

Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of ‘Unwillingness’ and ‘Inability’ in the Context of the Complementarity Principle*

Harmen van der Wilt

Professor of international criminal law, Research fellow, Amsterdam Center for International Law (ACIL), University of Amsterdam, The Netherlands

Sandra Lyngdorf

PhD student, University of Reykjavik, Iceland

Abstract

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1. Introduction

The proliferation of international criminal tribunals raises pertinent questions on the proper relationships between those tribunals and domestic courts. As is well known, the statutes constituting these tribunals have opted for different solutions. Whereas the Statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda and the Statute of the Special Court for Sierra Leone dictate that the Tribunal’s jurisdiction prevails over national courts, the Rome Statute, reversely, determines that the International Criminal Court shall be complementary to national criminal jurisdictions.¹ This entails that a case is only admissible before

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¹⁾ ICTY-Statute, Article 9(2); ICTR-Statute, Article 8(2); Statute for the SCSL, Article 8(2); Preamble of the Rome Statute. An early comment on the different constructions is B. Brown,

the International Criminal Court if a state is either ‘unwilling’ or ‘unable’ genuinely to carry out investigations and prosecutions. The Rome Statute itself provides some clues as to how to assess the notions of ‘unwillingness’ and ‘inability’. Unjustified delays, sham trials which serve to shield the perpetrator from criminal responsibility, or proceedings lacking independence or impartiality are indicative of unwillingness, while ‘inability’ is more precisely defined as the incapacity to obtain the accused or necessary evidence and testimony, due to a total or substantial collapse or unavailability of the national judicial system.² Moreover, it seems clear that the whole procedure of admissibility is only triggered if the state at a minimum takes some initial investigative steps. In other words: complete inertia will leave the International Criminal Court a free hand to start investigations itself.³

Although these provisions at least give some guidance how to interpret the complementarity principle, there is much speculation on how the International Criminal Court will apply the relevant standards in practice. After all, the decision that a case is admissible implies a repudiation of a state’s performance which is, especially in the case of a determination of ‘unwillingness’ a highly sensitive political issue. Until now, the International Criminal Court has only pronounced on admissibility in case of ‘auto referral’, a rather safe bet, unlikely to ignite the wrath of the state involved, as it has agreed to referral of jurisdiction to the ICC in the first place.⁴ It remains to be seen how the ICC will tackle more delicate and potentially explosive situations.⁵

This article intends to shed some light on the topic, shortly summarized above, by taking a comparative legal approach. We will investigate whether the case law of the European Court of Human Rights provides useful guidelines to assess

‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’, 23 *Yale J. Int’L.* (1998), 383–436.

² Rome Statute, Article 17, section 2 and 3.

³ Compare J.K. Kleffner, *Complementarity in the Rome Statute and National Jurisdictions*, Amsterdam 2007, 120: ‘In sum, complete inaction on the national level would thus allow the ICC to take up a case without having to enter into an assessment of the admissibility criteria in Article 17 (1)(a) to (c). The provisions on complementarity only apply once a State takes, at the minimum, initial investigative steps.’

⁴ The case concerns the situation in the Democratic Republic of Congo (ICC-01/04) and include *the Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06); *the Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06); and *the Prosecutor v. Germaine Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07).

⁵ The situation in Darfur presents a far more contentious case. The Pre-Trial Chamber has issued two arrest warrants against Ahmad Harun and Ali Kushayb, avoiding the admissibility issue (*Prosecutor v. Ahmad Muhammad Hharun* (“Ahmad Harun”) and *Ali Muhammad Al Abd-Al-Rahman* (“Ali Kushayb”), ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007. However, this does not prevent the Sudanese government from challenging the ICC’s jurisdiction, which it has not done, though, until now. On this issue, see the very thorough analysis of J. Pichon, ‘The Principle of Complementarity in the Cases of the Sudanese Nationals *Ahmad Harun* and *Ali Kushayb* before the International Criminal Court’, *International Criminal Law Review* 8 (2008), 185–228.

whether states parties to the European Convention on Human Rights comply with their conventional obligations to redress effectively serious and flagrant violations of human rights. By implication, we will explore the hypothesis that this case law provides an adequate frame of reference for the ICC to judge the admissibility of a case in the light of the complementarity principle in similar situations.

