



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

International and national courts confronting large-scale violations of human rights

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Ladies and gentlemen, it is a great pleasure and privilege for me to have the opportunity to participate in this judicial dialogue on the occasion of the opening of the 2016 judicial year and to reflect together with my friend Judge Møse upon the presentation by our distinguished colleague Judge Piotr Hofmański on the first topic of the seminar – International and national courts confronting large-scale violations of human rights.

My reflection is inspired by your proposition that only joint and multifaceted action can stop atrocities (paragraph 2 of your paper) and that both forms of international justice (the International Criminal Court and the European Court of Human Rights) have the same goal, even if they try to achieve it by different means (paragraph 5 of your paper). In my remarks I would like to explore the relationship between the International Criminal Court, the European Court of Human Rights and the national courts in the fight against impunity, which must be pursued as a matter of justice for the victims, as a deterrent to prevent new violations, and to uphold the rule of law and public trust in the judicial system.¹

In the early 1990s, with the establishment of *ad hoc* international criminal courts, the human rights movement started to pay increased attention to and put its faith in criminal justice systems – both national and international. Impunity for serious human rights violations started to be seen not only as a failure to remedy human rights violations, but as one of the causes of them. Individual criminal responsibility and the fight against impunity became central to the human rights effort.²

In Europe this coincided with new democracies and societies in transition joining the European system for the protection of human rights. The Court was faced with the problem of large-scale violations on a level it had not seen before (the few cases dealing previously with large-scale violations in Turkey and Cyprus were the exception in our case-law) and since the early 1990s the Court has developed extensive

¹ See the Preamble to the Guidelines on “Eradicating impunity for serious human rights violations”, adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers’ Deputies.

² See Karen Engle, “Anti-Impunity and the Turn to Criminal Law in Human Rights”, 100 *Cornell L.J.* 1069 (2015).

case-law in this area. This process has been accelerated by the Kurdish, Chechen, Transdnestrian, Nagorno-Karabakh and other conflicts.

By 2009 the Council of Europe set as one of its most important goals the eradication of impunity throughout the continent. In 2009 the Parliamentary Assembly adopted a Recommendation on “The state of human rights in Europe: the need to eradicate impunity”³ and in 2011 the Committee of Ministers adopted Guidelines on “Eradicating impunity for serious human rights violations”.⁴

All these factors, together with the ever-increasing use of individual complaint mechanisms as a means of dealing with serious violations of human rights, have led to the gradual criminalisation of our case-law. Or perhaps it could be said that we are faced with the instrumentalisation of national and international criminal laws for the purpose of preventing serious violations of human rights.⁵ Let me give just a few examples that all of us are well acquainted with.⁶

In the light of the Court's case-law, States have an obligation under the Convention (Articles 2, 3 and 4, Article 5 § 1 and Article 8) to enact criminal-law provisions to effectively punish serious human rights violations through adequate penalties.⁷ Not all violations of these Articles will necessarily reach this threshold. States Parties do not have a margin of appreciation in the choice of means of protection in relation to war crimes, crimes against humanity or genocide.

Furthermore, the State has an obligation to establish criminal-law machinery and enforce criminal-law provisions.⁸ Persistent ineffective implementation of criminal law may amount to a violation of individual rights if a general atmosphere of impunity leads to the commission of further crimes.⁹ Passivity may be equated with complicity. This I would call responsibility of the State for failure to prosecute.

In particular, States have the obligation to conduct an effective investigation of serious human rights violations to ensure the accountability of those responsible for the violations.¹⁰ States should do this on their own initiative. Of course, an effective investigation is an obligation as to means and not as to results.

Furthermore, States have a duty to prosecute where the outcome of an investigation warrants this. The Court must on no account be prepared to let the physical or psychological suffering inflicted go unpunished.¹¹

The Convention does not guarantee a right to secure a conviction in criminal proceedings. However, when serious human rights violations have been found, the imposition of a suitable penalty should

³ Recommendation 1876 (2009).

