

PROTECTION OF HUMAN RIGHTS AND ROLE OF THE PROSECUTION FROM THE PERSPECTIVE OF THE ECHR

THE PUBLIC PROSECUTOR: HUMAN RIGHTS ON DUTY ¹

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1 On 19 November 2020 the Consultative Council of European Prosecutors (CCPE) adopted CCPE Opinion No. 15 (2020): *The role of prosecutors in emergency situations, in particular when facing a pandemic.* ²

Point 2 of the Introduction (purpose and scope of the Opinion) reads:

An effective and autonomous prosecution service, committed to upholding the rule of law and human rights in the administration of justice is one of the pillars of a democratic state. The responsibility of prosecutors to promote and strengthen the rule of law has many inherent aspects entailing significant challenges to prosecutors. These challenges are particularly demanding in the context of emergency situations.

Point 12 of the Opinion makes it clear the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR) plus Recommendations of the Committee of Ministers of the Council of Europe were leading in preparing the opinion:

This opinion has been prepared on the basis of the ECHR and the relevant case law of the European Court of Human Rights (..ECtHR) as well as other Council of Europe instruments including Recommendation Rec(2000)19 of the Committee of Ministers on the role of public prosecution in the criminal justice system and Recommendation Rec(2012)11 of the Committee of Ministers on the role of public prosecutors outside the criminal justice.

2. At the European level the aforementioned Resolutions of the Committee of Ministers of the Council of Europe *on the role of public prosecution in the criminal justice system* (CM/REC (2000)19) and *on*

¹ Parts of this tekst were included in a lecture held by the author at the 2013 Annual IAP Conference (Moscow)

² The text of this Opinion can also be found in the Conference booklet: Case Law of the European Court of Human Rights, 2021, p, 169.

the role of public prosecutors outside the criminal justice system (CM/REC (2012)11) were leading in the elaboration of the professional (ethical) standards of the prosecutor. The Council of Europe was not the first to elaborate standards for prosecutors. At the UN-level this was already done in the UN ‘*Guidelines on the Role of Prosecutors*’ (Havana, Cuba 1990). It was also done by prosecutors themselves in the *Standards* of the International Association of Prosecutors (IAP) in 1999. And it was afterward done in the Guidelines adopted by the Conference of Prosecutors-General of Europe (CPGE). In 2005 the CPGE adopted European Guidelines on Ethics and Conduct for Public Prosecutors (“*the Budapest Guidelines*”). In the same year 2005 the Committee of Ministers of the Council of Europe decided to institutionalize the yearly Conference of Prosecutors General of Europe (CPCE) through the creation of the Consultative Council of European Prosecutors (CCPE). Ever since the CCPE adopted 15 Opinions on issues related to the activities of prosecutors. Apart from what I mentioned at the start of my presentation on Opinion No. 15 (2020), I mention in particular Opinion No. 9 (2014) on *European norms and principles concerning prosecutors* (“*the Rome Charter*”) and Opinion No. 13 (2018): *Independence, accountability and ethics of prosecutors*.

3. The Resolutions and Guidelines at the UN and Council of Europe-level, plus the IAP Standards make a point of requiring prosecutors, in the exercise of their duties, to serve and protect the public interest, respect, protect and uphold human rights and uphold the rule of law and of course, to do so in full accordance with the principles of legality, objectivity, fairness and impartiality. And the Rome Charter contains the ‘**European norms and principles concerning prosecutors**’, norms that can mainly be found in the ECHR and the case law of the ECtHR. The Rome Charter starts by emphasizing:

- I. In all legal systems, public prosecutors (hereafter prosecutors) contribute to ensuring that the rule of law is guaranteed, especially by the fair, impartial and efficient administration of justice in all cases and at all stages of the proceedings within their competence.
- II. Prosecutors act on behalf of society and in the public interest to respect and protect human rights and freedoms as laid down, in particular, in the Convention for the Protection of Human Rights and Fundamental Freedoms and in the case-law of the European Court of Human Rights.

