



# **“International and national courts confronting large-scale violations of human rights”**



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

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

# Dialogue between judges

Proceedings of the Seminar  
29 January 2016

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

All or part of this document may be freely reproduced with acknowledgment of the source *“Dialogue between judges, European Court of Human Rights, Council of Europe, 2016”*

© European Court of Human Rights, 2016  
© Photo: Council of Europe

Strasbourg, January 2016

TABLE OF CONTENTS

Proceedings of the Seminar

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

- 1. Genocide, crimes against humanity and war crimes
- 2. Terrorism

<b>Guido Raimondi</b> President of the European Court of Human Rights	5
<b>Julia Laffranque</b> Judge of the European Court of Human Rights	7
<b>Juge Piotr Hofmański</b> Judge of the International Criminal Court - The Hague	9
<b>Erik Møse</b> Judge of the European Court of Human Rights	13
<b>Ksenija Turković</b> Judge of the European Court of Human Rights	17
<b>Aharon Barak</b> Professor - <i>Interdisciplinary Center</i> - Israël	21
<b>Robert Spano</b> Judge of the European Court of Human Rights	29
<b>Iulia-Antoanella Motoc</b> Judge of the European Court of Human Rights	33

Solemn Hearing  
on the occasion of the opening of the judicial year 2016

<b>Guido Raimondi</b> President of the European Court of Human Rights	37
<b>Andrzej Rzepliński</b> President of the Polish Constitutional Court	41
<b>Photo</b>	47



Guido Raimondi

President  
of the European Court of Human Rights

Welcome speech

Dear Presidents, Ladies and gentlemen, Dear friends,

First of all, let me say how pleased I am to see so many of you gathered here for this seminar which traditionally precedes the ceremony marking the start of the Court’s judicial year.

Your presence here is a reflection of your interest in this meeting between the European Court of Human Rights and European supreme courts. Among us there are high-level academics and Government Agents before the Court, and I am convinced that the presence of all of you will contribute to the value of this afternoon’s discussions.

Please allow me to thank Judges Yudkivska, Laffranque, Møse, Lemmens, Vehabović, Turković, Spano, Motoc and Grozev, who have organised the seminar with the assistance of the Jurisconsult’s department and John Darcy.

This year we have with us two speakers whom I have no hesitation in describing as exceptional, and it is an honour for me to welcome them: Judge Piotr Hofmański, a distinguished Polish academic, judge of the Criminal Division of the Supreme Court of Poland from 1996 and, for the last few months, judge of the International Criminal Court; and President Aharon Barak, former President of the Supreme Court of the State of Israel and a lawyer of worldwide renown.

The theme chosen for this year’s seminar – international and national courts confronting large-scale violations of human rights – is unfortunately of tragic relevance today. The issues to be discussed this afternoon – be it genocide, crimes against humanity or terrorism – are now being raised increasingly frequently before our Court. As regards terrorism, for example, our case-law is developing by weighing up the various interests at stake: on the one hand, the protection of fundamental interests, since even terrorists are entitled to the protection of the European Convention on Human Rights, and on the other hand, preservation of security and public order, without overlooking the rights of victims, who are increasingly making their voices heard, reminding States that they also have positive obligations towards them.

A number of Convention provisions are applicable in these fields, and I am sure that Articles 2, 3, 5, 7, 8 and 14 will be at the heart of your discussions today.

Without wishing to give away too much of my speech this evening, I can already tell you that I will touch upon the recent *Zakharov* judgment, which is closely linked to the theme you will be discussing today.

I have already spoken for too long, so without further ado I will give the floor to my friend and colleague Julia Laffranque, who has very kindly agreed to chair the first part of this seminar. The second part will be chaired by our colleague Ganna Yudkivska.

Thank you for your attention.



## Julia Laffranque

Judge to the  
European Court of Human Rights

Mr President, distinguished judges, ladies and gentlemen, dear colleagues,

“I would rather die standing than live on my knees”: those are the words of Stéphane Charbonnier, known as Charb, a cartoonist and journalist at *Charlie Hebdo*, who died on 7 January 2015<sup>1</sup>. A few months after this terrible event, on 13 November of the same year, Paris again fell victim to a series of terrorist attacks. Every day, we hear in the media that terrorist acts have been committed somewhere in the world. So, as you can see, the topics of this seminar are, I am sorry to say, still highly relevant.

Questions relating to genocide, crimes against humanity and war crimes are unfortunately an inseparable part of the case-law of the European Court of Human Rights. The Estonians, like the other Baltic peoples among others, have endured the painful experience of being the victims of a foreign totalitarian regime, an experience which a former President of Estonia, Lennart Meri, once described as a valuable asset to the European legal system and the development of the democratic world<sup>2</sup>.

We need to remind ourselves, again and again, how fragile the rule of law actually is and how necessary it is to protect human rights.

We should not stoop to the same level as those who trample on the rights protected by the European Convention on Human Rights; it is important not to respond to terrorism through measures that restrict human rights. We must remain true to ourselves, as independent and impartial judges, faithful to fundamental values. The Court of Human Rights must set the example in this respect.

In this context, cooperation between national, regional and international courts appears fundamental, because what unites us is our common attachment to human rights values. We are all, in a sense, the conscience of the European peoples and States.

Ladies and gentlemen, as the former President of our Court Dean Spielmann has said, judicial dialogue is the golden key to a desirable future for the protection of human rights in Europe<sup>3</sup>. I would go even further and say that a key is not enough; one also needs to know how to use this key. Of course, a seminar is an important meeting and instrument in order to exchange views and thoughts, as well as have some time for mutual social relations, but judicial cooperation should not only remain abstract on paper, and not only consist of plain words, of catchphrases, but should also be realised in practice, in our everyday work – and why not also, in the future, via the active implementation of Protocol No. 16 once it enters into force? Therefore, I am particularly happy that the European Court of Human Rights has launched an information exchange network with superior courts of the Contracting States of the European Convention on Human Rights. It would be good if this network could be beneficial not only for the partner courts, but also for our Court, the European Court of

<sup>1</sup> “Zoom, Morts sur leur lieu de travail”, *DNA*, Thursday 8 January 2015, p. 5.

<sup>2</sup> Vabariigi presidendi Lennart Meri kõne Riigikogu tööaasta avamisel 10. septembril 2001. aastal, Sirp, sotsiaalia, 14.09.2001.

<sup>3</sup> Dean Spielmann, President of the European Court of Human Rights, “Whither Judicial Dialogue?”, Sir Thomas More Lecture, Lincoln’s Inn, 12 October 2015.

Human Rights itself, as well as for the national judiciaries when interacting with each other. It would be even better if all of us, while cooperating, never forgot our mission: to work for democracy and the rule of law and, above all, not to forget the most valuable thing: human beings and human dignity.

This year we are once again extremely happy to welcome to our seminar some very renowned international keynote speakers and, in addition to them, as many as four co-speakers/commentators altogether from our Court. At the end of our seminar you will also hear more about the Network of Superior Courts. This time the background papers, which as usual have been made available to you on our Internet site beforehand, have been prepared by the Research and Library Division of the Registry and compile the relevant case-law of our Court on the subjects of the seminar. At this point my warmest thanks go to Anna Austin and Stefano Piedimonte. Another important innovation this year is that the background papers have not only been prepared by us, but we have asked you, the national courts, to participate actively in advance and to contribute in writing by explaining your law and court practice in answering three questions on each of the two main topics of our seminar. This valuable material has been included in your seminar files. We thank those of you who have provided contributions and urge all of you to participate actively in the seminar.

Furthermore, we have a new and extended organising committee, of which I was honoured to be re-elected as chair. However, this will be the last annual seminar of the Court for me to chair and preside over. I thank you all warmly for your very pleasant co-operation over the past years, and I also thank my colleagues, including former and current Presidents of the Court, for their confidence. These four years have been a wonderful and enjoyable experience. I would especially like to thank all those who have contributed enormously with their efforts to the success of our event: Rod Liddell, Valérie Schwartz, John Darcy, Patrick Titun, Erika Nyman, Loredana Bianchi, interpreters and many, many others. Since 3 November last year, when I was elected Vice-President of the Second Section of our Court, new challenges have opened up for me and I would like to devote all my energy to them. In this context I would like to remind you to remain aware that all of us as judges need to regularly train ourselves and keep up with the times and with new developments, and have the courage to meet new challenges.

A court cannot act in isolation, but it should not replace the politicians either, and we should certainly not be misused to do the uncomfortable job the politicians themselves will not do. An independent court does not deal with politics; nevertheless, we do become confronted with important judicial and legal policy issues. We have to be capable, when solving a concrete case, of also seeing the overall picture around it and the possible consequences of our decisions. I wish you all courage, good health and strength in our common mission, and thank you once again with all my heart!



**Prof. Dr. Piotr Hofmański**

**Judge  
International Criminal Court - La Haye**

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.

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.

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.

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.

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.

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.

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.



**Erik Møse**

**Judge to the  
European Court of Human Rights**

## 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.



**Ksenija Turković**

**Judge to the  
European Court of Human Rights**

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<sup>1</sup>.

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<sup>2</sup>.

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 case-law in this area. This process has been accelerated by the Kurdish, Chechen, Transdniestrian, 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"<sup>3</sup> and in 2011 the Committee of Ministers adopted Guidelines on "Eradicating impunity for serious human rights violations"<sup>4</sup>.

<sup>1</sup> 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 1110<sup>th</sup> meeting of the Ministers' Deputies.

<sup>2</sup> See Karen Engle, "Anti-Impunity and the Turn to Criminal Law in Human Rights", 100 *Cornell LJ*. 1069 (2015).

<sup>3</sup> Recommendation 1876 (2009).

