

Human Rights in Europe: time to honour our pledges

Viewpoints by **Thomas Hammarberg**
Commissioner for Human Rights



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



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Foreword

Time to honour our pledges

There is still a gap between political rhetoric and reality when it comes to addressing human rights.

Almost every politician is on record as favouring the protection of freedom and justice. Indeed, a great number of European and United Nations standards on human rights are agreed and in some cases also made part of national law.

However, these pledges are not consistently enforced. There is an implementation gap.

No country in Europe is free from discrimination. Roma communities suffer from anti-Ziganism; migrants from xenophobia and homosexuals from homophobia. There are unacceptable tendencies of anti-Semitism as well as Islamophobia.

Persons with disabilities are denied access to possibilities which are seen as basic rights by others.

Women are discriminated in the job market and under-represented in political bodies. Domestic violence is a sad reality in too many homes. Abuse of children is reported in every country.

The different components of the classic system of justice – including the police, the judiciary and the penitentiary – are gradually being strengthened in the new democracies, but there are regular reports of corruption, incompetence and abuse of power.

It has to be recognized that it takes time to develop a human rights culture and to establish institutions and procedures which will turn

our ideals into reality. However, progress is too slow; the impatience felt by many is justified. The implementation gap has to be addressed with greater consistency.

There are, of course, objective circumstances which could delay the possibility to move faster on human rights reforms: war or political strife, natural disasters and economic crises. Indeed, it is recognized in human rights treaties that international assistance may be necessary for the fulfilment of some human rights obligations.

Less convincing are the excuses that public opinion resists reforms which would protect and promote human rights. On the whole, people at large want freedom and justice not only for themselves but also for others.

Intolerance and racism are often the result of xenophobic agitation by a few extremists who exploit fear among people in order to promote their own destructive ambitions. In periods of economic crisis it is particularly important that leading politicians demonstrate a leadership with ethical substance.

It is said that implementation of the human rights norms requires three types of action by governments: that they themselves *respect* the standards, that they *protect* people from violations initiated by others; and that they take the necessary steps to *fulfil* the rights which require pro-active efforts.

One conclusion from this analysis is that there are rights which entail positive obligations. For their realisation the authorities must do something more than simply abstaining from violating people's rights. Obvious examples are several of the economic and social rights.

The Universal Declaration of Human Rights establishes that human rights include the right to social security, the right to an adequate standard of living, the right to food, the right to education, the right to housing, the right to health, the right to work and the right to rest and leisure.

These economic and social rights were not defined in a vacuum; they were based on the experience of past crises and on the knowledge that ignoring social justice comes at an enormous price. They should also serve as very useful guiding principles for political decision-makers at a time when difficult choices have to be made.

Such economic and social rights have since been legally recognized in United Nations and Council of Europe treaties – the latter through the European Social Charter of 1961 revised in 1996. These rights are furthermore defined in the International Labour Organization (ILO) core conventions. They cover, for example, trade union rights, decent work conditions, non-discriminatory salaries and rules against the exploitation of child labour.

Though economic and social rights must be regarded as an integral part of international human rights law, they have still not been fully recognized by some European governments. It is unfortunate if they are seen as the “poor cousins” of civil and political rights. There are still some Council of Europe member states that have not ratified the Charter in its original or revised version, thereby failing to confirm the importance of these rights.

Implementation of most human rights has a financial cost and it is true that the realization of some tend to be particularly expensive, for instance, the right for everyone to education or to health care. For this very reason, the agreed standards allow for a *gradual* implementation of such rights - anything else would be unrealistic. Governments should, however, establish minimum acceptable standards or core entitlements and at the same time strive to attain full implementation as soon as possible. They cannot postpone the realisation of these norms indefinitely.

This is one reason why a *systematic planning* of human rights implementation is desirable, even indispensable.

The first step in such a process is to identify the existing problems in the form of a baseline study. Local non-governmental groups, ombudsmen, and international bodies can usually provide information for the study as well as the media and relevant authorities. Such data must be collated and analysed in a structured manner for the purpose of planning.

The second step is to draw up a national human rights action plan or strategy where the main human rights concerns are identified and suitable measures to address these problems are set. Thereafter comes the crucial stage of implementation, always followed by evaluation.

I believe that it is high time for governments to honour their pledges by ensuring that words are translated into action, that human rights commitments do not exist merely on paper, but also in real life.

This volume is a compilation of articles I wrote as “Viewpoints” during the past year – with the editorial assistance of my colleague Rachael Kondak. They reflect my reaction to problems I witnessed during visits to a large number of European countries where I met leading politicians, prosecutors, judges, ombudsmen, religious leaders, journalists, civil society representatives, migrants and citizens – including inmates and staff in a great number of institutions. After the country visits, special reports with recommendations were published on www.commissioner.coe.int.

Thomas Hammarberg

Strasbourg, 1 April 2009

International human rights
bodies worldwide need more support
and more self-criticism

14 April 2008

Governments have agreed to set up multilateral mechanisms to monitor and assist the realisation of international human rights norms. This reflects a recognition that these standards are indeed an international concern and that co-operation on their implementation is desirable. However, it does happen that these bodies are criticised by the same governments. Some of this criticism is not well founded and rather reflects an unease about hearing uncomfortable truths. This does not mean that international human rights mechanisms are free from flaws. There is a need for an open and constructive discussion on how to improve their capacity and overall efficiency.

Quite a number of human rights mechanisms have been established since the Universal Declaration of Human Rights was adopted 60 years ago, not only within the United Nations but also on a European level. Several of them are underfunded, which has caused difficulties for them to undertake serious, professional work. Committee members and rapporteurs are in several cases not even paid but act as volunteers. My own office – supposed to assist 47 countries – still has a modest, though expanding budget.

This will hopefully change when governments realise the full importance of these human rights mechanisms, diverse as they may be. For that to happen it is essential that these bodies do their utmost to prove their value – and learn from the experiences so far in order to improve their effectiveness.

One very clear lesson for both governments and the international organisations is that human rights mechanisms are more effective when their *independence* is recognised and respected, as it is the case, I am pleased to say, for those mechanisms created in the Council of Europe framework. This experience should influence the definition

Flags at the ONU building, Geneva, © Yann Forquet



“There is a need for an open and constructive discussion on how to improve their capacity and overall efficiency.”

of the mandate of the mechanisms and the appointment of office holders. It also underlines the importance of ensuring funding which would not create dependencies.

The human rights bodies should of course avoid any country stereotyping and always stand above party-political struggles. The protection of their impartiality is of key importance. Governments for their part must be prepared to listen to well-founded criticism even when such messages could be utilised by the opposition. They should also accept that the international representatives are in touch with and listen to non-governmental groups.

Another lesson is that the various human rights bodies must co-operate and co-ordinate their activities. Some governments have genuine problems in coping with the many human rights visitors and the reporting requirements and integrating the recommendations into concrete policies.

This underlines the need for information sharing, rational division of labour and co-ordinated actions between the international actors. Confusing overlap should be avoided and a principle of subsidiarity be established. It is absolutely essential that the various mechanisms avoid giving conflicting messages.

For the moment there is a good atmosphere of co-operation between the European human rights institutions, including with the relevant parts of the United Nations. I myself spend quite a lot of time on such co-ordination and feel that it is worthwhile in order to maximise our combined impact. Usually, we do build on one another's findings in a meaningful manner.

The co-ordination between the monitoring mechanisms and the assistance bodies has also improved. For instance, UNICEF is analysing the Concluding Observations of the Committee on the Rights of the Child when designing its programmes and the European Union has helped to fund some of the follow-up programmes of my office.

Though problems have been reduced by the goodwill and co-operation of the actors involved, I would recommend a very critical attitude towards suggestions of new international or European human rights mechanisms. Many of the newly defined issues can be tackled within the existing structures.

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

A major point is *how the international actors relate to actors at the national and local levels* – the authorities but also the media and the

civil society, including representatives of the victims. This is not an easy task. It takes a lot of experience to grasp the real problems and to give useful advice.

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

Advice may be given on, for instance, education and training but international bodies should avoid taking over such functions and thereby steal the space from domestic actors, who know better the local possibilities and problems, and how to address them. We have to scrap the idea that the international institutions are at the top of a hierarchy – we are rather at the service of the members or supporters of these bodies. The international actors should also focus on the sharing of knowledge about successful approaches in other countries.

There is a need now for a broader evaluation of ways of improving and strengthening the international human rights system. The leading agencies should set up a task force for this purpose. Independent experts should be invited, among them people with genuine experience of working for human rights in their own societies – the people we have in mind when we talk about human rights defenders.

Questions which could be addressed would include:

- How can the independence and integrity of the monitoring mechanisms be best protected and upheld?
- What further steps are needed to facilitate co-ordination and division of labour between the agencies on different levels?
- What more could be done to relate problem definition to concrete advice and support to the national level?

- What should be done to ensure sufficient financing of international human rights work, and the recruitment of the necessary staff?
- What is the experience of “mainstreaming” of human rights into development and security programmes? How should these efforts be pursued?

Such an evaluation should of course also draw lessons from the successes – and there have been successes. To take but a few examples from the Council of Europe monitoring bodies, I have seen prisons rebuilt for the better after criticism from the European Committee for the Prevention of Torture (CPT) and new laws against racism adopted after recommendations from the European Commission against Racism and Intolerance (ECRI). Recommendations from my predecessor or myself have led to the closure of outdated prison facilities, improvements in asylum procedures, creation of ombudsman institutions, changes in laws concerning compulsory placement in psychiatric institutions, and adoption of laws against discrimination.

A review of the practical impact of the Council of Europe mechanisms in improving respect for human rights in member states was published in April 2007. It contains a large selection of policy reforms and legislative changes, which can somehow be linked to judgments of the European Court of Human Rights, the ECRI, the CPT, the supervisory mechanisms of the European Social Charter and the European Convention for the Protection of National Minorities. While we all, of course, recognise that changes are usually the result of multiple forces, the compilation is indeed encouraging.

However, there is no place for complacency. Instead we should constantly remind ourselves about the enormous responsibility that comes with the fact that so many people all over the world have put their trust into our serious efforts.

Aged people are too often ignored
and denied their full human rights

28 April 2008

Older people have the same rights as others. Because of their vulnerability they need special protection and the Universal Declaration of Human Rights states specifically that elderly persons have the right to security. Many of the subsequent human rights treaties stipulate basic rights for aged people: one example is the revised European Social Charter. However, the rights of old persons are still often ignored and sometimes totally denied. They suffer from widespread perceptions that they are non-productive and worthless in modern society. It is time for a more constructive debate on how human rights for the older generation can be ensured.

One problem is that older people in general do not often have a strong say in politics. Organisations defending their interests are – with few exceptions – weak, and political parties tend to focus on younger generations. The fact that a clear majority of the elderly are women may also have contributed to this lack of political attention.

The revised European Social Charter contains the first binding human rights provision for the protection of the rights of the elderly. The main objective is to enable older people to lead a decent life and participate in society. To put this into practice, states should ensure that their social protection systems, health care and housing policies are suitable for older people. They should also enact non-discrimination legislation in certain areas, including the labour market.

A growing number of those who reach retirement age are perfectly fit and would prefer to continue their professional activities. This fact has not provoked the necessary rethink about how the professional skills, experience and dedication of these individuals could be utilised for the common good. Special attention should be given to ensure that it is possible for older people who may lack advanced



“The rights of old persons are still often ignored and sometimes totally denied.”

formal qualifications to continue their working life. Age is not a valid reason to disregard someone in the recruitment procedure nor for dismissal, except if this is in accordance with the pension system.¹

More flexibility on retirement ages on the basis of personal preferences and capabilities would be logical. With some adjustments in working conditions, including working hours, many more people would like to continue long after the present retirement age. A UN conference stated some years ago that “older persons should have the opportunity to work as long as they wish and are able to, in satisfying and productive work”.²

1. Arts 23 and 24 of the revised European Social Charter.

2. United Nations Second World Assembly on Ageing, Madrid 2002.

Many of these at the age of 60+ will live for two or three decades beyond retirement and in some cases even longer. The number of very old people is now growing rapidly in countries all over Europe. This is a category which in many cases will require special care, as some of them are clearly dependent and suffer from dementia and/or other disabilities.

Protection measures should be flexible so as to fit individual needs and they should only be put in place in those fields of the individual's life where they are indispensable. It should also be possible for an individual, at a time when he or she is still capable, to make decisions on what should happen in the future and who should act as his or her representative in case of eventual incapacity. Such measures of self-determination are in line with respect for the dignity of each person as a human being. That is why the Council of Europe is at present working on a recommendation protecting incapable adults when such incapacity occurs.

The increasing number of elderly people will inevitably be a strain on the social and health care system. Even with a more flexible pension policy, there will in economic terms be a less favourable relationship in future between the proportion of the population who are working and those who are dependent. However, a humane and just society must accept that responsibility and respect the human dignity and rights of the very oldest. Health care systems should implement age-friendly policies and practices and consider healthy ageing.

Many of the elderly are poor, and their human right to an adequate standard of living is not respected. Not least in the transition countries old people have suffered from the changes and of course have had little possibility to compensate for price increases with more work or higher salaries. A great number of them have had to accept, for instance, a dramatic downturn in housing standards. The term "lost generation" is sadly appropriate.

New social security strategies are required in order for older people to have adequate protection in the future. Also in countries where social security is more protected, there is a need to review aspects of how older people are treated. There have been too many reports about bad treatment and even abuse in institutions for the elderly

– some of them privately run. In every case, this is an unacceptable failure, made worse by the fact that the residents in these homes are often unable to claim their rights and even less able to defend themselves against abuse.

During my travels in European countries I have seen the extremes: both modern and homelike institutions with a democratic atmosphere and excellent medical care but also centres in which the inmates were reduced to numbers and the staff untrained, overstretched and resigned. There is clearly a need in some countries to monitor the conditions in institutions for old persons much more thoroughly.

Persons living in institutions should of course get appropriate care and services. Their right to privacy and dignity should be fully respected. They also have the right to participate in decisions concerning their treatment as well as the conditions of the institution. Independent complaints and inspection systems should be set up to prevent ill-treatment and promote quality care. As the Council of Europe Parliamentary Assembly has proposed, European model rules on minimum standards for elderly persons in institutional care should be drawn up.³

Even in countries with aged-friendly institutions, many elderly people prefer to stay at home as long as possible. This requires another care organisation from the social authorities. Such reforms have indeed taken place in many countries. However, it is my impression that more could be done to offer the elderly more choices and more influence on what care they would prefer now and later. One aspect is to give more priority to supporting and sometimes off-loading family members who assist their elderly relatives daily. The well-being of care givers has a significant impact on the quality of care and on the dignity and quality of life of the dependent person.

Among the very old there are those who are particularly vulnerable. We know that aged women suffer discrimination in some cases and that they often receive a reduced pension allowance because they have had to care for family members rather than being professionally active.

3. Recommendation 1796 (2007) of the Parliamentary Assembly on the situation of the elderly in Europe.

People with disabilities face particular difficulties, which are increased as a consequence of the ageing process: for instance, reduced vision, reduced hearing or reduced mobility. This has to be taken into account when designing policies and programmes. The ratification of the UN Convention on the Rights of Persons with Disabilities, which creates a number of safeguards for such persons, should be given a high priority as well as the implementation of the Council of Europe Disability Action Plan 2006-2015.⁴

Vulnerable, too, are many older migrants, some of whom have language difficulties. With a growing immigrant population, European countries are here faced with a challenge for which the authorities seem to be grossly unprepared. The result is that individuals are discriminated against on several grounds.

I suggest that European political leaders review their own policies for the rights of old people – before they themselves have to experience the consequences of their present-day policies, or lack thereof.

4. Recommendation Rec(2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015.

Time to recognise that human rights
principles also apply to sexual
orientation and gender identity

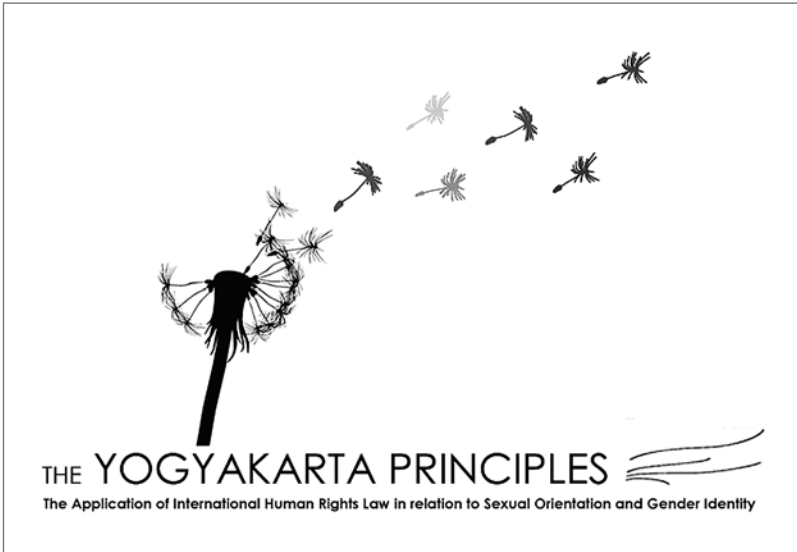
14 May 2008

A number of people around the world – including in Europe – continue to be stigmatised because of their actual or perceived sexual orientation and gender identity. In some cases these individuals are still being denied their right to education, health care, housing and work. Some of them are harassed by the police, get no protection when attacked by extremists or are deported to countries where they risk torture or execution. Also, some of their organisations are denied registration or are refused a permit to organise peaceful meetings and demonstrations. Too few leading politicians stand up against these or even worse homophobic and transphobic expressions.

It is sometimes said that the protection of the human rights of lesbians, gays, bisexuals and transgender people (LGBT) amounts to introducing new rights. That is a misunderstanding. The Universal Declaration of Human Rights and the agreed treaties establish that human rights apply to everyone and that no one should be excluded.

What is new is that there is now a stronger quest for this universal principle to be applied *consistently*. When grounds for impermissible discrimination are listed in human rights treaties or such previous lists are interpreted, there are now clear references to sexual orientation. This also goes for the interpretation of the 1966 UN International Covenant on Civil and Political Rights. Also, the European Court of Human Rights has clarified in several judgments that discrimination on grounds of sexual orientation is not allowed. The EU's Fundamental Rights Charter explicitly includes discrimination based on sexual orientation.

The idea is to make clear the obvious – that lesbians, gays, bisexuals and transgender people have the same rights as others. The international



“The Universal Declaration of Human Rights establishes that human rights apply to everyone and that no one should be excluded.”

standards do apply to them as well. In other words, discrimination against anyone on the grounds of sexual orientation or gender identity is a human rights violation.

This is the main message of the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity.¹ These principles, which were adopted after an expert meeting in Yogyakarta in Indonesia in 2006, identify the obligations

1. See www.yogyakartaprinciples.org/.

of states to respect, protect and fulfil the human rights of all people, regardless of their sexual orientation² or gender identity.³

The principles are the unanimous result of discussions between 29 independent international human rights experts from different parts of the world, of whom almost half have served in United Nations treaty committees or as special rapporteurs. One of the experts was the former High Commissioner for Human Rights Mary Robinson.⁴

In the introduction to the principles the experts make clear that they do not ask for new norms, only that those existing should be respected. They state that it is critical to clarify state obligations under agreed international human rights law in order to promote and protect all human rights for all people on the basis of equality and without discrimination.

Therefore, the Yogyakarta document goes further than just defining the principles, it also spells out the state's obligations. It asks for legislative and other measures to prohibit and eliminate discrimination against individuals because of their sexual orientation or gender identity. Legislation and action plans against discrimination should include this type of discrimination as well. Laws should be repealed which criminalise consensual sexual acts between people of the same sex.⁵

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2. The Yogyakarta document states that the term "sexual orientation" refers to "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender".
 3. The document defines "gender identity" with reference to "each person's deeply felt internal and individual experience of gender which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms".
 4. Other Europeans among the experts are Maxim Anmeghichean (Moldova), Yakin Erturk (Turkey), Judith Mesquita (United Kingdom), Manfred Nowak (Austria), Michael O'Flaherty (Ireland), Dimitrina Petrova (Bulgaria), Nevena Vuckovic Sahovic (Serbia), Martin Scheinin (Finland), Stephen Whittle (United Kingdom) and Roman Wieruszewski (Poland).
 5. More than 80 countries still criminalise consensual same-sex acts and at least seven maintain the death penalty.

