



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



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COMMISSIONER FOR HUMAN RIGHTS

Positions on post-war justice and durable peace in the former Yugoslavia

This is a collection of Positions concerning post-war justice and the efforts to attain durable peace in the former Yugoslavia from the Council of Europe Commissioner for Human Rights. It is a short summary of the findings of the Commissioner based mainly on his country-monitoring reports, viewpoints and human rights comments. By collating these findings drawn from different components of his work, the Commissioner presents a summary of his conclusions and recommendations concerning the process of post-war justice in the former Yugoslavia.

European institutions failed to protect the people of the former Yugoslavia from ethnic cleansing and other war atrocities which took place in the 1990s. The return to normalcy has been slow and major obstacles still remain. The lack of a systematic approach across the region to tackle past gross human rights violations has resulted in impunity for war criminals and the erosion of the rule of law. National proceedings to prosecute war-related crimes have been too slow throughout the region. They have failed to secure widespread political support and on occasion have even been deliberately thwarted by some political forces. Witness protection systems remain limited in their capacity and reportedly fail to inspire confidence and trust among existing and potential witnesses. Reports indicate that due to fear for their physical integrity, witnesses are increasingly unwilling to come forward and testify. The safety of witnesses is a major concern in the investigations now underway into the serious allegations against some Kosovars about organ transplants, illegal detentions and killings from 1998 onwards.

Some 438 000 refugees and other displaced persons are still waiting for durable solutions to their legitimate claims. About 18 000 individuals remain stateless or are at risk of statelessness in the region. The situation of displaced Roma, many of whom are also stateless inside and outside of the region, is extremely precarious. Roma displaced from Kosovo* and subject to forced returns have well-founded fears for their safety.

About 26 000 cases of persons declared missing during the wars have been solved. An estimated 14 000 persons are still unaccounted for. There has been progress in this field but more needs to be done to alleviate the protracted suffering of the families of missing persons and to ensure that the identification of missing persons remains a priority.

The full and effective respect of the human rights of all war victims requires political leaders in the region to reflect on and further support the truth and reconciliation process by enhancing inter-state dialogue and agreeing on a truth and reconciliation policy which would unite all countries and peoples concerned. European institutions have a key supportive role to play.

Elimination of impunity

As noted in the Council of Europe Committee of Ministers Guidelines *on eradicating impunity for serious human rights violations*, adopted in 2011, impunity must be fought as a matter of justice for the victims and as a deterrent to prevent new violations, as well as to uphold the rule of law and to foster public trust in the justice system, especially where there is a legacy of gross human rights violations. The countries in the region are urged to intensify their efforts to remove obstacles to the effective prosecution of all war-related criminals. Amnesty laws should not be used to deter accountability for the crimes committed during the wars in the former Yugoslavia.

War-related crimes should be prosecuted and tried in an unbiased manner, independently of the alleged perpetrator's ethnic or other background. As a matter of principle, persons convicted *in absentia* should have access to an effective remedy, in accordance with the fair trial standards established by the European Court of Human Rights. All persons wrongfully convicted and punished should have effective access to compensation, in accordance with Article 3 of Protocol No 7 to the European Convention on Human Rights.

Testimonies of witnesses are principal evidence in most war-related criminal cases in light of the non-existence or unavailability of documentary evidence. The provision of effective protection and support to witnesses in the context of war-related proceedings is therefore crucial. The authorities

* Throughout this text, 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.

in the region are called on to ensure the efficient functioning of national witness protection systems by allocating qualified and trained staff, and adequate financial resources.

It is particularly important that the authorities promptly investigate all reported cases of threats against and intimidation of witnesses, initiate criminal proceedings, and ensure witness security in accordance with the recommendations of the Parliamentary Assembly of the Council of Europe contained in Resolution 1784 (2011) on *the protection of witnesses as a cornerstone for justice and reconciliation in the Balkans*.

Regarding justice for the estimated 20 000 women who have been the victims of rape and other forms of sexual violence, states should draw upon UN Security Council Resolution 1820 (2008) on *Women and Peace and Security* and prosecute persons responsible for these crimes. It is of the utmost importance to end impunity for such acts as part of a comprehensive approach to seeking sustainable justice, truth, reconciliation and peace.

The complex but necessary process of post-war justice in the region cannot be successfully achieved without close and constructive co-operation among the respective countries. The countries in the region should intensify efforts to remove the remaining obstacles to greater regional co-operation in order to reduce and eliminate the impunity gap. Possible measures to be taken include constitutional amendments to allow extradition or bilateral or multilateral agreements to facilitate extradition.

