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Reparation and reconciliation processes to overcome past conflicts and build a common peaceful future – the question of just and equal redress

Committee Opinion[1]
Committee on Political Affairs and Democracy
Rapporteur: Mr George LOUCAIDES, Cyprus, Group of the Unified European Left

A. Conclusions of the committee

1. The Committee on Political Affairs and Democracy congratulates the rapporteur, Lord Richard Keen (United Kingdom, EC/DA), on his report on "Reparation and reconciliation processes to overcome past conflicts and build a common peaceful future – the question of just and equal redress", which raises a number of important issues relating to post-conflict situations and proposes new avenues as to the ways to address the conflicts of the past and to promote reconciliation and reparation.

2. The committee fully shares the rapporteur's view that the Council of Europe may play an increased role in promoting solutions to foster justice, co-operation and peace in Europe, thus fulfilling its statutory goal. It therefore welcomes the idea of considering establishing a mediation mechanism under the auspices of the Council of Europe to complete the existing tools at the disposal of the Organisation to facilitate finding solutions to post-conflict disputes.

3. At the same time, the committee believes that this proposal requires thorough consideration at expert level. In this respect, it is of the opinion that the elements of the mediation mechanism as suggested by the draft resolution and draft recommendation are too prescriptive, which may prove to be counter-productive in the process of exploring the feasibility of such a mechanism, taking into account the innovative character of the proposal.

4. Furthermore, the committee has reservations as to the mandatory nature of the mediation process in the absence of consent by the parties involved. As the report rightly states, the reparation and reconciliation process in post-conflict situations can be a highly sensitive matter. One must avoid any risks that, instead of helping promote reconciliation, attempts to impose mediation lead to new tensions.

5. The committee firmly believes that any mediation mechanism should avoid duplication or conflict with any other existing processes and should not be used to bypass or undermine such processes, including in the framework of the United Nations, as well as the procedures before, and the implementation of judgements of, the European Court of Human Rights.

6. With this in mind, while agreeing with the report's findings and analysis, the committee proposes several amendments to the draft resolution and the draft recommendation with a view to making them less prescriptive and allowing more options to be considered at expert level, so as to gather the maximum support for this initiative.

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1. Reference to committee: Doc. 15676, Reference 4706 of 27 January 2023. Reporting committee: Committee on Legal Affairs and Human Rights. See Doc. 15933. Opinion approved by the committee on 25 June 2024.

B. Proposed amendments to the draft resolution

Amendment A (to the draft resolution)

After paragraph 9.1, insert the following paragraph:

> *"The mediation mechanism should avoid duplication or conflict with any other existing processes and should not be used to bypass or undermine such processes, including in the framework of the United Nations, as well as the procedures before, and the implementation of judgments of, the European Court of Human Rights."*

Amendment B (to the draft resolution)

Replace paragraph 9.2, with the following paragraph:

> *"The Committee of Ministers, the Parliamentary Assembly or the Secretary General of the Council of Europe may invite member States to resort to the mediation under the auspices of the Council of Europe. However, the mediation process may only be initiated with the full consent of all parties involved."*

Amendment C (to the draft resolution)

In paragraph 9.7, replace the first sentence "There should be an obligation on member States to engage with a mediation process in good faith." with the following sentence:

> *"Member States which resort to the mediation process should commit to engage with it in good faith."*

Amendment D (to the draft resolution)

In paragraph 9.7, delete the last sentence:

> *"There should thus be potential repercussions for a State that is considered not to have engaged with the process in good faith."*

Amendment E (to the draft resolution)

In paragraph 9.9, delete the last sentence:

> *"In a serious case of non-compliance, use of the complementary joint procedure could be considered, as well as potential suspension where a breach would constitute a serious violation of Article 3 of the Statute of the Council of Europe (namely a serious violation of the principles of the rule of law, human rights and sincere and effective collaboration in the realisation of the aims of the Organisation)."*

C. Proposed amendments to the draft recommendation

[The amendments to paragraph 9 of the draft resolution are to be applied to paragraph 5 of the draft recommendation.]

Amendment F (to the draft recommendation)

After paragraph 5.1, insert the following paragraph:

> *"The mediation mechanism should avoid duplication or conflict with any other existing processes and should not be used to bypass or undermine such processes, including in the framework of the United Nations, as well as the procedures before, and the implementation of judgments of, the European Court of Human Rights."*

Amendment G (to the draft recommendation)

Replace paragraph 5.2, with the following paragraph:

> *"The Committee of Ministers, the Parliamentary Assembly or the Secretary General of the Council of Europe may invite member States to resort to the mediation under the auspices of the Council of Europe. However, the mediation process may only be initiated with the full consent of all parties involved."*

Amendment H (to the draft recommendation)

In paragraph 5.7, replace the first sentence "There should be an obligation on member States to engage with a mediation process in good faith" with the following sentence:

> *"Member States which resort to the mediation process should commit to engage with it in good faith."*

Amendment I (to the draft recommendation)

In paragraph 5.7, delete the last sentence:

> *"There should thus be potential repercussions for a State that is considered not to have engaged with the process in good faith."*

Amendment J (to the draft recommendation)

In paragraph 5.9, delete the last sentence:

> *"In a serious case of non-compliance, use of the complementary joint procedure could be considered, as well as potential suspension where a breach would constitute a serious violation of Article 3 of the Statute of the Council of Europe (namely a serious violation of the principles of the rule of law, human rights and sincere and effective collaboration in the realisation of the aims of the Organisation)."*

D. Explanatory memorandum by Mr George Loucaides, Rapporteur for opinion

1. I wish to welcome the report on "Reparation and reconciliation processes to overcome past conflicts and build a common peaceful future – the question of just and equal redress" presented by Lord Richard Keen (United Kingdom, EC/DA) on behalf of the Committee on Legal Affairs and Human Rights.