III. The role and tasks of prosecutors, both within and outside the field of criminal justice, should be defined by law at the highest possible level and carried out in the strictest respect for the democratic principles and values of the Council of Europe.

That is quite a tall order. Of course, all public servants are bound by these high standards in every society that claims to be civilized; and not only they: also every politician should abide by them. However, prosecutors in particular cannot escape their constraints: because of their very particular status and its attendant powers, which enable them to impact on the rights of ordinary citizens and even to wreck their lives, they have to be exemplary in every respect. If they fail to live up to the basic requirements of their office then, as may happen with judges, they will cease to be credible when they prosecute other people for dishonest behaviour and society as a whole will lose confidence in them and will suffer as a result.

4. What more can be said about the binding (Article 1 ECHR) norms laid down in the ECHR and the case law of the ECtHR in relation to the prosecutor? In Opinion No 13 (2018) *Independence, accountability and ethics of prosecutors* a very short Annex can be found: *Selection of the case law of the ECtHR concerning the prosecutors' status and activities*.

The ECtHR stated that the absence of the prosecutor at the hearing could lead to a violation of the principle of a fair trial.

The ECtHR considered the question of independence of prosecutors with regard to compliance with Article 6 §1 (fair trial) of the ECHR when the prosecution service was one of the parties to the trial challenged by the applicant.

In the case *Zinsat v. Bulgaria* of 15 June 2006 (57785/00), the ECtHR challenged the fact that the prosecutor had substituted himself for a court, deciding to act on his own, without effective remedy.

The ECtHR has also endeavoured to verify the compliance with the requirements of Article 5§3 of the ECHR when the supervision of detention was entrusted to a prosecutor. It considered that when this control was entrusted to a prosecutor, the latter must in any case be independent, impartial, able to control the validity of the measure and be competent to order the release.

This is the meaning of the judgment *Schiesser v. Switzerland* of 4 December 1979 (7710/76), in which the need for the independence of the prosecutor vis-à-vis the executive and the parties was affirmed.

If the member States wish the prosecution service to be recognised as a judicial authority within the meaning of the ECHR - a quality to which the prosecutors of the countries concerned are very attached - the member States must take into account that in a few judgments, the ECtHR decided that the prosecution service did not meet the criteria for being recognised as a judicial authority within the meaning of Article 5 of the ECHR.

The ECtHR is very demanding with regard to the independence of prosecutors, but this should not lead to interpreting this requirement one of mistrust, or even as a depreciation of the role of prosecutors in the judicial process, quite the contrary. As Mr André Potocki, judge of the ECtHR in respect of France noted at a conference held in Paris on 17 May 2018 before the Network of Prosecutors General of the Supreme Courts of the European Union, the prosecutor who directs and controls the first phase of criminal proceedings is also and at the same time, "the advanced watchdog of human rights".

But that is by far not all. When I searched on the word 'prosecutor' on the website of the ECrtHR (www.echr.coe.int) I got 705 results (police: 1402) , not included what can be found on the case law website HUDOC. And not without interest: (almost) all 'case law guides' are mentioned in that list plus many factsheets.

5. In the daily work of the prosecutor in the criminal justice system, the main human rights tools are the rights laid down in Article 5 , 6 and 7 of the ECHR. When prosecuting a case prosecutors should take care that they will uphold the procedural rights of suspects as laid down in art. 5 ECHR (right to liberty), art. 6 ECHR (right to a fair trial) and art. 7 ECHR (no punishment without law). They also have a responsibility that they will not prosecute a case where evidence is obtained via unlawful methods, particularly grave human rights violations, like the right not to be tortured, or even the right to respect for private life and family life (art. 8 ECHR). For short up-to-date summaries of the main case law I refer to the case law guides on Article 5, Article 6 (civil limb), Article 6 (criminal limb) and Article 7 on the Court's website.

