Генеральная прокуратура
Российской Федерации

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

CONFERENCE OF PROSECUTORS GENERAL OF EUROPE

The role of public prosecution in the protection of human rights and public interests outside the criminal law field

organised by the Council of Europe and the Prosecutor General's Office of the Russian Federation

Saint Petersburg, 2-3 July 2008

Konstantinovsky Palace

"The role of public prosecutors outside the criminal law field – European standards from the perspective of the European Court of Human Rights"

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Greetings

* Best wishes to all of you from Jean Paul Costa, president of the European Court of Human Rights. Since he was not able to come I was asked to make some remarks on the Court's case law. The reason why I was chosen has only to do with my professional past. Before my election in the European Court of Human Rights in 2004 I was the deputy prosecutor-general (chief advocate-general) at Amsterdam (The Netherlands) and professor of human rights at Amsterdam Free University.

Preliminary remark

* The European Convention on Human Rights entered into force in The Netherlands in 1954. Still…. On 24 December 1968 (when the Convention had been in force for The Netherlands for 14 years) the Cantonal Judge at Den Helder wrote in a judgment: the lawyer has invoked the Treaty of Rome (as the Convention was at that time sometimes referred to). Since the text of that Convention is neither available in the library of this Court, nor in the library of the District Court of Alkmaar, we had to ask for a copy from the library of the Ministry of Justice at The Hague. This took so much time that we could not deliver this judgment within the period of 14 days, as laid down in the law on criminal procedure.
* The European Convention on Human Rights entered into force in Russia in 1998.
Still… 8 years later, on 26 April 2006, the St Petersburg City Court ruled:

' The applicant's complaint (to the European Court) was lodged against the Russian Federation… The request by the European Court was addressed to the authorities of the Russian Federation. The Russian Federation as a special subject of international relations enjoys immunity from foreign jurisdiction, it is not bound by coercive measures applied by foreign courts and cannot be subjected to such measures… without its consent. The (domestic) courts have no right to undertake on behalf of the Russian Federation an obligation to comply with the preliminary measures… This can be decided by the executive… by way of an administrative decision.' [1]

* Both examples show how important it is to also pay attention to the European Convention and the case-law of the European Court at conferences, like this one, where the daily work of judges or prosecutors is on the agenda. See also: the Recommendations of the Committee of Ministers of the Council of Europe to member states:
- Rec (2002) 13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights;
- Rec (2004) 4 on the European Convention on Human Rights in university education and professional training. [2]

The European Convention on Human Rights

* Whole Convention system is directed at: it should be done at the national level.
- Art. 1:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

- Art. 13: Right to an effective remedy at the national level

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[1] Judgment European Court of 27 March 2008 in the case Shtukaturov v. Russia.
All judgments and decisions of the European Court are published on internet: www.echr.coe.int (HUDOC).
[2] These resolutions together with other relevant texts (like protocol 14) can be found in: Directorate General of Human Rights, Guaranteeing the effectiveness of the European Convention on Human Rights. Collected texts, Strasbourg 2004. See also on internet: www.coe.int

- Art. 35: exhaustion of domestic remedies
- Art. 46:

The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

- In the case-law of the Court: margin of appreciation (However: European supervision)
- In the case-law of the Court: Court is no fourth instance (except when judgment at the national level is violating human rights or is clearly arbitrary)
* Interpretation methods by the Court:
- autonomous interpretation;
- evolutive interpretation;
- protection must be practical and effective as opposed theoretical and illusory;
- positive obligations.
* European Convention only mentions minimum rights. When the European Court finds no violation, it only means: 'no violation'. It does not give an approval of the national situation.
* The European Court only deals with cases in which an individual or State complaint has been filed. So I can only draw some general conclusions from the existing case-law. The European Court has no power to give preliminary rulings on the conformity of existing laws in a particular country with the demands of the Convention.
* Officially: judgments of the European Court are only given in a case against one particular country. (see also Art. 46). In practice: often mentioning of general applicable principles. Therefore: useful to not only take notice of judgments and decisions against own country, but at least also of all Grand Chamber judgments (where the Court may deal with a case which raises a serious question affecting the interpretation or application of the Convention or the protocols thereto) and further, if possible, all judgments which the Court itself has classified as a judgment of importance level 1. [3]

