

The excessive use of force during demonstrations and/or apprehensions is, however, just the tip of the iceberg. Other forms of police misconduct occur out of the sight of the general public.

The treatment of persons while in police detention is a case in point. Ill-treatment, sometimes lethal, occurs in several European states, as documented by the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). This treatment mostly takes the form of slaps, punches and kicks as well as blows with hard objects (such as baseball bats) to various parts of the body. The CPT has noted that the allegations concerning police violence tends to relate mostly to ill-treatment inflicted at the time of questioning with a view to obtaining a confession or extracting information.

I have been particularly concerned by the practice of police custody in Spain, where the *incommunicado* detention by the *Guardia Civil* (the national police) is a long-standing problematic practice, as noted in my 2013 report on Spain, which has led

to serious human rights violations found by the European Court of Human Rights and the UN Committee against Torture.

Another serious form of police misconduct is violence targeting minorities, in particular Roma, and migrants. In Greece, for instance, regular threats and racially motivated ill-treatment of migrants and Roma by members of the police and coast guard have been reported. Institutionalised racism also plays a major role in ethnic profiling resulting in abusive stops and searches targeting minorities and migrants. In a recent report on France, the Open Society Justice Initiative highlighted the very negative impact of this practice on “entire sectors of the population [who] are left feeling that no matter what they do, they will always be second-class citizens”.<sup>161</sup>

*There is a need to eradicate impunity*

It is a fundamental duty of European states to combat impunity for human rights violations committed by law enforcement officials so that victims receive justice, future misconduct by law enforcement officials is deterred and public trust in and co-operation with law enforcement can be strengthened.

It is of utmost importance that all allegations of police misconduct are effectively investigated so as to lead to the identification and punishment of those responsible, as required by the well-established case-law of the European Court of Human Rights. Moreover, there is a need to impose dissuasive penalties on offenders involved in serious human rights violations, in line with the Committee of Ministers’ Guidelines on eradicating impunity for serious human rights violations.

Regrettably, many investigations of human rights violations committed by law enforcement officials are ineffective, as it is often members of the same force who are investigating into actions of their colleagues and there is sometimes a “code of silence” about protecting one’s own. The creation of independent police complaints mechanisms, which exist in United Kingdom, Ireland and Denmark, could be one of the solutions to this problem. Other options include empowering national ombudsmen to investigate complaints about law enforcement forces.

Political leaders also bear an important part of responsibility. As the organisation of law enforcement is hierarchical, the discourse and attitudes of politicians, particularly ministers of interior, are rarely ignored by rank-and-file officials. It is extremely damaging to public trust in state institutions when law enforcement officials convicted of misconduct involving ill-treatment are pardoned or receive inadequate sanctions. Political leaders should instil the clear message that responsibility for ill-treatment extends beyond the actual perpetrators to anyone who knows, or should know, that ill-treatment is occurring and fails to prevent or report it.

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161 Open Society Justice Initiative Report, *Equality Betrayed: Speaking Out Against Ethnic Profiling by French Police*, September 2013.

## *Strengthening safeguards and restoring trust*

States should develop clear guidelines concerning the proportionate use of force by police, including the use of tear gas, pepper spray, water cannons and firearms in the context of demonstrations, in line with international standards.

In addition, practical and easily adoptable measures should be taken, such as the obligation for riot police officers to display identification numbers in a way which makes them visible from a distance and are brief enough that people can memorise and use them to report abuses.

Furthermore, in the selection, recruitment and promotion of police, special attention should be paid to reports of past misconduct, racist attitudes, and the ability of individuals to withstand stressful situations. The recruitment of officers among minority groups would also help reduce the risk of racially motivated violence and contribute to make the police more representative of society's diversity. In this context, continuous, systematic human rights training as well as the adoption and implementation of the 2001 European Code of Police Ethics, are essential.

Police misconduct is a long-standing matter of concern, but is not inevitable. Effective means to combat this phenomenon exist and must be used by states. This is an essential requirement for restoring the public's trust in state authority and safeguarding human rights and the rule of law.