<sup>4</sup> See note 1 above.

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<sup>5</sup>. Let me give just a few examples that all of us are well acquainted with<sup>6</sup>.

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<sup>7</sup>. 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<sup>8</sup>. 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<sup>9</sup>. 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<sup>10</sup>. 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<sup>11</sup>.

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 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."<sup>12</sup>

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<sup>13</sup>.

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*<sup>14</sup> the test was whether shortcomings (failings) in an investigation could be considered inevitable, while in cases following *Palić v. Bosnia and Herzegovina*<sup>15</sup> 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<sup>16</sup>, or to secure a conviction or punishment<sup>17</sup>. 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<sup>18</sup>. 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"<sup>19</sup>.

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 violations of human rights<sup>20</sup>. 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<sup>21</sup>.

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*<sup>22</sup> 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<sup>23</sup>.

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.

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*, *Öneyildız v. Turkey* [GC], no. 48939/99, § 96, ECHR 2004 XII; *Okkalı v. Turkey*, no. 52067/99, § 65, ECHR 2006 XII (extracts); and *Türkmen v. Turkey*, no. 43124/98, § 51, 19 December 2006.

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).

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](http://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).

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. 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.



**Aharon Barak\***

**Professor  
Interdisciplinary Center - Israël**

### A. THE ROLE OF THE JUDGE – TO PROTECT DEMOCRACY

I see the role of any judge – national or international – as the protection of democracy<sup>1</sup>. We cannot take the continued existence of a democracy for granted. This is certainly the case for new democracies, but it is also true for the old and well-established ones. The approach that «it cannot happen to us» can no longer be accepted. Anything can happen. If democracy was perverted and destroyed in the Germany of Kant, Beethoven and Goethe, it can happen anywhere. If we do not protect democracy, democracy will not protect us. I do not know if the Supreme Court judges in Germany could have prevented Hitler from coming to power in the 1930s. But I do know that one of the lessons of the Holocaust and of the Second World War is the need to have democratic constitutions and ensure that they are put into effect by judges whose task is to protect democracy. It was this awareness, in the post-World War II era, that helped disseminate the idea of judicial review of legislative action, both at the national level and at the international level – and make human rights central. And it shaped my perspective that the main role of the judge in a democracy is to maintain and protect democracy.

According to this approach, judges – whether national or international – have a major role to play in protecting democracy. They should protect it both from terrorism and from the means the State wishes to use to fight terrorism. Judges are, of course, tested daily in their protection of democracy, but judges meet their supreme test when they face situations of terrorism. The protection of the human rights of every individual is a much more formidable duty in situations of terrorism than in times of peace and security. If judges fail in their role in times of terrorism, they will be unable to fulfil their role in times of peace and tranquillity. It is a myth to think that it is possible to maintain a sharp distinction between the status of human rights during a period of terror and the status of human rights during a period of tranquillity. It is self-deception to believe that judges can limit their judicial rulings so that they will be valid only during terror, and that they can decide that things will change in peacetime. The line between terror and tranquillity is thin. In any case, it is impossible to maintain this distinction in the long term. Judges should assume that whatever they decide when terrorism is

\* President (retired) of the Supreme Court of Israel; Professor of Law, Interdisciplinary Center (IDC), Herzliya. This paper is based on selections from Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19 (2002), and Aharon Barak, *Role of a Supreme Court in a Democracy, and the Fight against Terrorism*, 58 U. MIAMI L. REV. 125 (2003); Aharon Barak, *Human Rights in Times of Terror - A Judicial Point of View*, 28 LEGAL STUD. 493 (2008).

<sup>1</sup> For a comprehensive analysis of my thesis, see AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 20 (2006).

threatening security will linger many years after the terrorism is over. Indeed, judges must act with coherence and consistency. A wrong decision in a time of terrorism plots a point that will cause the judicial curve to deviate after the crisis passes<sup>2</sup>.

Moreover, democracy ensures the independence of judges – both national and international. It strengthens them, because of their political non-accountability in the face of fluctuations in public opinion. The real test of this independence comes in situations of terrorism. The significance of judges' non-accountability becomes clear in those situations when public opinion is more likely to be near-unanimous. Precisely in these times of terrorism, judges must embrace their supreme responsibility to protect democracy. They should always reflect history – not hysteria. Admittedly, the struggle against terrorism turns our democracy into a “defensive democracy” or “militant democracy”<sup>3</sup>. Nonetheless, this defence and this militant fight must not deprive our regime of its democratic character. Judges should act in the spirit of defensive fighting or militant democracy, as opposed to uncontrolled democracy.

## B. THE BATTLE AGAINST TERROR – WITHIN THE LAW

There is a well-known saying that when the cannons speak, the Muses are silent. A similar idea was expressed by Cicero in his maxim “*Silent enim leges inter arma*” (In battle, indeed, the laws are silent)<sup>4</sup>. These statements are regrettable; I hope they do not reflect the way things are. I am convinced they do not reflect the way things should be. Every battle a country wages – against terrorism or against any other enemy – must be waged in accordance with rules and laws. There is always the law, according to which the State must act. There are no black holes in which there is no law. And the law needs Muses. We need the Muses most when the cannons speak. We need laws most in times of war.

The struggle against terrorism is not conducted *outside* the law, but *within* the law, using tools that the law makes available to a democratic State. Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists themselves. They act against the law, by violating and trampling on it. In its battle against terrorism, a democracy acts within the framework of the law and according to the law. Indeed, the battle against terrorism is a battle of a law-abiding nation and law-abiding citizens against lawbreakers. It is, therefore, not merely a battle of the State against its enemies; it is also a battle of the law against its enemies.

## C. THE NEED FOR A BALANCED APPROACH

Democracies should conduct the struggle against terrorism with a proper balance between two conflicting values and principles. On the one hand, we must consider the values and principles relating to the security of the State and its citizens. Human rights cannot justify undermining national

security in every case and in all circumstances. Human rights are not a stage for national destruction<sup>5</sup>. The Constitution is not a suicide pact. Judges always recognise the power of the State to protect its security and the security of its citizens.

On the other hand, we must consider the values and principles relating to human rights. National security cannot justify undermining human rights in every case and under all circumstances. National security does not grant an unlimited licence to harm the individual. Judges always emphasise that the rights of every individual must be preserved, including those of the individual suspected of being a terrorist. Also, a terrorist is a human being and his dignity must be protected.

Every balance that is struck between security and human rights will impose certain limitations on both security and human rights. A proper balance will not be achieved when human rights are fully protected, as if there were no terrorism. Similarly, a proper balance will not be achieved when national security is afforded full protection, as if there were no human rights. The balance is the price of democracy. Only a strong, safe and stable democracy may afford and protect human rights, and only a democracy built on the foundations of human rights can exist with security. It follows that the balance between security and human rights does not reflect the lack of a clear position. On the contrary, the proper balance between security and freedom is the result of a clear position that recognises both the need for security and the need for human rights.

When I speak about balance, I don't mean an external normative process that changes the scope of rights and the protection accorded them because of terror. I mean the ordinary process and the ordinary balancing rules we have when we address the relationship between individual rights and the needs of society. In this latter process, rights are not absolute. They may be limited to serve the needs of society. In a judgment that dealt with the battle against terror I wrote<sup>6</sup>:

“... Israeli constitutional law has a consistent approach to human rights in periods of relative calm and in periods of increased fighting. We do not recognise a clear distinction between the two. We do not have balancing laws that are unique to times of war. Naturally, human rights are not absolute. They can be restricted in times of calm and in times of war. I do not have a right to shout ‘fire’ in a theatre full of spectators ... War is like a barrel full of explosives next to a source of fire. In times of war the likelihood that damage will occur to the public interest increases and the strength of the harm to the public interest increases, and so the restriction of the right becomes possible within the framework of existing criteria ... Indeed, we do not have two sets of laws or balances, one for times of calm and the other for times of terror.”

When the court rules on the balance between security and freedom during times of terrorist threats, it often encounters complaints from both sides. The supporters of human rights argue that the court gives too much protection to security and too little to human rights. The supporters of security argue that the court gives too much protection to human rights and too little to security. Frequently, the persons making these arguments read only the judicial conclusion without considering the judicial reasoning that seeks to strike a proper balance between the conflicting values and principles. None of this should intimidate the judge. He or she must and does rule according to his or her best understanding and conscience.

This balance is based upon the view that in democracy, not all means are acceptable. The ends do not justify the means. Thus, we ruled that parts of the separation fence in the West Bank, which was intended to prevent terrorists from the West Bank from entering Israel, were not legal. We

<sup>2</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944): «[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty ... A military order, however unconstitutional, is not apt to last longer than the military emergency ... But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need ... A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.» See Patricia Hughes, *Judicial Independence: Contemporary Pressures and Appropriate Responses*, 80 CANADIAN B. REV. 181, 186 (2001) (noting the general agreement that «judicial independence is both an individual and a systemic, institutional or ‘collective’ quality»).

<sup>3</sup> See *MILITANT DEMOCRACY* (András Sajó ed., 2004).

<sup>4</sup> CICERO, *PRO MILONE* 16 (N.H. Watts trans., 5th ed. 1972).

<sup>5</sup> See EA 2/84 *Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset*, 39(2) P.D. 225, 310 [1985], available at <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Neiman%20v.%20Chairman%20of%20the%20Central%20Elections%20Committee.pdf>. Based on *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson J dissenting).

<sup>6</sup> HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior*, 61(2) P.D. 202, 282–283 [2006] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/03/520/070/a47/03070520\\_a47.pdf](http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520_a47.pdf).



determined that the additional security attained by the location chosen for the security fence by the army was not proportionate to the harm which the fence's location caused to the fabric of the lives of the local inhabitants. In one case I wrote<sup>7</sup>:

"The ends do not justify the means. This is a manifestation of the idea that there is a barrier of values which democracy cannot surpass, even if the purpose whose attainment is being attempted is worthy."

