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The European Court of Human Rights as a Pathway to Impunity for International Crimes

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Dr. Sonja C. Grover
Lakehead University
Faculty of Education
955 Oliver Road
Thunder Bay, Ontario, Canada P7B 5E1
sonja.grover@lakeheadu.ca

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In loving memory of and in honour of my parents Gina and David Gazan who never lost faith in humanity when it seemed like the more rational thing to do would be the converse and whose quiet dignity is still a source of great strength and comfort to me

and

In loving memory also of my brother Albert Gazan who struggled for the rights of the dispossessed as social worker, psychologist and educator

About the Author

Sonja C. Grover, Ph.D., is a Professor at Lakehead University. In the past eight years, she has authored over 60 refereed articles on the topic of human rights and international law published in leading international human rights and law journals and contributed two book chapters for a 2007 edited volume on children's rights in Canada. She has also presented papers at various international conferences on the topic of human rights and vulnerable groups. Dr. Grover is Associate Editor of the International Journal of Human Rights. In 2007 she authored the book *Children's Human Rights: Challenging Global Barriers to the Child Liberation Movement*, published by Sandstone Academic Press; in 2008 *The Child's Right to Legal Standing* published by Lexis Nexis and in 2009 a major reference book *Prosecuting International Crimes and Human Rights Abuses Committed Against Children: Leading International Court Cases* published by Springer.

Preface

Introductory Remarks on the Perspective and Intent of the Author in Writing This Monograph

The European Court of Human Rights comments in the judgment *Korbely v. Hungary* that:

> *However, clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.* Indeed, in the Convention States, the progressive development of the criminal law through judicial law making is a well-entrenched and necessary part of legal tradition...The Court's role is confined to ascertaining whether the effects of such an interpretation [interpretation by the national courts and authorities of domestic law which sometimes may refer to or incorporate international law principles or agreements] are compatible with the Convention [European Convention on Human Rights and Fundamental Freedoms] (emphasis added).[1]

This book then examines to what degree this "inevitable element of judicial interpretation" has been applied by the European Court of Human Rights in a manner consistent with the guarantees of the most fundamental human rights under international criminal, human rights and humanitarian law. In many instances, as the cases discussed will illustrate it is contended, the implicit assumption has been rather that the applicable law is intransigent, as if the law had a life of its own, rather than having life breathed into it by those jurists and legal academics and other authorities who interpret it. The end result has too often been additional suffering for victims and their surviving relatives due to the European Court of Human Rights

[1]Korbely v. Hungary (application no. 9174/02), European Court of Human Rights Grand Chamber Judgment of 19 September 2008, para. 71. http://www.menschenrechte.ac.at/orig/08_5/Korbely.pdf. Accessed 22 June 2009.

denying, in those certain cases, any modicum of a remedy in terms of (i) reparations, or (ii) in terms of the making of declarations regarding European Convention of Human rights violations, or new legal characterizations of the facts which would serve to increase the likelihood of domestic or international criminal prosecution of the applicant's tormenters. Though this book focuses on what the author holds are the European Court of Human Rights' less than shining moments, this is in no way meant to detract from the accomplishments of the Court over more than 50 years in advancing regard for and protection of human rights under the European Convention. Rather, this critical monograph is offered with great respect for the Court and with full acknowledgement of the great importance of European Court of Human Rights jurisprudence to our understanding of international human rights law in general. This critical piece, furthermore, was written out of a deep desire for the Court to deliver justice for victims of atrocity in all the cases it considers, and not just in the vast majority. For many, the European Court of Human Rights is the last and best hope for justice, and it is imperative for that reason and so many others that the Court's promise to deliver in that regard not amount, in any instance, to false advertising.