## **TORTURE SURVIVORS HAVE THE RIGHT TO REDRESS AND REHABILITATION**

*Human Rights Comment published on 7 June 2016*

Torture and ill-treatment are practiced in at least 140 countries worldwide, according to data compiled by Amnesty International. Regrettably, those phenomena still occur in Europe, too. They are often – but not only – linked to armed conflicts. Moreover, people who have experienced torture elsewhere continue to arrive on the European continent.

The thousands of human beings who have already been through the severe pain of torture also face a range of devastating long-term consequences. In particular, survivors of torture frequently experience chronic pain, headaches, insomnia, nightmares, depression, flashbacks, anxiety, and panic attacks, and can become overwhelmed by feelings of fear, helplessness and even guilt because of what happened to them. Feelings of shame and a loss of dignity on the part of torture victims are often compounded by stigmatisation in the community and social isolation. Post-traumatic stress disorder affects both the victims themselves and their families. If left untreated, the consequences of torture can extend throughout a person's life-time and even beyond, across generations, having a corrosive effect upon entire societies.

One of the main international instruments concerning victims' right to redress for gross human rights violations, including torture, is the 2005 UN Resolution on Basic

Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law.<sup>162</sup> The restoration of the dignity of the victim is the ultimate goal of the provision of redress. The obligation of states to provide redress to a victim of torture has two components: substantive, in the form of reparation (restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition);<sup>163</sup> and procedural, in the form of an effective remedy.<sup>164</sup> The latter requires the existence of a proper legislative framework and institutional mechanisms enabling a prompt and effective investigation and, eventually, prosecution and punishment of those responsible for the violations. The notion of an effective remedy also encompasses the victim's right to participate in those proceedings to safeguard his or her legitimate interests.

When seeking compensation, victims of serious human rights violations such as torture can encounter obstacles. For example, in Serbia, a pending draft law on compensation still excluded some 15 000 civilian victims of wartime sexual violence and torture, and the judiciary set a high standard of proof in the proceedings concerned. In the Russian Federation, the amount of compensation awarded in torture cases can vary significantly from one region to another. In many cases, the compensation victims receive is inadequate as compared to the harm suffered. However, the standards set up by the European Court of Human Rights play a positive role in influencing domestic courts in raising compensation to an adequate level.

Monetary compensation alone cannot be regarded as adequate redress for a victim of torture. Setting things "right" after such a traumatic life experience as torture or ill-treatment requires holistic and long-term rehabilitation efforts to restore the dignity, physical and mental ability, and social independence of the individuals concerned, as well as their full re-inclusion in society. The rehabilitation process should include not only medical and psychological care, but also social, legal, educational and other measures, as well as family support.<sup>165</sup> To be effective, rehabilitation must be victim-centred and be provided at the earliest possible point in time after the torture event based on the recommendations by a qualified health professional. Rehabilitation should be tailored to the specific needs of a given victim.

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162 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Resolution adopted by the UN General Assembly on 16 December 2005). The right to redress is also explicitly recognised in the Universal Declaration of Human Rights (Article 8), the International Covenant on Civil and Political Rights (Article 2), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 14), the Additional Protocol I to the Geneva Conventions of 1949 (Article 91), the Rome Statute of the International Criminal Court (Article 68) etc.

163 See the General Comment no. 3 (2012) of the Committee against Torture on the Implementation of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by State parties.

164 See for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 13), the American Convention on Human Rights (Article 25), the African Charter on Human and Peoples' Rights (Article 7) and other instruments.

165 See Committee of Ministers Recommendation Rec(2006)8 to member states on assistance to crime victims adopted on 14 June 2006.

In the context of armed hostilities, we often observe a rapid deterioration in the human rights situation. There have been thousands of cases of torture and other forms of ill-treatment related to the armed conflict in eastern Ukraine. During my March 2016 visit to Ukraine, I received information that military personnel who had been released from captivity were eligible for state psychological rehabilitation programmes upon their exchange and return. However, civilian victims of torture were not benefiting from such systematic state support. While NGOs and volunteers were actively engaged in the rehabilitation process, they apparently lacked funding and support by the State. This issue must be addressed as a matter of priority, not least because rehabilitation of victims of gross human rights violations can play a crucial role in the reconciliation process.

