



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

Genocide, crimes against humanity and war crimes

(Theme 1 contribution)

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1. The International Criminal Court's perspective on the issues discussed in the Background paper for the seminar, prepared by the Department of the Jurisconsult of the ECHR, is slightly different. The ICC has jurisdiction over genocide, crimes against humanity and war crimes. Therefore, judges of the International Criminal Court deal with allegations of large-scale violations of human rights. Our focus is primarily on the criminal responsibility of individuals for conduct falling within the scope of the ICC's jurisdiction, rather than on the responsibility of States, even where such conduct is aimed at implementing State policy. Nevertheless, a number of significant issues are of common interest for all courts confronting large-scale violations of human rights.
2. The most serious crimes of concern to the international community as a whole involve most cruel violations of human rights. I am strongly convinced that only collective multi-faceted action can stop atrocities. This is one of the most important challenges for the international community. While every court or body confronting human rights violations has its role to play, the role of international courts is crucial. I would emphasise that if international courts are to be efficient, they must not act in isolation. Nor should one forget the national courts confronted with serious violations of human rights or the State authorities which are responsible for policies that impact on the level of respect for human rights and on the effectiveness of their protection. Non-governmental organisations are playing an increasingly important role, monitoring the activities of State authorities and courts, including international courts, and publicising respect for the rule of law and human rights.

In order to strengthen the effectiveness of protection at the international level we must intensify two processes.

The first is to universalise international criminal justice. As you know we now have 123 States Parties to the Rome Statute. That is a fairly large number, but we must remember that many States, including some powerful ones such as USA, China, India and Russia, have not ratified the Rome Statute, as it appears that some of them are concerned about the lack

of a political mechanism to limit the potential responsibility of their officials and citizens. As a result, unfortunately, more than a half of the world's population remains outside the protection offered by the ICC. This is a serious problem. On the one hand, powerful States keep away from the ICC, presumably because of their limited political influence over its work, but on the other, it is essential to strengthen the political independence of the Court in order to ensure the effectiveness of its activities and guarantee its international plausibility.

Thought should be given to the relationship between the sovereignty of States and their readiness to accept the jurisdiction of the Court. Generally, the exercise of criminal jurisdiction is a sensitive matter where the sovereignty issue is concerned. Nevertheless, I hope that more States will be ready to redefine the concept of sovereignty in the near future. In my opinion, sovereignty should also cover responsibility for joint security and for ensuring that the most serious crimes do not go unpunished.

The second important process is publicising international standards of human rights protection. This should be done on the universal as well as the regional level. Europe has one of the best and most effective regional systems of human rights protection. However, most cruel atrocities occur on other continents, and this is why our task and responsibility is to strengthen other regional systems. An alternative would be a strong universal system of human rights protection. We have such a system within the UN, but there are concerns about its efficiency. Among the possible reasons for the limited efficiency of that system are the difficulties in reaching an international consensus on a catalogue of rights to be protected. These difficulties may relate to deep-rooted worldwide differences of legal culture and levels of social development.

3. At the international level, criminal courts and human rights courts are complementary. International criminal courts deal with the criminal responsibility of individuals for crimes falling within their jurisdiction. International human rights courts decide on the responsibility of States for violations of the rights of individuals. Outwardly, these courts have disparate jurisdictional scopes. In fact, a State can be responsible for human rights violations caused by the conduct of individuals acting on that State's behalf. At the same time, such conduct can also fall within the jurisdiction of an international criminal court. Persons acting on behalf of States, especially in high-level government positions, are usually tried by the international criminal courts.

Nevertheless, there is no conflict of jurisdiction. Both the object and the type of responsibility are different. On the one hand, we have a typical criminal responsibility for conduct qualifying as an international crime under the jurisdiction of international criminal courts. On the other, the same conduct is considered as an act of violation of human rights. One type of justice concentrates mainly on the perpetrators, while the other focuses on the victims. This is why the two types of responsibility complement each other perfectly.

Both elements should be seen as necessary, on the basis of the twofold role of international justice. International human rights courts mainly adjudicate on the responsibility of States for violations of human rights. However, the responsibility of a State and the protection of an individual from human rights violations resulting from that State's activities are not the only goals. Equally important, and maybe even more so, is the preventive effect.

Similarly, the main goal of international criminal justice is to hold perpetrators responsible for the crimes committed, as well as to show to the international community that genocide, crimes against humanity and war crimes do not go unpunished and therefore to prevent future perpetration of such crimes.

4. International tribunals are courts of the last resort. Human rights courts are certainly unable to deal with all human rights violations occurring all over the world. For this reason, the

exhaustion of effective domestic remedies is one of the admissibility criteria for an individual application. Furthermore, international treaties require States Parties to introduce effective remedies before domestic authorities for everyone who alleges that his rights protected by the treaties have been violated (for example under Article 13 ECHR). This admissibility criterion is interpreted broadly, and the States Parties are encouraged to introduce such remedies in increasing numbers of spheres. The binding effect of the Court's decisions broadens the role of the domestic authorities in the protection of victims of human rights violations and strengthens domestic systems of human rights protection.