The prosecutor has a distinct role in deciding whether or not to prosecute. The prosecutor should respect the principle of equality of arms between prosecution and defence. The prosecutor should disclose all relevant evidence to the defence. It is not only the judge, also the prosecutor who should take care that a fair hearing can be guaranteed. Thus, as the caselaw of the ECrtHR is well summarized in the Rome Charter:

- XV. Prosecutors should decide to prosecute only upon well-founded evidence, reasonably believed to be reliable and admissible. Prosecutors should refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods, in particular when they constitute a grave violation of human rights. They should seek to ensure that appropriate sanctions are taken against those responsible for using such methods or for other violations of the law.

XVI. Prosecutions should be firmly but fairly conducted. Prosecutors contribute to reaching just verdicts by the courts and should contribute to the effective, expeditious and efficient operation of the justice system.

I daresay: when looking at judgments of the ECrtHR where the ECrtHR found a violation of Article 5 , 6 or 7 ECHR, in many of these cases it is not only the judge at the national level, but in most of the cases also the prosecutor who was (co)responsible for that violation.

6. It is certain that a prosecutor who – when prosecuting a case - goes out of his way to uphold human rights will not be able to court universal popularity. The graver the crimes for which he must prosecute, the greater the public unrest and the greater the clamour for tough action. Similarly, political office-holders will not always appreciate the intervention of a prosecutor demonstrating to them that human rights limit their room to manoeuvre – the less so if the special responsibilities of a prosecutor lead to a criminal investigation into cases of corruption or abuse of office of which those self-same office-holders are suspected. Whoever seeks popularity above all else had better choose another career. Moreover, human rights interests can be diametrically opposed to the wish to close a criminal investigation as speedily as one might like.

7. It is my position that the attributes of a prosecutor worth his salt should include a special form of courage: the courage to stick to the narrow path, if need be against the whim of the public or the self-interest of political leaders; the courage to cope with various pressures, political, social and of public opinion, as well as from the media and vested interests.

I do not mean to say that a prosecutor should exercise his duties as a human rights activist – let that be the reserved domain of others, including non-governmental organisations, whose work cannot be too highly praised – but I do mean to convey the message that a conscientious prosecutor will be aware that “human rights on duty” must guide him first and foremost. Thus, a prosecutor in prosecuting cases should be imbued with this sense of responsibility on a day to day basis.

I am fully aware this is not always an easy task to fulfill. In that respect I refer to the very fact that the Executive Committee of the IAP felt the need to adopt (in May 2012) a Protocol which regulates the way in which the IAP processes requests for assistance for prosecutors in difficulty and that a Standing Committee was established to respond to the difficulties which confront prosecutors in particular situations.

8. But there is more from the perspective of the ECHR and the Court's case law. Actually, sometimes the very fact of prosecuting a case may be demanded by human rights imperatives. In the case-law of the ECtHR many examples can be found. This has to do with so-called positive obligations deriving from the Convention. Indeed, the provisions of the ECHR have been formulated with an eye to interferences with the traditionally negative rights "Thou shall not interfere..... The Court has in its evolving case law underlined that there are also positive obligations. The obligation to protect the right to life (art. 2 ECHR), the right not be tortured (art. 3 ECHR) or the prohibition of slavery and forced labour (art. 4 ECHR) and other Convention-rights read in conjunction with the State's general duty under article 1 ECHR 'to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, requires by implication that there should be some form of immediate, effective and impartial official investigation and – if possible – prosecution and punishment when individuals have been killed, tortured or have been the subject of a serious human rights violation as a result of force by agents of the State.

I also refer to the Guidelines on the Role of Prosecutors:

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

10. It would however be a misunderstanding that only the aforementioned rights in the ECHR and the corresponding case law of the ECtHR are of importance to the prosecutor. I have to admit that I myself, when (in 2002) drafting the IAP Human Rights Manual for Prosecutors, mainly paid attention to human rights and the right to life, the investigation of offenses, during arrest and pre-trial detention,

pre-trial procedures, trial procedures, sentencing and the treatment of prisoners, administration of criminal justice under states of emergency and juvenile justice, and did not elaborate on the other human rights. Still, there are other human rights, which – according to the ECHR or the case law of the ECtHR - are also of great importance for the functioning of the prosecutor.