The document also requests governments to take concrete action to counter prejudices through education and training. Steps should be taken to dispel discriminatory attitudes or behaviours which are built on the idea that any sexual orientation or gender identity is superior or inferior.

One particularly important chapter in the document relates to the implementation of *the principle of the right to security of persons*. In this chapter it is recommended that governments do the following:

- take all necessary policing, or other, measures to prevent and provide protection from all forms of violence and harassment related to sexual orientation and gender identity;
- take all necessary legislative measures to impose appropriate criminal penalties for violence, threats of violence, incitement to violence and related harassment, based on the sexual orientation and gender identity of any person or group of people, in all spheres of life, including the family;
- take all necessary legislative, administrative or other necessary measures to ensure that the sexual orientation and gender identity of the victim may not be advanced to justify, excuse or mitigate such violence;
- ensure that preparation of such violence is vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished, and that victims are provided with appropriate remedies and redress, including compensation;
- undertake campaigns of awareness-raising, directed at the general public as well as actual and potential perpetrators of violence, in order to combat the prejudices that underlie violence related to sexual orientation and gender identity.

Such steps are necessary. During my mission travels, I have been confronted with some of the realities behind the aggressive intolerance of those who are perceived as different. I have met individuals who live in fear of being exposed and others who have “come out” but suffer serious consequences.

Transgender persons are humiliated. Some of them have been denied necessary health care and have been confronted with medical practitioners who refuse to provide gender reassignment therapy. Others

have been prevented from having a change of name in passport or identification documents or only managed such a change after having gone through de-humanising procedures that are currently in place in many states.

The prejudices in this area are indeed very deep, not least in countries with a recent past of dictatorship and absence of free discussion. Unfortunately, some religious preaching has also been influenced by similar tendencies and generally not been helpful in the defence of human rights of LGBTs. Advocacy against homophobia is clearly not opportune in a number of countries. This underlines the importance of broader and more systematic education and awareness efforts and more principled positions by leading politicians. I believe that the Yogyakarta Principles are important in this endeavour.

I recommend all governments of the Council of Europe member states to study the document and build on its principles through concrete action. In fact, some of the member states have already made them an integral part of their human rights policies. For my part, I fully endorse the Yogyakarta Principles.

Strong data protection rules
are needed to prevent the emergence
of a surveillance society

26 May 2008

Surveillance technology is developing with breathtaking speed. This creates new instruments in the struggle against terrorism and organised crime, but also raises fundamental questions on the right to privacy for everyone. Individuals should be protected from intrusions into their private life and from the improper collecting, storing, sharing and use of data about them. Terrorism and organised crime must be combated – but not with means which undermine basic human rights.

Nowadays there are technologies to monitor, screen and analyse billions of telephone and e-mail communications simultaneously; to use virtually undetectable listening and tracing devices; and to install “spyware” surreptitiously on someone’s computer which can secretly monitor the online activities and e-mails of the user and even turn on the computer’s camera and microphone.

It is sometimes said that only those who have something to hide should be fearful about these new measures. However, the notion that if you have nothing to hide you have nothing to fear puts the onus in the wrong place – it should be for states to justify precisely the interferences they seek to make on privacy rights, not for individuals to justify their concern about interferences with their basic human rights.

The use of such new facilities and expanded competencies for the police and security services requires enhanced democratic and judicial control.

Already, the storing of enormous amounts of personal data in social security, medical and police databases¹ is a matter of concern. The

1. The European Court of Human Rights is currently considering a case brought against the United Kingdom which concerns the decision to continue storing fingerprints and DNA samples taken from the applicants after unsuccessful criminal proceedings against them were closed (*S. and Michael Marper v. the United Kingdom* (Applications nos. 30562/04 and 30566/04).



“Individuals should be protected from intrusions into their private life.”

recent loss, in the United Kingdom, of a disk with millions of such confidential data pieces illustrates some of the risks.

Banks, insurance companies and other business enterprises also develop databases on clients and their transactions. Understandably, there is widespread concern that these various databases can be combined and the question is raised whether there is sufficient protection against such interlinking.

Those who travel are today encountering modern security measures in very concrete ways. Fingerprinting and other biometric identity control methods are being introduced widely. The EU has agreed to US demands that airlines going to the US should provide 19 pieces of personal data on all their passengers, including names, phone numbers, e-mail addresses, credit card numbers and billing addresses.

This information is to be stored for 13 years and will be available to the US security services. Preparations are under way to introduce a similar system for travellers to and from EU countries.

Police and secret services already have a massive amount of data available to them through these methods. The intention when they process this information is not only to find previously identified culprits of crime. Increasingly they seek people who match pre-determined “profiles” of people who allegedly are more likely be a terrorist.

Obviously, it is essential that data protection rules also cover the police, the judiciary and the security services. One of the shortcomings of the proposed EU Council Framework Decision on the Protection of Personal Data is that it would apply neither to domestic data processing relating to European police and judicial co-operation, nor to any processing of personal data by the security services, or indeed by the police when they act in relation to national security. Individuals should be provided with an effective legal remedy to challenge the information, its storage and use to judicial scrutiny as laid down in *Segerstedt-Wiberg and Others v. Sweden* before the European Court.

As terrorists and other organised criminals increasingly act across borders, co-operation between law-enforcement forces in various countries has become more urgent. A principle of “availability” is being established within the European Union, to promote unhindered sharing of information. The idea is that the national law-enforcement agencies in any one EU country should in principle have full and prompt access, with little or no “bureaucratic obstacles”, to all the data held by any other such agencies in any other member state.

This means that every piece of information in any national law-enforcement database will be available in large parts of Europe – and possibly in other countries as well, notably the US, which in turn can disseminate it to other collaborating states. This will facilitate police work. On the other hand, any mistake or misreporting will have a potentially much deeper negative impact on the individual. This calls for a developed data protection regime within the Union, based on accepted common high standards.

If the “availability” process is opened for authorities in other countries as well, including the US, it becomes necessary to ensure that they genuinely respect standards of data protection. Europe should not compromise on these important rules in order to please US counterparts.

The European data protection authorities have stressed the need for a stronger data protection regime.² In a joint declaration last year they stated:

“In view of the increasing use of availability of information as a concept for improving the fight against serious crime and the use of this concept on both national level and between Member States, the lack of harmonised and high level of data protection regime in the Union creates a situation in which the fundamental right of protection of personal data is not sufficiently guaranteed any more.”³

This was a serious warning from official expert watchdogs on the national level in Europe. It is important to listen to them, as these problems are very complex and it is not easy for ordinary people, or even politicians, to fully grasp the implications of the changes proposed or already decided.

Trust in privacy protection and data protection has been badly undermined during the “war on terror”, in which previously accepted safeguards have been undermined by governments themselves. In the United States, not even library records have been protected. Also, the fact that extensive telephone surveillance was approved by the President but kept secret even from Congress did not enhance confidence.

In Europe, as well, there is a need for a deeper discussion on the balance between methods of preventing terrorism and other crimes and the protection of everyone’s private life. In recent years, the human rights requirements have not been given sufficient emphasis.

2. The European Data Protection Supervisor: www.edps.europa.eu/EDPSWEB/.

3. Declaration adopted by the European Data Protection Authorities in Cyprus on 11 May 2007.

Intrusive methods have turned out to be ineffective, but thorough debate on such cases has been prevented by secrecy rules.

In some discussions data protection has even been referred to as an obstacle to effective law enforcement. This is a mistake. It has to be realised that there are risks on both sides – and both relate to human rights.

There is an imperative duty on states to protect their populations against possible terrorist acts. At the same time, governments have an obligation to protect people's privacy and to ensure that private information on them is not coming into the wrong hands or is otherwise misused.

It is urgent that the principles of the Rule of Law be re-asserted in this area. The European Convention on Human Rights, with its case law, and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and its additional Protocol specify the standards. Important guidance is also given by the Council of Europe recommendation on data protection in the police sector.⁴

The following are some of the key principles I find particularly relevant for the future discussion on privacy protection and data protection in the fight against terrorism:

- All processing of personal data for law enforcement and anti-terrorist purposes must be based on clear and specific binding and published legal rules.
- The collection of data on individuals solely on the basis of ethnic origin, religious conviction, sexual behaviour or political opinions or belonging to particular movements or organisations which are not proscribed by law should be prohibited.
- The collection of data on people not suspected of involvement in a specific crime or not posing a threat must be subject of to a particularly strict “necessity” and “proportionality” test. The concerned individual should be provided with an effective legal remedy to challenge the information, its storage and use.

4. Recommendation R (87) 15 of the Committee of Ministers regulating the use of personal data in the police sector.

- Access to police and secret service files should only be allowed on a case-by-case basis, for specified purposes and subject to judicial control.
- There must be limits to the length of time for which information collected can be retained.
- There must be strong safeguards established by law which ensure appropriate and effective supervision over the activities of the police and the secret services – also in the fight against terrorism. This supervision should be carried out by the judiciary and/or through parliamentary scrutiny.
- All personal data processing operations should be subject to close and effective supervision by independent and impartial data protection authorities.
- National authorities have an obligation to ensure that these standards are fully respected by the recipients before any personal data are shared with another country.

No one should have to be stateless
in today's Europe

9 June 2008

Everyone has the right to a nationality. Also, no one shall be arbitrarily deprived of his or her nationality or denied the right to change nationality. These rights are spelled out in the 1948 Universal Declaration of Human Rights – but still not respected in a number of countries, even in Europe. The victims are stateless.

A stateless person is an individual who is not considered as a national by any state under its domestic law. Some of them are refugees or migrants, having left their country of origin. Others live in their home country but are still not recognised as citizens.

Having a nationality means in both law and practice to possess “a right to have rights” (together with the obvious duties). Though non-citizens residing in a country also have human rights, there are certain rights which may be limited to nationals: for example the right to enter a country and stay there but also to vote and be a candidate in elections.

The fact that stateless persons are excluded from participation in the political process undermines the reciprocal relationship between duties and rights. In fact, non-citizens also tend to be marginalised in areas where formally they have rights. Many of them face gross discrimination in their daily lives. They may be denied employment, housing or access to education and health care, because they do not have valid personal identification documents.

When travelling across borders they are particularly vulnerable, if they can travel at all.

The plight of the stateless has received limited attention in recent years and seems to be little understood in wide circles. The number of stateless people worldwide is currently estimated by the Office of the UN High Commissioner for Refugees at 12 million. The number in Europe is estimated to be 640 000.



“The persistence of ‘legal ghosts’
in today’s Europe is unacceptable.”

There are, however, agreed international standards to protect the right to have a nationality and to be well treated even while one still has no citizenship. There is a UN Convention relating to the Status of Stateless Persons from 1954 and a Convention on the Reduction of Statelessness from 1961.

The provisions of the first treaty enable stateless persons to have access to fundamental human rights in host states. At the same time these states are encouraged to facilitate the integration and naturalisation of these individuals. The second treaty complements the first one and includes provisions to prevent the emergence of new cases of stateless persons. UNHCR has been charged with the task of helping to eliminate statelessness globally.

There has been a special focus on the need to ensure that children are not made victims of statelessness. Both the UN Convention on the Rights of the Child and the International Covenant of Civil and Political Rights stipulate that children shall have the right to acquire a nationality.¹ The host country has an obligation to ensure that children do have a citizenship; that the parents are stateless is no excuse.

Europe has a shameful history of producing and repressing stateless people, the memory of which contributed to the norms which were agreed through the UN treaties mentioned here. However, developments after 1989 created new problems of statelessness in Europe.

The break-up of the Soviet Union, Yugoslavia and Czechoslovakia caused enormous difficulties for people who were regarded by the new governments as belonging somewhere else – even if they had resided in their current location for many years.

For instance, large numbers of residents, including children, remain non-citizens in Latvia and Estonia. I have recommended that steps be taken to grant citizenship automatically to children and to relieve older people from the requirement to go through the tests for naturalisation.² It should be noted that the European Court of Human Rights has highlighted the obligation of states to effectively protect personal and family life in such situations.³

Several thousand people, among them many Roma, who had not sought or obtained Slovenian citizenship soon after the independence of that country, became victims of a decision in 1992 to erase non-Slovene residents from the Register of Permanent Residents. Many of them had moved to Slovenia from other parts of Yugoslavia before the dissolution of the federation.

In other states in the Balkans there are Roma who are without citizenship or even basic identity papers. Those who have moved from

1. Convention on the Rights of the Child, Article 7 and International Covenant on Civil and Political Rights, Article 24.

2. See the Commissioner for Human Rights' Memorandums to the Latvian Government CommDH(2007)9 and the Estonian Government CommDH2007(12).

3. See *Slivenko v. Latvia*, judgment of 9 October 2003, *Sisojeva v. Latvia*, judgments of 16 June 2005 and 15 January 2007.

the former Yugoslav Federation to other parts of Europe – for instance Italy – often lack personal documents and therefore live in uncertainty. They are *de facto* stateless. Their newborn children are frequently not registered and risk losing their right to apply for citizenship one day as they cannot prove legal residence in the country.

In Greece, a Nationality Code caused the denationalisation of a large number of members of the Muslim minority in Thrace, many of them of Turkish origin. This particular provision in the Code was withdrawn in 1998 but the change did not apply retroactively, which meant that Muslims who had lost their citizenship did not get it back but had to start a naturalisation process as if they were newcomers. I have suggested that the Greek authorities address this unfair situation with priority.⁴

Another case of eventual denationalisation was discussed during my visit last year to Bosnia and Herzegovina, where the authorities had prepared a review of citizenship granted to a significant number of foreign nationals since 1992. To withdraw citizenship, when already granted, must be regarded as a very serious action and should only be possible in extreme circumstances of deliberate deceit in the original application.

A case which must be brought to a positive solution is the fate of the Meskhetians, who were deported 1944 from Georgia by Stalin to other parts of the Soviet Union. Very few of those who so wished have been able to return to Georgia and many of those who now are in, for instance, Krasnodar Krai in Russia are stateless. There are hopes that the Georgian authorities will now ensure the follow-through of their decision to ensure the possible return of this minority.

The Council of Europe has adopted two highly relevant treaties to guide a rights-based approach, especially to those problems which have followed the state dissolutions and successions since 1989. One is the 1997 Convention on Nationality and the other is the 2006 Convention on the Avoidance of Statelessness in relation to State Succession.

4. See the Commissioner for Human Rights' Follow-up Report on the Hellenic Republic (2002-2005) CommDH(2006)13.

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

- the overarching principle of non-discrimination in law and practice;
- the special protection that must be provided by states to children born on their territories and who do not acquire another nationality at birth;
- restrictive conditions on which someone may lose his or her nationality *ex lege*;
- the duty of the states to reason and provide in writing their nationality-related decisions.

It is a serious concern that only 16 Council of Europe member states have, so far, ratified the 1997 Convention on Nationality. This is in spite of Recommendation R (99) 18 of the Committee of Ministers on the avoidance and reduction of statelessness, which clearly encouraged ratification. Moreover, only two states have ratified the 2006 Convention on the Avoidance of Statelessness in relation to State Succession.

The problem of statelessness in Europe should be given higher priority. The victims have in most cases little chance of being heard themselves and are in many cases silenced by their fear of further discrimination. It is most important that governments, ombudsmen, national human rights institutions and non-governmental organisations take action for the rights of stateless persons.

The persistence of “legal ghosts” in today’s Europe is unacceptable. Council of Europe member states should protect the rights of stateless persons on their own or other states’ territories and adopt a proactive policy. They should realise that measures aimed at reducing and eliminating statelessness can prevent, as well as resolve, conflicts. This is one way of promoting social cohesion and harmony in our societies.

Corruption distorts the system
of justice and damages
poor people in particular

24 June 2008

In several European countries there is a widespread belief that the judiciary is corrupt and that the courts tend to favour people with money and contacts. Though this perception may sometimes be exaggerated, it should be taken seriously. No system of justice is effective if not trusted by the population. Even worse, there are indications to show that people's suspicions are in some cases well justified.

During my visits to member states of the Council of Europe I have often heard complaints about corruption affecting key components of the justice system: the judiciary, the police and the penitentiary.

Such allegations may be part of party political propaganda and are in many cases difficult to verify. Still, it has become clear to me that corruption in the justice system is a serious problem in several European countries – not only as a perception but also as a concrete reality.

In reports from recent visits I have therefore raised this problem and recommended strong action. One of several examples is the report on Albania¹ – where the government has given priority to this problem – but I still had to conclude that “more effective and efficient measures addressing corruption in the justice system need to be taken in order to restore public confidence and enable fair trials and due process”.

The report on Azerbaijan² also recognised that a number of legal and other measures had been taken to put an end to corrupt practices.

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1. Report by the Commissioner for Human Rights on his visit to Albania, 27 October to 2 November 2007, CommDH(2008)8.
 2. Report by the Commissioner for Human Rights on his visit to Azerbaijan, 3-7 September 2007, CommDH(2008)2.



“No system of justice is effective if not trusted by the population.”

However, some aspects of the administration of justice still seem to be influenced by pecuniary interests. I concluded that problems of corruption and dependence on the executive still marred Azerbaijani justice “as in many countries in fast transition from the former Soviet system”.

Corruption in the justice system often goes hand in hand with political interference. Ministers and other leading politicians do not always respect the independence of the judiciary and instead give underhand signals to prosecutors or judges on what they are expected to deliver. The distortive effect of such practices is even worse in countries where there are close links between the political leaders and big business. This is where greed tends to trump justice.

Corruption threatens human rights and in particular the rights of the poor. Policemen are badly paid in several countries and some of them try to add to their income by asking for bribes; the result is that people without money are treated badly. I have met prisoners who have had no family visits because the relatives could not pay the unofficial fee for entry into the prison.

Sadly, there are also cases of court officials who have been influenced by money under the table or by other less obvious favours, such as career promises. This is one explanation for the excessively drawn-out trials in some cases and for the shortcut procedures in others.

Judges should be well paid in order to minimise the temptation for such corrupt practices. However, a higher salary level is only one aspect of this picture and not always effective (greed sometimes tends to grow with income).

What is needed is a comprehensive, high-priority programme to stamp out corruption at all levels and in all public institutions. There is also a need to react clearly on corrupt practices in private business, the consequences of which tend to spill over into the public sphere.

The basis has to be a concise legislation which criminalises acts of corruption. However, such laws can in themselves hardly address all concrete problems in this field. It is extremely difficult to define the criminal dimension of some of the corrupt practices, such as nepotism and political favouritism. Issues relating to “conflicts of interest” must also be assessed in their contexts. In other words, more focused standards and effective follow-up mechanisms are necessary.

Clear procedures for the recruitment, promotion and tenure of judges and prosecutors are a must and should confirm the firewall between party politics and the judiciary. As I stressed in the report on Ukraine,³ the process of appointing judges should be transparent, fair and merit-based. Requirements concerning the integrity of judges should be part of their training and defined clearly and early in the recruitment process.

3. Report by the Commissioner for Human Rights on his visit to Ukraine, 10-17 December 2006, CommDH(2007)15.

Codes of conduct could serve as useful tools to enhance the integrity and accountability of the judiciary. The standards should regulate behaviour in office but also for outside activities and their remuneration. Independent disciplinary mechanisms should be established to deal with complaints against court officials. They should be able to receive and investigate complaints, protect the complainants against retaliation and provide for effective sanctions.

The experience is that such proceedings should not be conducted in a political setting, but rather through a special and independent body within the judicial system itself – still with the requirement that no undue influence is allowed, including from colleagues. Allegations of corruption must of course be investigated through procedures which are scrupulously fair.