Provision of adequate and effective reparation to victims

The provision of adequate, effective and proportionate reparation to all war victims is a major constituent element of the justice that should be delivered. The authorities are urged to take all necessary measures to ensure reparation to victims of war-related crimes and their families, in line with the established principles of international law which are reiterated in the UN 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 (2005).

Countries in the region should carefully examine cases of civilian victims of war-related crimes, provide them with adequate social protection, and eliminate any unequal treatment that exists between civilian and military victims of war.

The victims of the crime of rape and other forms of sexual violence during the wars should be provided with effective access to justice and adequate reparation, as underlined in Resolution 1670 (2009) on *sexual violence against women in armed conflict* of the Parliamentary Assembly of the Council of Europe. States should consider the rehabilitation of these victims, including their medical and psychological care, as a priority and an integral part of reparations for this particularly vulnerable group of persons.

Regarding the 'erased'¹ persons in Slovenia and the non-existence of a reparation mechanism that would provide redress to those of them who have suffered serious harm, the authorities need to take measures in order to create an effective reparation mechanism which fully takes into account the circumstances of each individual case.

Establishing and recognising of the truth

Post-war justice and durable peace call for measures that go far beyond criminal proceedings and victim reparations. Establishing and recognising the truth in relation to past gross human rights violations is one of the most important components of the transitional justice process.

¹ 'Erased' persons are Slovenian residents whose names were removed from the Register of Permanent Residents in 1992 – an action which has adversely affected their enjoyment of human rights.

Statements that deny responsibility for or even the occurrence of atrocities which took place during the wars in the region of the former Yugoslavia, such as the genocide committed in Srebrenica in 1995, are unacceptable. Such statements undermine the commendable efforts to achieve post-war justice and reconciliation in the region which have been made to date.

No comprehensive national or regional mechanism exists which is capable of establishing and recognising the truth concerning the gross human rights violations perpetrated by all sides during the wars. This situation seriously undermines the reconciliation efforts made to date.

The Commissioner supports the implementation of the Council of Europe Parliamentary Assembly Resolution 1786 (2011) *on the reconciliation and political dialogue between the countries of former Yugoslavia*, which seeks to establish a regional truth and reconciliation commission with the participation of all countries involved in the conflicts to reach a mutual understanding of past events and to honour and acknowledge the victims.

Knowledge of a shared history facilitates understanding, tolerance and trust between individuals, especially between young people and between different communities. It is only through open dialogue, knowledge of the truth, and deep reflection that members of post-conflict democracies in Europe may attain the social cohesion needed to preserve their inherent, valuable pluralism. All countries concerned should realise the vital need to teach history without resorting to a one-sided interpretation of events, and draw upon the Council of Europe Parliamentary Assembly Recommendation 1889 (2009) *on history teaching in conflict and post-conflict areas*.

Shedding light on the cases of missing persons

States are obliged to alleviate the protracted anxiety of the families of persons declared missing as a result of the armed conflicts, as well as to conduct investigations and provide all available information about the identification and fate of missing persons. This obligation derives from the 1949 Geneva Conventions, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance and Articles 2 and 3 of the European Convention on Human Rights.

The authorities in the region are invited to continue with determination their efforts, at both the national and regional level, to identify and resolve the pending cases of war-related missing persons. To this end, all states concerned should initiate or intensify searches for grave locations, screen state archives for information on the fate of missing persons, and speed up the identification of exhumed bodies. National commissions on missing persons and their forensic structures should be provided with increased resources. There should be an unconditional exchange of information between all states on the whereabouts of all missing persons.

States which have not yet done so should ratify the 2006 International Convention for the Protection of All Persons from Enforced Disappearance which entered into force in December 2010.

It may not be possible to clarify all cases of missing persons but it is of the utmost importance that this remains the goal. The families who are still waiting must receive assurances that every effort is being made to meet their expectations.

Human rights of refugees and other displaced persons

Issues resulting from forced displacement during the wars must be resolved as they remain central to the development of social cohesion. Their resolution is linked to and depends on the process of ethnic reconciliation in the region of the former Yugoslavia and on the development of the region's national systems for the protection of human rights, especially of national minorities.

States have the duty and responsibility to establish conditions and provide means to allow refugees and other displaced persons to enjoy one of the following options: *voluntary return* to their homes or places of habitual residence in safety and with dignity; *voluntary resettlement*; or *local integration* into the community in which they are presently located. The three possible processes require strenuous efforts and determination on the part of the states concerned who must ensure the full participation of refugees and displaced persons in the planning and management steps of any of the processes.

