COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

CommDH/Speech(2014)10

"Transitional Justice in the Context of European Convention Obligations: The Right to Life and Dealing with the Past"

Conference organised by the Transitional Justice Institute, University of Ulster
Belfast, 6 November 2014

Keynote speech by Nils Muižnieks
Council of Europe Commissioner for Human Rights

Ladies and Gentlemen,

First of all, I would like to thank very much the Transitional Justice Institute and especially Professor O'Connell for organising and inviting me to this conference, thus giving me the opportunity to visit as Commissioner for the first time Northern Ireland. This is also a commendable initiative showing the vital importance and role that national academic institutions can play in promoting reflection and finding solutions for major human rights questions on which social cohesion and stability depend.

The spectre of violent conflicts and dictatorships still lingers across several regions and countries of Europe, making the full enjoyment of human rights, democracy and the rule of law illusory for many Europeans. Continuing instability, deep divisions, the lack of resources and of functioning institutions make reconciliation and the rebuilding of peace in affected societies a daunting challenge which states have to confront.

While there is no unique package of measures for dealing with the past, history shows that durable solutions cannot be achieved unless they are based on the pillars of justice, reparations, truth, and guarantees of non-recurrence. I would like to share with you today my observations concerning these key elements of transitional justice.

Firstly, the provision of justice continues to be one of the most difficult aspects faced by societies torn apart by past conflicts. Spain, which has yet to 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, has not set up judicial mechanisms to provide justice for past violations. Concerning Bosnia and Herzegovina, Serbia, and Montenegro, my predecessors and I have found that lack of political will, of adequate expertise, weak witness protection systems, as well as the passing of time, have limited the functioning and efficiency of domestic justice systems. During my visit to Moldova last year, I found that all convictions regarding the torture and ill-treatment inflicted by police officers on participants in the post-electoral demonstrations of April 2009 have been suspended by courts.

However, impunity for serious human rights violations is a no-go for European states today. This was made crystal clear in 2011 when the Council of Europe Committee of Ministers adopted the Guidelines for eradicating impunity for serious human rights violations. In all these cases states are under a clear legal obligation to carry out effective investigations, to hold perpetrators to account, and to provide an effective remedy for the victims of those violations. As noted by the Committee of Ministers, states have to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system. As

regards in particular amnesties, I would like to recall that in its 2013 judgment in the case of *Marguš v. Croatia*, the European Court of Human Rights stressed that the application of amnesty to genocide, war crimes and crimes against humanity is not acceptable under international law. The same principle of non-amnesty for serious violations of human rights can be drawn from the aforementioned 2011 Guidelines.

Furthermore, the work of international tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), is not enough to address this issue. International justice is only subsidiary - the fight against impunity should be carried out at national level in the first place. It rests primarily on national authorities to effectively investigate serious human rights violations and to bring to justice and effectively sanction those responsible for such violations.

Secondly, justice is not only retributive. It also means the provision of adequate, effective and proportionate reparation to comfort and heal the wounds of victims. In July 2013 in Srebrenica I expressed my concern that the lack of a systematic approach in Bosnia and Herzegovina in addressing the victims' rights renders them more vulnerable and cultivates strong feelings of insecurity and despair. Also, the designing of reparation mechanisms should be done through an open, constructive dialogue with civil society, the victims and their representatives, ensuring their participation in finding better, durable outcomes. This was one of my recommendations to the Slovene authorities, following the Strasbourg Court's judgment in the case of *Kurić and others v. Slovenia* in 2012, concerning the persons who were erased from the permanent resident registries in Slovenia after the demise of the former Yugoslavia.

Thirdly, establishing and recognising the truth gives a chance to those who have suffered and whose voices have not been heard to speak up, to be recognised as victims and have a chance for social reintegration. Also, surviving witness accounts are an exceptional opportunity to collect evidence in order to eradicate impunity and to structure recommendations for the meaningful transformation of societies. In various countries around the world, Truth and Reconciliation Commissions have been established with the aim of investigating, establishing and acknowledging the truth. My predecessor and I have supported the initiative of a number of non-governmental organisations aimed at establishing a regional commission (RECOM) for the truth about the conflicts in the region of the former Yugoslavia. Unfortunately, this initiative has not yet been able to overcome the wall of indifference on the part of political leadership in some of the countries and concrete results remain to be seen.