⁴ See note 1 above.

⁵ See Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, Oxford University Press, 2009.

⁶ A good summary of all these principles can be found in *B. and Others v. Croatia*, no. 71593/11, §§ 56-61, 18 June 2015.

⁷ See *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports of Judgments and Decisions* 1998-VIII; *Mastromatteo v. Italy* [GC], no. [37703/97](#), §§ 67 and 89, ECHR 2002-VIII; and *Menson v. the United Kingdom* (dec.), no. [47916/99](#), ECHR 2003-V.

⁸ *Ibid.*

⁹ See *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 94-98, ECHR 2000-III. See also *Yaşa v. Turkey*, 2 September 1998, § 104, *Reports* 1998-VI.

¹⁰ See, for example, *Hugh Jordan v. the United Kingdom*, no. [24746/94](#), §§ 105-09, 4 May 2001; *Kelly and Others v. United Kingdom*, no. 30054/96, § 94, 4 May 2001; *Douglas-Williams v. the United Kingdom* (dec.), no. [56413/00](#), 8 January 2002; *Esmukhambetov and Others v. Russia*, no. [23445/03](#), §§ 115-18, 29 March 2011; and *Umarova and Others v. Russia*, no. [25654/08](#), §§ 84-88, 31 July 2012.

¹¹ See, *mutatis mutandis*, *Öneryıldız v. Turkey* [GC], no. [48939/99](#), § 96, ECHR 2004-XII; *Okkali v. Turkey*, no. [52067/99](#), § 65, ECHR 2006-XII (extracts); and *Türkmen v. Turkey*, no. [43124/98](#), § 51, 19 December 2006.

follow. The sentences that are handed out should be effective, proportionate and appropriate to the offence committed. They should be commensurate to the gravity of the case. The imposition of lenient sentences engenders a climate of impunity. Consequently, in cases of manifest disproportionality between the gravity of the crime and the punishment imposed, the Court will intervene. The Court explains this by its aim of ensuring practical and effective rights. “Were it to be otherwise, the States' duty to carry out an effective investigation would lose much of its meaning, and the right enshrined by Article 2, despite its fundamental importance, would be ineffective in practice.”¹²

However, the Court is cautious not to extend these protective and procedural obligations to an unreasonable extent and impose an impossible and disproportionate burden on the authorities.

For example, the Court has held that the obligation of investigative expedition in historical cases (for example, those in the countries of former Yugoslavia) may be quite different from the standard applicable to recent incidents. Owing to the lapse of time, the level of urgency may have diminished; the immediacy of the required investigative steps in the aftermath of an incident is likely to be absent. The authorities can legitimately take into account the prospects of launching a new prosecution at such a late stage.¹³

The Court has also held that this procedural duty has to be applied realistically, taking into account the circumstances and specific problems faced by investigators, in particular in a context of conflict or the aftermath of war, but concerning a wartime death or disappearance. In *Jaloud*¹⁴ the test was whether shortcomings (failings) in an investigation could be considered inevitable, while in cases following *Palić v. Bosnia and Herzegovina*¹⁵ the test was whether the authorities had done all that could be reasonably expected of them. This opens an interesting debate about the exact flexibility States enjoy in applying the Convention in wartime situations.

Furthermore, the right of access to a court does not entail the right for a victim to institute or have instituted criminal proceedings against another person,¹⁶ or to secure a conviction or punishment.¹⁷ There is no right to justice as a matter of redress.

In the *Marguš* case the Court held, under Articles 2 and 3 of the Convention, that in general, granting amnesty in relation to the killing of civilians constituted a breach of the State's fundamental human rights obligations unless this was accompanied by reconciliation and compensation processes.¹⁸ The Grand Chamber left open the possibility that amnesties might be permissible in certain circumstances.