The public prosecutor in the case-law of the European Court of Human Rights (general remarks)
* No express mentioning of prosecutors in the text of the Convention;
* When mentioned in the case-law: mostly in criminal matters. [4]
* Function of prosecutor and judge are different: European Court has refused to consider public prosecutors as an independent and impartial tribunal [5]:
- their intervention lacks the guarantees of a judicial procedure;[6]

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[3] The importance levels can be found on HUDOC.
[4] See: Egbert Myjer, Barry Hancock, Nicholas Cowdery (eds.), Human Rights Manual for Prosecutors (International Association of Prosecutors) 2003.
[5] In its judgment of 15 June 2006 in the case Zlinsat v. Bulgaria the European Court ruled:
'The mere fact that the prosecutors acted as guardians of the public interest cannot be regarded as conferring on them a judicial status of independent and impartial actors.'
[6] In relation to Art. 5 para 3 (judicial officer): the Grand Chamber of the European Court in its judgment of 3 October 2006 in the case McKay v. UK, ruled:

' The judicial officer must offer the requisite guarantees of independence from the executive and the parties and he or she must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention (*e.g. Assenov v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, § 146). As regards the scope of that review, the formulation which has been at the basis of the Court's long-established case-law dates back to the early case of *Schiesser v. Switzerland* (judgment of 4 December 1979, Series A no. 34, § 31):

> "…. [U]nder Article 5 § 3, there is both a procedural and a substantive requirement. The procedural requirement places the 'officer' under the obligation of hearing himself the individual brought before him (see, mutatis mutandis the above-mentioned Winterwerp judgment, p. 24, § 60); the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons (above-mentioned Ireland v. the United Kingdom judgment, p. 76, § 199)."

- they make decisions of their own motion, whereas a tribunal would normally become competent to deal with a matter if it is referred to it by another person or entity;
- they can hardly be deemed to be sufficiently impartial since they may subsequently act in proceedings against that person concerned.

* General obligation: as a high Government body/independent member of the national legal service: to contribute that the Government as a whole fulfils its Convention obligations. Human Rights on Duty.

* This also means acting according to positive obligations: when there is an arguable claim or a real risk that somebody has died (or has been treated in a way contrary to Art. 3) in cases involving State agents or bodies, an immediate, independent and effective investigation should be carried out. [7]

More recently, this has been expressed by saying "(i)n other words, Article 5 § 3 requires the judicial officer to consider the merits of the detention" (*T.W. v. Malta,* cited above, § 41; *Aquilina,* cited above, § 47).

[7] See as one of the leading judgments the judgment of the European Court of 4 May 2001 in the case Kelly and others v. UK:

' The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann judgment, cited above, p. 49, § 161, and the Kaya v. Turkey judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 329, § 105). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, for example, *mutatis mutandis*, *İlhan v. Turkey* [GC] no. 22277/93, ECHR 2000-VII, § 63).

For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see e.g. Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, §§ 81-82; *Öğur v. Turkey*, [GC] no. 21954/93, ECHR 1999-III, §§ 91-92). This means not only a lack of hierarchical or institutional connection but also a practical independence (see for example the case of Ergı v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, §§ 83-84 where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident).