A similar mechanism operates under the ICC. For obvious reasons, international criminal courts cannot deal with all the crimes coming under their jurisdiction which are committed worldwide. The complementarity principle means that the Court may deal with a case which is not already being investigated or prosecuted by a State which has jurisdiction over it, unless the authorities of that State are unwilling or unable properly to do so. Therefore, State authorities must be encouraged to carry out effective investigations with respect to perpetrators of genocide, crimes against humanity and war crimes.

Let me point out that the policy adopted by international human rights courts, including the ECHR, increases the chances for limiting the ICC's jurisdiction. According to ECHR case-law, State authorities are not only required to refrain from violating the rights guaranteed by the European Convention of Human Rights, but also to put in place effective criminal-law provisions, backed up by law-enforcement machinery, in order to secure the effective implementation of the domestic laws protecting the rights guaranteed by the Convention. This also concerns perpetrators of the most serious international crimes, since such crimes usually lead to large-scale violations of human rights. This is how international human rights justice and international criminal justice can complement each other.

5. It is plain to see that both sorts of international justice have the same goal, even if different courts pursue it by different means. From the perspective of international criminal justice, the goal is to put an end to impunity for the perpetrators of the most serious crimes of international concern. From the perspective of international human rights courts the goal is to prevent violations of human rights. However, what both systems of justice have in common is their concern for the victims of serious crimes and large-scale human rights violations.

The protection of victims is the very essence of international human rights justice. Human rights courts decide on the responsibility of States for violations of human rights, and some of them afford just satisfaction to the injured party.

From the perspective of The Hague, victim protection is an additional goal. After the person charged with crimes has been convicted, the Court may award reparations in separate proceedings. This is because the system has to be complete. On the one hand, it is crucial to show that the cruelest crimes of international concern do not go unpunished, while on the other, the victims of such crimes must be reassured that they are not being abandoned. As you know, a Trust Fund for the benefit of victims has been established under the Rome Statute and is being run according to the criteria determined by the Assembly of States Parties.

It should also be noted that the victims of the crimes charged have an important role to play in the trial proceedings. The ICC system is the first international judicial system where victims are participants in the proceedings against the persons charged with genocide, crimes against humanity and war crimes. Victims receive comprehensive support from a special section within the Registry.

6. The principle of legality plays a crucial role in the international human rights treaties and case-law. There must always be an appropriate legal basis for conviction. The question

whether or not one may be convicted solely on the basis of international law has been under debate for years. I personally consider that in the development of international criminal law, especially after the entry into force of the Rome Statute, the provisions of international substantive criminal law have increased in importance. Nevertheless, there is need to create an appropriate legal basis for individual criminal responsibility for international crimes at national level. As I mentioned earlier, the goal is to put an end to impunity for the perpetrators of genocide, crimes against humanity and war crimes. This goal will certainly be easier to achieve with the support of the national judicial systems, especially if they are encouraged to ensure an effective prosecution at national level.

For ECHR this seems crucial in the light of the guarantee enshrined in Article 7 of the Convention. Incorporating international crimes into domestic criminal law systems is also important on account of the expectation that States Parties to the Convention will actively investigate all actions relating to violations of the human rights guaranteed by the Convention. It is not the ICC's goal to increase the number of situations and cases investigated by the ICC prosecutor.

Incorporating Articles 6 to 8 of the Rome Statute into domestic legal systems is essential for the ICC in the light of the principle of complementarity. It is certainly more realistic to expect States to investigate crimes coming under the ICC's jurisdiction if they introduce appropriate provisions in their domestic criminal laws. The principle of complementarity dictates that it is in the States' interests to do so.

Nevertheless, one must remember that it is not enough for a State Party to incorporate the relevant provisions into its domestic legal order: it must also apply those provisions. For this reason, the ICC only replaces a domestic court where the State authorities are not already investigating or prosecuting a crime, unless they are unwilling or unable properly to carry out the investigation or prosecution.

7. As I have just briefly explained, there are many links between the different types of international courts as regards genocide, crimes against humanity and war crimes and their results. There is, however, yet another aspect of common interest to both types of courts, namely the protection of the accused's procedural rights. It is a truism that even the perpetrator of an extremely cruel crime has the right to a fair trial. National courts dealing with these crimes are obliged to follow the standards set out in the international human rights treaties ratified by their State authorities. Furthermore, in some regional systems of human rights protection, international courts may review the compliance of domestic proceedings with the international standards.

This does not apply to the ICC. The ICC cannot be a party to any human rights convention, whether at the universal or the regional level. However, according to Article 21 (3) of the Rome Statute the application and interpretation of law must be consistent with internationally recognised human rights and be without any adverse distinction on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. When applying Article 21 (3) of the Statute, the ICC often refers to the case-law of the ECHR. We are mindful of the protection of the accused's procedural rights, as this is an element which legitimises the exercise of our jurisdiction.

Hopefully international human rights courts will also have occasion to refer to the case-law of the ICC, particularly as far the interpretation of legal elements of genocide, crimes against humanity and war crimes are concerned. So far, the ECHR has had the opportunity to refer to ICTY case-law. ICC case-law will also gradually become involved in this judicial dialogue. We deal with atrocities which will hopefully not occur in Europe, but our case-law has a more general value, especially where the concept of a fair trial is concerned.