Part 1 of the monograph discusses the notion that "sovereignty" is "an attribute that states are required to exercise in accordance with international law"[2] including jus cogens principles regarding the absolute prohibition on various categories of international crime as defined under customary international law, and certain treaties such as the Rome Statute and the 1984 U.N. Treaty against Torture. This author argues that sovereign jurisdiction is exceeded in regards to the legal matters pertaining to the violation of fundamental human rights when agents of the State engage in grave human rights abuses, especially those amounting to international crimes, and the State is unwilling or unable to provide a civil or criminal law remedy to victims. The position here then is that it is *not* a colonial or Western encroachment on State sovereignty for the international criminal court in The Hague or for foreign national courts to apply universal criminal and civil law jurisdiction (extra-territorial jurisdiction) in such matters in an effort to seek justice for the victims of international crime. Indeed, the offending State forfeits its sovereignty of its own accord in respect of adjudication of such matters when it sponsors, or fails to prevent international crimes and then refuses to provide a fair and equitable remedy. This approach is in fact codified in the complementarity principle of the Rome Statute. To the extent then that the European Court of Human Rights (ECHR) declares such cases inadmissible as to the human rights complaint against the State based on State immunity, the ECHR has, it is contended, served to foster impunity based on legally insupportable grounds as will be discussed in the context of specific ECHR cases.

[2]Bennoune (2002, p. 245).

Part 2 discusses the way in which the European Court of Human Rights has often: (i) declined to discuss the systemic or widespread human rights abuses targeting certain ethnic groups such as the Roma; and (ii) declined to link ethnic discrimination – a European Convention Article 14 violation – to certain other grave Convention violations (such as infringements of European Convention Article 2 [right to life] and Article 3 [protection from torture or inhuman or degrading treatment or punishment]) by relying on an inappropriate *criminal* law standard of proof (proof 'beyond reasonable doubt') in an international *human rights* judicial proceeding. Of special interest in regards to European Court of Human Rights cases involving systemic discrimination and possible international crimes are the cases in Part 2 concerning: (i) systemic forced sterilization of Roma women in the Czech Republic and Slovakia carried out by physicians in a hospital setting in the context of C-sections and (ii) internally displaced Roma in post-conflict Kosovo placed in life threatening highly lead contaminated U.N. refugee camps in Northern Kosovo. The question is raised in Part 2 whether the latter cases involve forms of genocide and/or crimes against humanity.

The ultimate result of the Court's downgrading of the nature and gravity of the European Convention violations targeting a particular ethnic group is that the European Court of Human Rights has, in effect, contributed to decreasing the likelihood that any potential international crimes which are associated with the ECHR cases discussed in Parts 2 and 3 would be prosecuted (either domestically, or by other States exercising universal jurisdiction over international crimes, or by the international criminal court in those cases where all ICC admissibility criteria were in fact met). Recall that with respect to ICC admissibility of potential cases referred to the ICC Prosecutor by an individual or group of individuals or NGO, the Prosecutor will consider the level of outrage in the international community about the human rights violations alleged (among other admissibility criteria). Having the European Court of Human Rights disassociate ethnic hatred and systemic human rights violations targeting a certain ethnic group in such cases from the other European Convention violations serves to create the illusion that the case involves but regular serious European Convention violations rather than potentially also heinous international crimes which constitute the gravest of all human rights violations. This downgrading of the violations by the European Court of Human Rights, (the voice of the European international community), thus: (i) reduces the likelihood that the Prosecutor of the International Criminal Court will contravene the European Court of Human Rights' assessment of the *alleged* lesser gravity of the fundamental human rights violations involved (compared to international crimes), and (ii) reduces the likelihood, with respect to referred situations, that an independent ICC investigation would be initiated by the ICC Prosecutor's Office which might lead to prosecution of individual perpetrators in various cases.

As the European Court of Human Rights cases discussed in this book in Parts 2 and 3 have *not* been adjudicated by the ICC and the domestic courts have, where the question of international crimes was addressed, for the most part, if not always,

negated that possibility,[3] the objective in Parts 2 and 3 is somewhat modest. That objective is simply to present the cases and *raise for the reader questions* of whether: (i) the cases potentially or likely involve international crimes, and (ii) whether the European Court of Human Rights was legally and morally obligated to address this possibility as a possibility, or as a likelihood, or even certainty (depending on the fact pattern in the specific case), and have its consideration of this issue reflected in (a) its analysis of the case and its assessment of the gravity of the alleged Convention violations; (b) its declaratory judgments and (c) its orders (orders which could include a non-pecuniary remedy in the form of admonitions to the State to end systemic ethnic persecution via certain State proactive legislative and other measures; to properly criminally investigate, prosecute and punish international crimes, to establish, where necessary, a victims' assistance fund to provide State assistance to victims in filing civil and criminal complaints relating to ethnic persecution and international crimes, etc.).