In one case we decided that the executive branch had no authority to authorise torture (*ex ante*). This prohibition is comprehensive, and applies even in a «ticking bomb» situation. In my judgment I wrote<sup>8</sup>:

"We are aware that this judgment of ours does not make confronting that reality any easier. That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open. At times democracy fights with one hand tied behind her back. Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her and her spirit, and allow her to overcome her difficulties."

In one of my last judgments, I had to deal with the constitutionality of a statute that imposed a temporary blanket ban on family unification between Israelis and their West Bank spouses. The reason for the ban was that in twenty-six cases the non-Israeli spouse who had come to Israel under the programme of family unification was directly involved in terrorist activities. I decided that the statute was unconstitutional as it disproportionately affected the right to family unification, which in Israel is a constitutional right derived from the right to dignity. In my judgment I wrote<sup>9</sup>:

"Examination of the test of proportionality (in the narrow sense) returns us to first principles that are the foundation of our constitutional democracy and the human rights that are enjoyed by Israelis. These principles are that the end does not justify the means; that security is not above all else; that the proper purpose of increasing security does not justify serious harm to the lives of many thousands of Israeli citizens. Our democracy is characterised by the fact that it imposes limits on the ability to limit human rights; that it is based on the recognition that surrounding the individual there is a wall protecting his rights, which cannot be breached even by the majority. This is how the court acted in many different cases. Thus, for example, adopting physical measures ('torture') would without doubt increase security. But we held that our democracy was not prepared to adopt them, even at the price of a certain harm to security ... Similarly, determining the route of the separation fence in the place decided by the military commander [in Beit Sourik Village Council] would have increased security. But we held that the additional security was not commensurate with the serious harm to the lives of the Palestinians. Removing the family members of suicide bombers from their place of residence and moving them to other places ('assigned residence') would increase security in the territories, but it is inconsistent with the character of Israel as a 'democratic freedom-seeking and liberty-seeking state' .... We must adopt this path also in the case before us. The additional security achieved by abandoning the individual check and changing over to a blanket prohibition involves such a serious violation of the family life and equality of many thousands of Israeli citizens that it is a disproportionate change. Democracy does not act in this way. Democracy does not impose a blanket prohibition and thereby separate its citizens from their spouses; democracy does not prevent them from having a family life; democracy does not impose a blanket prohibition and thereby give its citizens the option of living in it without their spouse or leaving the State in order to live a proper family life; democracy does not impose a blanket prohibition and thereby separate parents from their children; democracy does not impose a blanket prohibition and thereby discriminate between its citizens with regard to the realisation of their family life.

7 HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence*, 62(1) PD. 1, 37 [2006] (Isr.), available at <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Adalah%20Legal%20Centre%20for%20Arab%20Minority%20Rights%20in%20Israel%20v.%20Minister%20of%20Defense.pdf>.

8 HC 5100/94 *Public Committee Against Torture in Israel v. The State of Israel*, 53(4) PD. 817, 845 [1999] (Isr.), available at [http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Public%20Committee%20Against%20Torture%20in%20Israel%20v.%20Government%20of%20Israel%281%29\\_0.pdf](http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Public%20Committee%20Against%20Torture%20in%20Israel%20v.%20Government%20of%20Israel%281%29_0.pdf).

9 *Adalah*, *supra* note 6, at 347–348.

Indeed, democracy concedes a certain amount of additional security in order to achieve an incomparably larger addition to family life and equality. This is how democracy acts in times of peace and calm. This is how democracy acts in times of war and terror. It is precisely in these difficult times that the power of democracy is revealed ... Precisely in the difficult situations in which Israel finds itself today, Israeli democracy is put to the test."

## D. JUDICIAL REVIEW OF THE BATTLE AGAINST TERROR

Judicial review of the battle against terrorism, by its very nature, raises the question of the timing and scope of such review. There should not be a theoretical difference between applying judicial review at a time when the State is under threat of terrorism and doing so at a time after the terrorism seems to have gone. We should never postpone our judgment until terror is over, because the fate of a democracy and of human beings may hang in the balance. The protection of human rights would be bankrupt if courts – consciously or unconsciously – decided to review the behaviour of the State only after the period of emergency had ended.

Furthermore, we should not accept arguments that the battle against terror is non-justiciable. When human rights are affected by State action, such action should always be justiciable.

What is the scope of judicial review in times of terror? The answer to this question should vary according to the essence of the concrete question raised. At one end of the spectrum stands the question: «What is the law on the battle against terror?» That question is within the realm of the judicial branch. The court is not permitted to liberate itself from the burden of that authority. The question which the court should ask itself is not whether the executive branch's understanding of the law is a reasonable understanding. The question should be: is it the correct understanding? At the other end of the spectrum is the decision, made on the basis of the knowledge of military professionals, to carry out an operation against terrorists. That decision is the responsibility of the executive branch. It has the professional-security expertise to make that decision. The court will ask itself only if a reasonable military commander could have made the decision which was made. If the answer is yes, the court will not exchange the military commander's security discretion for the security discretion of the court. True, «military discretion» and «State security» are not magic words which prevent judicial review. However, the question is not what the judge would decide in the given circumstances, but rather whether the decision which the military commander made is a decision that a reasonable military commander was permitted to make. On that subject, special weight is to be granted to the military opinion of the official who bears the responsibility for security.

Between these two ends of the spectrum, there are intermediate situations. Each of them requires a meticulous examination of the character of the decision. One of those legal aspects is the decision about proportionality.

Who decides about proportionality? Is it a military decision to be left to the military, or a legal decision within the discretion of the judges? My answer is that the proportionality of the military means used in the fight against terror is a legal question, which should be left to the judges. In a case concerning the proportionality of the harm which the separation fence caused to the fabric of life of the local inhabitants, I wrote<sup>10</sup>:

«The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route's harm to the local residents is proportionate. That is our expertise.»

Proportionality is not a standard of precision. At times there are a number of ways to fulfil its conditions. A zone of proportionality is created. It is the borders of that zone that the Court guards. The decision within the borders is the political branch's decision.

10 HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel*, 58(5) PD. 807, 845 [2004] (Isr.), available at [http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Beit%20Sourik%20Village%20Council%20v.%20Government%20of%20Israel\\_0.pdf](http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Beit%20Sourik%20Village%20Council%20v.%20Government%20of%20Israel_0.pdf).

Often the court will encounter the argument from the legislature or the executive that security considerations led to an action by the State, followed by a request that the court should be satisfied with this statement. Such a request should not be granted. «Security considerations» are not magic words. The court must insist on hearing the specific security considerations that prompted the State's actions. The court must be persuaded that the security considerations actively motivated the State's action and were not merely a pretext. The court must be convinced that the security measures adopted were proportionate. Indeed, in several of the many security cases that the Supreme Court has heard, senior army commanders and heads of the security services testified before us. Only if we were convinced that the security consideration was the prevailing one and that the security measure was proportionate did we dismiss the challenge against the security action. In dismissing challenges to security actions, judges should not be naïve or cynical. Judges should analyse the evidence before them objectively. In a case dealing with a review, under the fourth Geneva Convention, of the State's decision to assign Arab residents from the West Bank to the Gaza Strip, I noted<sup>11</sup>:

"In exercising judicial review ... we do not make ourselves into security experts. We do not replace the military commander's security considerations with those of our own. We take no position on the way security issues are handled. Our job is to maintain boundaries, and to guarantee the existence of conditions that restrict the military commander's discretion ... We do not, however, replace the commander's discretion with our own. We insist upon the legality of the military commander's exercise of discretion and that it fall into the range of reasonableness, determined by the relevant legal norms applicable to the issue."

Is it proper for judges to review the legality of the fight on terrorism? Many argue that the court should not become involved in these matters. These arguments are heard from both ends of the political spectrum. On one side, critics argue that judicial review undermines security. On the other side, critics argue that judicial review gives legitimacy to actions of the government authorities in their battle against terrorism. Both arguments are unacceptable.

As to the argument that judicial review undermines security, judicial review of the legality of the battle against terrorism may make the battle against terrorism harder in the short term. Judicial review, however, fortifies and strengthens the people in the long term. The rule of law is a central element in national security. As I wrote in a case involving a pre-trial pardon given to the heads of the General Security Service, who had committed crimes against terrorists<sup>12</sup>:

"There is no security without law. The rule of law is an element of national security. Security requires us to find proper tools for interrogation. Otherwise, the General Security Service will be unable to fulfil its purpose. The strength of the Service lies in the public's confidence in it. Its strength lies in the court's confidence in it. If security considerations are decisive, the public will have no confidence, and the court will have no confidence in the security service and the lawfulness of its interrogations. Without this confidence, the branches of the State cannot function. This is the case with regard to public confidence in the courts, and it is the case with regard to public confidence in the other branches of the State."

And, I would add, to confidence in international courts.

As to considerations of legitimacy: to the extent that legitimacy conferred by the court means that the acts of the State are lawful, the court fulfils its traditional role. Both when the State wins and when the State loses, the rule of law and democracy benefit. It should be remembered that the effect of a judicial decision does not occur only in the individual case that comes before the court. Rather, the main effect occurs in determining the general norms according to which the State acts, and in establishing the deterrent effect this norm will have. The test of the rule of law arises not merely in the few cases brought before the court, since State authorities are aware of the ruling of the court and act accordingly. The argument that judicial review somehow validates the State's actions does not take into account the nature of judicial review. In hearing a case, the court does not examine the wisdom

of the battle against terrorism, but only the legality of the acts carried out in furtherance of the battle. The court does not ask itself if it would have adopted the security measures that were adopted, if it were responsible for security. Instead, the court asks if a reasonable person responsible for security would be within the bounds of the law to adopt the security measures that were adopted. Thus, the court does not express agreement with the means adopted but rather fulfils its role by reviewing the legality of executive acts.

