

Consultative Conference on International Criminal Justice

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Speaking note for Erik Fribergh, Registrar, European Court of Human Rights

1. I will begin by congratulating Juan Mendez for the excellent paper he prepared for this session. It draws out, in a concise way, a series of interesting points about the contribution of the regional human rights courts and commissions to international criminal law.
2. He poses the preliminary question whether one can look at the organs of individual criminal responsibility and of State responsibility as forming an overall system of international justice, the ultimate objective of which is to deter, prevent and punish the most serious crimes against human beings. In my view, thinking of a system is going a bit too far. But the various bodies are certainly advancing in the same direction, towards highly complementary goals and using very compatible means to achieve them. There is also the good habit of finding inspiration in the case law of other courts and similar bodies that have tackled similar legal problems.
3. I certainly agree with Juan's point about the need to bring national courts into the picture. For the European Convention system, this is the key element of its design – primary responsibility on the competent national authorities, with a special role for the domestic courts, and a subsidiary role for the European Court. The European Convention has progressively permeated the judicial systems of the Contracting States – in every one of them it now forms part of the domestic law, and the habit of referring to and following the Strasbourg case law grows ever stronger. This can be seen as national authorities taking not just responsibility but, more positively, ownership of European human rights law, allowing it to take root and grow in every legal system in Europe. Only in such conditions can the European Court of Human Rights perform its intended role, i.e. the court of final resort for all issues pertaining to the interpretation and application of the Convention, the ultimate guarantor of the effectiveness of the Convention guarantees.
4. I would like to pick up on the notion of gross and consistent violations of human rights, which Juan refers to in Part III of his paper. One cannot really say that this is a concept that the European Court has really taken on board, in the sense that where it finds such a situation the legal consequences for the State will be more serious, or the remedy ordered will be more onerous. There is a strong contrast with the Inter-American Court of Human Rights, which is more demanding and imaginative when it comes to remedies and reparation. The practice of the European Court in this respect is much more “prudent”.

Some recent judgments concerning very serious human rights violations in Chechnya illustrate this clearly. Since 2005, the Court has given dozens of judgments in such cases, finding flagrant and serious violations of the most fundamental rights: right to life, prohibition of torture, protection against illegal arrest and unacknowledged detention. In addition to the usual award of compensation, some of the applicants requested other measures, such as an order to the Russian Government to launch independent investigations, issue a public apology or return the remains of the deceased for burial. These are common features of IACHR judgments, but the European Court declined, stressing the declaratory nature of its jurisdiction. It recalled that it was for the respondent Government to choose how it would discharge its binding obligation to abide by the judgment given in the case (e.g. *Bersunkayeva v. Russia*, no. 27233/03, para. §§ 123-126, 4 December 2008).

Nor does the Court award punitive damages against a State, even if the actions of its officials were particularly culpable. It only considers the harm suffered by the applicant and the consequences for them of the violation.

That is not to say that the European Court has no regard to the context in which an individual application arises. It has responded in other ways to grave, systemic violations of human rights. For example, it has applied the rule of exhaustion of domestic remedies with some flexibility, taking account of the difficulties (and even dangers) that applicants would face if they sought redress from the domestic authorities (*Akdivar*).

[I would also mention the concept of an administrative practice incompatible with the Convention. This has rarely been established, as it needs to be proven beyond reasonable doubt (*Ireland v. United Kingdom, Cyprus v. Turkey*). For the most part, it is in a context far removed from international criminal law that it has been established – dysfunctional civil justice systems (length of proceedings in Italy, non-enforcement of judgments in Russian and Moldova).]

The Court will use strong language in its judgments where the situation is especially grave (e.g. “astonishing ineffectiveness” of an investigation into the killing of more than 50 civilians, which could only be qualified as “acquiescence in the events” - *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, § 164, 26 July 2007). But the consequence of this is more political (bad press for the Government) than legal.

What I am saying, then, is that one does not find in the Strasbourg case law a substantive equivalent to crimes against humanity within the meaning of the Rome Statute.

5. But human rights law clearly has, as Juan puts it, contributed mightily to the emerging norms in international law that are at the basis of the Rome Statute. As he notes briefly, since the mid-1990s, when it started deciding cases arising out of the intense conflict in south-east Turkey, the European Court has developed robust procedural obligations under Articles 2, 3 and 5 of the Convention. The national authorities are thus obliged to react swiftly and

effectively to situations in which serious human rights violations have occurred, so that the perpetrators – be they State agents or private persons – are identified and punished. Any impunity is totally incompatible with the obligations laid on the State by these core provisions of the Convention. For this reason, even after the Court has completed its examination of a case, the State will remain subject to international scrutiny before the Committee of Ministers, which takes the view that failure to discharge the obligation to investigate means that the national authorities have a continuing obligation to do so.