The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (e.g. Kaya v. Turkey judgment, cited above, p. 324, § 87) and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see concerning autopsies, e.g. *Salman v. Turkey* cited above, § 106; concerning witnesses e.g. *Tanrıkulu v. Turkey* [GC], no. 23763/94, ECHR 199-IV, § 109; concerning forensic evidence e.g. *Gül v. Turkey*, 22676/93, [Section 4], § 89). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

A requirement of promptness and reasonable expedition is implicit in this context (see Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-IV, pp. 2439-2440, §§ 102-104; *Cakıcı v. Turkey* cited above, §§ 80, 87 and 106; *Tanrikulu v. Turkey*, cited above, § 109; *Mahmut Kaya v. Turkey*, no. 22535/93, [Section I] ECHR 2000-III, §§ 106-107). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see Güleç v. Turkey, cited above, p. 1733, § 82, where the

The public prosecutor in the case-law of the European Court of Human Rights outside the criminal law field

***** Different traditions in the member States. Where member states give the possibility to a public prosecutor/prosecutor-general to play a role in civil or administrative cases at the national level, the Court has elaborated on some issues regarding Art. 6:

- *The right to an independent and impartial tribunal.* In order to comply with Art. 6 the prosecutor's decisions in this kind of cases should be subject to review by a judicial body. [8] The same applies to Art. 5. [9]
- *The right to adversarial proceedings.* When the public prosecutor/prosecutor-general/any other Government body has an advisory role in a case pending before a national (highest) court, the individual(s) whose case is/are at stake do have the right to have knowledge and comment on all observations filed, with a view to influencing the court's decision. [10] This even applies when the public prosecutor is just acting as an *amicus curiae*.
- *The right to equality of arms.* The public prosecutor should not be present at the deliberations by the judges or be informed on forehand of the reporting judge's report.
- *The right to legal certainty.* The Court has generally found that the quashing of final judgments violates the principles of *res iudicata* and legal certainty and consequently Art. 6. This applies both in cases in which it was the public prosecutor who set the supervisory review proceedings in motion, or when this was done by the members of the Supreme Court. [11] There seems to be no problem in the case-law of the European Court if the supervisory review proceedings have no consequences for the case at hand but only for future cases.
- *The intervention of public prosecutors in family law.* There have been some cases in which the public prosecutor acted in disputes relating to the establishment and disavowal of paternity under Art. 8. The Court has required that prosecutors intervening in these matters take into account the different interests and rights at stake under Article 8 of the Convention.

Concluding remarks

I am very happy that the organisers have included in the programme this introduction on the European Court's case-law. It gives a prefect opportunity to all of us present to just have a look if the own national system – as far as the contribution of a member of the public prosecutions service is concerned – is in conformity with the minimum European level, as laid down in the European Convention on Human Rights and the case-law of the Court. And although the European Court until now has not given many judgments in cases concerning the public prosecutor outside the criminal law field, from the existing case-law it is clear that there have been cases in the recent past in which countries had to adapt their internal legislation or practice.

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father of the victim was not informed of the decisions not to prosecute; *Öğur v. Turkey*, cited above, § 92, where the family of the victim had no access to the investigation and court documents; *Gül v. Turkey* judgment, cited above, § 93).'

[8] See for instance judgments of the European Court of Human Rights of 15 June 2006 (case Zinslat v. Bulgaria) and of 22 may 1998 (Vasilescu v. Romania).

[9] Judgment of the European Court of Human Rights of 5 October 2000 in the case Varbanov v. Bulgaria.

[10] Standard case-law. See the judgments of the European Court of 30 October 1991 in the case Borgers v. Belgium; of 23 June 1993 in the case Ruiz-Mateos v. Spain; of 20 February 1996 in the case Lobo Machado v. Portugal; of 20 February 1996 in the case Vermeulen v. Belgium; of 25 June 1997 in the case Van Orshoven v. Belgium; of 27 March 1998 in the case K.D.B. v. The Netherlands; of 7 June 2001 in the case Kress v. France

[11] Standard case law. See the judgments of the European Court of 28 October 1999 in the case Brumarescu v. Romania; of 24 July 2003 in the case Ryabykh v. Russia.