Part 3 addresses the extent to which the European Court of Human Rights applied humanitarian law principles in various cases involving ethnic targeting and probable 'war crimes' or 'crimes against humanity' in times of armed conflict. Part 3 discusses also the European Court of Human Rights apparent reluctance, in certain instances, to classify European Convention violations as international crimes even when those violations likely constitute 'war crimes' or 'crimes against humanity' in times of armed conflict.

The cases discussed in Parts 2 and 3 pose important ethical challenges and it is imperative that the European Court of Human Rights judgments in these cases be scrutinized as to their implications for our understanding of the interconnectedness of various branches of international law (i.e. international humanitarian law, international criminal law concerning the international crimes of 'genocide', 'war crimes' and 'crimes against humanity' and international human rights law). The European Court of Human Rights judgments have implications that reach far beyond simply the Court's pronouncement on European Convention violations as the cases in Parts 2 and 3 in particular illustrate.

There is a famous quote from Cicero's writing on the law; the original quote being "Those who share law must also share justice."[4] Unfortunately, as the cases discussed in this book will hopefully highlight, 'shared law' (such as, for instance,

[3]See, for instance, (i) the Ostrava court decision regarding refusal of compensation in the Ferencikova case of forced sterilization of a 22-year old Roma woman (sterilization without informed consent) where the Ostrava court held, despite acknowledging that forced sterilization had occurred, that the case was not an instance of genocide and was, in any event, statute-barred, and (ii) the case of Iveta Cervenakova. Ms. Cervenakova was awarded 500,000 CZK damages, (half that requested), by the Regional Court in Ostrava for forced sterilization, (where there was no signed consent, and consent was obtained verbally while the 19 year old was under the influence of anaesthesia in preparation for an imminent caesarean section). That compensation award was overturned by the Olomouc High Court by its retroactively applying to her 2007 case; a new 2008 amendment to the statute of limitations law introducing a three year statute of limitations period for the filing of "medical harm" claims (Romea 2007; The Prague Post 2008).

[4]Ishay (2007, p. 15) citing Cicero's The Laws, 52 BCE.

the *European Convention on Human Rights*) *as interpreted* does *not* always deliver what our intuitive sense tells us would amount to *justice* for the direct and indirect victims of atrocity. Rather, myopic interpretations of this shared law can, and too often do, provide for impunity for perpetrators of international crimes. We must guard against impunity cloaked in a sanctimonious version of the law which is not grounded in the reality of human suffering, but rather based on the arcane analysis of that majority of the bench that happens to hold sway in a particular legal case. *Of course, it is left to the reader, in the final analysis, to decide if and when this has occurred in the European Court of Human Rights cases examined in this book.* If nothing else, this author will have accomplished something worthwhile via this monograph if the European Court of Human Rights cases and issues discussed better highlight for the reader that the more useful version of the aforementioned Cicero quote on the relationship between law and justice might be: 'Those who share a particular version, interpretation, or vision of the law must share that version of justice that flows from the former which, in fact, may, or may not, amount to genuine justice for all.' The only course is to continue to scrutinize the judgments of the European Court of Human Rights (and those of the other international courts) and to challenge those rulings which, in whole or in part, appear: (i) to have failed to advance an appropriate level of respect for the human dignity of victims, or appear (ii) to have been defective in indirectly holding perpetrators to full account via the symbolic declaratory content of the European Court of Human Rights' judgments concerning what European Convention violations have or have not been committed. Furthermore, in regards to *European Convention on Human Rights* Article 7 alleged violations where the applicant has been convicted domestically of an international crime, the Court bears the awesome responsibility of pronouncing on whether such crimes were or were not committed as part of the process of examining State compliance with Article 7 (i.e. see the cases in Part 3). Where the Court declares no international crime was committed, and in those particular cases where this finding is in actuality incorrect on the facts, the Court inadvertently contributes to impunity and to the suffering of victims and/or their surviving relatives and muddies the historical record. Part 4 presents some concluding comments regarding the importance of moral legitimacy in the rulings of the international human rights courts.