6. Concerning the problem of amnesties for serious violations of human rights, I would refer to a recent decision of the ECHR in a case filed by a Mauritanian army officer convicted by a French court for acts of torture committed in his country in the early 1990s – *Ould Dah c. France* (no. 13113/03, decision of 17 March 2009). The applicant, who absconded during the proceedings, was sentenced to 10 years' imprisonment. He complained under Article 7 of the Convention that French law had been applied rather than Mauritanian, under which he had the benefit of an amnesty. This gave the Court the opportunity to recall the absolute nature of the ban on torture and the imperative of punishing those who perpetrate it. To accept the applicant's complaint would be to completely thwart the purpose of the international norms against torture. Echoing the position of the UN Human Rights Committee and the ICTY, the ECHR declared amnesties to be generally incompatible with the duty of States to investigate acts of torture. The amnesty in Mauritania – which could be viewed as abusive under international law - could not be relied on to avoid criminal liability in France. The Court went on to find that the offence of which the applicant was convicted was sufficiently clear in national and international law at the time it was committed.
7. Another point I would like to pick up on is the extent to which the case law of the human rights courts on the guarantees of a fair criminal trial is reflected in the practice of the ICC. The Strasbourg case law in this area is extensive and detailed, and likely to be referred to by defendants and their lawyers as the ICC does its work (as is the case before the ICTY).
8. This raises the question to what extent could a regional human rights body be called upon to examine whether the fair trial rights set out in a regional human rights treaty have been adequately respected by an international criminal tribunal? To be more specific, how would the European Court of Human Rights handle a complaint from an accused person before the ICC that their trial was not in accordance with Article 6 of the Convention?

Two recent decisions of the Court deal with that situation in the context of the ICTY: *Blagojevic* and *Galic*, both of them against the Netherlands. Each applicant had been convicted of serious crimes and sentenced to long terms of imprisonment. One complained that he had not been permitted to engage new legal counsel following a breakdown (as he put it) of trust and communications with his court-appointed lawyers. The other raised several complaints about the fairness of the proceedings against him. The Court came to the same conclusion in each case – it did not have jurisdiction *ratione*

personae to consider the merits. Clearly, the Court could not directly examine the acts or omissions of the ICTY, which were ultimately attributable to the UN Security Council. Nor was the responsibility of the Netherlands engaged by the mere fact that the trials had taken place on its territory. In each case, the Court expressly noted that the ICTY's organisation and procedures had been designed to provide accused persons with all appropriate guarantees. One may see in these decisions both a measure of reassurance for the international criminal tribunals, and a mild warning of the imperative of abiding by the principles of a fair trial.

9. [We can talk about the contribution of the regional human rights systems to the emergent system of international criminal justice, but it is also important to recall the practical limits to what bodies such as the European Court can achieve. Since inter-State cases, which would be a more suitable framework for examining allegations of systemic human rights violations in a country, are so rare, the main form of proceedings is the individual complaint. And these reach Strasbourg in huge numbers, making it difficult for the Court to deal with them in an acceptable time. Coupled with the rule on exhaustion of domestic remedies, it can happen that the Court is ruling on events that happened ten or more years ago. The Grand Chamber is about to deliver judgement in a case against Turkey the facts of which go back to the invasion of Cyprus in 1974 – *Varnava*. The individual case is not the most appropriate vehicle to properly analyse the underlying problem. The fact that there may be hundreds or even thousands of such cases – e.g. the individual applications brought against Georgia and Russia since last year's war – does not alter that. One might put it this way – the Court can handle gross violations of human rights, but handling widespread or systemic violations is more difficult.
10. But we are developing new approaches. In terms of judicial policy, the pilot-judgment procedure is an important innovation which sees the Court looking beyond the individual situation to the underlying issue, and framing its judgment in wider terms than usual. While this has so far been used in situations rather far-removed from crimes against humanity, it cannot be excluded that the Court might take some sort of pilot approach to complaints of such gravity for the sake of greater effectiveness of its action.
11. In terms of case management, the Court now prioritises its work, so that the most serious and significant cases take priority over other types of complaint. The Court cannot choose its cases, nor can it turn away cases that are merely repetitive, but it can ensure that the most urgent cases are not kept waiting any longer than necessary.]