In the case of asylum seekers and refugees, specific additional rehabilitation services could include assistance in documentation of torture for the asylum decision, as well as help in finding the whereabouts of relatives and connecting with them. In some countries such as Germany where the authorities have made considerable efforts to protect refugees, there is still no consistent practice regarding rehabilitation of victims of torture. The latter frequently experience difficulties in access to treatment, due to high demand, staff shortages and lack of infrastructure; only 25 centres across the country, usually NGO-operated, carry out rehabilitation work. A lack of interpreters, especially in the mental health care system, may also hamper assistance to victims.

Victims of sexual violence must be provided with specific rehabilitation programmes adapted to their needs. In June 2015 a law was enacted in Croatia on the rights of victims of wartime sexual violence, which provides compensation and other forms of reparation, including medical rehabilitation and psychosocial services. Although this development certainly represents a positive step, certain shortcomings in the law and its implementation were reported to me during my recent visit to Croatia.

States have the obligation to ensure that long-term programmes of rehabilitation are accessible to all victims of torture or ill-treatment without discrimination and with full respect for victims' right to confidentiality. This may either be done through the direct provision of these services by states, or by support or funding to private or non-governmental programmes. Irrespective of the arrangements found, it is essential that persons who have experienced torture are able to place their trust in the rehabilitation services offered. It is also important to ensure that providers of rehabilitation services are protected from reprisals or intimidation for their work. Cooperation between NGOs and state services is therefore vital to ensure the effective provision of holistic rehabilitation services to victims.

Many of the torture rehabilitation services active today are under the umbrella of the International Rehabilitation Centre for Torture Victims (IRCT), a large global network. Those centres provide holistic rehabilitation services to victims and have amassed extensive knowledge about the experience of victims and the situation as regards torture and ill-treatment in specific settings. In Turkey, for example, NGOs perform invaluable work to rehabilitate torture survivors, both physically and psychologically. For example, the Human Rights Foundation of Turkey, a member of the IRCT, operates five centres in major cities in Turkey, where support is provided to victims and family members free of charge.



However, despite the work carried out by organisations involved for decades in the fight against torture, most states do not implement the right to rehabilitation in accordance with established international norms and obligations. Domestic laws, public policies and state budgets frequently do not ensure the implementation of the right to rehabilitation and, even if there is a state rehabilitation programme in place, victims are often reluctant to turn to them if they have doubts about their independence. In a number of cases victims of torture and ill-treatment are not properly identified by the relevant mechanisms and procedures, which prevents them from accessing rehabilitation services.

Access to justice is an essential feature of the right to redress. This implies a criminal investigation of allegations of torture and ill-treatment (or an ex officio investigation in the absence of a complaint), fair and impartial judicial proceedings within a reasonable time and the enforcement of the decisions taken. The possibility for a victim to participate actively in the proceedings is especially important, and could in itself constitute a part of the rehabilitation process. Often, participation in judicial proceedings can contribute to the restoration of victim's dignity and a sense of justice, and testifying before the court can bring a sense of empowerment, thereby attenuating the negative effects of the human rights violation experienced.

However, the available procedures and mechanisms must be conceived and implemented with special care to avoid a person's re-victimisation. This is particularly important in the context of criminal proceedings, when respect for the principle of presumption of innocence for defendants, cross-examinations of a victim, strict rules on admissibility of evidence, and the questioning of a complainant's credibility, can expose victims to renewed trauma and humiliation. In addition, attention should be devoted to protect victims from intimidation and retaliation due to their involvement in such judicial proceedings.