A Brief Overview of Selected Key Aspects of the Structure and Workings of the European Court of Human Rights

The European Court of Human Rights located in Strasbourg, France was established in 1959 and operates as an international court on a full time permanent basis. The European Court of Human Rights is widely referred to as "the conscience of Europe". The *European Convention on Human Rights and Fundamental Freedoms* (also referred to as the *European Convention on Human Rights*), administered by the European Court of Human Rights, first entered into force in 1953 (and as amended by Protocol 11, entry into force in 1998) and guarantees a diverse set of civil and political rights and freedoms.

The European Court of Human Rights has 47 judges in total as its full compliment and includes one judge for every State Party to the *European Convention on Human Rights and Fundamental Freedoms* (one for every member State of the Council of Europe). The judges are elected by majority vote of the Parliamentary Assembly of the Contracting Party to *the European Convention on Human Rights and Fundamental Freedoms* from a list of three candidates nominated by the Contracting Party. The judges are expected to function as an unbiased and independent judiciary and not as representatives of any particular State or advocates for any State's interests in any particular case they are assigned. A judge elected by a particular State will not necessarily have the nationality of that State. The President of the Court, Vice-President(s) of the Court, and Section Presidents are elected by the plenary court (full court) while the Section Vice-Presidents are elected by the section (division of the Court into sections is explained below). The Registrar and two Deputy Registrars are also elected by the plenary court.

Every judge of the European Court of Human Rights is assigned to one of five sections such that the section judges represent a balanced gender and geographic mix and represent a balanced mix of the various and differing domestic legal systems of the States Parties to the European Convention of Human Rights and Fundamental Freedoms. Each of the five sections is comprised of seven judges and includes a Section President and Section Vice-President (two Section Vice-Presidents also serve as Vice Presidents of the Court as a whole) and, in addition, a Section Registrar and Deputy Section Registrar. Judges are assigned to a section for three years. The European Court of Human Rights as a whole also has an elected President.

Most of the cases heard by the European Court of Human Rights are heard by 'the Chamber' (lower court) comprised of the seven judges selected from the section to which the case was assigned. One of the seven judges is the President of the section to which the case was assigned. The lower Chamber also includes among its seven judges the judge elected by the respondent State party to the case (or another person chosen by that State Party in question who sits in the capacity of a judge in instances where the person elected is unable to serve).

The upper chamber is named the 'Grand Chamber' and it is empowered to re-hear cases de novo on request by one or both parties but will do so only in very selected cases. The cases will come before the Grand Chamber for re-hearing only if accepted by the five member Grand Chamber screening panel which considers the application for a re-hearing (that application being made by one or both of the parties to the case). Alternatively, the Grand Chamber may hear the case when the lower Chamber relinquishes its jurisdiction and the case concerns central questions regarding the Convention or its application or other important questions that require clarification. The Chamber may relinquish jurisdiction to the Grand Chamber at any point prior to rendering its judgment.

The Grand Chamber is comprised of 17 judges and at least three substitute judges who can serve as alternates if one of the 17 judges of the Grand Chamber is unable to serve. The Grand Chamber includes among the 17 judges the President and Vice-Presidents of the European Court of Human Rights, and the five section

Presidents (Any Vice-President of the Court or President of a Section who is unable to sit as a member of the Grand Chamber is replaced by the Vice-President of the relevant section).

In cases to be re-heard on application for re-hearing by one or both parties (that application having been screened and accepted by a five member Grand Chamber screening panel), no judge who sat on the lower Chamber panel dealing with the case and rendered judgment will also be on the Grand Chamber panel which re-hears the case de novo with the exception of (a) the Section President of the lower Chamber that rendered the judgment and (b) the judge elected by the State that is a party to the case who previously sat as an ex officio member on the case in the lower Chamber that rendered a judgment (or the substitute judge from that State that sat on the Chamber panel that rendered judgment in the case in the lower Chamber) and (c) any judge that sat in regard to the decision on admissibility of the case.