The choice for the European Court of Human Rights is inspired by a number of considerations. For one thing, the European Court, like the ICC, has subsidiary jurisdiction which comes to the fore in the requirement that an applicant should first have exhausted local remedies, before he can seize the Court. This implies that the Court has to develop appropriate standards in order to determine when it is allowed to supersede the judgements of national courts. Obviously, we will have to inquire more thoroughly whether the nature of the ICC's admissibility procedure and the local remedies rule are sufficiently similar to warrant any meaningful comparison.

Secondly, the European Court of Human Rights, at least partially, deals with the same conduct as the ICC, albeit in a different legal context and with a different purpose. It is undisputed that international crimes may amount to flagrant and very serious violations under the jurisdiction of the ECHR, as long as those violations meet the necessary contextual elements, like having been committed in the context of an armed conflict or having been part of a widespread or systematic conflict. The stringent separation between human rights law, covering human relations in peace time and international humanitarian law, covering situations of armed conflict is outmoded.⁶ The fact that Article 15 of the European Convention on Human Rights allows for (some measure of) derogation of the state obligations under the Convention, in case of war time or some other general emergency which threatens the existence of the state, proves that the ECHR is competent to assess (grave) violations of international humanitarian law, including war crimes, as well.⁷ However, the legal context, in which the ICC and the ECHR operate and their respective aims and purposes are rather different. Whereas the International Criminal Court is concerned with individual criminal responsibility, the European Court has to investigate whether a state is responsible for (flagrant) violations of human rights, in view of its obligation to secure respect for those rights on its territory. The concurrence of state responsibility and individual

⁶ Compare also R. Prevost, *International Human Rights and Humanitarian Law*, Cambridge University Press, 2002.

⁷ On derogation in time of war, see also C.J. Staal, *De vaststelling van de reikwijdte van de rechten van de mens*, Nijmegen 1995, 107-112. Certain fundamental provisions, like the prohibition of torture (Article 3), the prohibition of slavery and forced labour (Article 4) and the *nullum crimen* principle, are non-derogable or *Notstandsfest*. It is interesting that section 2 of Article 15, by providing that the right to life is only derogable in case of death as a consequence of *legitimate* acts of war, already suggests that the ECHR is competent to adjudicate war crimes as violations of Article 2.

responsibility which is increasingly recognized in legal doctrine⁸ is an incentive for courts to consult each other's decisions and elaborate, when appropriate and with the necessary modifications, on each other's findings in the field of evidence and legal concepts.⁹

The final reason for choosing the European Court of Human Rights is closely related to the previous one and is the most relevant for our purpose. The ECHR does not only conclude that states have acted in breach of the Convention, if acts of their officials or agents can be directly attributed to them. According to the Court's case law, a state can also violate its conventional obligations, by failing to provide an effective remedy which can redress the inflicted wrong (Article 13 ECHR), or failing to comply with procedural obligations to investigate flagrant violations of fundamental human rights, like the right to life and the prohibition of torture, and identify and punish the culprits. At this point the analogy with the application of the complementarity principle becomes evident. We have strong reasons to assume that the standards which have been developed in this respect by the ECHR are equally applicable in the context of the ICC's assessment of the quality of prior investigations and prosecutions by states, potentially barring the exercise of jurisdiction by the ICC. The hypothesis is thus that a determination by the ECHR that a state has not lived up to its obligations in the realm of investigation and prosecution of (perpetrators of) flagrant violations of human rights, amounting to international crimes, will equally serve the ICC as a strong presumption that the state in question is either 'unwilling' or 'unable' to prosecute the perpetrators genuinely.

