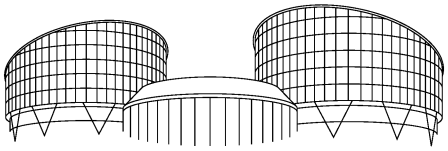

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COMMENTS ON JUDICIAL DIALOGUE BETWEEN COURTS CONFRONTING INTERNATIONAL CRIMES

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I. Introduction

In his inspirational introductory statement to this session about genocide, crimes against humanity and war crimes, Judge Hofmański rightly emphasised that if international courts are to be efficient, they must not act in isolation. He drew attention to Article 21 § 3 of the Statute of the International Criminal Court (ICC), which provides that the interpretation and application of law must be consistent with internationally recognised human rights, and said that the ICC often referred to the case-law of the Strasbourg Court. He further expressed the hope that international human rights courts would refer to the case-law of the ICC as well. This raises the issue of what is often called "judicial dialogue", in this instance between human rights courts and international criminal courts.

II. International criminal courts

Let me first say a few words about the case-law of international criminal courts. There is an abundance of judgments and decisions by the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), as well as the special courts for Sierra Leone, Cambodia and Lebanon, in which reference is made to the ECHR and other human rights conventions. Our case-law concerning fair trials has often been used.

Landmark cases referring to the ECHR include *Aleksovski*, *Čelebići*, *Tadić* and *Kayishema and Ruzindana*, to mention but a few. Several authors have addressed the ECHR's impact in this field. Some contributions can be found in the book

Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide (2003). As regards the ICC, a recent book edited by Carsten Stahn, *The Law and Practice of the International Criminal Court* (2015), contains an article describing the ICC's frequent use of ECHR case-law. It is not possible to go further into this today.

III. ECHR case-law

My main focus will be on the Strasbourg Court's use of the statutes and case-law of the international criminal courts. It is convenient to use the Jurisconsult's background paper to this session as a point of departure.

1. The first part of the paper deals with ECHR case-law concerning enforced disappearances, missing persons and related investigations, which raise issues under Article 2 in relation to the right to life. There are many judgments about this subject, but few contain specific references to international criminal law. For instance, the famous Grand Chamber judgments in *Šilih v. Slovenia* (2009) and *Varnava and Others v. Turkey* (2009), as well as the important semi-pilot Chamber judgment in *Aslakhanova and Others v. Russia* (2012), do not mention such legal sources.

In the group of Article 2 cases some judgments contain international criminal-law references in the factual or comparative parts but not in the reasoning. For instance, in *Palić v. Bosnia and Herzegovina* (2011) the Chamber explained the ICTY's practice concerning joint criminal enterprise in the facts (paragraph 30), but there was no need to revert to this in the reasoning. Similarly, in *Janowiec and Others v. Russia* (2013), concerning the Katyn massacre in 1940, the Grand Chamber referred briefly to the Nuremberg Tribunal in the section about international law (paragraphs 76-77).

In my view, this is not surprising. The ECHR's main principles under Article 2 were established early and gradually, at a time when the international criminal courts had either not yet been established or were at the beginning of their activities.

However, in some recent Article 2 cases the influence of international criminal law is visible in the reasoning. In *Jelić v. Croatia* (2014) the applicant complained that the authorities had not done enough to investigate the killing of her husband during the events of the early 1990s. In the part of the judgment describing international law (paragraph 42), the Chamber referred to the Statutes of the ICC (Article 25), ICTR (Article 6) and ICTY (Article 7), which regulate individual criminal responsibility. This was followed up in the reasoning (paragraphs 88-90), where the Chamber observed that in the context of war crimes, responsibility of superiors (command responsibility) had to be distinguished from the responsibility of their subordinates. It was not sufficient that the authorities' investigations had led to the prosecution and punishment of a superior involved

in an incident in which the applicant's husband had been killed. This could not release the subordinates from their own criminal responsibility. The Chamber found unanimously that the investigations had not been adequate and effective.

A similar case is *B. and Others v. Croatia* (2015), where a majority of the Chamber also found a procedural violation of Article 2 (see paragraphs 39 and 72-74).

2. The second part of the Jurisconsult's paper illustrates that genocide, crimes against humanity and war crimes have raised issues under Article 7 of the Convention, with respect both to the principle of legality and to the prohibition of retroactive application of the criminal law.

Korbely v. Hungary (2008), concerning a conviction for a killing in 1956, contains a wealth of humanitarian law in its comparative-law part, and includes the relevant provisions from the Statutes of the ICTY, the ICTR and the ICC (paragraph 51). In its reasoning, the Grand Chamber pointed out that "these four primary formulations of crimes against humanity" all included murder (paragraph 81), before assessing whether other elements of crimes against humanity had been present when the applicant had been convicted.

In *Scoppola v. Italy (no. 2)* from 2009 the Grand Chamber referred – in the section on international texts and documents – to Article 24 § 2 of the ICC Statute, which provides that the most favourable law applicable to a person being investigated, prosecuted or convicted is to apply in the event that there is a change in the law (paragraph 40). The comparative-law part of the judgment quotes from the *Dragan Nikolić* judgment, in which the ICTY Appeals Chamber held that the principle of the applicability of the more lenient law applied to the ICTY Statute (paragraph 41). These two elements were then used as a supporting argument in the reasoning of the Court leading to a violation (paragraph 105).