Relevant recommendations have been presented by the Group of States against Corruption (GRECO),⁴ a body initiated by the Council of Europe to fight bribery, abuse of public office and corrupt business practices. GRECO has also developed a system for regular review of anti-corruption measures among its participating member states; its reports have encouraged important reforms on the national level.⁵

Legally binding norms for measures against corruption are set by a couple of important international treaties which should be used as inspiration for national action. The Council of Europe has adopted the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption, which entered into force in 2002 and 2003 respectively.⁶ There is also the United Nations Convention against Corruption, which entered into force in 2005.

4. The Group of States against Corruption (GRECO): www.coe.int/t/dg1/greco.

5. In May 1998, the Committee of Ministers authorised the establishment of the “Group of States against Corruption – GRECO” in the form of an enlarged partial agreement and on 1 May 1999, GRECO was set up by 17 founding members. It now has 46 members.

6. The Additional Protocol to the Criminal Law Convention on Corruption, which entered into force in 2005, complements the Convention’s provisions aimed at protecting judicial authorities from corruption.

One aspect stressed in these treaties is the need to protect those individuals who report their suspicion in good faith internally or externally. Such whistleblowers have too often been hit by retaliation – dismissals or worse – which in turn may have silenced others who have had grounds to report. Even if such overt sanctions are prevented there remains a problem of how to hinder more subtle forms of retribution, for instance non-promotion or isolation.

Many corruption scandals have been exposed by the media and freedom of expression is indeed key in this struggle. This is one reason why it is essential to promote freedom and diversity of the media and to protect the political independence of public service media. The European Court of Human Rights has recognised that the press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the task entrusted to them.⁷

It is also important that freedom of information legislation promotes governmental transparency. The public should in principle have access to all information which is handled on their behalf by the authorities. Confidentiality is of course necessary, for instance in order to protect privacy and personal data, but should be seen as exceptional and be justified. Though progress on this is being made in Europe, transparency is far from the general rule.

Not only should governments be passively transparent, they have an obligation to ensure that the public has effective access to information. The European Court of Human Rights has emphasised that the public must have information on the functioning of the judicial system, which is an essential institution for any democratic society. "The Courts, as with all other public institutions, are not immune from criticism and scrutiny."⁸

When reporting on Ukraine I had to stress the importance of such transparency. "With the exception of the judgments of the highest courts, only a small percentage of judicial decisions are published. Accurate and reliable records are an exception."

7. *Prager and Oberschlick*, 26 April 1995, paragraph 34.

8. *Skalka v. Poland*, 27 May 2003, paragraph 34.

Parliamentarians could play a particularly important role in the fight against corrupt practices. They should certainly set a good ethical example themselves and openly declare their income and capital assets as well as all relevant side activities, connections and interests. Further, they could act as watchdogs on the risk of corruption within the government administration and ask questions which others may find difficulty in answering. They could ensure that legislation and oversight procedures are in place and functioning.

Some of the non-governmental organisations already play an important role in the struggle against corruption. On an international level the Berlin-based Transparency International (TI)⁹ has made major contributions and also managed to encourage the World Bank to take the problem more seriously. TI now has national sections in several countries and there are also other groups on a national level which expose bad practices and seek reforms against corruption.

Ombudsmen and other independent national human rights structures are in some countries actively working against undue influence and other corrupt practices. Examples are the Public Defenders in Georgia and Armenia, who have described how poor and destitute people are damaged by such tendencies.

The poor need legal aid, not pressure to pay bribes. They need proof that everyone is equal before the law. They need a system of justice that is fair and unbiased.

That is their right.

9. Transparency International, the global coalition against corruption: www.transparency.org/.

Fighting terrorism – learn the lessons from Northern Ireland

11 July 2008

In recent years, Europe has been struck by the most vicious terrorist acts. We still remember with horror the attacks in Beslan, Istanbul, London, Madrid and several other cities. It is of the utmost importance that effective measures are taken to prevent such evil crimes in future. One of the crucial lessons we have learnt is that terrorism should not be fought with methods which violate human rights. Such means undermine precisely those values which we want to defend against the enemies of democracy. And they are not effective.

Immediately after 9/11, the US administration started its “war on terror”. Seven years later it is obvious that the approach of the Bush administration has been deeply flawed. The “warfare” has not only been ineffective, there are clear indications that the methods on the whole have even been counter-productive. The so-called collateral damage has planted the seeds of further extremism.

People have been kidnapped and detained for several years without due process, and some of them were even brought to secret prisons. Torture has been approved at the highest level in the US administration and systematically practised. People have been blacklisted without the possibility of defending themselves and have had their bank accounts frozen. Bugging, phone-tapping and other techniques of surveillance have been surreptitiously introduced.

The civil rights of a high number of innocent people have been violated during this “warfare”. In particular, Muslims and people coming from Arab countries or South Asia have been targeted. “Profiling” of a racist or Islamophobic nature has been used.

The fight against terrorism

Council of Europe standards

4th edition

“Terrorism should not be fought with methods violating human rights.”

Sadly, European countries have co-operated with this policy or looked the other way when US security agents have been active on their soil. This is also what made the rendition flights possible.

It is now urgent that counter-terrorism measures in Europe be reviewed. This requires a sober approach, without scaremongering or hysteria. The time has come to resurrect the respect for the human rights principles we once agreed upon but which have been compromised in recent years.

I would recommend taking a close look at the experiences of Northern Ireland, which suffered from the terrorist threat for no less than 30 years. The Committee on the Administration of Justice (CAJ) – a cross-community human rights group based in Belfast – has published

an interesting and well-documented 120-page report titled “War on Terror: Lessons from Northern Ireland”. In this work the CAJ has co-operated with the International Commission of Jurists in Geneva and in particular with the Eminent Jurists Panel.

More than 3,600 persons were killed during the “troubles” (of a population of only 1,6 million people) and different emergency legislation and counter-terrorism measures were tried to put an end to the violence. At last, through the 1998 Good Friday Agreement, the tide was turned and peace building could start. The CAJ report defines the good and bad lessons from these experiences. Many of them are relevant for other parts of the world.

A major lesson was that *emergency* legislation could easily lead to serious abuses and therefore be counter-productive. The experience in Northern Ireland was that such laws corroded the normal criminal justice system and politicised the rule of law.

Such legislation also proved ineffective in deterring terrorism as it tended to demonise and alienate the very communities that could be of most assistance in fighting terrorism. It fuelled the violence it attempted to contain by making real or perceived grievances worse, by normalising violence and by potentially giving propaganda victories to state opponents.

When special legislation was introduced in Northern Ireland, there were also supposed human rights safeguards adopted, such as regular reviews of the emergency powers. However, these *safeguards were not enough* to keep in check a state with extraordinary powers. The review processes were mostly ineffective. One reason was that their terms of reference were too limited.

Another reason was that the reviewers themselves were unwilling to take clear positions. Not even the judges turned out to be immune to the climate of fear that was dominating at the time. References to “national security” tended to prevent an independent analysis. The government was left to interpret such requirements itself.

The counter-terrorism legislation was not balanced by stronger protection for human rights. This had an effect on *policing* which became very controversial in Northern Ireland, and there were frequent

allegations of ill-treatment, lethal force and discriminatory stop-and-search practices. An independent international commission was later set up to address these problems.

The commission proposed a series of measures to ensure that the police became more representative; that they received thorough human rights training; that effective accountability mechanisms were introduced; that a completely independent complaints system was established; and that greater community involvement with the police was actively encouraged.

Such measures could certainly have a preventive effect if taken at an early stage. The fact that the police commission was set up in Northern Ireland and came with concrete recommendations did clearly build trust. Indeed, the independent complaints system established there is now an impressive model for others.

Next lesson: it is absolutely crucial to *protect the rule of law and the principles of due process*. Public confidence in the justice system breaks down if people engaged in criminal acts are not arrested or if the wrong suspects are imprisoned.

The report listed the lessons:

- long or indeterminate pre-trial detention is unacceptable;
- ill-treatment of detainees and prisoners must be actively prevented and allegations must be immediately and independently investigated;
- false allegations of torture or ill-treatment can be avoided by ensuring independent medical examinations; immediate and confidential access to legal advice and to family; audio and video recording of interrogations; and unannounced visits to places of detention by independent observers;
- coercive interrogations should also be prevented by proper police training; detailed custody records; courts' refusal to accept confession evidence secured through unacceptable interrogation methods; and serious penalties for wrongful behaviour of interrogators;

- the principle of “innocent until proven guilty” requires that suspects be allowed to retain their right to silence and their right not to self-incriminate;
- trials should be prompt and thereby avoid “internment by remand”; bail should be available for all but the most serious of charges;
- trials should be fair and ensure equality of arms with full disclosure of evidence to defence solicitors; speedy access by the accused to independent legal advice; and an adequate legal aid system.

The experience in Northern Ireland underlines once again the importance of *addressing the underlying causes* of conflict. Effective programmes to tackle poverty, education gaps and discrimination are necessary as human rights requirements but also in order to prevent social exclusion, anger and violence.

A remaining challenge in Northern Ireland is how to deal with the *tragedies of the past*. Of course, the idea is not to provoke new tensions between the communities but to engage with the rights of the individual victims. Lasting peace and security requires that complaints of gross injustices are heard and handled by way of proper procedures in accordance with national and international human rights standards. This has to be handled with care but not ignored.

The CAJ report also explains about the impact of interventions from the Council of Europe and other international human rights bodies. The experience was largely positive and the various initiatives did contribute to the protection of human rights. “Sometimes international pressure can be much more influential than local efforts, though of course such pressure is best exerted when it is informed by local knowledge and expertise.”

Hate crimes – the ugly face of racism,
anti-Semitism, anti-Gypsyism,
Islamophobia and homophobia

21 July 2008

Hate crimes are a daily reality all over the European continent. Credible recent reports show that people suffer violence because they are black, Jewish, Roma or Muslim or because of their sexual orientation or gender identity. They give examples of how individuals have been physically attacked in the street, had their windows broken or homes set on fire. Government authorities have a responsibility to put an end to these shameful and serious crimes.

Both the OSCE's Office for Democratic Institutions and Human Rights (ODIHR)¹ and the non-governmental Human Rights First² have published surveys on violent acts motivated by intolerance and hatred. The European Commission against Racism and Intolerance (ECRI)³ presents facts and analysis about such crimes in its country reports and recommendations on how to counter them. All these documents demonstrate the danger of allowing prejudices against others to take root and spread. Unfortunately, the step from hate speech to hate crime is easily made.

One country where several incidents have been reported is Ukraine. Last year a Nigerian medical student, George Itoro Ebong, was smashed over the head with a bottle while waiting for a bus in Kiev. To the bleeding victim the three attackers shouted "Go back to Africa; you are a monkey!". This was not a unique case, there have been a number of other racist crimes in Ukraine in recent years, some of them with fatal outcomes.

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1. OSCE Office for Democratic Institutions and Human Rights: www.osce.org/odihhr.
 2. Human Rights First: www.humanrightsfirst.org.
 3. See www.coe.int/T/E/human_rights/Ecri/.



“Government authorities have a responsibility to put an end to these shameful and serious crimes.”

In my assessment report on the human rights situation in Ukraine⁴ I referred to such racist attacks and also to violence against Roma people and to a worrying trend of active anti-Semitic movements. Racist criminals were usually arrested when found but often rapidly released by the police, who were reported to have taken bribes. In other cases, the attacks were judged not to be xenophobic, but the criminal actions of hooligans, and therefore given a more lenient response.

Similar violent hate crimes can be observed in a number of other countries. In the Russian Federation, extreme right-wing groups have

4. Report by the Commissioner for Human Rights, Mr Thomas Hammarberg, on his visit to Ukraine, 10-17 December 2006.

committed a series of hate crimes, in some cases even murders, against members of ethnic, religious and national minorities. In recent years, people from the Caucasus, not least Chechens, have been targeted as well. The law is clear and sees such racist and anti-Semitic motives as an aggravating factor but this is not always borne out in the trials. Though the government has spoken out against racist and anti-Semitic violence, the problem remains.

In Italy there have been serious violent actions against Roma people during the past year, including physical attacks and arson, following prejudiced speeches by some politicians and xenophobic reporting in some media outlets. The whole Roma community has been made a scapegoat for crimes committed by only a very few, and politicians have demonstrated little moral leadership in trying to stem this wave of anti-Gypsyism.

A mixture of Islamophobia and racism is also directed against immigrant Muslims or their children. This tendency has increased considerably after 9/11 and government responses to such terrorist crimes. Muslims have been physically attacked and mosques vandalised or burnt in a number of countries. In the United Kingdom no fewer than 11 mosques were attacked after the London terrorist bombings on 7 July 2005 and in France five mosques were attacked with explosives or set alight in 2006.

Gay Pride events have been attacked in several European cities, including Bucharest, Budapest and Moscow. In Riga, extremists hurled faeces and eggs at gay activists and their supporters when they were seen were leaving a church service. Some years ago a Swedish hockey player was stabbed to death in Vasteras after he had made it known that he was homosexual. In Oporto, Portugal, a group of boys attacked and killed a homeless Brazilian transgender woman and left the body in a water-filled pit. These incidents are only the tip of the iceberg.

Some of these assaults may have been committed by individuals with distorted minds but many of them bear the imprints of neo-Nazi groups or other organised, extremist gangs who tend to be at the same time racist, anti-Semitic, anti-Roma, anti-Muslim, anti-Arab, and homophobic. They may also target foreigners and people with disabilities.

The seriousness of such crimes and the duty of governments to take action to stop them have also been underlined by the Court of Human Rights. In one judgment it underlined the importance of effective investigation in cases of racially motivated violence:

“Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment.”⁵

In the same judgment the Court also stressed the duty on governments to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.

So, what ought to be done in concrete terms to prevent and react upon cases of hate crime?

- Anti-discrimination bodies should be established with a broad mandate and the authority to address hate violence through monitoring, reporting and assistance to victims.
- Governments should establish co-operative relations with minority communities themselves and invite proposals on measures to be taken to prevent and act upon concrete hate incidents. Such measures will build confidence within the community and reassure citizens that reports of hate crimes are taken seriously.
- Steps should be taken to ensure that the bias-motivated crimes are monitored and that data is collected on them and their circumstances. Unfortunately, there is an information gap in several countries due to lack of sufficient official determination. The European Union Monitoring Centre on Racism and Xenophobia – the forerunner to the Fundamental Rights

5. The European Court of Human Rights, in its Grand Chamber judgment in the case of *Nachova and others v. Bulgaria* (6 July 2005).

Agency – reported in 2006 that among the EU countries only Finland and the United Kingdom had data collection systems on racist crime that could be considered “comprehensive”. In 2007 the European Commission Against Racism and Intolerance (ECRI) issued practical guidelines to assist member states in monitoring and effectively investigating these types of crime.⁶

- Access to complaints procedures needs to be improved for both individual victims and defence groups. Extra efforts are needed in this area as it is likely that quite a number of assaults will otherwise go unreported because of fear and reluctance among the victims themselves.
- The judicial response to hate crimes must be severe. The bias motivation is indeed seen as an aggravating factor enhancing the penalty in several countries. In some others the legal approach is to define hate crimes as distinct crimes requiring strict sentences. However, there are still member states of the Council of Europe which have no provision to enhance penalties on hate crimes. In some others the definition of the bias is limited to only some victim groups. For example, violence against people because of their sexual orientation or disability is not included in the hate crime legislation in several countries.
- Existing hate crime laws must be promptly *enforced* in order to increase their deterrent effect. The procedures should be well documented and made public.

On top of these concrete steps there is a need to invest more energy into *prevention* – to inform and educate in order to address the ignorance and fear which is often behind xenophobia and intolerance. The Strasbourg Court has also highlighted the responsibility of teachers in the promotion of a society of tolerance.

This is an area in which the Council of Europe has produced excellent teaching material, for instance in its campaigns “All Different – All Equal” and “Dosta!” (on meeting the Roma). School curricula in member

6. ECRI General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, 29 June 2007, Section III.

states should nowadays also include education about other religions and cultures with the aim of countering intolerance. The media also have a responsibility not to become a vehicle for the dissemination of hate speech and the promotion of violence.

However, some politicians undermine such efforts by using their platforms to foster and exploit prejudices, rather than to stand up for human rights and respect for those who are different. Thereby they “legitimise” intolerance which in turn may spur hate speech and hate crimes. They should be held responsible.

Refugees must be able to reunite
with their family members

4 August 2008

A restrictive refugee policy in European countries has affected the possibilities of reunifying separated families. Governments have tried to limit the arrival of close relatives to those refugees who already reside in the country. The result is unnecessary human suffering in a number of cases where family members who depend on one another have been kept apart. This policy goes against the right to family reunification as stipulated in some international standards.

The world community has agreed in a number of declarations that the family is the *fundamental group unit* in society.¹ From this follows the right to family unity which in turn places certain obligations on state authorities. For refugees this right is particularly crucial as in many cases refugees have been forced to leave family members behind when fleeing.

Prolonged separation from close family members can cause severe stress and prevent a normal life for both those who have left and those who remain at home. Indeed, many refugees and other migrants live isolated lives, cut off from social relations. As a consequence, they face even more difficulties to integrate, while those left behind

1. See Article 16 of the Universal Declaration of Human Rights, Article 8 of the European Convention on Human Rights (this right emphasises the importance of protecting the family circle, the social unit that nurtures most children to adulthood); Article 16 of the 1961 European Social Charter; Articles 17 and 23 of the International Covenant on Civil and Political Rights; Article 74 of Additional Protocol of 1977 to the Fourth Geneva Convention Relative to the Protection of Civilians in Times of War; Articles 9, 10 and 22 of the Convention on the Rights of the Child; and Article 9 of the Charter of Fundamental Rights of the European Union.



“Those who have seen the pain suffered by separated families realise what a mistake it is to deny the right to family unity.”

– often women and children – tend to be vulnerable, often stand without the protection of male family members and seldom can work towards durable solutions.

Though states retain their right to regulate and control the entry of non-nationals, there has been a progressive development in international law on the right to family reunification across borders. Nowadays, the respect of the right to family unity requires not only that states refrain from action which would split families, but also to take measures to reunite separated family members when they are unable to enjoy the right to family unity somewhere else.

This development started when the 1951 UN Convention relating to the Status of Refugees² was adopted and the diplomatic conference in a Final Act stated that the unity of the family was an “essential right” and recommended governments to take the necessary measures to *protect the refugee’s family* especially with the view to:

- ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country;
- the protection of refugees who are minors, in particular unaccompanied children and girls with special reference to guardianship and adoption.

Since then the Executive Committee of the UN High Commissioner for Refugees has adopted several authoritative statements promoting family reunification as both a human right and a humanitarian principle. It has encouraged governments to adopt legislation to implement “a right to family unity for all refugees, taking into account the human rights of the refugees and their families”³.

In the Council of Europe both the Committee of Ministers and the Parliamentary Assembly have used similar language in several recommendations and resolutions.⁴ Notions of family and family reunification also enjoy protection under the European Convention on Human Rights and the European Social Charter.

The 1989 UN Convention on the Rights of the Child⁵ stipulates that children should not be separated from their parents against their will (Article 9) and that governments should deal with cases of family reunification across borders “in a positive, humane and expeditious manner” (Article 10).

2. UN Convention relating to the Status of Refugees: www.unhchr.ch/html/menu3/b/o_c_ref.htm.

3. UNHCR Executive Committee’s Conclusions 1, 9, 24, 84, 85 and 88.

4. See Recommendation No. R (99) 23 of the Committee of Ministers on family reunion for refugees and other persons in need of international protection and Recommendation Rec(2002)4 of the Committee of Ministers to member states on the legal status of persons admitted for family reunification.