In the case-law of the European Court of Human Rights, there are many cases in which human rights like freedom of expression (art. 10 ECHR), freedom of thought, conscience or religion (art. 9 ECHR), freedom of assembly and association (art. 11 ECHR) were violated and where actually the national prosecutor who prosecuted the case at the domestic level (and the judge who did the actual sentencing) were to blame for that very violation. Cases in which opposition media were prosecuted and disproportionately sentenced for bringing news or commentaries which firmly criticized political office-holders. Cases in which people opposed to the ruling political class were prosecuted and heavily sentenced for their verbal attacks on the attitudes and opinions of the ruling classes. Cases in which members of minority religions were attacked by followers of the majority religion. Cases in which around election time opposition politicians were sentenced to short-term detention in order to prevent or discourage their participation in political rallies. Cases in which people taking part in a perfectly legal public demonstration were prosecuted for disturbing the public order on obviously fabricated arguments.

It is not my intention to name and shame the countries concerned. Those who are interested in the case-law of the European Court can have a look themselves at the website of the Court (www.echr.coe.int, HUDOC). I wish only to indicate that, especially in cases where the freedom of expression, belief, association and assembly of political opponents or of minority groups are at stake, the case-law of the European Court clearly shows that prosecutors have not always shown the necessary sense of human rights awareness and/or sometimes failed the test of courage.

11. From the articles in the Convention it is clear that limitations on the freedom to manifest one's religion (but never on the freedom to have or to adopt a religion or belief, or the freedom to hold an

opinion), on the freedom of expression, the freedom of peaceful assembly or the freedom of association, may be justified, but only if prescribed by law and if necessary for the protection of legitimate aims mentioned in the provisions. The very term ‘necessary’ implies that there must be a *pressing social need* to limit the basic rights, the fact that whoever happens to be in power considers such limitations convenient is definitely not sufficient justification. After all, classical human rights law is as much about protecting individuals against the power of the state as anything else. Finally, necessary also means that limitations should be proportionate to the legitimate aim pursued. And just to be complete: the restrictions permitted under the Convention to these rights shall not be applied for any purpose other than for which they have been prescribed. (Article 18 ECHR). The object and purpose of that provision is to prohibit the misuse of power.

The forgoing does not mean that a prosecutor should never prosecute a case directed against the media. As said before: an interference can be based on relevant and sufficient reasons. Limitations to the freedom of press may be justifiable, as long as they are clearly laid down in the national law, are necessary for the protection of the legitimate aims mentioned in the provisions and are proportionate. As a rule there is no trouble in prosecuting cases in which the press incites to violence, hatred or discrimination (not only on grounds of race, color, gender, language, political or other opinion, national or social origin, but also religion or sexual orientation). When the protection of the reputation or rights of others is at stake, a balance should be struck.

What is important is that a prosecutor, before taking the decision whether or not to prosecute the media (or if he or she has the power to supervise the investigation by the police from the outset, even at that early stage) should carefully consider all relevant human rights implications. It goes without saying that, especially when political office-holders do insist that a critical press, playing its public watchdog role, should be prosecuted, some courage is required to do the relevant balancing exercise. Where the political office-holders have the power to give instructions to the public prosecutor, the prosecutor should at least remain free to submit to the national courts

any legal arguments of their choice, even when they are under a duty to reflect in writing the instructions received.

12. Similar considerations apply to the other rights mentioned: freedom of religion, association and assembly. I repeat: no interference is at any time allowed because someone wants to have, adopt or change a religion. There may however be limitations on the freedom to manifest a religion, on the freedom of association or the freedom of assembly. Here again, these limitations must be laid down in national law and must, in the particular case, be necessary to pursue legitimate aims and proportionate to the legitimate aim pursued.