Another set of obstacles in providing an effective remedy to a victim of torture or ill-treatment relates to the application of statutes of limitations for certain offences, and immunities and amnesties to those responsible for violations. Although statutes of limitations should not apply to serious violations of human rights and humanitarian law, behaviour amounting to torture or other forms of ill-treatment may not always be qualified as such under domestic criminal provisions. A common example – which I have encountered in several Council of Europe member states – is when instances of torture are prosecuted under criminal provisions such as “abuse of authority” or “infliction of light bodily harm”. Similarly, the application of amnesties and immunities deprives victims of reparation and of an effective remedy for the harm sustained.<sup>166</sup>

In order to grant torture survivors full redress and rehabilitation, states should ratify all relevant international instruments and ensure that their domestic law is in full compliance with international standards. Holistic rehabilitation services must be given full support, to enable the individuals affected to rebuild their lives and regain their place in society. The foregoing must be accompanied by anti-torture measures of a preventive nature, including a zero-tolerance message, awareness-raising and professional training for public officials, as well as a firm commitment to combating

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166 See, for example ECtHR judgment, *Marguš v Croatia*, application no. 4455/10, 27 May 2014.

impunity. When measured against the horrors experienced by those individuals who have survived torture and the negative repercussions upon society at large, it is the least a state can do.

## **LEANING ON JUDGES: ERODING THE RULE OF LAW IN EUROPE**

*Article published in openDemocracy on 20 February 2014*

The preamble to the Universal Declaration of Human Rights affirms that the rule of law is an important antidote to “rebellion against tyranny and oppression”. Despite progress in the 47 member states of the Council of Europe, the antidote is growing weaker in a number of them. Following country visits focusing on the administration of justice and human rights, I have identified three recurring problems: non-enforcement of court decisions, challenges to the legitimacy of the judiciary and pressure on the independence of judges.

Delay in—or, indeed, absence of—implementation of decisions by national courts is one of the most insidious threats to the rule of law. This has increasingly been recognised by the European Court of Human Rights as a violation of the European Convention on Human Rights (ECHR), in particular the right to a fair trial. By failing to enforce decisions of national courts, state authorities undercut a pillar of the rule of law and deny justice.

From 2010 to 2013, the European court found 289 violations of the ECHR because of non-enforcement of domestic judgments. Turkey, Russia, and Romania accounted for more than half of them. The problem persists too in Albania, Azerbaijan, Bosnia and Herzegovina, the Republic of Moldova, Serbia and Ukraine. And these cases which actually reach Strasbourg are likely only the tip of the iceberg, with many more domestic judgments not enforced at member-state level.

### *“Cherry-picking” judgments*

The problem is not confined to decisions of national courts, however. At the end of 2012, more than 11 000 decisions of the European court were still awaiting implementation by member states.

Moreover, there is a tendency in some countries to “cherry-pick” judgments of the court, depending on their acceptance by political authorities. Take the cases concerning actions of security forces in the north Caucasus. Over the last decade, more than 120 judgments of the European court have found violations by the Russian Federation, resulting from serious infringements of the convention: unjustified use of force, disappearances, unacknowledged detentions, torture and ill-treatment—as well as lack of effective investigations into the alleged abuses and absence of an effective domestic remedy. Though monetary compensation has generally been awarded, Russia has yet fully to implement the judgments, particularly in effective investigation of such crimes.

Another example is the Czech Republic, which in 2007 was found in violation of the ECHR for segregating Roma children in education. Though action plans to address the

situation have been adopted by the authorities, seven years after the *DH* judgment the percentage of Roma pupils corralled in programmes designed for children with “slight mental disabilities” remains disproportionately high.

### *Toxic discourse*

The case of selective implementation on which most ink has been spilled is probably the United Kingdom’s prolonged non-compliance with the *Hirst* and *Greens and MT* judgments, where the European court found that an automatic and indiscriminate ban on voting rights for prisoners breached the ECHR. Political leaders at the highest level have clearly stated their opposition to implementing this judgment and have fuelled a toxic discourse depicting the European court as a threat to parliamentary sovereignty.

This denies justice to thousands of people in the UK and exposes another facet of the threat to the rule of law—the challenge to judicial authority itself, whereby political elites have contributed to the delegitimisation of the judiciary. At the root of the problem of non-enforcement lies the belief that those in power are the depositaries of higher democratic legitimacy than those who are there to ensure that the rules are respected. The result, rulers think, is that the law can be broken to accommodate the state’s interest or the real or supposed will of the people. This notion is profoundly wrong and dangerous.