5. UN Convention on the Rights of the Child: www.unicef.org/crc/.

However, concrete policies have not always been positive, humane and expeditious – neither for children nor for adults. A number of governments have chosen to interpret their obligations narrowly, which was also reflected in the 2003 EU Council Directive on the Right to Family Reunification.⁶ Only spouses and unmarried minors were to benefit from favourable treatment while other family members would not. Only people with full refugee status would be accepted as sponsors, while those with subsidiary protection or other migrants were not.

In reality the policies have differed between European countries, but many have used a strictly limited definition of family to include only parents and their immediate children. This ignores the obvious fact that the shape of the core family differs depending on traditions and situations. In war-torn and HIV-affected areas, for instance, it is not unusual for orphaned children to be cared for by other relatives. Often grandparents, or other members of the extended family, depend on the active generation. A positive and humane policy should consider the real family pattern in each individual case.

Some governments argue that family unity could be reached in many cases if the newcomers go back to their family members in the country of origin; the implied message is that the family separation is self-inflicted. However, many just cannot go back home for the same reasons that forced them once to flee. This is the case not only for those who have been granted asylum but also for those who are seeking such status and a great number of those who have temporary or subsidiary protection. Again, a positive and humane policy would give room for considering the real situation.

Requirements of self-support are used in some cases to refuse family reunification. Bars are put on sponsorship if the sponsor is receiving social assistance. This is a policy which also ignores the reality in many cases. As family unification is a *human right*, the poverty of the resident family member is no reason to prevent the application.

6. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

Official attitudes to quests for family reunification across borders have been strikingly negative. The response has often been marked by suspicion – as if applicants try to deceive the authorities and obtain undeserved favours. There have, of course, been cases where people have given wrong information in order to get entry, but it is a great mistake to allow such cases to influence the overall policy.

Significantly, DNA testing has been introduced in several countries as a key instrument to assist government decisions in spite of the resulting time loss. The purpose is to verify whether the applicant really is the child or the parent of the residing family member. This method excludes by definition any other relations, for instance adopted children, and is not adjusted to the real family pattern in cultures from where many refugees are coming to Europe.

The UN High Commissioner has also rightly warned that DNA testing can have serious implications for the right to privacy. Though voluntary testing can be accepted in certain circumstances in order to prevent fraud, this activity should be carefully regulated and the sharing of obtained data should be bound by the principle of confidentiality. When testing is considered necessary, the costs should be borne by the requesting authorities.

Some governments adopt even more restrictive rules as a response to public perception of foreigners as a danger. Very often, these measures are discriminatory. For example, in my follow-up Memorandum to the Danish authorities,⁷ I took issue with the requirement that a person must be a citizen in the country for 28 years before obtaining the right for his or her foreign partner to get a residence permit. This clearly discriminates against those who have not lived in the country since childhood. I was also concerned that the right to family reunification of children ends when the child turns 15. The fact that this rule violates the UN Convention on the Rights of the Child has only made the government declare that exceptions could be considered.

7. Memorandum to the Danish Government – Assessment of the progress made in implementing the 2004 recommendations of the Council of Europe Commissioner for Human Rights (CommDH(2007)11).

The administrative processing of applications is far from “expeditious” in a number of countries. In fact, the tendency is that they are extremely slow and unnecessarily bureaucratic. Some countries require that applications are made at the embassies or consulates in the country of origin which is not always easy or even possible. In other cases documents and proven data are requested, which can be very difficult for applicants to obtain from the authorities in their countries of origin. Requirements to provide evidentiary proof of relationship for the purpose of family reunification have therefore to be realistic.

Those who have seen the pain suffered by separated families realise what a mistake it is to deny the right to family unity – for the refugees, for the family members left behind and for the host country. Facilitating reunification helps to ensure the physical care, protection, emotional well-being and often also the economic self-sufficiency of the refugee communities.

The shameful history of anti-Gypsyism
is forgotten – and repeated

18 August 2008

Only a few thousand Roma in Germany survived the Holocaust and the concentration camps. They faced enormous difficulties when trying to rebuild their lives, having lost so many of their family members and relatives, and having had their properties destroyed or confiscated. Many of them had their health ruined. When some of them tried to obtain compensation, their claims were rejected for years.

For these survivors no justice came with the post-Hitler era. Significantly, the mass killing of the Roma people was not an issue at the Nuremberg Trials. The genocide of the Roma – Samudaripe or Porrajmos – was hardly recognised in the public discourse.

This passive denial of the grim facts could not have been surprising to the Roma themselves, as for generations they had been treated as a people without history. The violations they had suffered were quickly forgotten, if even recognised.

Sadly, this same pattern is repeated even today.

That is why it is particularly valuable that the Council of Europe has produced a series of factsheets on Roma history.¹ These are intended for teachers, pupils, political and other decision makers and anyone else interested in knowing the facts about what these people have gone through.

1. The factsheets on Roma history are part of the Council of Europe Project "Education of Roma Children in Europe": www.coe.int/T/E/Cultural_Co-operation/education/Roma_children. Partner in the project is the University of Graz: <http://romani.uni-graz.at/romani>.



“Today’s rhetoric against the Roma is very similar to the one used by Nazis and fascists before the mass killings.”

Readers of these factsheets may learn about 500 years of shameful repression in Europe of the various Roma groups since their arrival following the long migration from India. The methods have varied between enslavement, enforced assimilation, expulsion, internment and mass killings.

The “reasons” for these policies have, however, been similar. The Roma were seen as unreliable, dangerous, criminal, and undesirable. They were the outsiders who could easily be used as scapegoats when things went wrong and the locals did not want to take responsibility.

In Wallachia and Moldavia (today’s Romania) the Roma lived in slavery and bondage for centuries up to 1855 when the last Roma slaves were finally emancipated.

In Spain more than 10 000 Roma were rounded up in a well-planned military-police action one day in 1749. The purpose, according to a leading clergyman who advised the government, was to “root out this bad race, which is hateful to God and pernicious to man”. The result was devastating to the Roma community – the deportations, detentions, forced labour and killings destroyed much of the original Roma culture.

In the Austro-Hungarian Empire during the 18th century the rulers applied a policy of enforced assimilation. Roma children were taken from their parents and instructions went out that no Roma was allowed to marry another Roma. Furthermore, the Romani language was banned. This policy was brutally enforced. For instance, the use of the “Gypsy” language was punishable by flogging.

Fascists in the 20th century also turned against the Roma. In Italy a circular went out in 1926 which ordered the expulsion of all foreign Roma in order to “cleanse the country of Gypsy caravans which needless to recall, constitute a risk to safety and public health by virtue of the characteristic Gypsy lifestyle”.

The order made clear that the aim was to “strike at the heart of the Gypsy organism”. What followed in fascist Italy for the Roma was discrimination and persecution. Many were detained in special camps; others were sent to Germany or Austria and later exterminated.

The fascist “Iron Guard” regime in Romania started deportations in 1942. Like many Jews, about 30 000 Roma were brought across the river Dniester where they suffered hunger, disease and death. Only about half of them managed to survive the two years of extreme hardship before the policy changed.

In France about 6 000 Roma were interned during the war, the majority of them in the occupied zone. Unlike other victims, the Roma were not systematically released upon the German retreat. The new French authorities saw internment as a means of forcing them to settle.

In the Baltic States a large number of the Roma inhabitants were killed by the German invasion forces and their local supporters within the police. Only 5-10% of the Roma in Estonia survived. In Latvia about half of the Roma were shot while it is estimated that the vast majority of those in Lithuania were also killed.

In fact, all countries in Europe were affected by the racist ideas of the time. In neutral Sweden the authorities had encouraged a sterilisation programme already in the 1920s which primarily targeted the Roma (and which continued up to the 1970s). Also in Norway pressure was exerted on Roma to be sterilised.

The Nazi regime defined the Roma (including the Sinti) as “racially inferior” with an “asocial behaviour” which was deemed hereditary. This, in fact, was a development of old and widespread prejudices in both Germany and Austria. The so-called Nuremberg Race Laws of 1935 deprived the Roma of their nationality and citizen’s rights. It was demanded that they should be interned into labour camps and sterilised by force.

An earlier plan of Nazi racists to keep some of the “racially pure” Roma in a sort of anthropological museum was forgotten, while some Roma, not least children, were singled out for Josef Mengele’s cruel medical experiments. A policy of forced sterilisation was implemented, often without anaesthesia.

The systematic murder of Roma started in summer 1941 when German troops attacked the Soviet Union. They were seen as spies (like many Jews) for the “Jewish Bolshevism” and were shot by the German army and the SS in mass executions. Indeed, in all areas occupied by the Nazis there were executions of Roma people.

Figures are uncertain, but it is estimated that far more than 100 000 were executed in those situations, including in the Balkans where the killings were supported by local fascists. The Ustascha militia in Croatia ran camps but also organised deportations and carried out mass executions.

In December 1942, the Nazi regime decided that all Roma in the “German Reich” should be deported to Auschwitz. There they had to wear a dark triangle and a Z was tattooed on their arm. Of all camp inmates they had the highest death rate: 19 300 lost their lives there. Of these, 5 600 were gassed and 13 700 died from hunger, disease or following medical experiments.

It is still not known how many Roma in total fell victim to Nazi persecution. Not all Roma were registered as Roma and the records are

incomplete. The fact that there were no reliable statistics about the number of Roma in these areas before the mass killings makes it even more difficult to estimate the actual number of casualties. The Council of Europe factsheets state that it is highly probable that the number was at least 250 000. Other credible studies indicate that more than 500 000 Roma lost their lives, perhaps many more.

The factsheets underline that there is a need of further research into Roma history. The Roma themselves have had little possibility of recording events and the authorities have had little interest in doing so. Still there are Roma and other scholars whose work should be encouraged (several of them have been drawn upon by the authors of the factsheets, for instance Ian Hancock and Grattan Puxon).

However, the published factsheets have already made a difference. My hope is that many people will read them and that governments in Europe will support and facilitate this through translating these texts into national languages and disseminating them to teachers, politicians and others. Roma organisations should be assisted in circulating them widely within their communities.

There are a number of conclusions that will have to be drawn by a serious reader. One is that it is not surprising that there is a lack of trust amongst many Roma towards the majority society and that some of them see the authorities as a threat. When told to register or to be fingerprinted, they fear the worst.

Indeed, there has still not been any recognition in several countries that this minority has been repressed in the past and no official apology has been given. One good example to the contrary was the decision by the government in Bucharest in 2003 to establish a commission on the Holocaust which later published an important report on the repression and killings in Romania during the fascist period.

The factsheets illustrate that the Roma have not migrated for devious reasons or because travelling is "in their blood". When it has been possible they have indeed settled but for years they have had to move between or within countries to avoid repression or simply because they were not allowed to stay. The other main reason was that the kind of employment or jobs which were open to them required them to move.

There are lessons from history on how to handle the present spread of anti-Gypsyism in some countries. The rhetoric from some politicians and xenophobic media has revived age-old stereotypes about the Roma and this in turn has “legitimised” actions, sometimes violent, against Roma individuals. Again, they are made scapegoats.

Today’s rhetoric against the Roma is very similar to the one used by Nazis and fascists before the mass killings started in the 1930s and 1940s. Once more, it is argued that the Roma are a threat to safety and public health. No distinction is made between a few criminals and the overwhelming majority of the Roma population. This is shameful and dangerous.

Roma representatives must be
welcomed into political decision-making

1 September 2008

Roma populations are grossly under-represented in local and national assemblies and government administrations all over Europe. This is a serious shortcoming in our democracies, violates the right to political participation and perpetuates a situation of exclusion and marginalisation of some 10-12 million people.

There are several explanations for the political alienation of Roma. One is the long history of discrimination and repression of this minority in Europe. Even after the genocide of Roma by the Nazis there was no genuine change of attitude among the majority population and it took years before the issue of compensation to surviving family members even came up for discussion.¹

The persecution did not end with the fall of the Hitler regime. Roma families were chased from place to place in a number of European countries many years after the Second World War – not being welcome anywhere. Afterwards, governments were slow to formulate apologies to the Roma community for these human rights violations.

It is not surprising that this history has created bitterness and a feeling of exclusion and alienation among the Roma. All efforts to encourage Roma participation in public life must recognise this basic point.

In many cases Roma communities are socially isolated and fragmented. As a result they may be less aware about political and electoral processes, and may lack vital information. They are therefore also vulnerable to electoral malpractices. Another major impediment is that

1. The term Roma/and or Travellers used in the present text refers to Roma, Sinti, Kale, Travellers, and related groups in Europe, and aims to cover the wide diversity of groups concerned, including groups which identify themselves as Gypsies.



“There is a need to develop a comprehensive approach in order to empower Roma populations.”

many of them are not included in civic and voter registers, frequently lack the necessary identity documents and are therefore not allowed to vote. Informed and conscious political participation also comes with higher levels of education. The dramatic gap which exists in this area between the majority and the Roma represents yet another obstacle to participation.

Majority mainstream political parties have a responsibility for this state of affairs. By and large, they have shown very little interest in Roma communities. Not only have Roma representatives not been invited onto their electoral lists, their views have seldom been sought.

As Roma populations generally have a low voter turnout, they have not been seen as an interesting audience in election campaigns. Political

parties are also aware that campaigning for Roma might cause harm to their own election chances. At the same time, extremist parties have targeted the Roma in xenophobic statements in order to exploit reactionary tendencies among the electorate. This is one reason why some of the poisonous cliché lies about the Roma have spread so widely.

Unfortunately, some of the established political parties have not made it clear that such anti-Gypsyism is unacceptable. I have noticed with deep disappointment that even some top-level politicians have made clearly prejudicial statements about the Roma – without making a distinction between a few misbehaving individuals and the whole ethnic community. This does not encourage the next generation of Roma to feel attracted to enter politics.

There is, of course, no simple and quick solution to these problems, which are so deeply ingrained in attitudes among both the Roma and the majority population. However, efforts in several countries could be analysed and conclusions drawn. A good model is set by the two Hungarian Roma members of the European Parliament. The inclusion of Roma candidates in electoral lists for the upcoming European parliamentary elections should be encouraged.

Lessons and inspiration can also be drawn from the efforts of the Organization for Security and Co-operation in Europe (OSCE), which has tried for several years to contribute to solutions in this area. It has run campaigns like “Roma, Use Your Ballot Wisely!” and convened meetings which have drafted standards such as the Lund recommendations in 1999 and the Guidelines to Assist National Minority Participation in the Electoral Process in 2001.² In February 2008 the Council of Europe’s Advisory Committee on the Framework Convention for the Protection of National Minorities adopted a Commentary on the effective participation of people belonging to national minorities in cultural, social and economic life and in public affairs.

2. Within the OSCE both the Office for Democratic Institutions and Human Rights (ODIHR) and the High Commissioner for National Minorities (HCNM) are active for the rights of Roma people. The “Lund recommendations” can be found at www.osce.org/documents/hcnm/1999/09/2698_en.pdf and the Guidelines to Assist National Minority Participation in the Electoral Process at www.osce.org/publications/odihhr/2001/01/12347_129_en.pdf.

One lesson is that *proactive measures* are absolutely necessary. It is not sufficient to unblock some hindrances – there is a need to compensate for the long history of exclusion and marginalisation through positive action.

By way of example, reserved seats for Roma representatives in national or local assemblies have been tried in Bosnia and Herzegovina, Croatia, Romania and Slovenia with largely positive results. When in Slovenia I found that the practice of reserving one seat in local assemblies had created a channel in some municipalities between the Roma communities and the authorities. Another example of good practice is to have various consultative bodies for Roma affairs or for general minority issues with Roma inclusion at the government or Ministry level. This type of solution is especially important in countries with dispersed and numerically small Romani populations like Finland or Poland.

Another lesson learnt is to focus on the *local level*. Roma participation will not be successful at the national level unless it is also encouraged in the municipalities. Efforts to encourage participation must of course be undertaken with *Roma participation*. The Roma themselves should represent their community's interests and voice their concerns.

On the basis of these principles there is a need to develop a comprehensive approach in order to empower Roma populations. Action should include the following:

- Governments should repeal any laws and regulations which discriminate against minorities, including the Roma and non-settled communities, in terms of political representation.
- Non-governmental organisations should be encouraged to support programmes in civic education for Roma communities. Such programmes should include human rights components and practical information about the electoral system. It is important that such support programmes reach women and young Roma. Written information should be available in the Romani language.

- More outreach efforts are needed to *ensure voter registration*. Again, it is also important to reach women. The widespread problem of lack of personal identification documents must be resolved with high priority. This must include effective measures to ensure the rights of those who are stateless.
- Public life is not only about elections. Participation in public life also includes the possibility to influence authorities on a daily basis. More *organised consultation* is needed, for instance, in the municipalities, between the local authorities and the Roma population on housing and other concrete problems. Such consultation must be genuine and meaningful; any tendency of tokenism will backfire.
- Mechanisms for equal, direct and open communication are needed. Advisory bodies could be set up to give such consultations more continuity and promote the legitimacy of the Roma representatives. Authorities should support *Roma cultural centres*. Where such centres have been tried in the past, they have also had a positive effect on inter-Roma communications.
- More needs to be done to recruit Roma into civil service on both local and national levels. Again, a proactive policy is justified. It is particularly important that Roma are invited into the police profession and as staff in schools.
- The impact of all this will depend on progress in the efforts to *put an end to anti-Gypsyism*. Comprehensive anti-discrimination legislation must be adopted and enforced and the various Roma communities recognised as national minorities.
- Further efforts to raise *awareness* among officials and the general public are necessary. Clear reactions must be made against any xenophobic discourse and jargon. In this our elected politicians carry a great responsibility.

Persons displaced during conflicts
have the right to return

15 September 2008

Armed conflict and inter-ethnic violence still force people to flee their homes and seek refuge in safer places. The outbreak of the war in South Ossetia in August 2008 has created a new wave of displaced persons, some of whom may have to wait a long time before being able to return home. In Georgia, as in other parts of the Caucasus and in former Yugoslavia, there are still many who have had to wait for more than a decade following earlier conflicts and therefore have been doubly victimised.

Having just returned from Russia and Georgia, I have seen once again the huge humanitarian challenge caused by such forced displacement, compounded by a polarised political environment. A large number of the victims with whom I met were deeply traumatised and some of those in Georgia lacked the very basics, such as beds, mattresses, blankets, adequate nutrition and medical assistance. Parents were worried about their children missing school.

It was also very sad to see that their experiences have given rise to strong feelings against their neighbour community; Ossetians towards Georgians and vice versa. An unfortunate mix of fear and hatred has taken root which may in future make it more difficult for those in the minority position to return.

The principle of the right to return must be defended even in such situations and this right must be ensured by the responsible authorities. This requires that potential returnees are guaranteed security which in turn underlines the importance of bringing those who caused the displacement to justice. It is also essential that other living conditions are adequate, for instance, that damaged houses are repaired or rebuilt and occupied property is returned to lawful owners.



“Member states should adopt a genuinely proactive stance.”

In reality, such return may be very complicated even when political and material obstacles are removed. A hostile atmosphere is not easily talked or bought away – as seen in Bosnia and Herzegovina, where displaced people have sold their houses rather than move back. Though this tendency may indicate failure, it is important to stress that return must always be *voluntary*; it is not an *obligation*.

It is estimated that there are about 2.5 million internally displaced persons (IDPs) in Europe today. The majority of them fled or were chased away in situations of inter-community confrontation; their safety was in danger. Those who have crossed international borders for similar reasons and have no protection are seen as refugees and have a different legal status.

Unlike refugees whose protection by host states is clearly provided for by the 1951 Convention relating to the Status of Refugees, IDPs have not been the subject of a special international treaty. This does not mean that they are in a legal vacuum. The European Convention on Human Rights, for example, is applicable to them if they are in a contracting state's territory. Indeed, the European Court of Human Rights has on many occasions been seized with applications and provided relief to IDP applicants.¹

The Representative of the UN Secretary-General on the Human Rights of IDPs has promoted three durable solutions which as a matter of principle should be sought by the competent authorities. He has made clear that states have the duty to establish conditions and provide the means which would allow the displaced persons to enjoy one of the following options:

- voluntary return: that the IDPs return to their homes or places of habitual residence in safety and with dignity;
- voluntary resettlement: that they resettle in another part of the country; and
- integration locally: that they get support for their choice to stay in the community where they are and integrate there.