The article consists of the following sections. Section 2 provides the theoretical framework. It contains a deeper inquiry into the conceptual inter-relation between the rule of exhaustion of local remedies, the right to an effective remedy and the procedural corollaries to Articles 2, 3 and 5 of the European Convention on Human Rights. Moreover, it seeks to compare these concepts with similar mechanisms and procedures within the legal framework of the Rome Statute. The comparative analysis is pursued in Section 3, in which we intend to canvass more in particular the specific standards in respect to effective investigation and prosecution of (perpetrators of) flagrant violations of human rights. The scope of the investigation is restricted in two respects. First, we will focus on the procedural

⁸ Cf. A. Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law', 52 *International and Comparative Law Quarterly* (2003), 615. For comparative analyses of both forms of responsibility in international criminal law, see the contributions in A. Nollkaemper & H. van der Wilt (eds.), *System Criminality in International Law*, Cambridge University Press, 2009.

⁹ A good example is offered by the International Court of Justice which completely followed the prior assessment of the ICTY that genocide had been committed in Srebrenica: ICJ, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 26 February 2007, General List No. 91, § 296.

obligations which emerge from Articles 2, 3 and 5 of the ECHR, as flagrant and systematic violations of the rights guaranteed by those provisions are most likely to be tantamount to the core crimes under the jurisdiction of the ICC. Second, our analysis will concentrate on case law which has emanated from internecine conflicts in Turkey and Russia (Chechnya), as these states have regrettably provided the dramatic background for mass violations of human rights and international crimes.

In Section 4 the hypothesis mentioned earlier will be put to the test, as we will explore whether the case law of the ECHR indeed provides a meaningful frame of reference for the ICC, from which the latter can extract useful standards to serve its own purposes. More in particular, we will discuss the obstacles which might emerge from the different nature and purposes of both institutions. Paragraph 5 will close with some conclusions and avenues for further discussion.

2. Subsidiary Jurisdiction and the Quality of Local Remedies

2.1. *The Local Remedies Rule*

As explained in the introduction, the ECHR and the ICC share the common feature that they are only allowed to exercise jurisdiction if a national state has failed to perform adequately in providing legal redress through its courts or legislature. Within the context of the European system of protection of human rights this principle is expressed by the rule that the applicant should first have tried and exhausted all remedies under national law.¹⁰ Rooted in the legal institute of diplomatic protection, the rule has been extended to the area of human rights protection.¹¹ In essence, the rule conveys the idea that an individual who has been wronged by a state, should, before invoking the legal protection of his home state or an international court, render that state the opportunity to redress the violation by its own means.¹² Although the genealogy of the rule is complex, as it seeks to reconcile different interests, its basic rationale is recognition of the sovereignty of the host state.¹³

At first sight, the parallel between the exhaustion of local remedies rule and the admissibility procedure under the Rome Statute seems to be remarkable. After all, the International Criminal Court has to verify whether it should not recoil before a competent domestic jurisdiction. The fact that a local remedy is not or

¹⁰ The rule is incorporated in Article 35 of the European Convention on Human Rights.

¹¹ For detailed monographs on the subject, see A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge University Press, 1983 and C.F. Amerasinghe, *Local Remedies in International Law*, 2nd ed., Cambridge University Press, 2004.

¹² ICJ, *Interhandel Case*, 1959 ICJ Reports, 27.

¹³ *Amerasinghe* (2004), 62.

no longer available seems likewise to be a precondition for the exercise of jurisdiction by the international court. Moreover, the whole concept of complementarity is predicated on respect for state sovereignty.¹⁴

On closer scrutiny, however, the differences between the procedures outnumber the similarities, due to the fact that the ECHR and the ICC operate in distinct legal contexts and seek to accomplish different objectives. A first difference which immediately meets the eye is that an applicant or victim who seeks redress for his injured rights has no place in the procedural infrastructure of the Rome Statute. Although compensation and redress for victims is an important objective of the International Criminal Court, this plight has neither been translated into a reinforcement of their procedural position in the triggering mechanism in general, nor in the admissibility procedure in particular. Partially related to this issue and even more fundamental, is the fact that the rule of exhaustion of local remedies in the context of diplomatic protection and human rights cannot be severed from the concept of state responsibility and the ensuing claim of the injured party. An international wrong for which a state incurs responsibility and which *may* give rise to a diplomatic claim or legal proceedings before an international court, can be generated by violation of individual rights which can be attributed to the state or by a subsequent denial of justice, if the initial violation cannot be attributed to the state. The local remedies rule suspends the claim to international redress, but the assessment of the question whether the local remedies yield satisfactory results is dependent on the initial nature of the responsibility of the state. As Amerasinghe argues convincingly, taking confiscation of property or torture by the state as an example:

‘Local remedies must be exhausted to redress the wrong. If the wrong remains unredressed or inadequately remedied after such exhaustion, a diplomatic or international judicial claim may be made in respect of the original confiscation or torture. No additional denial of justice in the process of exhausting remedies is required. It is sufficient that exhaustion of remedies has resulted in a decision which perpetuates the violation of international law, which was caused by the original confiscation, or act of torture, and does not restore the rights of the alien recognized by international law’.¹⁵

If, on the other hand, a private citizen would have destroyed the alien’s property,

‘ (...) the alien must resort to (...) local remedies and it is only if, in having such recourse, there is some act or omission amounting to what may be described as a denial of justice that an international wrong attributable to the host state will have been committed. (...) While the denial of justice generates international responsibility on the part of the host state, the alien

¹⁴ *Sharon A. Williams, William A. Schabas, ‘Article 17’, in: Otto Triffterer (ed.) ‘Commentary on the Rome Statute of the International Criminal Court. Observer’s Notes, Article by Article, 2nd ed. (2008), 606 (margin 1) and 613 (margin 20).*

¹⁵ *Amerasinghe, (2004), 100.*

must then exhaust (...) local remedies in respect of that denial of justice up to the highest level before his national state may espouse a diplomatic claim or take international action’.

Amerasinghe seems to suggest that the standards for a ‘denial of justice’ to constitute an international wrong are more stringent than for legal proceedings which in the process of exhausting remedies, fail to redress a wrong that can directly be attributed to the state.

Such refined distinctions are largely lost on the International Criminal Court. States can certainly incur responsibility for international crimes on the basis of conventions or international customary law. However, the ICC is only authorized to prosecute and try individuals for international crimes, the assessment of state responsibility being outside its scope of legal competence.¹⁶ And because the involvement of the state is not the ‘bone of contention’ in the criminal proceedings before the ICC, it cannot by definition equal the European Court’s differentiated assessment of the question whether a local remedy has provided sufficient redress to impede its jurisdiction. It would, for example, be impossible for the ICC to judge whether financial compensation for torture, granted by a local court, would meet the requirement that local remedies have been exhausted, because that would imply an assessment of the state’s involvement in the international crime. If, in such a case, the crime could be imputed to the state, the European Court would probably soon conclude that the financial compensation would not match the victim’s grief.¹⁷ If, on the other hand, the state was not to blame for the international crime, the Court would presumably apply the higher threshold of a ‘manifestly unjust judgement’ or a ‘miscarriage of justice’.

The fact that the International Criminal Court is unable to differentiate is probably one of the reasons that the standards for ‘unwillingness’ and ‘inability’ are both rather rigid and demanding.

¹⁶ Article 25(4) of the Rome Statute clearly states that ‘no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.’

¹⁷ In *Isayeva and Others v. Russia* (ECHR, nos. 57947/00, 57948/00 and 57949/00, §§ 148-149, 24 February 2005) the Government argued that the applicants had failed to exhaust the domestic remedies available to them due to the possibility of applying to a court at their new place of residence (the applicants had moved from Chechnya to Ingushetia). The Government referred to the case of *Khashiyev and Akayeva v. Russia* (ECHR, nos. 57942/00 and 57945/00, §§ 130-131, 24 February 2005) in which the applicant applied to the Nazran District Court in Ingushetia which awarded pecuniary and non-pecuniary damages for the death of the applicant’s relatives. The Court stated that it ‘is true that, after receiving the Government’s claim that a civil remedy existed, Mr. Khashiyev brought an action before the Nazran District Court in Ingushetia. That court was not able to, and did not, pursue any independent investigation as to the person or persons responsible for the fatal assaults, but it did make an award of damages to him on the basis of the common knowledge of the military superiority of the Russian federal forces in the district in question at the relevant time and the State’s general liability for the actions by the military. Despite the positive outcome for Mr. Khashiyev in the form of financial award, it confirms that a civil action is not capable, without the benefit of the conclusions of a criminal investigation, of making any findings as to the identity of the perpetrators of fatal assaults and still less to establish their responsibility’.