Naturally, one must not go from one extreme to the other. One must recognise that the court will not solve the problem of terrorism. It is a problem to be addressed by the other branches of the State. The role of the court is to ensure the legality of the battle against terrorism. It must ensure that the battle against terrorism is conducted within the framework of the law and not outside it. This is the court's contribution to the struggle of democracy to survive. It is an important contribution, one that aptly reflects the judicial role in a democracy. Realising this role during the battle against terrorism is difficult. Judges cannot and would not want to escape from this difficulty.

I regard myself as a judge who was sensitive to his role in a democracy. I took the tasks imposed on me – protecting democracy – seriously. Despite criticism often heard, I continued on this path for twenty-eight years. I hope that by doing so, I was serving my legal system properly. Indeed, as judges, we must continue on our path according to our consciences.

Judges have a North Star that guides them: the fundamental values and principles of democracy. A heavy responsibility rests on their shoulders. Even in hard times, they must remain true to themselves. I discussed this in an opinion considering whether extraordinary methods of interrogation – torture or inhuman treatment – could be used against a terrorist in a "ticking bomb" situation. The answer was no. I wrote<sup>13</sup>:

"Deciding these petitions weighed heavily on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. We know its problems, and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. Our concern that this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us. We are, however, judges. Our fellow-citizens demand that we act according to the law. This is also the same standard that we set for ourselves. When we sit at trial, we too stand trial."

11 HC 7015/02 *Ajuri v. IDF Commander in the West Bank*, 56(6) P.D. 352, 375–376 [2002] (Isr.).

12 HC 428/86 *Barzilai v. Government of Israel*, 40(3) P.D. 505, 585 [1986] (Isr.) (Barak J dissenting), available at <http://versa.cardoza.yu.edu/sites/default/files/upload/opinions/Barzilai%20v.%20Government%20of%20Israel.pdf>.

13 *Public Committee Against Torture in Israel*, note 8 above, at 845.


**Robert Spano**

**Judge to the  
European Court of Human Rights**

### PRELIMINARY REMARKS

Ladies and gentlemen, it is a great pleasure and honour to have the opportunity to participate in this dialogue on the occasion of the opening of the judicial year and, in particular, to share the stage with my distinguished colleague Chief Justice Barak and my fellow judges and friends Ganna Yudkivska and Iulia Motoc.

Let me begin by submitting that the fight against terrorism is one of the defining challenges of modern times, a claim which recent events have brought into stark relief as we all know. Although Europe has had to deal with terrorism before, the nature and scope of the current threat presents challenges which have important consequences for the work of national courts as well as for the Strasbourg Court.

Judges, whether national or international, must be realistic and sensitive to the overriding public interest underlying the State's positive obligations to protect life but must at the same time remain steadfast in protecting those fundamental guarantees that are essential for the preservation of the right to a fair trial, my topic here today, which is one of the hallmarks of a democratic society based on the rule of law.

Fair trial guarantees must be interpreted and adapted to take account of realities on the ground, as public-interest considerations become imperative in the face of mass-casualty terrorist acts. However, judges must not accept that the ends justify the means in the fight against terrorism. As Chief Justice Barak has poignantly and eloquently reminded us in his comprehensive remarks, the «struggle against terrorism is not conducted outside the law, but within the law». These sentiments echo Justice Kennedy's words in his opinion for the majority of the US Supreme Court in one of its most important war-on-terror cases, *Boumediene v. Bush*, where he said, and I quote: «The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the law.»

In my brief intervention I want to attempt to develop the arguments for and against the following claim:

The role of the Strasbourg court, as an international court, in terrorist-related fair-trial cases is not to adopt bright-line rules, although these are particularly effective to protect the rights of the defence, but rather to continue to formulate flexible, yet effective, procedural safeguards that enable the national judge to adequately balance the conflicting interests concerned.

To this end, I will proceed in two brief parts. *Firstly*, I will explain what I mean by bright-line rules and flexible procedural safeguards, arguing that the Strasbourg Court has historically developed its jurisprudence under the fair-trial provision of Article 6 so as to favour a reading which adopts a holistic assessment of procedural fairness rather than bright-line rules enforcing minimum procedural rights. *Secondly*, I will attempt to articulate why I consider that this approach by the Court is well suited to deal with the very difficult tensions between individual rights and the public interest that



arise in terrorist cases, and then, perhaps surprisingly to some of you, make the claim that the choice by the Strasbourg Court between bright-line rules and flexible procedural safeguards under Article 6 involves values that may be said to originate from the principle of subsidiarity.

## BRIGHT-LINE RULES AND FLEXIBLE PROCEDURAL SAFEGUARDS

I now turn to my first part.

Fair-trial or due process rights are a manifestation by civilised peoples of their wish to impose fair play on the relationship between the accused and the all-empowering State, an attempt to ensure that a balance is struck between individual rights – the liberty of the person – and the security of the masses – the life and limb of the innocent.

The level of protection that fair-trial rights grant the accused is relative to the scope of the accused's defence rights as interpreted and applied by an independent and impartial judge, the primary guarantor under the rule of law. The judge can maximise the protective force of defence rights by interpreting them as minimum rights, blanket proscriptions of government conduct, in other words by articulating bright-line rules that cannot be transgressed without a finding that the accused's defence rights have been violated. For example, such an approach considers the right to legal assistance to be absolute or to allow only very limited exceptions, even though the rights of the defence as applied in this way will almost certainly restrict the margin of manoeuvre for law-enforcement authorities. The same applies if, owing to considerations relating to the individual human rights of the accused, the State is forbidden to restrict the disclosure of evidence in a criminal trial on security grounds.

Interestingly, when one reads Article 6 of the Convention, one might at first glance think that the plain reading of the text supports this bright-line/minimum-rights approach. Although paragraph 1 requires a person charged with a criminal offence to be afforded a fair hearing, paragraph 3 is separate and explicitly sets down «minimum rights», such as the right of the accused to legal assistance, to adequate time and facilities to prepare his defence and to cross-examine witnesses.

But this is not the way the Strasbourg Court has interpreted and applied Article 6 in the context of criminal proceedings. The case-law has not always been developed in a perfectly consistent and linear fashion. However, Grand Chamber judgments of the Strasbourg Court in the last decade, such as *Salduz v. Turkey* of 2008, *Al-Khawaja and Tahery v. the United Kingdom* of 2011, and, very recently, *Dvorski v. Croatia* of 2015 and *Schatschaschwili v. Germany*, also of last year, reject in my view an absolutist minimum-rights reading of paragraph 3 of Article 6. The Court has instead interpreted the paragraph 3 rights as providing for constituent elements of the general principle of a fair trial under paragraph 1. In this way the Court has acknowledged that States may under certain circumstances restrict the rights of the defence so long as the accused has been afforded a fair trial on the basis of an overall assessment.

Of course, there have been attempts by applicants to invite the Court to move towards an absolutist minimum-rights approach, and certain judges of the Court have in forcefully argued separate opinions expressed the view that such an approach would be more in line with the structure of Article 6 and the individual human rights character of the Convention. However, a majority of the Court have consistently rejected such attempts.

## FLEXIBLE PROCEDURAL SAFEGUARDS, TERRORISM AND THE PRINCIPLE OF SUBSIDIARITY

On this basis, let me then turn to my second part, where I will argue that the Strasbourg Court has been justified in adopting the more flexible, holistic fairness approach, and then reflect on the practical effects of this approach on the manner in which terrorist trials are conducted at national level for the purposes of Article 6 of the Convention.

I would make two points here.

*Firstly*, I would submit that one of the main reasons why the Strasbourg Court has rejected the invitation to apply paragraphs 1 and 3 of Article 6 as distinct although related provisions is that such an approach would not be easily reconcilable with the nature and character of the Convention as an international treaty. The Court has been mindful that the Convention is not meant to harmonise domestic rules of criminal procedure but allows States to retain their discretion in fashioning such rules as are consistent with their respective legal and historical traditions. In other words, whilst the Convention imposes on States the duty to afford all persons accused of criminal offences a fair trial, States have latitude in deciding the way in which they go about prosecuting criminal cases while conforming to the general principle of fairness. The Strasbourg Court, in pursuing this approach, will look at the end result, but will not necessarily focus its examination on whether mistakes were made along the way, so long as the overall outcome is acceptable. The “overall fairness” approach of the Court attempts to preserve the primary role of national criminal judges under Article 6, allowing them flexibility in the conduct of proceedings, in line with the institutional divisions of power between national courts and the Strasbourg Court as manifested in the principle of subsidiarity.

Having said that, let me be clear. When an application is lodged at Strasbourg, the Court, as a human rights court, examines carefully whether the end result fulfils the Convention requirement of fairness. Although it is not determinative if mistakes have been made along the way, the Strasbourg Court must in my opinion take into account the existence of grave procedural errors in the domestic proceedings that have had detrimental effects on defence rights, by applying strong presumptions of unfairness requiring strict scrutiny by the international court in its assessment, particularly if the procedural error is manifest or deliberate.

My *second*, and last point, relates to the way in which this “overall fairness” approach under Article 6 is better suited to take account of the apparently irreconcilable interests at stake in proceedings dealing with the most serious of crimes, such as terrorism, where the duty of the State to protect life under Article 2 is overriding.

It is unrealistic to interpret and apply fair-trial guarantees in a vacuum by adopting bright-line rules that do not allow the requisite balancing exercise between conflicting interests along a spectrum of weak to very strong public interests in fighting crime. It is axiomatic that the public interest is at its apogee in mass-casualty terrorist cases.