In the course of any of these three possible processes, all of which necessitate strenuous efforts and determination on the part of the state, the competent authorities should not forget to ensure the full participation of the displaced persons themselves in the planning and management of the required measures.

These state obligations are part of the United Nations Guiding Principles on Internal Displacement which restate the relevant international

1. See, for example, *Loizidou v Turkey*, judgment of 18 December 1996, concerning the applicant's lack of access to her property and loss of control thereof after she became an IDP in Cyprus, and *Khamidov v. Russia*, judgment of 15 November 2007, concerning, *inter alia*, the violation of the displaced applicant's right to respect for his home and his right to peaceful enjoyment of his possessions in Chechnya.

human rights and humanitarian law standards.² The Council of Europe's Committee of Ministers has recognised the importance of these principles in its Recommendation on internally displaced persons,³ which develops some of the principles further on the basis of the existing Council of Europe standards.

A systematic review of national legislation and practice in order to bring such practice in line with the UN Guiding Principles and other relevant international instruments of human rights or humanitarian law is highly recommended. These Principles are now particularly relevant to member states which are directly or indirectly involved in the current South Ossetian crisis.

There are examples from recent history where large groups of displaced persons have been kept in unacceptable conditions and even in tent camps. Their suffering has been used as a propaganda tool in order to illustrate that the political problem left behind stays unresolved. Such a policy is not acceptable; it amounts to keeping already victimised people as hostages for political purposes. As the Committee of Ministers' Recommendation 2006(6) underlines, "member states affected by internal displacement should refrain from instrumental use of displaced persons for political aims". IDPs have the right to adequate living conditions while waiting for their return or another long-term solution.

For obvious reasons, displaced persons tend to flee to areas where they would not be in a minority position, where people from the same ethnic, religious or national community live. However, there are IDPs who either choose not to do this or for whom this is not an option: the Roma for example. Action plans on IDPs therefore need to give particular attention to minority groups in order to avoid a further cycle of violations. Many people from minority groups may need special protective measures given that they may lack proof of identity or residence before their displacement.

2. Representative of the Secretary-General on the human rights of internally displaced persons – International Standards: www2.ohchr.org/english/issues/idp/standards.htm.

3. See the Committee of Ministers Recommendation Rec(2006)6 on internally displaced persons and also Council of Europe's Parliamentary Assembly Recommendation 1631 (2003).

Children are particularly at risk in these crisis situations. Their rights must be protected and it should be recalled that the UN Convention on the Rights of the Child continues to apply even in the abnormal situation of forced internal or external displacement. Children, especially those who become unaccompanied during armed conflicts, should be the subject of particular attention and assistance by competent authorities in order to guarantee their basic needs and rights, including housing and access to education. Women and girls are also at a heightened risk of abuse and gender-based violence. Survivors of violence and torture require specific support.

We also must not forget that states have a duty to prevent displacement disasters from happening in the first place. The UN Guiding Principles state that “all authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons” (Principle 5).

In modern Europe, the root causes of forced displacement are found primarily in the more or less violent emergence of nation states and in the lack of broadminded and tolerant policies towards national minorities, as required by European democratic values.

European history continues to teach us, bitterly but clearly, that effective protection and promotion of the rights of national minorities are essential for stability, democratic security and peace on our continent. Governments have still to realise that the creation of a climate of tolerance and dialogue is necessary to enable ethnic and cultural diversity as a factor, not of division, but of enrichment and cohesion for European societies.

The Council of Europe provides a wealth of standards for the protection of IDPs and, above all, the prevention of their forced displacement. Member states should reflect more profoundly on them and adopt a genuinely proactive stance in order to ensure the effective respect and implementation of these principles by which they are bound.

It is wrong to criminalise migration

29 September 2008

have observed with increasing concern a trend to criminalise the irregular entry and presence of migrants as part of a policy of “migration management”. Such a method of controlling international movement corrodes established international law principles. It also causes many human tragedies without achieving its purpose of genuine control.

States do have a legitimate interest to control their borders and can refuse the entry and stay of people coming from the “outside”. However, there are binding international agreements about the right of individuals to seek asylum through fair, rights-based procedures. The principle of *non-refoulement* has been established in order to protect individuals from being sent back to situations which would threaten their lives or personal safety.

However, many migrants cannot claim refugee status, even if their enforced return would amount to personal tragedy and/or economic disaster. Many have not managed to regularise their presence in their new country and live underground, constantly in fear of being caught by the police and sent away. A number have lived in the host country for long periods and may have children at school.

Migrants are finding themselves increasingly targeted and some governments have even set quotas on how many should be found and deported through fast-track procedures. It has been necessary – and important – to make clear that irregular migrants have human rights.

I am now aware of proposals to *criminalise* attempts to enter a country or to stay there without a permit. This may be popular among xenophobes but would be a retrogressive step.



“Criminalisation is a disproportionate measure which exceeds a state’s legitimate interest in controlling its borders.”

For one thing, to put a criminal stamp on attempts to enter a country would undermine the right to seek asylum and affect refugees. In addition, persons who have been smuggled into a country should not be seen as having committed a crime.¹ There are agreed international standards to protect persons who have been victims of human trafficking from any criminal liability.

The 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families expressly holds

1. Article 5, the 2000 Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention Against Transnational Organized Crime.

that if migrants are detained for violating provisions relating to migration, they should be held separately from convicted persons or persons detained pending trial. They should not be seen as criminals.²

Criminalisation is a disproportionate measure which exceeds a state's legitimate interest in controlling its borders. To criminalise irregular migrants would, in effect, equate them with the smugglers or employers who, in many cases, have exploited them. Such a policy would cause further stigmatisation and marginalisation, even though the majority of migrants contribute to the development of European states and their societies. Immigration offences should remain *administrative* in nature.

There are two particular side effects which states should also bear in mind when they think about resorting to criminal law in order to control irregular immigration.

First, the issue of over-burdening the court system. When in Italy recently, I learned that national judges were worried about the introduction of new criminal offences into domestic legislation which would target migrants. Courts in several European countries face problems of excessive length of proceedings, in violation of Article 6 of the European Convention on Human Rights. Indeed, this in turn encourages a large number of applications before the European Court of Human Rights.

Second, the issue of overcrowding in prisons and detention centres. Categorising irregular migrants as "criminals" under national law would entail their pre-trial and post-conviction detention. It is well known, and I have personally witnessed this in several countries, that a number of Council of Europe member states are faced with a serious problem of overcrowding and of inhumane and degrading conditions in detention centres and prisons. Aliens in administrative detention are particularly vulnerable to such abusive treatment.

In this context, I should like to reiterate my grave concern about the possibility of detaining irregular migrants in EU member states for a maximum period of 18 months. This possibility is provided for by the

2. Article 17, paragraph 3 of the Convention.

legislative resolution in the “Returns Directive” which was adopted by the European Parliament in June 2007. This was a mistake and an unfortunate response to the urgent need to harmonise European policies in this area.

Political decision makers should not lose the human rights perspective in this discussion and should try to formulate a rational long-term strategy. Such an approach has to include the need for migrant labour to perform the jobs which nationals very often refuse to take. In other words, European states should face up to the reality that irregular migrants are working because migrant labour is in demand.

By way of example, the agricultural sector in southern European countries is one where irregular migrant workers have been extensively employed. Sadly, migrants in this field often fall prey to sub-standard working and living conditions.³

Migration is a social phenomenon which requires multilateral and intelligent action by states. Irregular migration has increased and thrived not only because of underdevelopment in migrants’ countries of origin. Another root cause is the lack of clear immigration mechanisms and procedures which can respond to labour demands through regular migration channels.

It is characteristic that immigration in most European states remains one of the most complex areas of law. Efforts to simplify immigration law, such as those under way in the UK, should be further promoted. In this regard, I draw attention to the important guidelines contained in the Parliamentary Assembly’s Recommendation 1618 (2003) and Resolution 1509 (2006) regarding irregular migrants. Member states should endeavour to establish transparent and efficient legal immigration avenues as a way out of irregular migration routes.

Such efforts may well benefit from member states’ accession to the 1977 European Convention on the Legal Status of Migrant Workers: an important treaty concerning regular migrant workers from Council of Europe member states. It covers the principal aspects of regular migration, such as migrant labour recruitment, working and living

3. See, *inter alia*, Parliamentary Assembly Recommendation 1618 (2003).

conditions, social and medical assistance. Regrettably, after thirty-one years, this treaty has still only been ratified by 11 member states.

I recommend that member states accede to the 1990 International Convention on Migrant Workers, the most comprehensive international treaty on migrant workers reaffirming and establishing basic human rights norms for regular and irregular migrants. To date it has been ratified by four and signed by two Council of Europe member states, even though many European countries actively participated in its drafting. Ratification and implementation of this treaty will enhance the effective protection of all migrant workers' fundamental rights, which should be an absolute priority for every state's immigration policy and practice.

Human rights education is a priority –
more concrete action is needed

6 October 2008

Human rights can only be realised if people are informed about their rights and know how to use them. Education about human rights is therefore central to the effective implementation of the agreed standards. While this was emphasised 60 years ago when the Universal Declaration of Human Rights was adopted, we are still far from ensuring that people know their rights and understand how to claim them.

The good news is that human rights education is receiving much-needed attention at the European or international level. Resolutions have been adopted, conferences held and action plans issued by the United Nations agencies, not least UNESCO. The Council of Europe is particularly active in this field. Non-governmental organisations have also initiated valuable programmes.

The current challenge remains one of translating these recommendations into concrete action at the *national* level. Human rights education needs to be more than a simple repetition of the various legal conventions with little explanation as to their relevance to ordinary people in their daily lives.

My experience is that a number of governments have not given sufficient priority to human rights education in schools. The allocated time is limited and the pedagogic methods unsuitable. The emphasis has been on preparing the pupils for the labour market rather than developing life skills which would incorporate human rights values.

More worryingly, it seems that some governments fear that a human rights approach in the schools could breed unwanted criticism and even undermine government policies. This is an undemocratic and short-sighted attitude. Educating citizens in their human rights creates



“We are still far from ensuring that people know their rights and understand how to claim them.”

an informed society which in turn strengthens democracy. For the Council of Europe, therefore, human rights education is crucially important.

International actors should focus efforts on assisting countries to develop their own programmes, with education materials tailored to the particular needs of individual countries. The UN World Programme for Human Rights Education, which started in 2005, aims to give guidance on how such national efforts can be planned and enforced. “Education for Democratic Citizenship and Human Rights”, one of the projects currently being run by the Council of Europe, builds on the experience of a network of national co-ordinators.

A European resource centre on education for intercultural understanding, human rights and democratic citizenship (the European

Wergeland Centre) will open in the autumn in Oslo. The centre will carry out and support research, provide in-service training for teachers and disseminate information and serve as a platform and meeting place for relevant actors. Countries can indeed learn from one another.

The school system will certainly remain at the root of making young generations aware of their rights and how to use them. Not only should the school provide the key facts about human rights norms and the mechanisms for their protection, it also has a vital role to play in fostering values such as respect for others, non-discrimination, gender equality and democratic participation.

Intercultural understanding and respect have to be stressed in such learning. When the Convention on the Rights of the Child lists values to be promoted, it makes special mention of respect for “the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own”. Human rights education should therefore be committed to an inclusive approach to societal diversity.¹

School curricula, education materials, pedagogic methods and the training of teachers have to be in conformity with such ambitions. At the same time, it is crucial that life in schools benefits from a human rights atmosphere. There should be both “human rights *through* education” and “human rights *in* education”.

The school itself must demonstrate that it takes human rights seriously. Pupils should be welcome to express their views and to participate in the running of the school as much as possible. The atmosphere in school should be characterised by mutual understanding, respect and responsibility between all actors. I have seen such schools and noticed that they tend to function much better than those run on an authoritarian model. Pupils learn social and other life skills, not only facts.

1. See the recent study on human rights education in Europe by Claudia Mahler, Anja Mihr and Reetta Toivanen (eds), *The United Nations Decade for Human Rights Education and the Inclusion of National Minorities*, Peter Lang Verlag, Frankfurt am Main, 2008.

Teachers and principals have a key role for developing such schools. In addition, they need the support of local and central authorities and not least the Ministry of Education. Educational policies should promote a rights-based approach. Teacher training for all teachers, regardless of their specialisation, should be conceived along this model. Pedagogic methods should be promoted which are democratic and participatory and the textbooks and other education material should be consistent with human rights values.

The fact that many children now spend more time with screens than with teachers (or with their parents) also affects human rights learning. While the technology is value-neutral, the messages picked up or sent may not be. Efforts by the school in the field of human rights may be undermined by impressions on the screen, often dictated by purely commercial interests.

The school has to relate to the supply on the Internet and be prepared to take the necessary discussions. However, as important is that human rights thinking and discussion is provided *through* the new media – which certainly is a major challenge in the light of the commercial and private nature of the media landscape.

Extra efforts are also required in order to ensure that minorities and disadvantaged groups are reached in human rights education programmes. This requires that basic materials are produced in relevant languages, teachers are recruited from within these communities and that the pedagogic methods are culturally adapted.

Respecting human rights, disseminating information on the existing standards and making people aware about their rights are commitments which states have willingly entered into. These words should be put into deeds.

Respect and rights-based
action instead of charity for people
with disabilities

20 October 2008

There are more than 80 million persons with disabilities in Europe. Their rights are recognised in international human rights treaties, including the recent UN Convention on the Rights of Persons with Disabilities. However, these rights are still far from realised. Moving from rhetoric to concrete implementation has been slow. Such steps also require a change of attitude – from a charity approach to rights-based action.

For far too long policies concerning persons with disabilities have focused exclusively on institutional care, medical rehabilitation and welfare benefits. Such policies build on the premise that persons with disabilities are victims, rather than subjects able and entitled to be active citizens. The result has been that men, women and children with disabilities have had their civil, cultural, economic, political and social rights violated.

However, a gradual shift in thinking has started as a result of pressure from the disability movements and other civil society groups. They have played an important and active role in the development of the new UN Convention and the Council of Europe Disability Action Plan 2006-2015.

These two instruments confirm clearly that the rights of persons with disabilities are *human rights*. States have an obligation to respect, ensure and fulfil these rights. Participation of persons with disabilities in all decisions affecting their lives, both at the individual level and through their organisations, is recognised as a fundamental principle in both. Words like “inclusion” and “empowerment” are used in this context.

However, in real life persons with disabilities still face a number of barriers when seeking to participate in society. Children with physical



“Moving from rhetoric to concrete implementation has been slow.”

disabilities cannot play with other children in public playgrounds because of their inaccessible design. TV programmes without subtitles exclude persons with hearing impairments..

Persons put under plenary guardianship are prevented from acting in almost all areas of life. They cannot, for example, vote, buy or sell things, or decide where to live, work, travel or marry.

Making societies inclusive requires planning and systematic work. It is therefore encouraging that several European states have now adopted disability plans and strategies. Every country will need to develop such plans tailored to its own circumstances. Those who have tried to set priorities, define time limits and allocate budget resources and responsibility for implementation have generally been rewarded with positive results.

Such plans must address the situation of *children with disabilities*. Many of these children are still not accepted in ordinary schools because the schools are not equipped to meet their needs. The same thing happens at day-care centres, sometimes forcing parents to choose between leaving their children in institutional care or giving up their job in order to care for their child.

The situation of children without parental care is particularly serious. Life in an institution, separating children from their family and their social context, almost inevitably leads to exclusion. More resources are needed for supporting families, especially families living in poverty and single-parent households, to enable children to grow up in their family environment.

Childcare centres and schools should be open to all children and equipped to meet different needs. Social services and health care providers in the community must be accessible and competent to care for persons with different disabilities. Such reforms are challenging and require commitment and re-allocation of resources.

The right to education is equally important to all children. Even though every child's ability to learn is undisputed, there are still children in Europe of school age who are considered to be "ineducable" and denied any form of education.

Such practices not only limit the child's options to support him or herself later as an adult, but also their possibility to become independent and participate in society. The obvious principle is that persons with disabilities have the right to receive quality education and no one should be excluded from ordinary schools because of their disability.

Another group not to be forgotten in such action plans is *aged people with disabilities*. As a consequence of getting older many of us will develop, for instance, reduced vision, reduced hearing or reduced mobility.

Innovative approaches are required to meet these challenges across a wide range of service areas. Co-ordinated action with the aim of enabling ageing people with disabilities to remain in their community to the greatest extent possible is essential. This requires an assessment of individual needs and forward planning as well as ensuring that the required services are indeed available.

Another aspect which must be taken up in the action plans is the situation of *persons with mental disabilities*. The situation in psychiatric institutions in several European countries is shockingly bad. I have seen institutions whose conditions are so inhuman and degrading that they should be closed down.

Unfortunately, medication is too often used as the only form of treatment. There is an urgent need to apply alternatives, such as different forms of therapy, rehabilitation and other activities. Unclear admission and discharge procedures constitute another problem resulting in what in reality is arbitrary detention.

There are, however, also positive examples and trends to empower patients with mental disabilities by facilitating their active involvement in treatment plans and providing complaints procedures for those who feel that their rights have been violated.

As with all closed settings where the liberty of person(s) is restricted, effective complaints procedures as well as independent monitoring visits are of crucial importance. The Optional Protocol to the UN Convention against Torture requires states to establish national inspection systems to monitor all places of detention, including mental health and social care institutions.

Finally, persons with disabilities can also be victims of hate crimes and hate-motivated incidents. Violence, harassment and negative stereotyping have a significant negative impact on disabled people's sense of security and well-being and their ability to participate socially and economically in their communities. Research conducted by Mencap in the United Kingdom demonstrated that 90% of people with a learning disability had experienced bullying and harassment. In addition to general awareness-raising measures, proactive policing and prompt prosecutions are needed to tackle hate crime against persons with disabilities.

Full removal of social, legal and physical barriers to the inclusion of persons with disabilities will take time and require resources. But it has to be done. We cannot afford to keep barriers that prevent 80 million people from fully participating in and contributing to our societies as voters, politicians, employees, consumers, parents and taxpayers like everybody else.

Governments should now take action in order to realise fully the human rights of persons with disabilities:

- Ratify the UN Convention on the Rights of Persons with Disabilities and the Optional Protocol and start implementing it. Use the European Action Plan as a tool to make the standards a reality.
- Develop action plans to remove physical, legal, social and other barriers that prevent persons with disabilities from participating in society. Consult with and include persons with disabilities and their organisations in the planning and monitoring of laws and policies which affect them.
- Adopt non-discrimination legislation covering all relevant areas of society.
- Set up independent ombudsmen or other equality bodies to check that persons with disabilities can fully exercise their rights.
- Develop programmes to enable persons with disabilities to live in the community. Cease new admissions to social care institutions and allocate sufficient resources to provide adequate health care, rehabilitation and social services in the community instead.
- Review the laws and procedures for involuntary hospitalisation to secure that both law and practice comply with international human rights standards.
- Set up independent mechanisms equipped to make regular, unannounced and effective visits to social care homes and psychiatric hospitals in accordance with the Optional Protocol to the UN Convention against Torture.
- Tackle hate crime against persons with disabilities through proactive policing and prompt prosecutions.

Concrete and comprehensive
action plans are needed to ensure
implementation of human rights

3 November 2008

The 1993 World Conference on Human Rights expressed concern about the gap between the agreed norms and the reality in a number of countries. It recommended that all governments should produce a national plan for the implementation of their human rights obligations.

Fifteen years have passed since that conference in Vienna but only a few countries have produced national plans, among them Azerbaijan, Lithuania, Norway, Moldova and Sweden. Several other countries, however, are now in the process of developing theirs.