Our interim conclusion is that the case law of the European Court of Human Rights in respect of the local remedies rule does not provide a proper frame of reference for the International Criminal Court. We should therefore continue our quest for appropriate analogue standards and the first that comes to mind is the requirement to provide an effective remedy.

2.2. *The Right to an Effective Remedy*

Article 13 of the European Convention on Human Rights stipulates that persons whose rights under the Convention have been violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. According to established case law, Articles 2 (on the right to life) and 3 (on freedom from torture or inhuman or degrading treatment or punishment) contain a ‘procedural aspect’ which includes ‘the minimum requirement of a mechanism whereby the circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny’.¹⁸ Although the right to an effective remedy has a general scope, whereas the ‘procedural limb’ of Articles 2 and 3 is attuned to those specific rights, both provisions are obviously strongly related, as they both entail the state’s duty to take legal action whenever human rights have been violated.¹⁹ Moreover, as was expounded in the introduction, failure to comply with this duty might present a strong indication that the state is ‘unwilling’ or ‘unable’ to carry out investigations and serve the ICC as a useful guideline for the assessment of the admissibility issue.

This sub-paragraph intends to explore the relationship between these provisions, in order to determine which of them would best qualify as a normative frame of reference for ICC purposes.

The right to an effective remedy is connected to the procedural requirement to exhaust local remedies, discussed in the previous section. This relationship has often been acknowledged by the ECHR:

‘The rule (of exhaustion of local remedies) is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity –, that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions are incorporated in national law’.²⁰

¹⁸ *Mc Cann, Farrell and Savage v. UK (Gibraltar case)*, European Commission, no. 18984/91, § 193, Com Rep. (1994).

¹⁹ Both provisions ensue from the State’s general duty to ‘secure to everyone within their jurisdiction the rights and freedoms defined in the Convention’, *Khashiyev and Akayeva v. Russia*, § 177 (cited above).

²⁰ *Akdivar and Others v. Turkey*, ECHR, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV.

In other words: the rule that local procedural avenues should have been tried and exhausted before the applicant can address the Court presupposes that such remedies are adequate in general to redress the impaired right and effective in practice. Nevertheless, the connection is somewhat more complex than one would be inclined to believe at first sight. For one thing, the failure of an applicant to vindicate his claim before the national judiciary does not necessarily imply that he had no access to an effective local remedy. If that would have been the case ‘all cases reaching Strasbourg would be a combination of Article 13 claims and claims that another article had been violated and a breach of Article 13 would be found only when a violation of the other article had been established, making the Article 13 obligation of little consequence’.²¹ However, these situations do not coincide, as was elucidated by the Court:

What Article 13 requires is the opportunity to test the substance of a claim that the Convention has been violated, not a guarantee that the national decision-maker will reach the right result on the Convention question’.²²

It might be more appropriate to emphasize the inverted relationship between the two concepts. The absence of an effective local remedy discharges the applicant from the obligation to exhaust local proceedings.²³ Article 13 serves hence as a double edged sword: it intends to guarantee a right to individuals claiming a violation of their human rights and simultaneously promises a procedural short cut, if the state is not willing or able to materialize this right.