In this context, I would like to note the importance of history teaching and its key political role notably in transitional societies. As stressed by the Council of Europe Parliamentary Assembly Recommendation 1880 (2009) on history teaching in conflict and post-conflict areas, history teaching can contribute to greater understanding, tolerance and confidence between individuals and between the peoples of Europe, but at the same time it can become a force for division, violence and intolerance. Multi-perspective knowledge by all society members of their shared history facilitates understanding, tolerance and trust, especially between young people and between different communities. It is only through open dialogue, knowledge of the truth, and deep reflection that post-conflict societies may attain the social cohesion needed to preserve their inherent, valuable pluralism.

Fourthly, there is a need for institutional reforms to prevent repetition of past events and attain sustainable peace and security. A reform of the justice system and the setting up of efficient and effective, independent National Human Rights Structures are key. In particular, as regards violations of the right to life and to freedom from torture, National Preventive Mechanisms under the Optional Protocol to the UN Convention Against Torture (OPCAT), as well as independent police complaints mechanisms, are among the most important measures that states need to take.

As concerns investigations into serious human rights violations committed by law-enforcement authorities, they should adhere to the major principles for effective investigations developed by the European Court of Human Rights in its case-law. These principles are: (a) *independence*: there should not be institutional or hierarchical connections between the investigators and the officer complained against, and there should be practical independence; (b) *adequacy*: the investigation should be capable of gathering evidence to determine whether the police behaviour complained of was unlawful and to identify and punish those responsible; (c) *promptness*: the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law; (d) *public scrutiny*: procedures and decision-making should be open and transparent in order to ensure accountability; and (e) *victim involvement*: the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests.[1]

I would also like to mention, in the context of reconciliation, the situation of stateless people, refugees and internally displaced people (IDPs). There has been little interest in Europe in consulting these persons as to finding remedies to their situation. This deficiency comes in addition to the protracted legal limbo in which they continue to live in their host communities. In some cases, the situation of these people can only be resolved in a durable way through active regional and international cooperation. During my recent visit to Montenegro I was pleased to learn that the authorities have organised more than 20 trips to Kosovo[*] for displaced persons living in Montenegro in order to help them obtain birth certificates and other documents in their municipalities of origin. 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.

Finally, I would like to discuss a principle whose importance cannot be accentuated enough: whatever combination of transitional justice measures is chosen, it must be in conformity with international human rights standards. Today's conference, which shall explore the conformity of measures taken in Northern Ireland with the requirements of Article 2 of the European Convention on Human Rights (ECHR), in light of a series of judgments by the European Court of Human Rights, touches precisely on this principle.

The current political debate in the United Kingdom concerning proposals to turn the Strasbourg Court into an "advisory body", and questioning the United Kingdom's obligations under the ECHR, make this discussion extremely topical. I wish to underline again some of the views that I expressed on this debate a year ago, in relation to the issue of prisoners' voting rights.

No matter how unpopular, the Strasbourg Court's judgments must be fully and effectively executed. Non-compliance of a member state with a judgment of the Court is irreconcilable with Article 46 ECHR (binding force and execution of judgments).

Human rights and the rule of law in Europe are very much dependent upon the ECHR system. More than 10 000 judgments delivered by the Strasbourg Court in 50 years have helped states to cope with serious challenges and to consolidate their rule of law and democracies. The preservation of this achievement, to which the United Kingdom played a pivotal role after World War II, ultimately rests on the continuing and unambiguous commitment of the member states which set it up in the first place. However, even if a withdrawal occurs, it will not lead to lifting the responsibility of the concerned state for past human rights violations that took place on its territory. In accordance with Article 58 of the

[1] See the Commissioner's Opinion concerning Independent and Effective Determination of Complaints against the Police, 2009.

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

ECHR, a denunciation may not release a state party from its obligations under the Convention "in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective".

The transitional justice mechanisms implemented in Northern Ireland must draw upon and be rooted in the human rights principles enshrined in the Convention, as interpreted authoritatively by the Court.
I would conclude by paraphrasing a statement made in the 1960s by the Canadian Prime Minister Trudeau and stress that the 21st century really belongs to those who will build it. The future can be promised to no one. Northern Ireland, like the rest of Europe, needs to overcome its violent, tragic legacy of the past century in order to build its own future. In order to successfully confront modern challenges a society has to confidently face up to its past and draw, from it, the right lessons to avoid recurrence.

This necessitates wise vision, courage, and determination by the national political leadership, as well as concerted and strenuous efforts based on enforcing justice. Europeans have learned from history that peace and security which is not based on the principle of justice can be extremely fragile and short lived.

I trust that today's conference and discussions will help the ongoing efforts to make this region more peaceful, more secure, and above all, more just.