2. The report presents a detailed and well-documented study on international law and practice relating to reparations, reconciliation and transitional justice, and offers an analysis of mechanisms currently available, in the Council of Europe and beyond, for promoting reconciliation and reparation.

3. Based on this analysis, the report concludes with a need for introducing a new Council of Europe mediation mechanism to complement the existing tools aimed at resolving disputes between member States resulting from past conflicts, and suggests specific elements for such a mechanism.

4. I fully share the view of the rapporteur that the lack of progress in achieving, through the existing tools, reconciliation and redress following past violent conflicts between States, including fair compensation to the victims, may result in a feeling of injustice and lead to the perpetuation of conflicts or even to a resumption of hostilities.

5. I also agree with the rapporteur that the Council of Europe can do more to help overcome the consequences of past conflicts between member States and to promote reconciliation and reparation as a basis for preventing possible new conflicts and creating conditions for peaceful co-operation.

6. At the same time, while fully endorsing the proposal of the rapporteur to consider establishing a mediation mechanism under the auspices of the Council of Europe to complete the existing tools at the disposal of the Organisation to facilitate finding solutions to post-conflict disputes, I have some reservations as to the specific parameters of such mechanism as set forth in the draft resolution and draft recommendation.

7. First, it is necessary to stress that a new mediation mechanism should not be conceived as a means to short cut, or to circumvent, the system of the European Convention on Human Rights (ETS No. 5) and the European Court of Human Rights. In this context, I wish to express a number of concerns.

8. In particular, paragraph 9.2 of the draft resolution and paragraph 5.2 of the draft recommendation suggest that the mediation process may be initiated "in the absence of consent by both parties". One can imagine a situation where one party decides to request that the mediation process be initiated with a view to bypassing mediation efforts already underway.

9. Furthermore, paragraph 65 of the explanatory memorandum suggests that "… it could be a prior requirement for States to attempt mediation before resorting to bringing a post-conflict inter-State case before the European Court of Human Rights." In my view, such requirement would be in contradiction with the right of member States to resort to the Court set forth by Article 33[2] of the European Convention on Human Rights as revised by Protocol 11 (ETS No. 155), which is one of the most effective tools at their disposal under the Convention.

10. More specifically, an obligation to exhaust the mediation mechanism remedy prior to lodging an application before the Court would most certainly have an impact on the admissibility of applications when it comes to complying with the four-month rule (Article 35 paragraph 1 as amended by Protocol No. 15, CETS No. 213) and, as a result, on the whole procedure.

11. Similarly, a proposal contained in the same paragraph 65 that the mediation process could be initiated in the framework of the implementation of Court judgments seems to suggest that such mediation could be seen as an alternative to the execution of a judgement, which would be contrary to States' obligations under Article 46.1[3] of the European Convention on Human Rights and undermine the effective implementation of the Court's judgments.

12. In my view, inter-State cases address mass and serious human rights violations and cannot be considered merely as "disputes" between member States. Fundamental human rights violations cannot be assessed nor addressed through mediation efforts and must remain under the jurisdiction of the Court. The Court's judgments should remain distinct from any sort of mediation process. The latter should not in any way replace the Court but might only act in its support, with the consent of all parties involved.

13. More generally, I believe that a mediation process should only be initiated with the full consent and adherence of both parties involved. Any attempts to impose a mediation process in the absence of such consent and adherence may lead to results opposite to those sought.

14. Accordingly, I am rather pessimistic as to the proposal that the Committee of Ministers, the Parliamentary Assembly or the Secretary General of the Council of Europe should be able to decide, acting on their own, to initiate a mediation process in the absence of consent by both parties involved as suggested in paragraph 9.2. of the draft resolution and paragraph 5.2. of the draft recommendation. I believe that the procedure for initiating a mediation process needs further consideration.

15. In addition, I find that the proposal that, in case of the Assembly, the process might be initiated through a recommendation is contradictory in itself: by its very nature, an Assembly recommendation is not a decision to act on its own but a request to act addressed to the Committee of Ministers.[4]

16. While I subscribe to the call on Council of Europe member States to ratify the European Convention for the Peaceful Settlement of Disputes (ETS No. 23) contained in paragraph 10.2. of the draft recommendation, I must recall that this instrument has been ratified by only 14 member States since its opening in 1957; 6 more States have signed, but not ratified it.

17. I also wish to stress that the mediation process suggested by the report should in no way weaken or duplicate other mediation efforts made in the framework of the United Nations. It is worth recalling that, under Article 103[5] of the United Nations Charter, States' obligations under that Charter prevail. Accordingly, in case there is an ongoing process under the auspices of the United Nations, the proposed Council of Europe mediation process would not be applicable.

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2. European Convention on Human Rights, Article 33 – Inter-State cases:
"Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party."
3. European Convention on Human Rights, Article 46 – Binding force and execution of judgments:
"The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."
4. Rules of Procedure of the Assembly, Rule 25.1.a – Tabling of motions for recommendations and resolutions:
"A recommendation is a proposal by the Assembly addressed to the Committee of Ministers, the implementation of which is beyond the competence of the Assembly, but within that of governments."
5. Charter of the United Nations, Article 103:

18. In conclusion, I welcome the report presented by the Committee on Legal Affairs and Human Rights and I endorse the proposal to consider establishing a mediation mechanism under the auspices of the Council of Europe to complete the existing tools at the disposal of the Organisation to facilitate finding solutions to post-conflict disputes. However, I believe that this proposal requires careful consideration at expert level. Accordingly, I propose several amendments to the draft resolution and draft recommendation with a view to making them less prescriptive and allowing more options to be considered at expert level, so as to gather the maximum support to this initiative.

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."