13. As far as the role of the public prosecutor outside the criminal law field is concerned, I refer to the website of the Court, where one case-law research report can be found on the Role of public prosecutor (2011) with an Annex with a list of cases decided by the ECtHR.

14. And for those who might think that the ECtHR is sometimes too much a human rights activist itself: The ECtHR has been set up ‘*to ensure the observance of the engagements undertaken by the High Contracting Parties*’ (HCP). The jurisdiction of the Court extends to all matters concerning the *interpretation and application* of the Convention which are referred to it (Article 32 ECHR). That is the basic task of the Court, as laid down in the Convention and acknowledged ever since by the HCP, through additional protocols, official Resolutions and Declarations and through the activities of the Committee of Ministers of the Council of Europe when exercising its supervisory task of the execution of judgments (Article 46).

It goes without saying that the European Court should not interpret the ‘originalist’ way, as was promoted in the US Supreme Court by the late Justice Antonin Scalia. Scalia defined that approach as follows:

"The Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted."

The Court has always emphasised (and this was never criticised by the HCP in doing so) that the *Convention is a living instrument which must be interpreted in the light of present day conditions*. That does not mean however that the Court has a blank permission to interpret the Convention as widely as it seems fit. In interpreting the

Convention, the Court is for instance, bound by the general interpretation rules, as laid down in the Vienna Convention on the Law of Treaties (1969). I quote the most relevant provisions of Section 3 (Interpretation of Treaties) of the Vienna Convention:

Article 31, GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (
 - b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 :

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable

And that is exactly what the Court does. The Court is always transparant in its judgments. Article 45 para 2 ECHR makes it clear that *“If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a seperate opinion”*. Those who might suggest that the Court every now and then renders a politicised judgment, are in the wrong. But practice shows that the 7 judges in a Chamber or the 17 judges in the Grand Chamber are not always unanimous in their reasoning. At the Copenhagen high level conference (April 2018) the representatives of the HCP expressly laid down in the Copenhagen Declaration:

(..) European supervision – the role of the Court

26. The Court provides a safeguard for violations that have not been remedied at national level and authoritatively interprets the Convention in accordance with relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties, giving appropriate consideration to present-day conditions.

27. The quality and in particular the clarity and consistency of the Court's judgments are important for the authority and effectiveness of the Convention system. They provide a framework for national authorities to effectively apply and enforce Convention standards at domestic level.

28. The principle of subsidiarity, which continues to develop and evolve in the Court's jurisprudence, guides the way in which the Court conducts its review.

The message is clear: the ECtHR authoritatively interprets the Convention.

And in a Declaration by the Committee of Ministers of the Council of Europe on the occasion of the 70th anniversary of the Council of Europe (17 May 2019), the Ministers of the 47 member States reaffirmed:

The European Convention on Human Rights is the most important legally binding instrument for collective enforcement of human rights and fundamental freedoms in Europe, maintaining and promoting the ideals and values of a democratic society. The European Court of Human Rights has a profound impact on the daily lives of over 830 million people in Europe through its judgments and well-established case law.

14. On 1 August 2021 Protocol 15 to the ECHR will enter into force. Article 1 of that Protocol reads:

At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,"

Thus the Protocol once and again emphasises the primary responsibility of the national authorities to take care that the human rights in the ECHR (as interpreted by the ECtHR), shall be secured at the national level.

15. Back to where I started:

An effective and autonomous prosecution service, committed to upholding the rule of law and human rights in the administration of justice is one of the pillars of a democratic state. The responsibility of prosecutors to promote and strengthen the rule of law has many inherent aspects entailing significant challenges to prosecutors.

Prosecutors are human rights on duty. Because of their very particular status and its attendant powers, which enable them to impact on the rights of ordinary citizens and even to wreck their lives, they have to be exemplary in every respect.