Kononov v. Latvia (2010), concerning a conviction for war crimes in 1944, contains an overview of humanitarian law and of the prosecution of war crimes by the international military tribunals in Nuremberg and Tokyo (paragraphs 115-122). The Court's reasoning relied heavily on these tribunals (paragraphs 186-233) and there were also some references to subsequent developments, admittedly in footnotes, concerning the ICC, the ICTY, ICTR and the Special Court for Sierra Leone (footnotes 50, 58, 59 and 63). The Court found no violation of Article 7.

An illuminating example of the impact of international criminal case-law is *Vasiliauskas v. Lithuania* (2015). The applicant had been convicted in 2005 for having killed two Lithuanian partisans in 1953. The Grand Chamber considered that his conviction for genocide with respect to a "political group" had not been foreseeable at the time of the killing and found a violation of Article 7. The judgment not only contained references to the Charter of the Nuremberg Tribunal (paragraphs 75-76) and the Statutes of the ICTY, the ICTR and the ICC (paragraphs

85-87); it also referred extensively to the ICTY's case-law, including *Jelisić*, *Krstić*, *Sikirica* and *Tolimir* (paragraphs 97-104), as well as ICTR cases such as *Rutaganda*, *Semanza* and *Kamuhanda* (paragraphs 109-113). This material played an important part in the Grand Chamber's reasoning (in particular paragraphs 167-178).

3. Turning now to amnesties for grave human rights violations, a leading case is *Marguš v. Croatia* (2014). Here the Court considered that the domestic authorities had acted in compliance with the Convention when bringing a fresh indictment against the applicant and convicting him of war crimes against the civilian population even though he had previously been granted amnesty. Article 4 of Protocol No. 7, concerning *non bis in idem*, was not applicable in the circumstances of the case. The judgment refers in the comparative part to the Genocide Convention (paragraph 42), Article 20 of the ICC Statute concerning *non bis in idem* (paragraph 44) and customary rules of international humanitarian law. And in the reasoning (paragraph 135), the Court explicitly took into account the rulings of several international courts, such as the ICTY's *Furundžija* judgment (paragraph 55) and decisions by the special courts for Cambodia and Sierra Leone (paragraphs 67-68).

4. Let me finally observe that international criminal case-law is also relevant in other contexts than Articles 2 and 7.

In *Perinçek v. Switzerland* (2015), concerning criminalisation of genocide denial, the Grand Chamber referred to the Nuremberg Tribunal and the ICC Statute (paragraphs 53-54). It also referred to the ICTR's ground-breaking genocide judgment in *Akayesu*, as well as to the *Nahimana et al*. judgment, often called the Media Case (paragraphs 55-58). These elements were taken into account in the reasoning, when the Grand Chamber found that at the material time there had been no international treaties in force that required in clear and explicit language the imposition of criminal penalties on genocide denial as such (paragraphs 262-268).

In *M.C. v. Bulgaria* (2003) the Chamber considered that States had a positive obligation inherent in Articles 3 and 8 to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and punishment. A wide range of comparative material was taken into account, including developments in international criminal law, according to which not only force but also taking advantage of coercive circumstances to proceed with sexual acts was punishable (paragraph 163). Reference was made to the ICTY's *Furundžija* case, as well as to the *Kunarac, Kovač and Vuković* judgment (paragraphs 102-107).

Finally, in *Ahorugeze v. Sweden* (2011), a Rwandan citizen complained that his extradition from Sweden to Rwanda to stand trial on charges of genocide during

the 1994 events would violate Articles 3 and 6 of the Convention. The Court did not find that there was a real risk of treatment proscribed by Article 3 or of a denial of justice. It attached decisive weight to the ICTR's case-law, which had gradually accepted the transfer of some trials from the ICTR to Rwanda (paragraphs 44-61).

IV. Concluding remarks

Firstly, it should be borne in mind that the emergence of international criminal courts is a relatively new phenomenon. It will be recalled that the ICTY and the ICTR were set up in 1993 and 1994 respectively, whereas the ICC Statute of 2000 entered into force in 2002. The special courts dealing with Sierra Leone, Cambodia and Lebanon were established in 2002, 2003 and 2007 respectively. It is therefore only in recent years that the Strasbourg Court has been able to mention these institutions.

Secondly, it is not surprising that the first references to international criminal courts mainly consisted in mentioning their statutes. Of necessity, it took some time for those courts to develop case-law which could be of relevance in the Strasbourg context. Subsequently, cases from these tribunals have been used by the Strasbourg Court not only in the comparative-law part, but also in its reasoning.

Thirdly, the Court has had an open attitude to these legal sources. This should come as no surprise. The Court has always taken into account other legal instruments and practice, such as the UN human rights conventions, EU law and The Hague conventions. An approach aimed at reconciling different international sources avoids fragmentation and makes it easier for national courts to apply international law.

Fourthly, as the ICC's case-law develops, there is reason to believe that its influence in ECHR case-law will increase. Looking towards the future, the ICC may become the Strasbourg Court's main interlocutor in the field of international criminal law. It should be noted that the ICTR has now been replaced by the Residual Mechanism for the International Criminal Tribunals from 1 January 2016, and the ICTY will soon likewise be replaced by the Mechanism. The Sierra Leone Court has closed down, whereas the Cambodia and Lebanon courts are approaching the end.