The idea is to be systematic about implementation and the first step is to *identify the existing problems* in the form of a baseline study. Normally, there is no lack of information about human rights shortcomings. Local non-governmental groups, ombudsmen, and international bodies usually provide such information as well as the media and relevant authorities. Such data must be collated and analysed in a structured manner for the purposes of planning.

It may also be advisable to undertake in-depth studies into some areas of particular interest. Views from minorities or marginalised groups should also be obtained.

Problems which tend to come up in serious baseline studies include an assessment of the record on ratification of international human rights treaties, gaps in legislation and shortcomings in the judicial proceedings. An obvious area for analysis is the functioning of existing monitoring systems, such as ombudsmen or national human rights institutions.

Human rights education is a strategic area which also deserves special attention, both the situation in schools and universities as well



“Governments should produce a national plan for the implementation of their human rights obligations.”

as specialist training for professionals. Awareness among the population about human rights is certainly an important aspect to consider in this process.

The relationship between the authorities and civil society should be looked at critically. A media policy which respects freedom of expression and encourages many voices to be heard is clearly an issue for examination in a number of countries.

A thorough baseline study should lay the ground for discussion about priorities and what action ought to be taken. A comprehensive human rights *action plan* or a series of more specific action plans can be drawn up. Observations and recommendations from international human rights bodies – including those from the Council of Europe – should be of substantial help at this stage.

As financial constraints and lack of human resources make it difficult to address all problems at once, there is a need to discuss priorities thoroughly and to plan for the medium and long term. All interested parties should be involved in this discussion, including politicians, representatives of the governmental authorities at different levels and non-governmental groups. This would create a sense of shared ownership.

To encourage authorities on board, it is necessary that they perceive this process as relevant for their own work. In the long term, a human rights perspective should be mainstreamed in the day-to-day activities of different authorities including in the budgetary decisions. Active participation by representatives from the political opposition during the drafting process can contribute to the continuity of the work.

Human rights work involves many, if not all, authorities. Co-ordination and co-operation within the government and among different authorities at national, regional and local levels is thus essential. One tested method is to establish a *co-ordinating body* consisting of representatives from all the relevant ministries and agencies.

Such a mechanism provides a forum for the exchange of experiences and information, discussion and co-operation. It is also useful for reporting to international human rights monitoring mechanisms and may in fact save resources, minimising overlap in reporting obligations.

Actors other than the authorities should also be involved in the continuous work for human rights. Focus groups representing civil society, indigenous and national minorities, national human rights structures and enterprises can be established for this purpose.

It takes time to build effective mechanisms to protect human rights, especially when laws need to be changed and institutions reformed. At the same time, the plan should not project too far into the future, otherwise it risks being too vague. Experience so far indicates that the time-frame for such national plans should be between four and five years.

Action plans should be evaluated when the time is up. It is equally important to assess the process, in terms of participation, inclusiveness

and transparency, as it is to evaluate the end result. The conclusions of this review should be openly presented and a debate about the effectiveness of the process encouraged. All those who participated in the planning process should be able to contribute to the evaluation.

The evaluation will provide the foundation for a new cycle of the process. A new baseline study should be developed with an equally inclusive, transparent and participatory approach. If well designed, benchmarks and human rights indicators can be valuable tools for follow-up and evaluation, taking both quantitative and qualitative aspects into consideration.

Systematic work for human rights is a *continuous process*. Baseline studies, action plans and evaluation exercises are tools for clarifying and assessing the steps to be taken to reach our objectives. They inform us what has worked and what has not.

In times of economic crisis
it is particularly essential to ensure
the protection of social rights

17 November 2008

Enormous sums of taxpayers' money have been poured into the banking system in order to prevent global financial meltdown. Ordinary people have been forced to pay for the reckless practices of a few. On top of this, there are already signs that it is the less wealthy who will suffer most from the recession the world is now facing.

Increased unemployment will place a further burden on state budgets and there will be less space for social assistance at a time when needs will inevitably grow. This is likely to cause tensions and perhaps even social unrest. There is a risk that xenophobia and other intolerance will spread further and that minorities and migrants may become targets. Extremists might seek to exploit and provoke such tendencies.

This is an extraordinary challenge for governments today, requiring wise leadership. It is also obvious that no country can resolve these major problems alone. Multilateral co-operation is a must and inter-state institutions should demonstrate political determination and solidarity beyond narrow national interests. Rules to regulate the financial markets are a necessary first step, but not sufficient alone. It is also necessary to develop concrete programmes which promote social cohesion and prevent any watering down of the already agreed human rights standards.

These standards include economic and social rights, several of which are listed in the 1948 Universal Declaration of Human Rights. One source of inspiration is the former US President Franklin D. Roosevelt, who had to deal with the aftermath of the financial crises at the end of the 1920s. One of the four freedoms he defined in his State of the Union speech in January 1941 was "Freedom from Want". Not only



“If we do not implement economic and social rights, large numbers of the poor will remain marginalised.”

should human beings be able to express their opinions and to practise a religion freely, they should also be protected against repression and social misery.

The Universal Declaration of Human Rights establishes that human rights include the right to social security, the right to an adequate standard of living, the right to food, the right to education, the right to housing, the right to health, the right to work and the right to rest and leisure.

Such rights have since been legally recognised in United Nations and Council of Europe treaties – the latter through the European Social Charter of 1961, revised in 1996. These rights are furthermore covered

through International Labour Organization (ILO) core conventions. They cover, for example, trade union rights, protection against forced labour and rules against the exploitation of child labour.

While economic and social rights must be regarded as an integral part of international human rights law, they have still not been fully recognised as justiciable rights in some European countries. This was obviously one reason why these rights were not incorporated into the 1950 European Convention on Human Rights but only later codified in the separate Social Charter. Some countries have been slow in ratifying the Revised Social Charter.¹

There may well be an ideological background to this hesitation. Some believe that government administration should not take full responsibility for providing possibilities for education, healthcare and a decent standard of living for all citizens. Some regard these rights as mere political aspirations.

However, the fact that the implementation of economic and social rights could be controversial is no rational basis for treating these rights as less important or as radically different from others.

They deal with some of the most crucial issues on today's political agenda: the right to a job and acceptable working conditions, the right to go to school and have a meaningful education, the right to protection and care in situations of crisis.

They are agreed in international treaties and must not be seen as the "poor cousins" of civil and political rights. All human rights are inter-related, interdependent and indivisible and therefore should not be ranked in any hierarchy.

There are governments that accept this approach in principle but state that they just do not have the resources to meet these obligations. What is the answer to them?

1. As of 11 November 2008, Croatia, Liechtenstein, Switzerland and "the former Yugoslav Republic of Macedonia" have not signed the Revised Social Charter. Austria, the Czech Republic, Denmark, Germany, Greece, Hungary, Iceland, Latvia, Luxembourg, Monaco, Montenegro, Poland, the Russian Federation, San Marino, Serbia, the Slovak Republic, Spain and the United Kingdom have signed but not ratified the Revised Charter.

Implementation of most human rights has a cost. It is true that some economic and social rights tend to be particularly expensive – for instance, the right for everyone to education or to health care. For this very reason, the agreed standards allow for a *gradual* implementation of rights – anything else would be unrealistic. Governments should establish minimum acceptable standards or core entitlements and at the same time strive to attain full implementation as soon as possible. They cannot postpone the realisation of these norms indefinitely.

To help achieve this goal, the definition of *socio-economic indicators* is particularly important. Such benchmarks have been developed in certain areas – for instance, by UNICEF in the field of children’s rights and the WHO in the field of healthcare – and could be defined in other areas as well.

If we do not implement economic and social rights, large numbers of the poor will remain marginalised on the edges of our society, and ultimately political and civil rights become devoid of all meaning. The notion of human dignity is key here and builds the bridge between civil and political rights on the one hand and social and economic rights on the other. By way of example, the European Court of Human Rights has commented that a wholly insufficient amount of social benefit or pension may, in principle, raise an issue under Article 3 of the European Convention on Human Rights, which prohibits inhuman or degrading treatment.²

Economic and social rights have not been defined in a vacuum; they are based on the experience of past crises and on the knowledge that ignoring social justice comes at an enormous cost. They can also serve as very useful guiding principles for political decision makers at a time when difficult choices have to be made.

2. *Larioshina v. Russia*, decision as to the admissibility of Application no. 56869/00, 23 April 2002 (although in the circumstances of this case, the application was declared inadmissible). Also see the pending case of *Antonina Dmitriyevna Budina v. Russia* (45603/05) of 21 November 2005.

We are in such a situation now and I would therefore like to support the statement of the Director-General of the ILO that we need "*prompt and co-ordinated government action to avert a social crisis that could be severe, long-standing and global*".³

This requires a serious programme for the protection of economic and social rights.

3. 20 October 2008, reference ILO/08/45.

Arbitrary procedures for terrorist
blacklisting must now be changed

1 December 2008

The “war on terror” has gravely undermined previously agreed human rights standards. The counter-terrorism measures taken since 9/11 must now be thoroughly reviewed and changed, not only in the United States and other affected countries, but also in inter-governmental organisations. Innocent victims must have their names cleared and receive compensation and steps must be taken to prevent similar injustices in future. Those suspected of association with terrorism must not find themselves on so-called “blacklists” without any prospect of having their case heard or reviewed by an independent body.

“Blacklisting” is indeed a striking illustration of how human rights principles have been ignored in the fight against terrorism. The term refers to procedures under which the United Nations or the European Union may order sanctions which target individuals or entities suspected of having links with terrorism. These sanctions include the freezing of financial assets.

The formal basis is a Security Council resolution which eight years ago established a list of individuals suspected of having connections with al-Qaeda, Osama bin Laden and the Taliban.¹

The European Union followed suit with its own regulations taking the view that European Community action was also essential in this area. Consequently, EU regulations freeze the funds and other economic resources of persons and entities whose names appear on the UN list.

1. The Sanctions Committee was set up by Security Council Resolution 1267 (1999) and the consolidated list by Security Council Resolution 1333 (2000).



“Inter-governmental bodies must themselves respect the human rights standards on which they are based.”

These measures have affected a number of rights of the targeted individuals, including the right to privacy, the right to property, the right of association, the right to travel or freedom of movement. Moreover, there has been no possibility to appeal or even know all the reasons for the blacklisting – the right to an effective remedy and due process have been eliminated.

Imagine the following scenario. You are placed on the targeted terrorist sanctions list at the UN level, which also means that your financial assets will be frozen within the European Union. You would like to challenge the assertion that you are linked to a terrorist group but you are not allowed to see all the evidence against you.

The de-listing procedure at the UN level allows you to submit a request to the Sanctions Committee or to your government for removal from the list, but the process is purely a matter of inter-governmental consultation. The Guidelines to the Committee make it plain that an applicant submitting a request for removal from the list may in no way assert his or her rights during the procedure before the Sanctions Committee or even be represented for that purpose. The government of his residence or citizenship alone have the right to submit observations on that request.

This sounds Kafka-esque but it is the reality, at least for the moment. In Sweden, three citizens of Somali origin found themselves on such a list. When I met them they were in despair, not knowing how to raise their case. Their bank accounts had been frozen and neither employers nor social authorities were permitted to provide means for their living.

The listing and delisting procedures have of course been questioned. In 2007, Council of Europe Parliamentarian Dick Marty issued a report which criticised the delisting procedures and the limited means of appeal available to individuals or entities on the lists.²

Following discussion of the report, the Council of Europe's Parliamentary Assembly found that "the procedural and substantive standards currently applied by the United Nations Security Council and the Council of the European Union ... in no way fulfil the minimum standards laid down ... and violate the fundamental principles of human rights and the rule of law".³ The Council of Europe's Committee of Ministers reiterated that "it is essential that these sanctions be accompanied by the necessary procedural guarantees".⁴

2. Report published on 16 November 2007. The Council of Europe Parliamentary Assembly's Committee on Legal Affairs and Human Rights also organised a "hearing" on this subject in Strasbourg on 28 June 2007.

3. Parliamentary Assembly Resolution 1597 (2008). See also Recommendation 1824 (2008) to the Council of Europe's Committee of Ministers.

4. Committee of Ministers of the Council of Europe, Reply to the Recommendation 1824 (2008) (Reply adopted by the Committee of Ministers on 9 July 2008).

More than a few have been targeted by these measures. The UN Special Rapporteur on human rights and terrorism stated recently that the listing regime “has resulted in hundreds of individuals or entities having their assets frozen and other fundamental rights restricted”.⁵

But this may all change, as a result of a landmark decision of the European Court of Justice delivered on 3 September 2008.

Yassin Abdullah Kadi, a resident of Saudi Arabia, and Al Barakaat International Foundation, established in Sweden, were both designated by the UN Sanctions Committee as being associated with Osama bin Laden, al-Qaeda or the Taliban. As a result of being placed on the list of suspects developed by the Committee, their accounts were frozen within the EU in 2001.

The Luxembourg Court found that the European Council regulations which were responsible for freezing their funds and other economic resources had infringed their fundamental rights, notably their right to property and their right to a review of those decisions.

It stated that “respect for human rights is a condition of lawfulness of Community acts and that measures incompatible with respect for human rights are not acceptable in the Community”. As a result of the judgment in the *Kadi and Al Barakaat* case, the EU were given a couple of months in which to remedy the shortcomings of the listing procedure.

What are the lessons from this judgment, and what future action should be taken at the international level?

The importance of the global fight against terrorism should not be underestimated. All Council of Europe Member States are definitely under a duty to fight terrorism and have a positive obligation to protect the lives of their citizens.⁶ The response to terrorist financing is a global problem and deserves international attention and action.

5. Statement by Martin Scheinin, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 63rd session of the General Assembly Third Committee, 22 October 2008, New York.

6. *Osman v. UK*, 28 October 1998.

Yet at the same time, fundamental human rights form the basis of European Community law. Measures taken for the maintenance of peace and security must respect these rights as enshrined in the European Convention on Human Rights and the EU Charter of Fundamental Rights.⁷

As the Advocate General Poiares Maduro wisely observed in his opinion on the *Kadi and Al Barakaat* case: "The claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community Law and deprive individuals of their fundamental rights."⁸

The ruling of the Luxembourg Court should trigger a change in the Security Council procedures. The changes to the listing and review process as introduced by Security Council Regulation 1822 are welcome, but they do not go far enough.⁹

The supreme authority of the Security Council must be protected, but this requires that the Council itself acts in harmony with agreed international human rights standards. There is therefore a need for an independent review mechanism as a last stage of the Security Council decision-making about the listing.

Such procedures should ensure the right of the individual to know the full case against him or her, the right to be heard within a reasonable time, the right to an independent review mechanism, the right to counsel in these procedures and the right to an effective remedy.

The UN Special Rapporteur on human rights and terrorism has argued that such a quasi-judicial body composed of security classified experts, serving in an independent capacity, would possibly be recognised by

7. See the recent Resolution of the Parliamentary Assembly of the Council of Europe 1634 (2008) on Proposed forty-two-day pre-charge detention in the United Kingdom.

8. Delivered on 16 January 2008.

9. In particular the fact that, by 30 June 2010, all the names on the consolidated list at the time of the adoption of the resolution will be reviewed, and the narrative summary of reasons for listing for all entities on the list will be posted on the Committee's website.

national courts, the Luxembourg Court, and regional human rights courts as a sufficient response to the requirement of the right to due process.

There may be other ways of responding constructively to the Luxembourg Court ruling. What is important is that human rights deficiencies at the global level are remedied before they are put in place at the European Union level. Inter-governmental bodies such as the UN and the EU must themselves respect the human rights standards on which they are based.

More control is needed
of police databases

15 December 2008

Fighting crime, including international terrorism, requires the use of modern and effective methods of investigation. The use of fingerprints, cellular samples and DNA profiles in our criminal justice systems is undeniable when determining innocence or guilt. But caution still needs to be taken when we decide on whose data should be stored in police databases and for how long.

If you are taken into custody in the UK, for example, fingerprints and other non-intimate samples may be taken without your consent – these include oral swabs, saliva, footwear impressions and photos. In some cases, intimate samples (such as blood, urine, semen, dental impressions, pubic hair, or tissue) may be requested. These need your written consent and the consent of the police inspector, but if you refuse, this could harm your defence if brought to trial.¹

Information from these samples will be stored in a database and may be used to identify you in future police investigations or unsolved past crimes. This is the case even if you are never convicted of any offence. There are approximately 4 million DNA profiles held in total on the UK database, which according to the Home Office's website is "the largest of any country". Approximately 850 000 of these profiles come from innocent individuals.

Two men, arrested in the UK but never convicted of any offence, brought their cases to the European Court of Human Rights in Strasbourg. In an important recent judgment,² 17 judges unanimously found that the retention of the cellular samples of these two men, their

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1. See the UK Home Office website: www.homeoffice.gov.uk/police/powers/custody.
 2. *S. and Marper v. the UK* (Applications Nos. 30562/04 and 30566/04, 4 December 2008).



“Retention of DNA samples and profiles should be confined to those convicted or cautioned of serious offences.”

DNA profiles and fingerprints constituted a disproportionate interference with their right to respect for private life. The Court was struck by the blanket and indiscriminate nature of the power of retention in the UK, under which material can be retained irrespective of the nature or gravity of the offence or the age of the suspected offender. In addition, the retention is not restricted in time and there are limited possibilities of asking for such data to be removed. The UK had overstepped its “margin of appreciation”³ and had not managed to find a fair balance between competing public and private interests.

3. The Court affords states a degree of deference when it examines how they have interpreted and applied national law.

England, Wales and Northern Ireland are the only jurisdictions within the Council of Europe with such a retention regime. Interestingly, in Scotland, the DNA of unconvicted persons is only retained in respect of adults who have been charged with violent or sexual offences, and even then, for three years only, with the possibility of a further extension for two years with the consent of a Sheriff.

This decision of the Strasbourg Court is not just relevant to the United Kingdom. It also sends out a clear message to all Council of Europe member states to look critically and analytically at their own laws which regulate the retention of intimate data.

Member states must find the right balance between the interests of society in preventing crime on the one hand and the interests of the individual and his or her right to privacy on the other.

DNA is biological material from human cells and represents an individual's unique identity. It contains details of the composition and functioning of our bodies as well as of our ethnic and familial heritage. Fingerprints, DNA profiles and cellular samples all constitute personal data. The mere retention of such data amounts to an interference with the right to private life within the meaning of Article 8 of the European Convention on Human Rights.

It might be tempting for national authorities to keep databases of intimate samples for future cross-checking, but such practices raise serious human rights concerns. The principle of proportionality in the carrying out of criminal justice is crucial here.

Our international legal standards are clear. The Council of Europe's Data Protection Convention 1981 sets out the framework and provides that data should be "stored for specified and legitimate purposes and not used in a way incompatible with those purposes".⁴

In relation to the length of time data should be held, the Committee of Ministers' Recommendation No. R 87 (15) suggests that personal

4. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981.

data kept for police purposes should be “deleted if they are no longer necessary for the purposes for which they were stored”.⁵

Factors which could trigger the deletion of data are the conclusion of an inquiry into a particular case; a final judicial decision, in particular an acquittal; rehabilitation; spent convictions; amnesties; the age of the data subject, and particular categories of data.

In other words, data should not simply be stored indefinitely for a possible future match.

Council of Europe Recommendation No. R (92) 1 on the use of analysis of DNA within the framework of the criminal justice system (adopted in 1992) goes one step further and recommends that “samples or other body tissues taken from individuals for DNA analysis should not be kept after the rendering of the final decision in the case for which they were used, unless it is necessary for purposes directly linked to those for which they were collected”.

However, it does provide that where the individual concerned has been convicted of serious offences against the life, integrity and security of persons, DNA may be retained, although in such cases storage periods should be defined by domestic law.

Why should we be concerned about retaining DNA on national databases?

First, if we hold on to the principle that all people are innocent until proven guilty, it should not be relevant to know whether a person has ever been suspected of any offence by the police. Once a person has been acquitted or the charge dropped against him or her, he should start again with a clean slate. Innocent persons should not feature on these types of database.