It is wrong, because in a democracy elected governments do not hold a monopoly on legitimacy. They share it with the judiciary, which, to fulfill its mandate as guarantor of human rights, has to remain impervious to power shifts resulting from the electoral process. It is dangerous because delegitimisation of the judiciary inevitably polarises society, thus risking destabilising the democratic fabric and distancing a country from internationally agreed human-rights norms and standards.

### *International criticism*

This has recently become evident in Turkey, where a bill extending the government’s influence on the functioning of the judiciary was adopted a few days ago, after being suspended in January amid national and international criticism. The bill represents a significant setback for judicial independence in Turkey, as it transfers key powers of the General Assembly of the High Council of the Judiciary to the minister of justice—going in the opposite direction to recommendations of international bodies, including my office.

This is highly regrettable and does not bode well for the future of Turkey’s democracy. Combined with the removal and reassignment of prosecutors involved in a high-profile criminal investigation, it has shaken already fragile public confidence in the independence and impartiality of the judiciary, in a country where impunity of state actors committing human-rights violations has consistently been a major concern.

Another example is Russia, where efforts by the government to reform the justice system have not fully assuaged concerns about the proper functioning of the judiciary, in particular its independence and impartiality. Procedures and criteria to appoint,

dismiss and sanction judges still provide insufficient guarantees of objectivity and fairness. Between 2002 and 2012 more than 600 judges were dismissed and almost 2 500 cautioned. Although there has been a steady decline in sanctions since 2010, the pattern remains that judges are not shielded from undue pressure, including from within the judiciary.

In addition, the criminal-justice system, where the prosecutor's office exercises wide discretionary powers, is still set up to deliver guilty verdicts: acquittals are perceived as a system failure. In their rare eventuality, prosecutors almost always file appeals, as they do against putatively lenient sentences. Defence rights are also often impaired by harassment and other forms of pressure on lawyers, who frequently face impediments in assisting their clients.

In Albania, the justice system has found it hard to shake off corruption and political interference. Various strategic documents and legislation have been adopted in recent years or are anticipated but so far the independence and impartiality of the judiciary are not properly ensured.

### *Leverage*

These examples—which I could easily multiply—show the various ways the executive and legislative branches use their leverage to influence judicial matters. Elected officials and parliaments have the power to propose, make and change the laws that the courts interpret and apply. This does not however entitle them to use their legislative powers to rein in the judiciary. On the contrary, politicians must uphold and strengthen judicial independence, impartiality and efficiency.

One means is to apply consistently and systematically the relevant international standards. The Council of Europe Committee of Ministers, the body where all member states take decisions, adopted a recommendation in 2010 providing guidance on ways to safeguard the independence of judges. Four seem highly topical today.

First, judicial independence should be enshrined in the constitution or at the highest possible legal level in member states. Secondly, the executive and the legislature should avoid actions which may call into question their willingness to abide by judges' decisions, such as attempts to discredit the judiciary or undermine its independence. A third element is to establish by law, or under the constitution, councils for the judiciary, whose members mainly comprise judges elected by their peers with full respect for the pluralism inside the judiciary. Finally, strict rules should apply when it comes to determining the liability of judges who fail to carry out their duties in an efficient and proper manner, with proceedings conducted by an independent authority or court without the involvement of political bodies and in full compliance with the principles of a fair trial.

### *Human rights*

Politicians can encourage the adoption of measures to improve court management and effectiveness, in full respect of judicial independence. One tool consists of performance indicators aimed at mainstreaming the application of human rights. In

Turkey, the High Council became much more independent following a constitutional referendum in 2010, which introduced among the assessment criteria of judges the compatibility of domestic rulings with the ECHR and the case-law of the European court. This has produced very encouraging results.

Another tool comprises the SATURN guidelines set by the Council of Europe Commission for the Efficiency of Justice, which contain specific recommendations to improve judicial effectiveness. In 2001 the First Instance Court of Turin adopted a programme to reduce the length of civil proceedings, which has yielded very positive results and has helped solve a quarter of the cases accumulated—all the more significant in a country where justice generally proceeds very slowly.