Whether a remedy is indeed effective in practice depends on its potential to redress a wrong and can therefore only be assessed on a case by case basis. *Cançado Trindade* identifies the general constituent elements of an effective remedy: ‘a remedy before a local court regularly instituted according to the provisions of municipal law, and which is competent to examine the matter which forms the object of the claim, and which is competent to render a decision on the subject’.²⁴

At this juncture, we need not bother to give a more precise account of the *general* content and prerequisites of an effective local remedy, as the scope of our inquiry invites us to ponder on the required legal redress of flagrant violations of human rights which amount to international crimes. The literal and unequivocal language of Article 17 of the Rome Statute makes it abundantly clear that nothing less than *criminal* investigations and prosecution are expected. Obviously, an effective local remedy in the sense of Article 13 ECHR does not demand the

²¹ D.J. Harris, M. O’Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, London/ Dublin/Edinburgh (1994), 446.

²² *Silver and Others v. the United Kingdom*, ECHR, 25 March 1983, § 113, Series A no. 61.

²³ *Amerasinghe*, (2004), p. 204: ‘The limitation arising from the positive requirement that the remedy be effective or adequate for the object of the claim or application implies that ineffective remedies need not be exhausted’.

²⁴ *Cançado Trindade* (1983), 113.

application of criminal law, but the situation may be different in case of very serious violations involving death or torture. This takes us to the procedural limb of Articles 2 and 3 ECHR which indeed appears to be more particular in this respect. In several judgments the ECHR has emphasized the state's obligation to instigate a thorough and effective *criminal* investigation, if the applicant has made a reasonable claim that he has been tortured. This investigation, as with that under Article 2, should be capable of leading to the identification and the punishment of those responsible.²⁵ These unambiguous findings seem to counter opinions expressing doubts about the required criminal nature of these procedural obligations.²⁶ It bears emphasis that the obligation to investigate and prosecute is not limited to situations in which state officials are allegedly involved in massive violations of human rights. The necessary efforts to divulge the circumstances of those violations and punish the perpetrators emanate from and are implied in the general duty under Article 1 of the Convention 'to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention'.²⁷ The message is clear: if life, bodily integrity and personal security are at stake, criminal investigations are indispensable.

These considerations beg the question whether, in case of serious violations threatening life and limb of individuals, Article 13 equally requires states to engage in criminal investigations or offers the state more leeway to comply with its obligation to provide an effective remedy. Put differently; is it conceivable that the ECHR would conclude that a state has provided an effective local remedy in the sense of Article 13, while failing to comply with its procedural obligations under Articles 2 or 3? If that were the case, the provisions would diverge, the procedural limb of Articles 2 and 3 being the more demanding.

The Court has explicitly excluded this possibility in the case of *Bazorkina*, where a defective criminal investigation in respect of disappearances clouded the prospect of any subsequent administrative or civil procedure:

'However, in circumstances where, as here, the criminal investigation into the disappearance and probable death was ineffective, and where the effectiveness of any other remedy that may

²⁵ *Aksoy v. Turkey*, ECHR, 18 December 1996, § XX, *Reports of Judgments and Decisions* 1996-VI and *Assenov and Others v. Bulgaria*, ECHR, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII.

²⁶ Compare for instance *M. Scharf*, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes', 59 *Law and Contemporary Problems* (1996), 50/51.

²⁷ *Bazorkina v. Russia*, ECHR, no. 69481/01, § 117, 27 July 2006: 'The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, *in those cases involving state agents or bodies*, to ensure their accountability for deaths occurring under their responsibility'. The sentence in italics is a bit cryptic, but it would be clearly absurd to interpret it as a limitation of accountability to state agents, excluding private wrongdoers. Rather it should be understood that, if state agents are involved they should be held accountable. See also: *Kaya v. Turkey*, ECHR, 19 February 1998, § 86, *Reports of Judgments and Decisions* 1998-I.

have existed, including the civil remedies suggested by the Government, was *consequently* undermined, the Court finds that the State has failed in its obligation under Article 13 of the Convention'. (emphasis added)²⁸

The success of an administrative or civil procedures in case of alleged violations of Articles 2 and 3 seems thus to be predicated on prior criminal investigations which apparently also constitute a bare essential for the purpose of Article 13. The Court has solidified this holding in a general rule, arguing that 'the scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention', while specifying that in case of a breach of Article 3 the notion of an effective remedy basically and at a minimum entailed a thorough and effective investigation of the kind also required under that same provision.²⁹