Since the Grand Chamber is re-hearing the case de novo, the Grand Chamber is empowered to consider both admissibility and merit with respect to the allegation (s) of Convention violations it examines. The cases which are accepted by a screening panel of the Grand Chamber for re-hearing and come before the Grand Chamber must first have been ruled admissible by the lower Chamber ('the Chamber') on one or more alleged Convention violations. It is important to understand that the Grand Chamber in re-hearing a case will consider only those alleged violations in the case that have been previously ruled admissible by the Chamber (lower Court). *The Grand Chamber could reverse or affirm either or both the lower Courts rulings on admissibility or merit as regards to one or more of the alleged violations.*

Where 'the Chamber' has relinquished its jurisdiction over the case and referred the case to the Grand Chamber, the Grand Chamber will issue a ruling on admissibility of each alleged Convention/Protocol violations made in the case and, for those ruled admissible, a ruling on merit in the same judgment and a determination regarding just satisfaction (financial compensation) if any is to be awarded. Rulings are by majority vote. The Grand Chamber in all cases before it will consider the legal issues de novo (afresh) thus considering everything again (that is issues regarding law or mixed law and fact) as pertains to admissibility and merit.

The European Court of Human Rights has jurisdiction to rule via binding judgments regarding: (a) State Party violations of the *European Convention on Human Rights and Fundamental Freedoms* as modified by Protocol #11; and/or (b) State infringements of the additional protocol(s) to the *European Convention on Human Rights and Fundamental Freedoms* as set out in the most recent amended version of the Convention (where the State Party to the case has also ratified or acceded to the Protocol(s) in question), and/or (c) State violations of such additional Conventions as agreed upon by the Council of Europe which are in force (where the State Party in question has also ratified or acceded to the additional Convention(s) at issue in the case).

The European Court of Human Rights is *not* an appeal court for national courts. Therefore, the Court cannot reverse or in any way change any ruling by a national court, nor alter or quash any domestic laws of the States Parties to the European

Convention on Human Rights. The European Court of Human Rights operates as a body that helps shed light on the extent of State compliance with the European Convention on Human Rights (and its Protocols) and certain other operative European Conventions adopted by the Council of Europe and ratified or acceded to by some or all of the Council of Europe member States. This by hearing admissible cases brought by individuals, organizations or State Parties concerning alleged *European Convention of Human Rights* infringements, and by making declarations regarding alleged violations, and ordering, in the proper cases, just satisfaction and/or certain other remedies. In exceptional circumstances (i.e. where there is a risk of imminent serious physical harm to the complainant by agents of the State Party or Parties in question for whatever reason), the Court may act on behalf of the complainant to intercede with the government(s) in question to ask that certain protections be afforded the complainant by the government(s) involved as the case proceeds.

The geographical jurisdiction of the European Court of Human Rights extends only to the 47 States Parties to the *European Convention on Human Rights and Fundamental Freedoms* who comprise the Council of Europe. It should be noted that both: (a) nationals of the States Parties to the *European Convention on Human Rights and Fundamental Freedoms*, as well as (b) any other persons present in the jurisdiction of one of the States Parties to the *European Convention on Human Rights and Fundamental Freedoms*, or in a territory under the control of that State Party at the time of the alleged State Convention infringement which caused them direct, personal harms, are potentially covered by the guarantees of the Convention. Thus, State violations of the Convention may be addressed to the European Court of Human Rights by the latter individuals as well. Petitions to the Court seeking a remedy for alleged infringements of *European Convention on Human Rights* provisions may be brought by: (a) individuals directly harmed, or others accepted by the Court as the official representatives of the harmed persons (i.e. parents as complainants on behalf of a minor child victim, NGOs on behalf of victims, etc.), (b) groups of individuals directly harmed, organizations such as NGOs considered as legal entities who have members victimized, or by (c) one Convention State Party against another (though the number of inter-State petitions to the Court are very few).

The Committee of Ministers of the Council of Europe, with the assistance of the Department for the Execution of Judgments of the European Court of Human Rights, is responsible for the enforcement of the judgments made by the European Court of Human Rights.

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Contents