It is true that it is exactly in such cases, when emotions run high, that judges need to be vigilant in effectively protecting core procedural guarantees. As I said at the outset, in a democratic State under the rule of law the ends can never justify the means, even in the fight against terrorism, unless we unwisely reject Benjamin Franklin's view that, and I quote, «he who would put security before liberty deserves neither». However, the Strasbourg Court has recognised that Article 6 must allow judges the necessary flexibility in taking the State's positive obligation to protect life under Article 2 effectively into account in making procedural determinations that may necessitate limiting defence rights for the public good. As the fight against terrorism invariably has the consequence that States often deem it necessary to take drastic measures to curtail defence rights, the Strasbourg Court may have to develop further its case-law in this area in the coming years, so as to maintain the appropriate balance between effective fair-trial rights and the public interest in protecting life.





## Iulia-Antoanella Motoc

Judge to the  
European Court of Human Rights

Ladies and Gentlemen,

It is a great privilege and honour to take part in this discussion on the opening of the judicial year, in particular with the eminent president and professor Aharon Barak together with my colleagues and friends Ganna Yudkivska and Robert Spano.

My subject today will consist in trying to see to what extent the concept of militant or defensive democracy – a central concept in the speech and work of Judge Barak today – can also be applied by judges of this Court. In my opinion, the Court is heading in that direction with its recent case-law on the question of mass surveillance in the terrorism context.

The concept of militant democracy was invented by Karl Lowenstein in a series of two articles published in 1937 in the *American Political Science Review*. He attempted to explain the failure of the Weimar Republic, and the fall of other democratic regimes in the period following the First World War. His idea was that those regimes had not been given the instruments to combat anti-democratic movements. In some respects, those problems harked back to similar dilemmas in the nineteenth century in the form of Bonapartism and Caesarism, which adopted plebiscitarian methods. In 1949 Germany incorporated some of those defence mechanisms in what became its Constitution.

In my view, the same type of safeguard of militant democracy lies in the European Convention on Human Rights. The Convention was created in the aftermath of the Second World War to give Europe a programme through which the most serious human rights violations committed during that war could be avoided in the future. That explains, in part, the constant references to values and principles which are “necessary in a democratic society” throughout the Convention, even though those principles are not at all defined in the Convention itself.

The best judicial definition of democracy can be found in our judgment *Refah Partisi (The Welfare Party) and Others v. Turkey*: “In view of the fact that these plans were incompatible with the concept of a ‘democratic society’ and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a ‘pressing social need’”.

However, the debate over militant democracy – and the question of how to balance democratic and liberal values against the need to defend democracy from totalitarian movements, on both the right and the left – has taken on a broader meaning at least on two occasions: during the Cold War and in the aftermath of the 11 September 2001 attacks, in view of the need to confront terrorist extremism. The perceived danger comes from amorphous groups and seems to target not direct suspects but also certain fundamental rights.

In judicial terms this dilemma has been addressed as follows by the Supreme Court of Canada in the *Suresh v. Canada* decision of 2002: “it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values”, namely, “values that are fundamental to our democratic society — liberty, the rule of law, and the principles of fundamental justice”.

As President Aharon Barak has reminded us: “human rights are not a stage for national destruction” and, according to Judge Kennedy, “The Constitution is not a suicide pact”. He points out that the existence of democracy cannot be “taken for granted. We have to fight for it”. And he sees judges as being on the front line in that battle.

In his book *The Idea of Europe* the philosopher George Steiner states that there are five axioms about Europe. The fourth is a “tale of two cities”, Athens and Jerusalem. “Being European means seeking to negotiate, on a moral, intellectual and existential level, between the contrasting ideals and praxis of the city of Socrates and the city of Isaiah”. The ultimate criterion is the consciousness of its own contingency and the possibility of its own downfall. A theme of which Paul Valéry is fond; he wrote of its beauty and the horror of a century that has just recently come to an end. With the memory of evil, which had its roots in Europe and which in Europe has led to the casting of blame. If European identity is the result of a project and a process, if the question of who we are is a question about who we want to be, that means that we are committed to being in and building a future in Europe. This is precisely the reason why the Court has granted a key role to European consensus. This term often appears in our judgments. On occasion we have, like all judges, a different interpretation of the term “European consensus”, as shown by the concurring opinion of Judge Ziemele in the *Rohlena v. the Czech Republic* judgment of January 2015, but we are all aware of the fundamental importance of that notion in preserving the unity of Europe.

The European Court of Human Rights has begun to respond to that question in the Grand Chamber’s *Zakharov v. Russia* judgment (no. 47143/06), of 4 December 2015 – a judgment which answers common questions: “Having regard to the secret nature of the surveillance measures provided for by the contested legislation [in Russia], the broad scope of their application, affecting all users of mobile telephone communications, and the lack of effective means to challenge the alleged application of secret surveillance measures at domestic level, the Court considers an examination of the relevant legislation in abstracto to be justified”. That paragraph of our judgment has been rightly regarded as an expression of the priority given by our Court to human rights. In that connection the Court has examined the principles on which to assess whether the interference was “necessary in a democratic society”, emphasising the tension between measures taken to protect safety and their consequences for society. The Court has stressed that it must be satisfied that there are appropriate and effective safeguards against abuse. A limited degree of involvement will not suffice for judicial authorisation to obtain. On the contrary, judges must be sufficiently empowered to verify the existence of a reasonable suspicion against the citizen. In addition, the judiciary must also have the capacity to assess the proportionality and necessity of the surveillance. In that sense, this judgment also mirrors the subject of judicial scrutiny of anti-terrorism measures, as mentioned by Judge Barak.

Isaiah Berlin gave us a good explanation of the question of the immeasurableness of values in the context of the pluralism of values. Ideas about pluralism were well explained by our former President Wildhaber, in his studies on the pluralism of constitutions within our Court. In 1945, Isaiah Berlin, then a diplomatic attaché in Moscow, had a chance encounter with the poet Anna Akhmatova. For her this meeting was an encounter with freedom, and she referred to him as the “Guest from the future”. Europe is now confronted with a terrorism which has shaken Israel for over half a century. So, for us too, President Barak is “the guest from the future”.

# SOLEMN HEARING OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE OCCASION OF THE OPENING OF THE JUDICIAL YEAR



## Guido Raimondi

**President of the  
European Court of Human Rights**

### Opening address

Presidents of Constitutional Courts and Supreme Courts, Madam Chair of the Ministers' Deputies, Secretary General of the Council of Europe, Excellencies, Ladies and Gentlemen,

I would like to thank you personally and on behalf of all my colleagues for honouring us with your presence at this solemn hearing for the opening of the judicial year of the European Court of Human Rights. By accepting our invitation you have shown once again the strength of your support for the Court. As we are still in January – albeit only for a few more hours – as is the tradition here, I would like to wish you a happy and fruitful new year 2016.

Today's hearing is one of particular significance. It is the first time that I have given an address on this occasion. It is a great honour to be in this position and I am grateful to my colleagues for showing their confidence in me by electing me as President of the Court.

In keeping with tradition, I would like to begin by referring to some statistical information about our Court's activity. But before doing so – and since the figures are very positive – I wish to pay tribute to my predecessors, and in particular to Dean Spielmann, under whose presidency the Court has considerably reduced its backlog, and also to its outstanding former Registrar Erik Fribergh, whose role in the Court has been essential.

In 2015, therefore, the Court continued to manage the flow of the cases brought before it. In total, it has decided over 45,000 cases. As you know, the elimination of the backlog of single-judge cases was one of the aims of 2015 and it was indeed fulfilled. We now have only 3,250 such cases pending. This is clearly a remarkable result and one to be commended. I hope that we will, within a short timeframe, dispose with similar efficiency of the 30,500 repetitive cases that are currently pending. We have the technical means to achieve that, but it will also depend on the capacity of the respondent States to deal with such cases.

The number of applications disposed of by a judgment remained high in 2015: 2,441, up on 2,388 the previous year. At the end of 2014, we had about 70,000 applications pending. That figure fell to just under 65,000 at the end of 2015, down 7%.

I would like to point out that this progress has to a significant extent, been made possible by those States which have agreed to support the Court, either by contributing to the special account set up after the Brighton Conference to help us deal with our backlog, or by making lawyers available to us through secondment.

I could simply express my satisfaction with these results and take the view that I now have an easy task ahead. But we cannot rest on our laurels. On the contrary, we will be facing some considerable challenges over the next few months. To start with, one of the new features in 2016 will be the introduction of improved reasoning for single-judge decisions. The reasoning in such decisions has, as you know, remained very laconic. That was a cause of frustration not only for applicants but for judges too. But the number of applications (over 100,000) was so high that we were unable to resolve the issue. Of course, the need for reasoning, according to our case-law, is the essential basis of the trust that citizens must have in their systems of justice. Furthermore, at the High-Level Conference held in Brussels last March, the States expressly asked the Court to provide reasoning

for single-judge decisions. I am therefore happy to announce that the Court will respond to that call during the first half of this year. Naturally, we will seek to meet that expectation while continuing to deal with admissible cases and avoiding the build-up of a new back-log.

My other concerns relate to priority cases – which currently total 11,500 – and ordinary Chamber cases, of which there are some 20,000. It is clear that these cases, which are by definition more complex, represent a challenge for us in the coming years. In any event, these figures will have to be brought down from their present unacceptable level. We will have to act on several fronts: dealing with the older cases while ensuring that new cases are resolved in a satisfactory time-frame. In order to succeed, it will be necessary to devise new working methods, including new forms of cooperation with national authorities.