Second, there is a risk that certain groups in our society are disproportionately affected by such databases. Given the peak age of offending, minors tend to be over-represented. Males from black and ethnic minorities are also over-represented, often as a result of policing habits, including stop and search techniques.

5. Committee of Ministers' Recommendation No. R (87) 15 Regulating the use of personal data in the police sector.

Third, we are right to be concerned about the potential use of cellular material in the future. Science might one day enable more detailed and personal information to be gleaned from such samples. Domestic law also might be changed to allow samples to be used for purposes other than those currently imagined.

The retention and storing of data is delicate and must be highly protected from risk of abuse. We have already seen what a devastating and stigmatising effect losing files or publishing lists of names on the Internet can have on the persons concerned.

We need clear and detailed national rules governing the storage and retention of samples. Complaint mechanisms before data protection monitoring bodies or courts also provide an important safeguard against potential abuse and arbitrariness.

The arguments in favour of a population-wide DNA database are not compelling. Retention of DNA samples and profiles should be confined to those convicted or cautioned of serious offences, for example violent and/or sexual offences, and then only for a limited time.

Discrimination against transgender
persons must no longer be tolerated

5 January 2009

During missions to member states of the Council of Europe, I have been reminded of the ongoing discrimination many face on account of their gender identity.¹ Transgender persons encounter severe problems in their daily lives as their identity is met with insensitivity, prejudice or outright rejection.

There have been some extremely brutal hate crimes against transgender persons. One case which received media attention was the murder in Portugal of a homeless, HIV-positive, Brazilian transgender woman, called Gisberta (Luna) Salce Junior. She was tortured and raped by a group of young men, thrown into a well and left to die.

My discussions with non-governmental organisations defending the rights of transgender persons indicate that a number of such hate crimes go unreported – even in serious cases. One of the reasons appears to be a lack of trust in the police.

Some people seem to have a problem with the mere existence of human beings whose outer expression of their inner gender identity is not the same as their gender determined at birth. Aggression against transgender persons cannot, however, be excused as resulting from ignorance or lack of education. These attitudes cause serious harm to innocent and vulnerable people and must therefore be countered.

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1. Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.



“There is no excuse for not immediately granting this community their full and unconditional human rights.”

I have been struck by the lack of knowledge about the human rights issues at stake for transgender persons, even among political decision-makers. This is probably the reason why more has not been done to address transphobia and discrimination based on gender identity. The result is that individuals are discriminated against all over Europe, in areas such as employment, health care and housing.

In a number of countries, the problem starts at the level of official recognition. Transgender persons who no longer identify with their birth gender seek changes to their birth certificates, passports and other documents, but often encounter difficulties. This in turn leads to a number of very concrete problems in daily life when showing one's ID papers – in the bank or the post office, when using a credit card, or crossing borders.

One well-publicised case related to Dr Lydia Foy in Ireland, who sought to have her legal gender changed from male to female on her birth certificate. After 10 years of struggle, in 2007 the Irish High Court finally ruled that the state was in breach of Article 8 of the European Convention on Human Rights.

The European Court of Human Rights has ruled that states are required to recognise legally the gender change of post-operative transsexuals.² In one case, *Christine Goodwin v. United Kingdom*, a post-operative male-to-female transgender person complained about sexual harassment in the workplace, discrimination in relation to contributions to the National Insurance system, and the fact that she was prevented from marrying a man (because she was still legally male).

The Court stated that “the very essence of the Convention was respect for human dignity and human freedom. Under Article 8 of the Convention in particular ... protection was given to the personal sphere of each individual, including the right to establish details of their identity as human beings.”³

In some European countries, it has now become possible to correct official records and obtain a new first name. However, in other countries a change of birth certificate is simply not allowed. In a large number of Council of Europe member states, such changes are permitted only upon proof that the transgender person has been sterilised or declared infertile, or has undergone other medical procedures, such as gender reassignment surgery or hormone treatment. The individual’s sincere affirmation of their gender identity is not seen as sufficient, and the suitability of the medical procedures for the person in question is not considered.

Additionally, many countries require that a married person divorces before his or her new gender can be recognised, even though the couple itself does not want to divorce. This in turn may have an impact on

2. Most recently, in *L. v. Lithuania*, Application No. 27527/03, 11 September 2007, paragraph 56.

3. *Christine Goodwin v. United Kingdom*, Application No. 28957/95, judgment of 11 July 2002.

children of the marriage. In fact, in several countries the parent who has undergone the gender change will lose custody rights. Legislation requiring divorce needs to be reformed in the spirit of the best interests of the child.

To require surgery as a prerequisite to enjoy legal recognition of one's gender identity ignores the fact that such operations are not always desired, medically possible, available, and affordable (without public or other funding). It is estimated that only 10% of transgender persons in Europe actually undergo gender reassignment surgery.

Even access to ordinary health care is a problem for transgender people. The lack of trained staff familiar with the specific health care needs of transgender persons – or simply prejudice towards transgender people – render them vulnerable to unpredictable and sometimes hostile reactions.

In the United Kingdom, male-to-female transgender persons have been struggling to get their gender status accepted for the purpose of pension benefits. In spite of overwhelming legal arguments they have so far been denied the pension rights that other women in the country (who were born female) enjoy without question.

There are other obstacles encountered in day-to-day life. A major problem for transgender persons is harassment and discrimination at work. Some leave their jobs to avoid it, while others avoid gender reassignment surgery for fear of stigmatisation.

Data presented by the EU's Fundamental Rights Agency shows that in some countries the unemployment rate of transgender persons can reach 50%. Some jobless transgender persons are unable to find employment, and see no other option but to work in the sex industry. A report from Human Rights Watch on Turkey called attention to the situation of transgender sex workers in that country – victimised by violence, drug addiction, sexual abuse, lack of health insurance, homelessness, police attacks, and a high risk of HIV/AIDS.

To date, very little factual information is available on the situation of transgender people in Council of Europe member states. This information is needed urgently to determine the extent of the problems faced.

There is no excuse for not immediately granting this community their full and unconditional human rights. Council of Europe member states should take all necessary concrete action to ensure that transphobia is stopped and that transgender persons are no longer discriminated against in any field.

Europe must open its doors
to Guantánamo Bay detainees
cleared for release

19 January 2009

The closure of the United States' military detention centre at Guantánamo Bay seems in sight at last. President-elect Barack Obama has indicated that closing the detention facility is one of his priorities. But questions remain as to how this will be done. European assistance is needed to help resettle a number of remaining detainees.

Since the 9/11 terrorist attacks on New York and Washington, over 700 detainees have been brought to Guantánamo Bay. The first arrived hooded and shackled on 11 January 2002, seven years ago. Following international investigations, such as the one carried out by the Council of Europe's Parliamentarian Senator Dick Marty,¹ we now know that many detainees arrived at Guantánamo Bay following a series of enforced disappearances, secret detentions and unlawful inter-state transfers, sometimes encompassing stop-overs in countries notorious for their use of torture.

Closing Guantánamo Bay and its military commissions is a global imperative. I hope that President-elect Obama will fix a date for closure as soon as he takes up office. Guantánamo Bay has become a worldwide symbol of injustice and oppression which has tarnished America's international reputation and has served as a recruitment tool for future insurgents. The sad reality is that Europe has *also* been tarnished by the stain which Guantánamo leaves on the rule of law and fair trial procedures.

1. See Resolution 1507 (2006) and Recommendation 1754 (2006) on alleged detentions and unlawful inter-state transfers of detainees involving Council of Europe member states (Rapporteur: Mr Dick Marty) and see Resolution 1562 (2007) and Recommendation 1801 (2007) on secret detentions and illegal transfers of detainees involving Council of Europe member states: second report (Rapporteur: Mr Dick Marty).



“Such assistance is both the right thing to do and of critical importance.”

Close to 250 detainees remain in Guantánamo Bay. Where evidence exists against some of these men for having committed serious crimes, they must now be prosecuted in the US criminal justice system and be given a fair trial in line with international standards. If there is no evidence against them that will stand up in court, they must be released. Evidence obtained through the use of torture must be excluded.

Any form of continued preventive detention is unacceptable – these men must either be prosecuted or given their liberty.

Those detainees who can safely go back to their own countries should be returned there. However, if there is a risk that they will suffer further ill-treatment in the country of their nationality, then the United States, Europe or third countries should open their doors.

There are detainees, approximately 60, who cannot be repatriated. Some cannot be returned because they are stateless. Others are likely

to face torture or persecution or other human rights violations if they are forcibly returned to their home countries. They are from places such as Algeria, China, Libya, the Occupied Palestinian Territories, Russia, Syria, Tajikistan, Tunisia, and Uzbekistan.

While the United States has created the Guantánamo problem and has the primary responsibility for correcting the injustices, there are cogent arguments for European assistance in closing the centre as soon as possible. To achieve this goal, Council of Europe member states should stand ready to provide humanitarian help to resettle the remaining detainees cleared for release and currently stuck in limbo.

I am not alone in making this appeal. In October last year, the Legal Affairs and Human Rights Committee of the Council of Europe's Parliamentary Assembly called on European governments to provide humanitarian protection for detainees at risk of torture. In November 2008, a coalition of NGOs convened a working group 2008 to advance collective efforts to find a solution for the remaining detainees.²

The European Union's Counter-Terrorism Co-ordinator, Gilles de Kerchove, has also said that the EU will need to help the United States as soon as possible by receiving detainees on their territory. Later this month, the EU's General Affairs and External Relations Council will discuss the role of EU member states in closing Guantánamo. I hope for some positive results from this meeting. So far, the European response has been hesitant.

The only European countries that have to date accepted non-citizen Guantánamo detainees are Albania and the United Kingdom. The UK has taken back all British nationals and four inmates who were formerly British residents, as well as pressing for the release of another two former British residents.

In 2006, Albania accepted eight detainees and granted them refugee status. Five are members of China's Uighur ethnic minority who were once captured – or bought from villagers, reportedly for US\$ 5 000 or more – in Afghanistan or Pakistan.

2. The Center for Constitutional Rights, Amnesty International, Reprieve, Human Rights Watch and the International Federation for Human Rights.

In October 2008, a US federal court ordered the Bush administration to release the remaining Uighurs into the United States because the government had failed to find another placement for them. The government has appealed the ruling, and these men are still kept in detention.

Resettlement is not a problem-free solution for many reasons. At the end of 2007, I met the resettled Chinese Uighurs in Albania. They found their life in Tirana very difficult, with little support to help their integration into society. One detainee, Adel Hakimjan, is currently seeking residency in Sweden, where his sister lives. She is his only relative outside China. Adel argues convincingly that Albania should not be considered his first country of asylum because he had not chosen to come to Albania. The Swedish court will soon make a decision in his case.

It is encouraging to hear that recently Portugal, Germany and Sweden have intimated that they are willing to accept some Guantánamo detainees. In an open letter in December 2008, Portugal's Foreign Minister urged fellow EU states to accept some of these men. The French Government has also called for the European Union to establish a common position on the Guantánamo prisoners.

Closing Guantánamo Bay does not mean that past abuses suffered by detainees should be brushed under the carpet. Those responsible for devising and approving the interrogation systems or those involved in sanctioning torture should be brought to justice. Transparent accounting for policy and practice is needed. Lessons should be learned from the mistakes made in Guantánamo Bay, so that they are not repeated.

It is essential that innocent men who have been detained should have their names cleared and should receive compensation for their unlawful detention and ill-treatment.

At the same time, we should not forget that Guantánamo Bay may only be the tip of the iceberg when it comes to prisoners held beyond the rule of law by the United States. There are unfortunately indications of more secret detention centres and prisoners out there. Our attempts at closing extra-judicial prisons should not end with Cuba. Council of Europe member states must keep this issue on the agenda with the new US administration.

I urge European governments to open their doors to a small number of men who fear persecution or torture if transferred to their home countries. Such assistance is both the right thing to do and of critical importance in our push for the prompt closure of Guantánamo Bay.

Children should not be treated
as criminals

2 February 2009

There is a disturbing trend in Europe today to lock up more children at an earlier age. The age of criminal responsibility is already very low in some countries, such as the United Kingdom. Suggestions to lower the age limit to 12 have recently been made in France, while a similar law has been adopted in Georgia. In my opinion the time has come to move the argument away from fixing an arbitrary age for criminal responsibility and to find a more child-friendly solution to juvenile justice.

A caring society responds promptly, resolutely and fairly to juvenile offences. Juveniles are certainly not helped by a *laissez-faire* response if they violate the law. It is imperative that young persons are taught to take responsibility for their actions.

However, experience has shown that criminalisation, and in particular imprisonment, tends to undermine efforts to assist juveniles in reintegrating positively into the community. Criminalisation and periods spent in juvenile detention centres may have the reverse effect of turning these juveniles into adult criminals.

Young offenders are *children* first and foremost and should be protected by all the agreed human rights standards for children. This is one of the messages of the United Nations Convention on the Rights of the Child (CRC), which calls for a separate system of justice for children. Under the CRC, which has been ratified by all European countries, children are defined as those who are under 18 years old.

This point was stressed by the European Network of Ombudspersons for Children (ENOC) in a position statement issued in 2003. These experts urged states "to review their juvenile justice systems against the requirements of the CRC and European human rights instruments".



“The time has come to move the argument away from fixing an arbitrary age for criminal responsibility and find a more childfriendly solution to juvenile justice.”

We need to separate the concepts of “responsibility” and “criminalisation”. It is essential to establish responsibility for conduct which contravenes the law. Where responsibility is disputed, there has to be a formal process to determine responsibility in a manner which respects the age and the capacity of the child. However, this does not have to be a criminal process, nor involve the criminalisation of children.

Once the facts of an offence are established, there would need to be a multi-disciplinary assessment of what is required to ensure awareness of the offence by the child. Such an assessment would also determine how best to respond to the needs of the victim and prevent

the child from reoffending. Such measures would, where necessary, be compulsory. The proceedings would not identify the child publicly and would not be formally linked to the adult criminal justice system.

Imprisonment should generally be avoided. Any arrest or detention of a child should only be used as a measure of last resort and for the “shortest appropriate period of time”. The only justification for detaining children should be that they pose a continuing and serious threat to public safety. This requires frequent periodic review of the necessity of detention in each case. The conditions of any detention must be humane and focused on rehabilitation. Schooling should be provided as set out in the 2008 European Rules for Juvenile Offenders.¹

In many of my assessment reports, I underline the importance of keeping juveniles separate from adult offenders. A recent judgment of the European Court of Human Rights against Turkey highlights the possible dire consequences of not respecting that important principle.²

Guidelines on child-friendly justice are currently being discussed within the Council of Europe. The debate on the reform of the juvenile justice system should include the desirability of avoiding criminalisation and putting the best interests of the child at the forefront of the discussion.

In promoting such policies and procedures which respect the human rights of young offenders, the rights and concerns of *victims* are not neglected. Victims must receive appropriate reparation and support from the state. But victims’ interests – and those of the wider society – are not served by a system which fails to rehabilitate offenders.

During my visits to European countries I have met a number of juvenile inmates in prisons and detention centres. Many of them have suffered neglect and violent abuse within their own families and have

1. Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures.

2. See *Güvec v Turkey*, judgment of 20 January 2009.

received little support from society at large. Understanding the origins of violence and serious offending in children does not mean condoning or sympathising with it.

An effective and humane policy would put strong emphasis on *prevention*. Social workers are more important than prison guards in this context. Certainly, broader reforms for genuine social justice have to be part of a strategy to tackle the problem of youth offending.

Unfortunately, this has not been the focus of the public debate in several countries. Instead, people's justified concerns about juvenile behaviour have been exploited for populist political purposes: children and young persons have been demonised and described as major threats to society.

The CRC encourages a minimum age to be set for criminal responsibility. Below such an age, it is presumed that a child does not have the capacity to infringe the penal law. Children in Scotland can be held criminally responsible at the age of 8. In England, Wales and Northern Ireland the minimum age is 10. In many of the Nordic countries the age for criminal responsibility is set at 15 and in Belgium it is 18.

The Council of Europe's European Committee of Social Rights (which monitors state compliance with the European Social Charter), the UN's Committee on the Rights of the Child and other UN Treaty bodies have all recommended substantial increases in a number of member states.

I would like to move the debate on from fixing an arbitrary age for criminal responsibility. Governments should now look for a holistic solution to juvenile offending which does not criminalise children for their conduct.

The United Nations Guidelines for the Prevention of Juvenile Delinquency, while adopted nineteen years ago, still provide the right benchmark. "Labelling a young person as 'deviant' or 'delinquent' or 'pre-delinquent' often contributes to the development of a consistent pattern of undesirable behaviour by young people ...".

Yes, it is in all our interests to stop making children criminals. We should therefore treat them as children while they are still children and save the criminal justice system for adults.

National parliaments can do more to promote human rights

16 February 2009

The ideal parliamentarian is also a human rights defender. Elected representatives of national parliamentary bodies should give priority to the promotion of freedoms and the protection of justice. More concrete discussion is needed about how this particular responsibility can be exercised to ensure action against current human rights failures. Parliamentary work can also help to develop a sustainable human rights culture for the future.

The role played by parliaments in adopting legislation is crucial for building a rights-based system of justice. Through the ratification process, parliaments take positions on international, including European, human rights conventions.

Law-making and ratifications must interrelate so that national laws reflect international agreements on human rights. The fact that the European Convention on Human Rights has been incorporated into domestic law in all member states of the Council of Europe has been of great importance to ensure this link.

New law proposals should be analysed by parliaments to ensure that they comply with the European Convention on Human Rights.¹ The emerging case law of the European Court of Human Rights should be followed at the national level in order to make sure that existing domestic laws are in conformity with the Court's jurisprudence.

The Parliamentary Assembly of the Council of Europe has on numerous occasions underlined the importance of the role of national parliaments

1. In accordance also with Recommendation Rec(2004)5 of the Committee of Ministers to member States on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights.



“Every government needs a parliament
which watches that human rights
pledges are not forgotten.”

in monitoring the execution of judgments of the Strasbourg Court.² Unfortunately, some countries are extremely late in responding to Court rulings, not least when it comes to the general measures required to prevent further violations of a similar nature in the future.

2. See, for example, Resolution 1516 (2006); see also the speech by Ms Marie-Louise Bemelmans-Videc, Member of the Parliamentary Assembly of the Council of Europe, “The effectiveness of the European Convention on Human Rights at national level: the parliamentary dimension”, Colloquy “Towards stronger implementation of the European Convention on Human Rights at national level”, organised under the Swedish chairmanship of the Committee of Ministers of the Council of Europe, Stockholm, 9-10 June 2008. For the latest work of the Parliamentary Assembly on this issue, see the Introductory Memorandum by Rapporteur Pourgourides on the Implementation of Judgments of the European Court of Human Rights dated 24 May 2008: http://assembly.coe.int/CommitteeDocs/2008/20080526_ajdoc24_2008.pdf.

Law-making is not the only aspect of parliamentary work with relevance to human rights. The adoption of a state's budget also has far-reaching implications for the rights of the individual.

The UN Convention on the Rights of the Child stipulates that states should undertake measures "to the maximum extent of their available resources" for the realisation of rights defined in that treaty. The UN Covenant on Economic, Social and Cultural Rights has a similar provision. The purpose is to signal that the rights specified in these conventions should be given priority when decisions are made about the allocation of resources. Ideally, Parliament should analyse the rights dimension of the annual budget proposal before the final decision is taken.

The promotion and protection of almost all human rights requires financial resources. For instance, ensuring the right to education and adequate health care are major undertakings and weigh heavily on the state budget.

A human rights approach to budget analysis should include a particular scrutiny of the effect on vulnerable groups in society, such as children in difficult circumstances, the elderly and persons with disabilities. Human rights principles require that conditions for these and other disadvantaged groups should be seen as a collective responsibility, and not dependent on charity.