Thus we are perceived by some as not being sufficiently “punitive”.¹⁹

Since the early 1990s the Court has delivered hundreds of judgments in cases concerning forced disappearances and war crimes in which it has pushed indirectly for accountability. The Court has slowly improved its ability to deal with large-scale human rights violations. Individual complaints have slowly evolved into a quasi-criminal mechanism providing a complementary way of dealing with large-scale

¹² See *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 62, 20 December 2007.

¹³ See *Treskavica v. Croatia*, no. 32036/13, § 62, 12 January 2016, with further references.

¹⁴ *Jaloud v. the Netherlands*, no. 47708/08, § 227, ECHR 2014.

¹⁵ *Palić v. Bosnia and Herzegovina*, no. 4704/04, § 70, 15 February 2011.

¹⁶ *Dujardin and Others v. France*, no. 16734/90, Commission decision of 2 September 1991, Decisions and Reports 72.

¹⁷ *Perez v. France*, no. 47287/99, § 70, ECHR 2004-I.

¹⁸ *Marguš v. Croatia*, no. 4455/10, § 139, ECHR 2014.

¹⁹ See, for example, Sonja C. Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (2010).

violations of human rights.²⁰ By reversing the burden of proof, drawing inferences from the State's failure to cooperate, instituting priority proceedings and ordering general measures under Article 46 of the Convention, the Court has increased its capability to deal with these types of cases.²¹

However, the key factor in combating impunity is the full and speedy execution of the Court's judgments. Here, an important role is played by the Committee of Ministers, which supervises the effective implementation of the judgments, often insisting on the introduction of some general measures and the undertaking of an effective investigation. For example, in *Aslakhanova and Others v. Russia*²² the Committee of Ministers declared that the successful prosecution of individual cases was a prerequisite to finding that the State had complied with its obligation to ensure effective remedies in accordance with the Court's judgment.²³

Large-scale violations of human rights, as I have demonstrated, are not merely extreme cases of ordinary crimes. They do pose distinct dilemmas for their adjudication and even more their implementation, the latter often being highly politicised.

To conclude, in the fight against impunity the International Criminal Court (ICC), the national courts and our Court are indeed dividing up the work between themselves. The domestic authorities have the primary role of investigating and prosecuting large-scale violations of human rights. Only if the national authorities fail to provide adequate remedies is our Court triggered into action (the principle of subsidiarity). Within its subsidiary role the Court provides normative guidance to national justice systems. However, if national authorities are unwilling or unable to act, the ICC could open its own prosecution (the principle of complementarity). Consequently, the supervision performed by our Court could be backed up by a threat of direct prosecution by the ICC. In the fight against impunity each of us is playing an important role, but the most important role is played by the national authorities.

Hannah Arendt warned us: "We convince ourselves that if we remove bad actors, we deal with evil." We must not forget that to properly deal with evil, criminal prosecution and individual accountability are far from sufficient. We have to develop strategies and further enhance our ability to attend to the underlying structural causes of large-scale human rights violations. Social research, though still scarce, indicates that violations of civil and political rights, in particular abuses of personal integrity rights, discrimination and denial of political participation rights, are closely identifiable as direct triggers of conflict or of its escalation.²⁴ By protecting human rights in general, we are in fact preventing the occurrence of large-scale violations of human rights. In this respect our preventive function is even greater.

²⁰ On the quasi-criminal jurisdiction of human rights courts see Alexandra Huneeus, "International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts", 107 *Am. J. Int. L.* 1 (2013).

²¹ See for more details, Background paper prepared for the seminar on "International and national courts confronting large-scale violations of human rights," at www.echr.coe.int/Documents/Seminar_background_paper_2016_part_1_ENG.pdf

²² *Aslakhanova and Others v. Russia*, nos. 2944/06 et al., 18 December 2012.

²³ For the range of remedial alternatives and their consequences, see Gerald L. Neuman, "Bi-Level Remedies for Human Rights Violations", 55 *Harvard Int. L.J.* 323 (2014).

²⁴ Oskar N.T. Thomas and James Ron, "Do Human Rights Violations Cause Internal Conflict?", 29 *Hum. Rts. Q.* 674 (2007).