These experiences are promising and should inspire legislators and policy-makers to improve judicial effectiveness. The common denominator has to be preservation of the independence, impartiality and proper functioning of the judicial system, which is an indispensable component of the rule of law and in turn constitutes the basis of a genuine democracy. The rule of law protects us all by ensuring equal treatment, maintaining order in society, guaranteeing fair trials in a reasonable time, sanctioning government abuse of power and preventing arbitrariness.

Undermining this system would lead society down a path where there might be rule *by* law but no longer real rule *of* law. This is a path European countries have the resources and the obligation to avoid.

## **NON-IMPLEMENTATION OF THE COURT'S JUDGMENTS: OUR SHARED RESPONSIBILITY**

*Human Rights Comment published on 23 August 2016*

In December last year, the Council of Europe's Steering Committee on Human Rights (CDDH) published a report on the longer-term future of the system of the European Convention on Human Rights ("the Convention"). There were two challenges which particularly struck me: firstly, prolonged non-implementation of a number of judgments of the European Court of Human Rights and secondly, direct attacks on the Court's authority.

It is difficult to overstate the extraordinary contribution of the Court to the protection of human rights in Europe. This has been acknowledged in each High Level conference declaration along the Interlaken-Izmir-Brighton-Brussels reform process. The fact that so many Europeans turn to the Strasbourg Court for redress reflects the high level of trust that they place in the Convention system. Yet states must make sure that the system works.

Prolonged non-implementation of the judgments of the Court is a challenge to the Court's authority and thus to the Convention system as a whole.

While the 2015 Annual Report of the Committee of Ministers on the execution of the Court's judgments shows that a new record number of cases were closed in 2015, there is a continued increase of cases pending for more than five years. In

2011 these cases accounted for 20% of the total number of cases, while by the end of 2015 that figure had risen to 55%. The number of 'leading' cases pending, those indicating structural problems, has also risen steeply from 278 cases in 2011 to 685 cases in 2015.

The average time it takes to close a case is generally around 4 years, however in some States that figure is much higher: around 10, 8 and 7 years in cases concerning Russia, Moldova and Ukraine, respectively.

Indeed, last year, in its eighth report on the implementation of Court judgments, the Legal and Human Rights Committee of the Council of Europe's Parliamentary Assembly concluded that there was a rising number of judgments concerning complex or structural problems, so-called 'leading' cases, that have not been implemented for more than ten years. It expressed its concern about the approximately 11 000 non-implemented judgments pending before the Committee of Ministers.

Prolonged non-implementation is problematic, even if it is true that complex problems do take time to resolve. Reforms can legitimately take time to design and implement. Nevertheless, the rule of law requires that all judgments should be implemented promptly, fully and effectively. Prompt execution of *domestic* court decisions is one of the hallmarks of a democratic society. The same should apply for execution of international judgments.

As Commissioner for Human Rights, I travel to many member states and push for the execution of the Court's judgments and the implementation of reforms aimed at addressing the root causes of repeat applications. This goes on in my bilateral meetings with government representatives and publicly in my reports. Sometimes my discussions with the authorities go even further. In 2013 I was invited to engage with a UK Parliamentary Committee by submitting my views on the UK's non-implementation of the *Hirst* (No. 2) and *Greens* and *M.T.* judgments concerning voting rights for prisoners. In that written submission I underlined that continued non-compliance would send a negative signal to other member states.

*To execute or not to execute: that is not the question*

Let us recall the basics.

State parties to the Convention have accepted the creation of a mechanism which has the competence to examine and decide on the way they ensure Convention rights and freedoms within their jurisdiction. That mechanism is the Strasbourg Court. States have also accepted the Court's ability not merely to apply, but to *interpret* the Convention.

According to Article 46 of the Convention, contracting parties must abide by the final judgment of the Court in any case to which they are parties. Article 46 (1) is an unequivocal legal obligation.

Article 1 of the Convention does not exclude any part of a member state's jurisdiction, including the Constitution, from scrutiny under the Convention. Possible conflicts between national law and the Court's case-law cannot be settled through refusing to execute a judgment of the Court. That would be unacceptable.