Several national parliaments in Europe adopt specific action plans in the field of human rights. Some of these plans are requested or inspired by international treaties or conferences, for instance those on children's rights, gender equality, action against human trafficking or the rights of persons with disabilities.

Within the Council of Europe there have been suggestions about a comprehensive national plan for systematic implementation of human rights. A conference on this very approach was held in Stockholm in November 2008 and the report will be published this week.³

3. "Rights Work", International Conference on Systematic Work for Human Rights Implementation, Stockholm, 6-7 November 2008. For the report see: www.sweden.gov.se/rightswork.

When parliaments adopt action plans on human rights they must also request progress reports from the executive in order to check implementation.

In addition, parliaments should see that a system is built which makes it possible for individuals to complain and have a response. One possibility is to appoint an independent Ombudsman, Public Defender or Commissioner (the titles differ between countries) who would receive complaints and seek solutions to the concrete problems raised.

All member states of the Council of Europe now have some structure of this kind, though their mandates differ somewhat. In some countries the office holders are appointed by the government, in others they are elected by parliament. My own view is that it is preferable that the parliaments take an active interest in these structures, that they are involved in the recruitment of the key office-holders and that they also receive and discuss their reports.

A somewhat different approach is taken by the elected assemblies in Germany, both at the federal and *Land* level, where special parliamentary committees are set up to receive individual complaints from the public. Complaints are then followed up by putting the complainant in contact with a relevant authority or through a motion or another parliamentary initiative.

One positive effect of this process is that the politicians involved become more deeply acquainted with current concerns among the public. The reports from the committees can give an indication of structural problems among the authorities.

Several parliaments have established a political human rights committee. One of the most powerful is probably the UK's Joint Committee on Human Rights, which consists of 12 members from both the House of Commons and the House of Lords. The Committee undertakes thematic inquiries on human rights issues and reports its findings and recommendations to Parliament. It scrutinises all Government Bills and picks out those with significant human rights implications for further examination. It also analyses government action in response to judgments of the Strasbourg Court.

In some European parliaments the human rights committee is of an informal and consultative nature. Discussions leading to decisions on human rights issues tend to take place in standing committees such as those dealing with legal or social affairs.

In Italy, the Senate recently established a committee on human rights while the other chamber discusses human rights in a sub-committee to the foreign affairs committee.

By having active discussions at the parliamentary level we underline that human rights relate to politics and, indeed, are about important political issues. Sometimes, of course, party politicisation of human rights matters can distort reality. It can happen that parliamentarians from the majority party argue more in defence of the government, rather than in support of human rights principles.

A great number of European parliaments include individuals who act as human rights defenders. Typically, many are also members of the Council of Europe's Parliamentary Assembly. Indeed, their dual role as domestic and European parliamentarians is an important factor in helping to promote human rights, the rule of law and democracy at the local level.⁴ Others have their roots in minority communities and represent their diverse interests.

The importance of such voices in the parliamentary debate cannot be underestimated. For this reason, rules which protect the immunity of those elected should not easily be waived. By way of example, I felt that the decision last year of the Armenian Parliament to lift the immunity of four of its members was not sufficiently justified. After all, parliamentarians have a popular mandate.

In a parliamentary democracy, governments must ensure that they have the support of parliament. However, this dependency does not work the other way round – parliaments do not need the blessing of the executive. As an elected body they have their own separate role and can establish their own approach. In fact, every government needs a parliament which ensures that human rights pledges are not forgotten.

4. Resolution 1640 (2008) of the Parliamentary Assembly of the Council of Europe.

Think globally, act locally -
for human rights

2 March 2009

The struggle for human rights is also a local affair. Authorities at local or regional level take key decisions on education, housing, health care, social services and policing – areas extremely relevant for people’s human rights. These decision-makers should apply European and international human rights standards when they formulate their policies and ensure that their approach is rights-based.

While governments and national parliaments ratify international treaties on behalf of the state, the day-to-day work of implementing human rights standards often rests on the shoulders of local and regional authorities. They too are bound by these agreements.

Promoting and protecting human rights at the local level is of crucial importance. Local and regional authorities are often directly responsible for services related to health care, education, housing, water supply, environment, policing and also, in many cases, taxation. These matters affect people’s human rights, not least their social rights.

The geographical and personal proximity between inhabitants and local decision-makers has obvious advantages. Local decision-makers are more accessible and they are aware of the latest human rights needs and challenges in their area.

Dialogue with inhabitants and non-governmental groups can be more direct and inclusive at the local level. Municipalities and provinces with an activist approach to human rights have learnt that much is to be gained from treating people as “holders of rights” instead of merely trying to meet their needs.

But this requires some active awareness-raising by local leaders. It is essential to ensure that individuals have an understanding of their rights and those of others.



“Local politicians and public officials should seize the opportunity to enhance the quality of life in their communities by implementing human rights in their ordinary work.”

During my visits to Council of Europe member states, I always try to meet with those who work at the local and regional level. I have been impressed by the commitment and creativity of many.

In Austria, provincial governments have human rights co-ordinators who function as the authorities’ network in this field. This network is used, for example, when submissions to international human rights monitoring mechanisms are prepared. An interesting initiative was developed by the City of Graz, which established a human rights council

at the local level, which means that city regulations and activities can be scrutinised from the perspective of human rights.

I learnt of good initiatives undertaken at the local level in Italy, such as those in Bologna, where social inclusion projects have been developed and access to decision making facilitated, or Naples, where housing projects have been started, even though a lack of funds blocked the works. Other successful experiences were carried out in that country, in particular through local networks which facilitated the integration of asylum-seekers, refugees and foreign pupils.

Mayors in some cities across Europe have volunteered in co-operation with UNICEF to act as special protectors of children's rights. The Human Rights Cities Programme, a non-governmental initiative which has been supported by UN-HABITAT, has inspired local councils in some cities to address human rights issues in a comprehensive and participatory manner.

In 2007, 20 mayors from different European countries joined together to appeal to their peers to ensure freedom of assembly and association for lesbian, gay, bisexual and transgender (LGBT) groups in those countries where such rights had been denied or restricted.

Unfortunately, I have also seen some examples of xenophobia and lack of understanding at the local level, particularly when it comes to the needs of disadvantaged groups.

This is a shame, because local governance, based on human rights, has proved to be effective in tackling discrimination and social exclusion. Indeed, there are many local projects carried out by municipalities across Europe which improve the living conditions of disadvantaged groups, for example Roma, migrants and refugees, and empower them to exercise their human rights.

In October 2008, the Congress of Local and Regional Authorities of the Council of Europe organised a seminar in Stockholm on local work for the implementation of human rights. It highlighted the importance of awareness-raising campaigns, local action plans, the establishment of local or regional ombudsmen, the monitoring of human rights implementation, and training local politicians and

staff of authorities about their human rights responsibilities. This provides an excellent agenda for further work.

- Municipalities and regional authorities are encouraged to develop their own action plans. These local plans are more tailored to their specific needs, resources and priorities. A number of local agencies in various European countries have already developed sector-based action plans, for example, to protect children's rights, promote gender equality or to build a society that is also accessible to persons with disabilities. Through coherent planning, the local human rights situation can be regularly monitored and analysed. Problems as well as solutions are directly discussed with civil society, the public and other stakeholders. The experience gained at the local level can also contribute to human rights planning at the national level.
- Ombudsmen and similar human rights institutions need to be well known and easy to approach by all, and not just those living in the capital or major cities. Particularly in larger countries, this may call for the establishment of satellite offices of the National Ombudsman outside metropolitan areas. Another solution is to set up local or regional ombudsmen. Their geographical proximity to people makes them more available and accessible to those whose rights have been violated.
- For public officials to identify and address human rights issues in their ordinary work, they must also benefit from human rights training themselves.
- The human rights consequences of the widespread privatisation of provisions of education, health care or social services call for discussion. Though various service functions can be outsourced, the *responsibility* for the enforcement of the international standards cannot be delegated to the private sector. Consequently, a system of accountability within the respective agencies as well as monitoring the quality of the services has to be established.
- The local budget is usually a good indicator of commitment to human rights. Local politicians are often faced with the task of prioritising competing needs. Budget review from a human

rights perspective is a tool for making elected representatives and officials informed of the consequences of their decisions.

The human rights approach at the local level empowers patients, pupils, the elderly, the homeless and others to claim their rights and, thereby, improve their situation. It is closely related to good governance. Local politicians and public officials should seize the opportunity to enhance the quality of life in their communities by implementing human rights in their ordinary work.

After the human rights breakdown
during the “war on terror”,
the damage must be assessed
and corrective action taken

16 March 2009

The Obama administration has banned torture during interrogation of terrorist suspects and declared that the Central Intelligence Agency of the United States of America can no longer use secret prisons in the United States or abroad. The detention camp in Guantánamo Bay will be closed within one year. European governments must now review their own conduct during the Bush administration, and take corrective action.

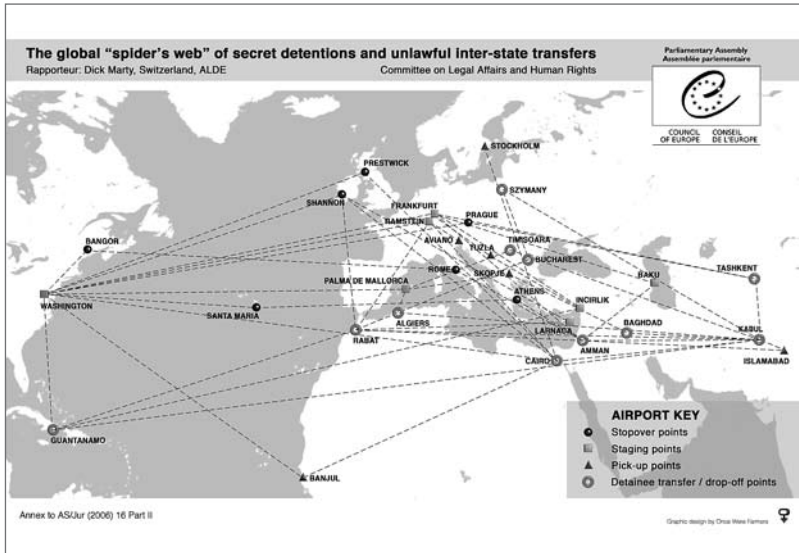
An independent, international panel of eminent judges and lawyers recently published a comprehensive report on the damage caused by the “war on terror” since 2001.¹ Their findings are alarming and call for corrective action.

The panel, established by the International Commission of Jurists (ICJ) and chaired by Arthur Chaskalson, former Chief Justice of South Africa, held 16 hearings covering more than 40 countries in all regions of the world.

The report describes counter-terrorism practices such as torture, disappearances, arbitrary and secret detention, unfair trials, and persistent impunity for gross human rights violations. Many governments have allowed themselves to be rushed into hasty responses to terrorism that have undermined basic values and violated human rights. The result is a serious threat to the integrity of the international human rights legal framework.

When the report was released, former UN High Commissioner for Human Rights and one of the panellists, Mary Robinson, said that all states must now restore their commitment to human rights. If we fail to act now, she emphasised, the damage to international law risks becoming permanent.

1. “Assessing Damage, Urging Action”, February 2009. International Commission of Jurists. www.icj.org.



“The work of intelligence agencies, including their international co-operation, must be regulated in line with human rights standards.”

Some European security agencies co-operated closely with the CIA in the rendition programme. Suspects were brought to Guantánamo Bay and other locations where they were interrogated using unlawful methods.

In some cases European intelligence services literally handed over prisoners to CIA agents, as the Swedish authorities did in the case of Ahmed Agiza and Mohammed El Zary. In others, they provided information with the same result, or looked the other way when foreign colleagues operated on their territory. PACE Rapporteur Senator Dick Marty reported that the CIA flights would not have been possible without such co-operation.²

2. “Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report”, 11 June 2007.

There have been allegations that agents of European security services co-operated with torturers and that they themselves interrogated detainees after they had been “softened up” by local security police. Reports that British, French, German and Swedish security personnel questioned countrymen while in CIA custody makes it necessary to clarify this co-operation.

Released prisoners have also alleged that they were asked questions during unlawful interrogations – by CIA or local agents – which must have originated from the intelligence services in their home countries. Further, there are indications that information obtained through such illegal means has later been exchanged between agencies.

The full facts about this inter-agency co-operation must be established to allow for follow-up action to be taken. It is disappointing that some European governments have been slow to recognise this need.

One argument is that such investigations would disturb the “special relationship” with the United States. This point was made recently in the trial of Binyam Mohamed, who is reported to have been tortured in Pakistan and Morocco before being transferred to Afghanistan and later to Guantánamo Bay. Questions have been raised about the role of the British intelligence in that case. The Foreign Minister argued that information about Binyam Mohamed’s treatment could not be made available even when requested by a court, because of the risk of negative reactions in Washington.

It is understandable that the European security services are keen to have good working relations with the CIA; exchange of intelligence information is essential for effective security operations. However, this dependency is now being used to cover up facts about human rights violations – and that is unacceptable.

This problem must be discussed further. Sound intelligence is certainly needed in order to prevent terrorist acts and the gathering of such intelligence data does require a degree of confidentiality. Information about intelligence gathering methods can undermine essential security efforts.

The Eminent Jurists Panel respected these arguments, but warned that secrecy may also be used to prevent proper accountability when

legitimate security interests are not at stake. The experts reported that they came across many examples of such misuse and stressed the importance of appropriate safeguards.

A distinction must also be made between genuine reasons to keep certain information confidential and arguments about preserving friendly international relations. Following the political changes in Washington it should now be possible to have a constructive discussion on how to ensure that inter-agency co-operation does not result in human rights violations.

This requires a determined position on cleaning up the immediate past.

The Canadian Government initiated a thorough investigation in the case of Maher Arar, a Canadian citizen who was arrested in an airport in the US and then transported to Syria where he was subjected to torture and cruel, inhuman and degrading treatment. This inquiry should serve as a good example for European governments.

The time has come for commissions to establish the facts. Secrecy can be protected if and where necessary, but in a democracy no-one should be above the law.

Establishing the facts is important in itself, but it is also necessary to prepare sound policy in this area. Intelligence agencies have acquired new powers and resources during these past years, but these have not been matched by political and legal accountability.³ The work of intelligence agencies, including their international co-operation, must be regulated in line with human rights standards.

3. See also: a) Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while fighting terrorism regarding the role of intelligence agencies in the fight against terrorism, 4 February 2009; b) Proposals made by the Secretary General, 30 June 2007, SG(2006)01; and c) Council of Europe's Venice Commission, Opinion no 363/2005, Strasbourg 17 March 2006.

Foreign policy should be
based on a principled approach
to human rights

30 March 2009

Some governments take an active approach to human rights in their foreign policies. Others are more cautious or even oppose what they see as meddling in the internal affairs of others. My view is that European governments should also pursue the values enshrined in international treaties, including the European Convention on Human Rights and the European Social Charter, in their external relations.

The United Nations Charter makes clear that the protection of human rights is not only a national but also an *international* concern and responsibility. This principle has been further confirmed in international and regional human rights treaties. The European Convention itself includes the possibility of bringing inter-state complaints.

While action for human rights began by being principally channelled through international organisations and mechanisms, such as the United Nations and the Council of Europe, governments are increasingly raising human rights in *bilateral* contacts. If seriously pursued, with the intent to improve the protection of human rights, this should be welcomed.

The Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights, has underlined that States Parties should pay attention to violations by other States Parties:

“To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.”¹

1. Human Rights Committee, General Comment 31.



“European governments should pursue the values enshrined in international treaties, also in their external relations.”

States have an obvious self-interest in stability and peace, not least among their neighbours. Experience has shown that repression and human rights violations often lead to unrest and sometimes even armed conflict, which in turn affects the broader region. One consequence may be the arrival of large numbers of refugees.

In other words, there is a link between respect for human rights and international security which no government can ignore.

There is also a compelling, principled argument for caring about human rights in other countries. People who are oppressed and silenced cannot defend their own rights, but they should be able to rely on those in freer societies to protect their interests in the spirit of

human solidarity. I have met individuals in such situations who have testified to the enormous importance of knowing that people or authorities in other countries are informed and care.

However, for governments to raise human rights issues in international fora or bilaterally is often seen as controversial and even provocative. This is partly because the concept of human rights has taken a moral dimension: those who violate the standards are seen not only as making mistakes, but guilty of unacceptable, unethical acts.

This is why it is so important that governments are *sincere* when they criticise others. This was not the case when, for instance, the former US administration lectured others on human rights while approving torture of persons apprehended abroad. The signals that the new administration in Washington will put an end to such hypocrisy – and has already begun to confront its own failings – are welcome indeed.

Dialogue between governments on human rights is often positive. The original idea of the UN Human Rights Council's "peer" review, later called the Universal Periodic Review, had obvious merits. However, some governments have been sadly selective, commending the performance of allies and ignoring reports by independent human rights bodies that show quite a different picture.

In-depth *knowledge* is crucial for meaningful dialogue. Too often, approaches are made without sufficient information and can easily be dismissed as politically motivated. Today, there is no lack of information; it is possible to find facts from reports issued by international agencies and non-governmental organisations, though these reports have of course to be read with a critical eye and are not always up to date.

It is also essential to be *consistent*. Much of the unfortunate politicisation of human rights is based on an unequal response to similar problems in different countries. For instance, the European semi-silence on the US torture during the Bush administration was damaging, as is the continued lack of strong initiatives to respond to the mass killing in Darfur. There have also been unfortunate cases of stereotyping certain countries, positively or negatively.

The methods to be used in an active foreign policy based on human rights require both a thorough reflection and a clear explanation. The choice of silent diplomacy may not always be understood, even when there are good arguments for keeping discussions confidential. There have also been cases where quiet diplomacy has been used to cover passivity.

Boycotts and other sanctions are often not effective and can even worsen the situation for the victims, although in some cases the threat of punitive action has helped to put the problem more firmly on the domestic agenda of the country in question. While such action should not be excluded in very serious cases, the general trend is to try to solve the problems through other methods.

One approach is to include human rights promotion in overseas development programmes. Some such assistance is channelled through non-governmental organisations. This is usually positive, but it is essential that this support be free from partisan political ambitions and does not compromise the impartiality of recipients.

Indeed, advisory services and technical assistance are almost always welcome. Yet to be effective they need to address the actual problems competently. They can be combined with monitoring and frank discussions.

Several governments in Europe are now guided by a *strategy directive* for human rights in their foreign affairs policy, in some cases approved by parliament. This has proved to be an effective way of clarifying basic principles and priorities. The adoption of such directives and reports on their implementation have provided a sound basis for in-depth discussions on human rights in foreign relations.

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“Since the establishment of Commissioner’s Office 10 year’s ago, its objectives and lines of action have clearly complemented the work of the European Court of Human Rights. Our discussions and exchanges of information are mutually beneficial. It is always with great interest that I read the Commissioner’s Viewpoints. Their publication is very important, not only because they refer to the European Convention on Human Rights and the case-law of our Court, but also because they provide a vital and wide-ranging source of information about the human rights situation in Europe. I strongly recommend reading them”.

Jean-Paul Costa

President, European Court for Human Rights

“Thomas Hammarberg’s articles are interesting and strong on content. What is particularly important, though, is that these words are backed by action. One example is the work after the war in Georgia 2008, when he succeeded in obtaining the release of more than one hundred Georgian and Ossetian detainees and hostages. What Thomas Hammarberg did and continues to do lends extra weight not only to this collection, but also to the position of Council of Europe’s Commissioner for Human Rights”.

Oleg Orlov

Council Chairman, “Memorial” Human Rights Centre

“This is the third collection of Viewpoints issued by the Council of Europe Commissioner for Human Rights, Thomas Hammarberg. Illuminating and informative, these Viewpoints place human rights standards, both at the UN and the European level, in the context of some of the most pressing challenges facing Europe today. Informed by his own visits in the field across all Council of Europe member states, Commissioner Hammarberg continues to provoke innovative and constructive discussion, and warns against complacency in all its forms”.

Navanethem Pillay

UN High Commissioner for Human Rights



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