This is one of the ambitions for my term of office as President. However, I am not alone in this endeavour. I am fortunate to be able to work with judges of the highest quality who are profoundly devoted to the Court. I would like to commend them publicly on this occasion. I am particularly happy to mention those of us here tonight who are taking part for the first time in this solemn hearing as judges of the Court. They have recently taken up office and will sit on the bench for the next nine years. They can rely on the assistance of the high-quality staff of the Registry and on this occasion I would also like to thank all of our staff for the work that they accomplish on a daily basis for the good of the Court.

As you all know, the authority of a court and its legitimacy depend largely on the quality of those who sit on its bench; hence the importance of the process by which our judges are appointed. Here I would like to pay tribute to the work of the Council of Europe's Parliamentary Assembly and the Advisory Panel of Experts on Candidates for Election as Judge, chaired by former Chief Justice [of Ireland] John Murray.

In 2015 we pursued our dialogue with other courts, both national and international. We have received and paid many visits, furthering the dialogue between judges, but I will not list them all here. I will confine myself to three examples, because they illustrate our Court's renown throughout the world. A very important visit was paid to the Supreme Court of Canada, and it was marked by the warm welcome we were given there. In Strasbourg we received a delegation of members of the International Court of Justice, with whom we were able to share working methods and discuss our respective case-law. Lastly, only a few days ago, it was the very prestigious Constitutional Court of South Africa which paid us a visit.

Another event related to this dialogue was the launch – on 5 October 2015 – of our network for the exchange of information on the case-law of the European Convention on Human Rights, as announced on this occasion last year. The aim of this initiative, welcomed in the Brussels Declaration, is to promote a reciprocal flow of information between us and the higher national courts. We are currently conducting a trial run with the two supreme French courts, the *Conseil d'État* and the *Cour de cassation*, and I am glad to welcome here tonight the distinguished heads of those courts: Vice-President Jean-Marc Sauvé, First President Bertrand Louvel and Prosecutor-General Jean-Claude Marin. Other courts have already expressed an interest in joining our network and I hope that this will be possible in 2016. This new cooperation between the European Court of Human Rights and national supreme courts is an embodiment of our shared responsibility for the implementation of the European Convention on Human Rights – a subject which was the focus of the Brussels Conference.

However, an overview of the past year cannot be confined to figures or to a description of how the Court works. Of most importance, ultimately, are the decisions that we deliver, and especially those that demonstrate our capacity to rise to the challenges of the contemporary world. In this connection, the year 2015 has been particularly fruitful.

The Court is regularly called upon to deal with new problems. They are usually extremely sensitive matters on which there is little or no consensus, neither in Europe as a whole nor even at national level. These are issues which sometimes give rise to very heated debates in our societies.

I do, of course, consider it to be a positive sign that citizens are turning to our Court to find the answers to their questions. It reflects the high level of trust that they place in the Convention system. This is a great responsibility for us.

On the subject of case-law, I will begin by referring to that of the Grand Chamber. These are the cases that give rise – and understandably so – to particular scrutiny by domestic courts and they are considered by some to be the cursors of the Court's jurisprudential policy. These judgments are of equal legitimacy, regardless of the majority by which they are decided.

The leading cases of 2015 include that of *Lambert v. France* on the question of end-of-life situations. It is quite rare for a case to have attracted, to such an extent, the interest of the media worldwide. The Court was confronted with the fact that there was no consensus between the member States of the Council of Europe as to the discontinuance of treatment keeping a human being alive artificially. It took the view that the provisions of French law, as interpreted by the *Conseil d'État*, constituted a legal framework which was sufficiently clear to regulate with precision the decisions taken by doctors in such situations. The Court was fully aware of the issues raised by a case concerning medical, legal and ethical questions of the highest complexity. It found that it was primarily for the domestic authorities to verify whether the decision to stop such treatment was in conformity with domestic law and with the Convention, and to establish any wishes that may have been expressed by the patient.

We therefore reached the conclusion that the case had been the subject of an in-depth examination in which all views had been heard and all aspects carefully weighed up, having regard both to a detailed medical assessment and to general observations emanating from the highest medical and ethical bodies. This case is a fine example of the proper application of the subsidiarity principle.

Another case *Delfi v. Estonia* was much less distressing but equally important — on the question of freedom of expression in the digital-media context. This case illustrates the sort of new subject-matter we are called upon to address, often related to new technologies or scientific progress. This was the first case in which the Court had occasion to examine the responsibility of an on-line news portal for comments posted by its readers. Two contradictory realities lay at the heart of this case: on the one hand, the benefits of the Internet that we all appreciate, especially the fact that it is an unprecedented medium for the exercise of freedom of expression, and on the other, the risks that it presents, and in particular the danger of its being used for hate speech or calls to violence, reaching a worldwide audience instantly and remaining on line perhaps indefinitely.

The applicant company complained that the national courts had found it liable for offensive comments posted by third parties.

In its judgment, the Court attached particular weight to the extreme nature of the comments, and also to the fact that Delfi ran its news portal on a commercial basis. It then took account of the fact that Delfi had not ensured that the authors of the posted comments could be held to account for their own remarks. Lastly, it noted that the measures taken by Delfi to prevent the publication of defamatory comments or to delete such remarks promptly after their publication had been insufficient. The decision of the Estonian courts to find against Delfi was thus regarded as justified and as not constituting a disproportionate restriction of its right to freedom of expression.

Delivered at the end of last year, the case of *Zakharov v. Russia* is also of interest, for a number of reasons. First, because it dealt with a fundamental question in our societies – that of covert surveillance. Secondly, in terms of admissibility, as our Court found that the applicant was entitled to claim to be a victim of a violation of the Convention, even though he had presumably not been subjected to any real surveillance measure himself. In view of the lack of a remedy at national level, together with the covert nature of the measures and the fact that they affected all users of mobile telephone services, the Court thus examined the Russian legislation in the abstract. That led us to conclude that the provisions of Russian law governing the interception of communications did not contain adequate and effective safeguards against arbitrariness. Also finding shortcomings in the legal framework in a number of respects, we held that there had been a violation of Article 8 of the Convention.



End-of-life situations; issues about new technologies; arbitrary surveillance measures; those are just a few examples, among many others, of the diversity of our case-law in 2015.

To conclude this brief overview, I would like to mention one other case – not a Grand Chamber or Chamber judgment but an inadmissibility decision. A decision which brings us back to the essence of our mission, to the values that our Court has defended from the outset.

In the case of *M'Bala M'Bala v. France*, the applicant had tried to take advantage of his status as artist in order to propagate his racist ideas. In one of his shows he had called upon a well-known academic, who has been convicted a number of times in France for his negationist and revisionist views, to join him on stage in a gruesome and ludicrous scene which the audience were invited to applaud. The Court took the view that the show at that point was no longer a form of entertainment but had become a sort of rally and that, behind the façade of humour, it was promoting negationism. The applicant had sought to misuse Article 10 by claiming a right to freedom of expression for purposes that were incompatible with the letter and spirit of the Convention. It was important for the Court to reassert that the European Convention on Human Rights did not protect negationist and anti-Semitic expression.

But my overview of 2015 would not be complete without mentioning the crises that we have witnessed: not only the migrant crisis, which has been escalating over the past few months, but also and above all the terrorist attacks which have struck us in Europe – again recently – and which have left our democracies in a state of shock.

We cannot but commend the foresight of the Convention's drafters, who, by inserting Article 15 into our body of law, and thus providing for the possibility of derogating from certain rights in cases of danger threatening the life of the nation, gave our democracies the means to defend themselves in times of emergency; but importantly, to defend themselves without destroying the fundamental values on which our system is based and without abandoning the Convention system. Faced with the enemies of democracy, we must continue to uphold the rule of law.

Article 15 of the Convention leaves States a broad margin of appreciation. However, they do not enjoy unlimited powers and the Court will always be required to verify that their measures remain within the "extent strictly required by the exigencies" of the crisis at hand.

I felt that it was important to emphasise, on this occasion, that the Court is [, to use the words of its case-law,] "acutely conscious of the difficulties faced by States in protecting their populations against terrorist violence, which constitutes, in itself, a grave threat to human rights". The Court thus finds it legitimate for "the Contracting States to take a firm stand against those who contribute to terrorist acts", but without destroying our fundamental freedoms, for not everything can be justified by an emergency.

Presidents of Constitutional Courts and Supreme Courts,

Your presence among us here every year is something to which I attach great importance. Our Court and your courts protect rights which are, broadly speaking, the same.

Like you, we have the task of examining individual applications and a mission that is constitutional in nature.

Like us, you are sometimes exposed to criticism. But, in your respective countries, your very existence and the respect due to you are necessary conditions of democracy and you participate, like us and with us, in the construction of a Europe of rights and freedoms.

Ladies and gentlemen,

One of the oldest constitutions in the world is that of Poland. It dates back to 3 May 1791. It has enshrined, since then, the separation of powers and the independence of the judiciary, and the third of May is now the Polish national day. A fine symbol indeed!

I am particularly glad to welcome here this evening, to the European Court of Human Rights, Mr Andrzej Rzepliński, President of the Polish Constitutional Court.

President, It is a pleasure for me to give you the floor.



## Andrzej Rzepliński

President of the Polish  
Constitutional Court

### TO BE A JUDGE

Being a judge is equally as beautiful and utterly as absorbing as being a doctor or being a scholar. The profession of judge is not a good career for persons who do not possess a sufficiently well-established sense of personal and professional dignity, the virtue of personal integrity, an impeccable past, professional and practical knowledge, social and family maturity, and personal maturity, to be able to assume full responsibility for each ruling given in accordance with the law and with their own conscience.