Moreover, a State is bound under Article 26 of the Vienna Convention on the Law on Treaties to respect ratified international agreements and pursuant to Article 27 it cannot invoke the provisions of its internal law as justification for its failure to perform a treaty, including the European Convention on Human Rights.

The authority and the efficiency of the human rights protection system based on the Convention is undermined where national authorities chose not to fully comply with judgments of the Court. Member states can fully see what their peers are doing during the Committee of Ministers' meetings.

### *Pitting sovereignty against the Convention system*

In recent years direct challenges to the authority of the Court within a handful of member states have also become more explicit and vocal. They have gone beyond prolonged non-implementation of a few of the Court's judgments.

They are of particular concern because the integrity and legitimacy of the Convention system is at stake. I have been able to catalogue a number of these worrying national examples during my country visits and through my on-going discussions with civil society.

Last year the first political party in Switzerland, the UDC, launched a popular initiative entitled "Swiss law instead of foreign judges". The initiative does not rule out the possibility of Switzerland leaving the Convention in the event of repeated, fundamental conflicts with Swiss Constitutional law. This is worrying even though we are still at an early stage of the procedure, with a popular vote not foreseen until 2017 or 2018.

Six years ago in the United Kingdom, the Conservative Party's manifesto set out its proposal to repeal a domestic piece of legislation which gives effect to the Convention into national law (the Human Rights Act) and replace it with a UK Bill of Rights. Consultation on those proposals is still awaited.

The authority of Strasbourg judgments has also been questioned in Russia. In December last year the Federal law on the Federal Constitutional Court was amended to allow the Russian Constitutional Court to declare some judgments of the Strasbourg Court (and other human rights bodies) unconstitutional and therefore impossible to implement. The Council of Europe's Commission for Democracy through Law (the Venice Commission) issued an interim opinion in March this year on the amendments.<sup>167</sup> The Opinion underlined that a State does not have the choice to execute or not to execute. Only the modality of execution may be at a State's discretion.

On 19 April this year, the Russian Constitutional Court applied the amended law for the first time in the case of *Anchugov and Gladkov v. Russia* (2013).<sup>168</sup> It found that the Constitutional provisions enshrining the ban on prisoners' voting could not be amended and therefore the general measures flowing from the judgment could

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<sup>167</sup> The final opinion was adopted in June 2016.

<sup>168</sup> ECtHR judgment, *Anchugov and Gladkov v. Russia*, applications nos. 11157/04 and 15162/05, 4 July 2013.



not be directly implemented. While the Constitutional Court suggested legislative amendments which would give some effect to the Strasbourg judgment, the principle of review of Strasbourg judgments by a Constitutional Court is problematic and cannot affect their validity in international law.

In Azerbaijan, a Draft Constitutional Law, along the lines of the Russian Constitutional Court law, has been introduced by one of the members of parliament during the 2016 spring session of the National Assembly.

### *The way forward*

If we need reminding about what the Convention has done for us, a recent Parliamentary Assembly report provides examples from all 47 member states which illustrate how the protection of human rights and fundamental freedoms has been strengthened at the domestic level thanks to the Convention and the Strasbourg Court's case law. A member state's commitment to the implementation process sends a strong signal of continued commitment to upholding and advancing human rights globally. This is what I urge to all member states of the Council of Europe.

Some judgments may be difficult to implement because of technical reasons, or because they touch extremely sensitive and complex issues of national concern, or because they are unpopular with the majority population. Nevertheless, the Convention system crumbles when one member state, and then the next, and then the next, cherry pick which judgments to implement. Non-implementation is also our shared responsibility and we must not turn a blind eye to it any longer.

The way forward is through three major lines of action: improving domestic implementation of the Convention thus reinforcing subsidiarity; improving the efficiency of the procedures before the Court and improving the Committee of Ministers supervision of the implementation process. A future where each Council of Europe member state reorganises its internal constitutional hierarchy so that the Convention can be trumped is a danger to the rule of law in that state and in all other states.





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