It follows that any failure of a state to conduct effective criminal investigations into breaches of Articles 2, 3 and 5 (in case of disappearances) simultaneously constitutes a violation of those very provisions *and* of Article 13. From this perspective, it seems immaterial whether one chooses the procedural limbs of those provisions or Article 13 as frame of reference. However, the insertion of the words 'as a minimum' suggests that Article 13 may be more demanding than the procedural obligations under Articles 2 and 3. The European Court has indeed confirmed that 'the requirements under Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation'.³⁰ Adding that: '[Article 13 includes] effective access for the complainant to the investigatory procedure and the payment of compensation where appropriate'.³¹

It follows that a Contracting State could comply with its procedural obligations, stemming from Article 2 or 3, while still failing to offer an effective local remedy in the sense of Article 13 by, for instance, refusing to involve the applicant in a criminal procedure. For the International Criminal Court, not being a human rights court, the procedural rights of the victim in the national context are of lesser concern. As already noted in the previous section, the position of the victim is not in the limelight of the ICC's attention. It is primarily interested in the question whether domestic jurisdictions are capable and willing to uncover the material truth.

Moreover, in the structure of deliberations the ECHR usually discusses the quality of criminal investigations at length under the heading of Articles 2, 3 and 5, noting succinctly that an effective remedy in the sense of Article 13 is also defective, if these investigations fail to meet the requisite standards. We will

²⁸) *Bazorkina v. Russia*, § 163 (cited above).

²⁹) *Assenov and Others v. Bulgaria*, § 117 (cited above).

³⁰) *Orhan v. Turkey*, ECHR, no. 25656/94, § 384, 18 June 2002; *Bazorkina v. Russia*, § 161 (cited above); and *Khashbiyev and Akayeva v. Russia*, § 183 (cited above).

³¹) *Assenov and Others v. Bulgaria*, § 117 (cited above) and *Aksoy v. Turkey*, §§ 95 and 98 (cited above).

therefore take the procedural limbs of Articles 2, 3 and 5 as point of reference for our subsequent investigations.

3. ECHR Standards in Respect of the Obligation to Conduct Adequate and Effective Investigations

The obligation to carry out criminal investigations pertains to violations of the right to life and the freedom from torture or inhuman or degrading treatment or punishment. For the purpose of this study, this is obviously relevant, as killings, disappearances, torture and inhuman treatment may amount to the core crimes under the jurisdiction of the ICC, provided that contextual elements are met.³² The incorporation of an inquiry into the procedural obligations which stem from the right to liberty and security of the person (Article 5 ECHR) is warranted in view of the fact that unacknowledged detention may constitute the crime of humanity of ‘enforced disappearances’.

To a large extent the requirements in respect of the investigations are similar under the distinct provisions, as they are supposed to divulge the exact circumstances of the case and identify the persons who are responsible for the violations. However, as the procedural limb is intimately connected to the substantive content of the provision in question, the standards display some specific features. The procedural obligations in respect of a violation of the right to life, for instance, include an inquiry into permitted exceptions or justifications which relieve the state from responsibility.³³ Nevertheless we will not structure our investigation on the basis of the obligations which stem from each provision separately. Instead we intend to paint a general picture of the current standards, espoused by the

³² Murder and torture may constitute a crime against humanity, when committed as part of a widespread or systematic attack directed against a civilian population, when the perpetrator is aware of the attack. Willful killing and torture or inhuman treatment of protected persons is a ‘Grave breach’ of the Geneva Conventions, when committed in an international armed conflict and a ‘serious violation of Article 3 Common to the four Geneva Conventions’ when committed in an armed conflict not of an international character. In the latter case these offences constitute war crimes.