Each judge must be equipped with good work-organisation skills so that any acts of neglect do not tempt him to pacify either "the superiors" or one of the parties.

A judge must have the courage not only to make decisions but also the moral courage to judge specific persons. This entails that judging belongs to "one of the most fundamental functions in each society"<sup>1</sup>.

The importance that societies have always attached to selecting possibly the best persons to fill these posts is well demonstrated by the requirements posed for future judges by the ancient Jewish law, which included first of all "the knowledge of law, combined with general education" and "the impeccability of character combined with piety, gentleness and kind-heartedness"<sup>2</sup>. A judge – in the Christian doctrine, according to Saint Thomas Aquinas – is a man who should live in "a state of perfection, that is in truth." Judges "should by virtue of their office be the guardians of truth in the judiciary", like scholars in science – "A lie in a court or against science is a deadly sin"<sup>3</sup>.

Worlds apart from the values that a judge must represent in a State ruled by law, was a judge called to serve by Vladimir Lenin who, by virtue of his absolute authority, issued orders to judges to openly sow terror with their rulings, and to justify and legitimise it "in a principle-based manner, without any falsehood and beautification". In civil cases, judges were to pass orders of confiscation and requisition, to exercise supervision over merchants and entrepreneurs, and not to recognise any private ownership. From criminal court judges he demanded his two favourite punishments: either death by firing squad or deportation for forced labour. The punishments had to be "merciless", the courts had to be "militant" – "the proletariat's courts", he wrote, "should know what to allow"<sup>4</sup>.

1 Israel Drapkin, *The Art of Sentencing: Some Criminological Considerations*, "Reports of UNAFEI", 1979, No. 16, p. 53.

2 Salomon Ladier, *Proces karny w Talmudzie (A Penal Trial in the Talmud)*, Lwów, Jaeger, 1933, p. 46.

3 Tomasz z Akwinu, *Cnoty społeczne pokrewne sprawiedliwości (Treatise on Justice)*, transl. F.W. Bednarski, London, Veritas, 1972, qu.110, 4, 5.

4 W.I. Lenin, *Dziela wszystkie (The Collected Works)*, Warsaw, 1989, vol. 44, pp. 317, 379, 394.

Within the system of a totalitarian state, there was no room for an independent judge. Even though the regime gradually softened, and the judiciary's terror subsided accordingly, the subsequent generations of judges were prepared for service by judges who, through their rulings, had destroyed the lives of tens of thousands of people. In a totalitarian state, for the purposes of a ruthless fight with the political opposition, it was always easy to find judges who did not mind being used to spread institutionalised, legal terror, in the name of the law. A specific award for them was a sense of total impunity. They were protected by the Communist party – their party. The judiciary was permeated with political corruption through and through. Hitler was just as efficient in demoralising judges as Lenin was<sup>5</sup>.

After 1948, judges behind the Iron Curtain worked in toxic conditions. The departure, after 1956-1960, from the exercise of power by mass intimidation of society opened up a margin of independence for most judges. Extraordinary courage was no longer required. What was required was internal honesty. Nonetheless, regimes still need judges, also in periods of decline, to maintain control over society. Admittedly, this was already to be achieved at lesser expense. It had been hard to govern with bayonets. The control of people began to be exercised using relatively soft measures. This created a niche for most judges. Particularly those who preserved some institutional memory of the pre-Communist or pre-Nazi eras.

Many judges then still had pre-revolutionary publications in their home libraries.

Few managed to get hold of uncensored books published in free countries.

Most of the judges were aware of the standards that were binding in the countries of free Europe.

These circumstances helped the transformation of the judiciary, which started in 1989-1990. This transformation required and still requires time; it also requires painstaking practice, good, stable law, respect for the separateness of the judiciary on the part of the subsequent political parties after they win parliamentary elections.

For the transformation of the judiciary to be fully completed, it is necessary, after the period of transformation, for the new judges to be prepared for their role by older colleagues who have adjudicated throughout their lives in a State ruled by law where the separation of powers is a well-established and unquestioned principle. This means decades of practice, as in the Bible's story of forty years of exodus from Egyptian slavery. One cannot buy time.

Just as it has been throughout the centuries, also at the present time, societies demand judges who are men of integrity and who have adequate intellectual capabilities, good work-organisation skills and solid knowledge of the law and its application<sup>6</sup>. Not every lawyer who has passed a judge's exam is able to meet such requirements.

I have devoted thirty years to research on the history of the judiciary, to analysing the essence and challenges of a judge's authority<sup>7</sup>, to the formation of the system of courts guaranteeing the separation of the three powers in Poland and in other countries, and furthermore, to the active defence of judges against attacks, as well as to monitoring the procedures of the judges' appointment to office and to monitoring the quality of the work of courts and judges.

I have held the office of judge in the Constitutional Court for eight years; soon my nine-year term of office will come to an end. Having the experience of these years of a judge's practice, I can attempt to answer the fundamental question that I asked myself when I accepted the kind invitation of the President of the European Court of Human Rights, Professor Guido Raimondi, to deliver a speech before such a dignified assembly, so uniquely important for over 800 million Europeans – this assembly of outstanding judges, judges of those millions of people, also my judges. I decided to ask myself this question, as expressed in the title: what does it mean to be a judge? For the needs of my speech today, I have gathered thoughts that have come to mind at various stages of my career as judge and in my research on the judiciary.

Referring to the concept of antinomy in the idea of law from the work of Gustav Radbruch<sup>8</sup>, I would say that a judge's public function is to realise an idea of law which comprises legal security, common good and justice. In the case of a constitutional judge, this means assessing the conformity of normative acts with the Constitution in a manner which at the same time protects the stability of law, eliminates instances of injustice from it (e.g. unjustified interference with the liberties and rights of man and the citizen) and realises the idea of common good, i.e. the idea of a State in which the decisions are made by way of agreement and cooperation, and not imposition, a State which does not exclude anyone and for which all citizens bear responsibility. This is an extremely difficult task, requiring no mean competences and skills and a specific attitude; which is why not everyone can undertake it. To perform this task thoroughly one has to be very well prepared in terms of substantive knowledge, and apart from that, one must be characterised – at the very least – by fairness, independence, courage, sensitivity and – a quality which is often forgotten – humility.

Speaking of the necessity of very good preparation in terms of substantive knowledge, one may say that to be a judge means to be a craftsman and to have the ambition to be a craft artist, like Italian craftsmen – artists of luxury goods, so admired worldwide. A wise, fair judgment is the work of a craftsman – an artist of law. This term may be used for a judge who is an expert in the dogmatics of law, understands law, perceives it as a structure, as a certain mechanism, i.e. who knows and "feels" "how law is built, what rules govern or should govern its construction, functioning and interpretation"<sup>9</sup>. The knowledge and understanding of law require from a judge that he keeps his mind in constant motion. He does not stop being a judge the moment he leaves the court-house. Some judges are better at the art of judging, others are not so good. Each judge being a rapporteur of a case in which there is – and in which he will notice – an important legal issue, a constitutional issue, an issue of importance from the perspective of the European Convention, may actually outplay the first violin, as in a chamber symphony orchestra. But just as in an orchestra, nearly each work of art that an unprecedented judgment, referred to for years to come, undoubtedly is, will be a common achievement of various artists of law: those who brought the case to the court, presented new, challenging arguments and those who, in a court dispute, submitted in an equally brilliant manner their counter-arguments, together with – an equally salient point – any other judges who have adjudicated upon the case. Poor is the judge who will not notice the potential of such a case for jurisprudence. A wise and fair judgment multiplies the satisfaction of being a judge. Such a judge must possess the skill of bridging law and life. This is a challenge of special importance when the IT revolution changes, twists and redefines eternal values. The bar has been raised very high. Not without reason did Ronald Dworkin present in his works the character of the judge as Hercules<sup>10</sup>. To be a judge, one has to, more often than not, demonstrate a strength that is comparable to the strength of a Greek hero.

5 Ingo Müller, *Hitler's Justice*. The Courts of the Third Reich. Harvard University Press 1991; Helmut Ortne, *Der Hinrichter: Roland Freisler – Mörder im Dienste Hitlers*. Nomen 2009.

6 The eighth principle on the independence of the judiciary of the UN from 1985 reads that "judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary", whereas from the tenth principle it follows that judges shall be "individuals of integrity and ability, with appropriate training and qualifications in law", see A. Rzepliński, 1981, "Niezawisłość sądownictwa w świetle norm ONZ" ("The Independence of the Judiciary in the Light of the UN Norms"), *Tygodnik Powszechny*, 1987, No. 33. Similar is the wording of the international norms taken over by the International Commission of Jurists and by the Law Association of Asia and Western Pacific (see The World Conference on the Independence of Justice, Working Documents, Montreal, June 5-10, 1983).

7 Andrzej Rzepliński, *Die Justiz in der Volksrepublik Polen*. Dieter Simon (Vorwort). Frankfurt am Main 1996.

8 See Gustav Radbruch, *Filozofia prawa (Rechtsphilosophie)*, transl. Ewa Nowak, Warsaw, 2012, pp. 79–84, 241–243.

9 Ewa Łętowska, *Prawo bywa bardzo piękne (The Law is Sometimes Very Beautiful)*, an interview on Channel Three of the Polish Radio of February 27, 2011.

10 See Ronald Dworkin, *Biorąc prawa poważnie (Taking Laws Seriously)*, Warsaw 1998; Ronald Dworkin, *Imperium prawa (Law's Empire)*, Warsaw 2006.

In order to thoroughly fulfil the public function of a judge, i.e. – as I mentioned above – to realise an idea of law which comprises legal security, common good and justice, what is indispensable is not only expertise in the craft and art of law, but also a certain attitude of a judge as an individual. A judge must possess certain traits of character and personality. Among the most important ones, as I said at the beginning, I would list fairness, independence, courage, sensitivity and humility.