Any decisions should be based on updated, reliable data on the number and situation of forcibly displaced persons and returnees. The authorities in the region are encouraged to ensure the full participation of minority members in all relevant action-planning and decision-making, in accordance with the standards enshrined in the Framework Convention for the Protection of National Minorities (FCNM) and the guidelines contained in the *Commentary on the Effective Participation of Persons belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, adopted by the Advisory Committee on FCNM.

It is crucial that the authorities provide durable solutions for the displaced persons living in collective centres who continue to endure extremely difficult conditions. Adequate housing should be provided to all vulnerable residents of collective centres, possibly by converting a number of collective centres into social housing facilities.

The authorities are urged to take all necessary measures to enable displaced persons and returnees to enjoy fully, and without discrimination, their rights to healthcare, social care and pension rights. Funding for returns must be accompanied by positive measures to ensure that funds address the specific needs of these individuals and their families, in accordance with the Council of Europe Parliamentary Assembly Resolution 1708 (2010) on *solving property issues of refugees and internally displaced persons*.

Pending cases pertaining to the repossession by displaced persons of their property should be dealt with promptly in full compliance with the relevant case-law of the European Court of Human Rights. The process of the reconstruction of houses affected by the wars should be accelerated, and the manpower of the competent authorities needs to be properly reinforced.

The best possible solution for displaced Roma unable to return to Kosovo in safety and dignity is local integration through a process which will ultimately lead to the acquisition of host country nationality. States which have not yet done so are called upon to accede to the 1997 European Convention on Nationality and the 2006 Council of Europe Convention on the avoidance of statelessness in relation to State succession.

Landmines and cluster munition remnants are a major obstacle to returns in many countries in the region. Efforts to clear parts of the territories which remain contaminated by landmines should be accelerated. This is an obligation emanating not only from the 1997 Mine Ban Treaty but also from the obligations arising notably from the fundamental provisions of Article 2 of the European Convention on Human Rights, where everyone's right to life has been enshrined and positive obligations are placed on all states parties to protect this right.

KEY RECOMMENDATIONS

Genuine inter-ethnic reconciliation in the former Yugoslavia cannot be achieved without justice. Justice is key, and it must be justice without distinction.

It is extremely important to counter and eliminate any pattern of impunity for the gross human rights violations which occurred in former Yugoslavia in the 1990s. Amnesty laws should not be used to avoid accountability, thereby perpetuating impunity for war-related crimes.

States which have not as yet done so should accede to the 1974 European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes. All war-related crimes should be prosecuted and tried in an unbiased manner, in full accordance with the fair trial standards enshrined in the European Convention on Human Rights and the Court's case-law.

The authorities should ensure the functioning of the witness protection systems according to professional standards by allocating qualified and trained staff, as well as adequate financial resources. All reported cases of threats against and intimidation of witnesses should be effectively investigated and prosecuted, and the security of witnesses should be fully safeguarded.

The provision to all war victims of adequate, effective and proportionate reparation for the harms they have suffered during the wars is a major constituent element of the justice that should be delivered.

Establishing and recognising the truth about gross human rights violations is one of the most important components of the transitional justice process. It is necessary to establish a mechanism that will make effective investigations possible and give victims access to the truth.

Sustained and concerted efforts aimed at resolving the pending cases of missing persons are necessary. To this end, all countries concerned should initiate or intensify searches for grave locations, screen state archives for information on the fate of missing persons, and speed up the identification of exhumed bodies. National commissions on missing persons and their forensic structures should be provided with increased resources. There should be an unconditional exchange of information among all states concerned on the whereabouts of missing persons.

The pending issues arising out of the forced displacement that occurred during the wars should be resolved in a manner which would allow refugees and other displaced persons to enjoy one of the following options: *voluntary return* to their homes or places of habitual residence in safety and with dignity; *voluntary resettlement*; or *local integration* into the community in which they are presently located. .

Efforts by states to clear parts of their territories which remain contaminated by landmines and cluster munition remnants should be reinforced and accelerated. Prompt and generous assistance for the care and rehabilitation of all mine victims should be available, in compliance with the standards contained in the 2006 Convention on the Rights of Persons with Disabilities.

Pending cases pertaining to the repossession of property by all displaced persons should be dealt with promptly in full compliance with the relevant case-law of the European Court of Human Rights.

It is crucial that the authorities find durable solutions for refugees and displaced persons living in collective centres where they continue to endure extremely difficult conditions.

The best possible solution for displaced Roma unable to return to Kosovo in safety and dignity is local integration through a process which will ultimately lead to the acquisition of host country's nationality.