A fair judge is a judge who gives everyone his rightful due. Such a definition of a fair judge requires specification of a criterion whereby he assesses what is rightfully due to whom. For constitutional judges, such a criterion is the Constitution, confirming the fundamental values and rights, setting forth the competences of individual constitutional bodies. A fair judge must apply the criterion of giving everyone his due in a consistent manner, i.e. he must treat equals the same way, and those who are not equal he must treat differently. Only such a judge will be a fair judge, and thereby also an impartial one.

The Constitution, as a criterion whereby everyone is given his due, or another objective criterion, is linked with another indispensable trait of a judge as an individual – with his independence. An independent judge is a judge who is well prepared in terms of substantive knowledge – this is where yet another role of good substantive preparation comes into the fore, as a condition of a judge's independence – and is able to think critically, i.e. is intellectually independent. Otherwise he will be dependent on the knowledge and views of other people, for example, other judges or his assistants. An independent judge is also someone who is internally independent, adjudicating not on the basis of his views and postulates, but on the basis of the criterion of adjudication conferred on him by law<sup>11</sup>. In the case of constitutional judges, this criterion is the Constitution.

A judge must also be a sensitive individual. Just like a doctor must remember that a patient is a human being and not a medical case, a judge must also remember that a person appearing in a specific legal situation is a human being and not a subjective element of a case. This also applies to constitutional judges. The decisions of a constitutional court shape people's lives – sometimes the life of all inhabitants of the country. To be a constitutional judge is to remember that behind a judgment on the hierarchical conformity of legal norms with the Constitution there are specific situations involving many people, and this fact needs to be taken into account in adjudicating upon a case.

The fundamental traits of a judge, determining as they do the reliable holding of the public function entrusted to him, also include humility. This is an oft-forgotten trait. Meanwhile, the awareness of one's own imperfection, and – by the same token – fallibility, is a judge's indispensable tool that makes him able to choose the best solutions, and not always those invented by himself. Humility will also be necessary to be able to accept reasonable criticism of the decisions made – on the part both of professionals and of public opinion, the voice of which, in a democratic State ruled by law, a judge cannot disregard.

Therefore, a judge must thoroughly justify his decisions in order to explain to others, and to public opinion in general, the reason for a particular decision, and thereby to account for the authority he has been entrusted with. A judge is there for people, and not vice versa. Respect for public opinion, treating it as an empowered subject, and care for being understood by it, should not be confused with yielding to its demands.

So it means that a judge must be independent also of public opinion. It is not by accident that a provision in one of the Roman constitutions read that “the hollow and vain voices of the mob should not be heeded” (*Vanae voces populi non sunt audiendae*)<sup>12</sup>. If judges had followed such voices – as Professor Juliusz Makarewicz said – “we would probably still be burning witches at the stake”<sup>13</sup>.

To be a judge is also to offer the parties to the proceedings one's moderate temperament, to be equally loyal towards each participant in the proceedings. This means understanding people, their emotions, interests and hopes. Here a judge must be able, in difficult moments, when a case is heard, to skilfully use his authority, not to lecture, and, in particular, not to treat people in an arrogant manner<sup>14</sup>. Because if a judge cannot do this, then what is the worth of his respect for the dignity of every person, be he even the worst man?

To be able to thoroughly hold the public office entrusted to him, a judge must also be a courageous person. He has to have the courage to take a different stand from that of others, including other members of the bench, if he is convinced that there are more arguments for his opinion than for others' opinions.

Courage is also indispensable for a judge to perform his duty of being independent. He who lacks courage will yield to all kinds of pressure, be it political, community-related or ideological. A courageous judge applies the law in a manner independent of what others expect of him. As a dignified example of this, I would mention some of the judges who adjudicated during martial law in Poland in matters of political crimes. Next to obedient judges, being part of the apparatus of political repression, there were also those who acquitted the initiators of peaceful opposition against the regime<sup>15</sup>. The courage of those judges restored the law's authority and dignity. In their hands, the law was what it was supposed to be: a tool allowing people to be protected from abuse by public authority.

A courageous judge must also be able to step down, to depart from the profession – if his presence in the corps of judges would legitimise an authoritarian regime. A Polish judge who, in 1980, joined the peaceful “Solidarity” movement, then about a dozen months later, when the Communist party declared a war against society, was interrogated by military supervisors, could either withdraw from “Solidarity” and condemn his political “error”, or defend his attitude and the principles of a freedom-loving movement and sentence himself to banishment from the judiciary. Each of those judges was faithful to the judge's oath that he had taken: to conscientiously guard the law. The decree on martial law of December 1981 was an unlawful act, even in the light of the Communist Constitution. Every courageous judge who departed from the court or was removed from the judiciary delegitimised the regime and throughout the 1980s became a role model for the judges who stayed on the sidelines and for the judges that were just entering the profession. A regime usually steps back when confronted with a courageous judge<sup>16</sup>. There is some power in the profession of a judge that holds back even political hooligans.

A judge of the supreme court or a judge of the constitutional court is often, even against his will and against his temperament, a public person. Judges of these tribunals have an essential impact on the quality of constitutional democracy. Through their judgments, they shape the boundaries of this democracy and the values that govern it, while protecting the fundamental rights of each human being. It may happen that this causes irritation among political leaders who demonstrate an authoritarian inclination. They perceive such a state of affairs as a threat to their authority. Their irritation focuses usually on the presidents of the supreme court or the constitutional court. That these judges are guardians of the value of constitutional democracy, they perceive as an intolerable state of affairs. Such leaders try, either themselves or through their adjutants, to force the president of the court to resign, by fair means or foul. The mere fact of not succumbing to the pressure is perceived by them – rather erroneously – as delegitimising their authority. The history of such tensions shows that judges/presidents of such courts have had sufficient courage and determination to protect the integrity of their courts. Usually, the best solution for such tension has been to develop a better understanding of the authorities and their functions. A well-organised State, with a strong legislative and a strong executive authority, requires equally strong courts.

11 See Marek Safjan, *Wyzwania dla państwa prawa* (Challenges for a State Ruled by Law), Warsaw 2007, pp. 81–82.

12 See Agnieszka Kacprzak, Jerzy Krzynówek, Witold Wołodkiewicz, *Rugulae iuris. łacińskie inskrypcje na kolumnach Sądu Najwyższego Rzeczypospolitej Polskiej* (*Rugulae iuris. Latin Inscriptions on the Columns of the Supreme Court of the Republic of Poland*), Warsaw 2006, pp. 92–93.

13 Lech Gardocki, *Naprawdę jesteśmy trzecią władzą* (*We Really Are the Third Power*), Warsaw 2008, p. 119.

14 Aharon Barak, *The Judge In a Democracy*. Princeton 2006, p. 311.

15 See e.g. Maria Stanowska, Adam Strzembosz, *Sędziowie warszawscy w czasie próby 1981–1988* (*Warsaw –Based Judges During the Time of Test, 1981–1988*), Warsaw 2005, pp. 255–257.

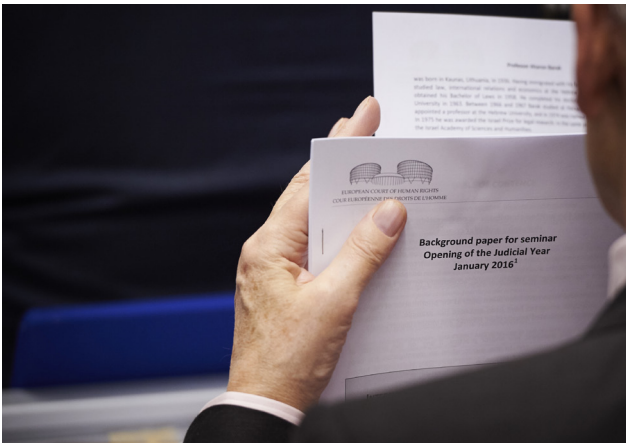
16 Ibid, Maria Stanowska, Adam Strzembosz; Hans Petter Graver, *Judges Against Justice. On Judges When the Rule of Law is Under Attack*. Berlin Heidelberg 2015, pp. 259–270.



To be able to be a judge – a good judge – you have to constantly demand a lot from yourself. It is, however, worth the trouble, because he who is an expert lawyer and, as also happens several times in a judge’s career, an artist of law, is an important actor – which particularly applies to a constitutional judge – in the protection of constitutional democracy and of its foundations. To be a judge means to be an individual who is – at the very least – fair, independent, courageous, sensitive, humble and kind, and who is constantly learning, and, for that matter, not only from the books of law. Such a judge is – to quote Cicero – entitled to say “let arms yield to the toga” (*Cedant arma togae*)<sup>17</sup>, and – by the same token – demand that strength and violence yield to law.

Let us then pose the question as to what kind of satisfaction a judge may expect from meeting these tough requirements, from subordinating his life to the profession of judge? There is no doubt that a good judge may find an interest in expecting the reverence that will surround him, in personal satisfaction on account of his impartiality in the application of the law, and in the ensured high material status. The less heroism a specific system of law or a social system demands of a judge, the better both this law and this system will be.

Photo



17 Agnieszka Kacprzak, Jerzy Krzynówek, Witold Wołodkiewicz, op. cit., p. 103.





## PREVIOUS DIALOGUE BETWEEN JUDGES

- Dialogue between judges - 2015
- Dialogue between judges - 2014
- Dialogue between judges - 2013
- Dialogue between judges - 2012
- Dialogue between judges - 2011
- Dialogue between judges - 2010
- Dialogue between judges - 2009
- Dialogue between judges - 2008
- Dialogue between judges - 2007
- Dialogue between judges - 2006