³³ For example, in *Isayeva and Others v. Russia* (§§ 159-160 and 199, cited above), a case concerning the bombing of a convoy of refugees from Grozny on 29 October 1999, the Government did not dispute the fact of the attack but stated that the use of air power was justified by the heavy fire opened by members of illegal armed formations and therefore legitimate under Article 2(2)(a) of the Convention (in defence of any person from unlawful violence). The Court stated that ‘even assuming that the military were pursuing a legitimate aim in launching 12 S-24 non-guided air-to-ground missiles on 29 October 1999 the Court does not accept that the operation near the village of Shaami-Yurt was planned and executed with the requisite care for the lives of the civilian population’. The Court found a violation of Articles 2 and 13 of the Convention. On the other hand, in *Abmet Özkanet v. Turkey* (ECHR, no. 21689/93, § 306, 6 April 2004), the Court found that the security forces’ choice to open intensive fire on the village of Ormaniçi in response to shots fired at them from the village was “absolutely necessary” for the purpose of protecting life. The Court concluded that there had been no violation of Article 2 of the Convention in this respect.

European Court, in order to facilitate a meaningful comparison with the analogous assessment of the complementarity principle by the ICC.

Some general observations on the triggering of the duty to investigate human rights violations and the purpose of the investigations are apposite.

The first question which arises concerns the threshold situation which creates the obligation under scrutiny. In other words: which cases trigger the duty of a state to embark on criminal investigations? In respect of infringements of the freedom from torture and inhumane treatment, the applicant must raise an arguable claim that he has been seriously ill-treated by the police or other such agents of the state. In such a case, Article 3, read in conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention" requires by implication that there should be an effective official investigation.³⁴

The purpose of the investigations is to clarify the circumstances of the violations of human rights, to identify those who are responsible for these violations and to punish the culprits.³⁵ This again demonstrates the criminal nature of these investigations. More particularly, the investigation must be effective. In cases, for example, in which people had perished during armed clashes between the military and insurgents, the investigation should be capable of leading to a determination of whether the force used was or was not justified in the circumstances.³⁶

The sub-paragraphs of this chapter distinguish between the independence, the substantive quality and the timeliness of the investigations.

3.1. *The Need to Conduct Independent Investigations*

As was already noted above, the duty to investigate massive violations of human rights exists, irrespective of the question whether state officials are involved in those violations. However, if an arguable claim is made that state agents are responsible, the Court attaches specific importance to the fact that the persons who are expected to carry out the investigation, are independent from those implicated in the events.³⁷ This means not only a lack of hierarchical or institutional connection but also a practical independence.³⁸ At the time of the events in

³⁴ *Assenov v. Bulgaria*, § 102 (cited above).

³⁵ As regards this final aspect, compare *Mc Kerr v. United Kingdom*, ECHR, 4 May 2001, no. 28883/95, § 121, ECHR 2001-III.

³⁶ *Kaya v. Turkey*, § 87 (cited above).

³⁷ *Güleç v. Turkey*, ECHR, 27 July 1998, §§ 81-82, *Reports of Judgments and Decisions* 1998-IV.

³⁸ See, for example *Ergi v. Turkey*, ECHR, 28 July 1998, §§ 83-84, *Reports of Judgments and Decisions* 1998-IV. In *Ergi*, the Court was struck by the heavy reliance placed by the public prosecutor who was obliged to carry out the investigation, on the conclusion of the gendarmerie incident report that it was the PKK which had shot the applicant's sister. The prosecutor explained that only if there had been any elements contradicting this conclusion would he have considered that any other investigatory measures would have been necessary (§ 83).

south-east Turkey which gave rise to the cases brought before the ECHR, the investigation of offences allegedly committed by members of the security forces was not the responsibility of the prosecutors, but of administrative councils made up of civil servants.³⁹ These civil servants were subordinate to the governor who was also responsible for the security forces whose conduct was in question. One example is *Koku v. Turkey*, in which the investigation was purportedly carried out by the Kahramanmaraş Governor who was himself responsible for the security forces whose conduct was at issue. The Court found that this does not comply with the requirements that an investigation be independent and impartial.⁴⁰ Also, in the case of *Orhan v. Turkey*, the Court observed a deficiency in an investigation into the disappearance of three men, as the investigation was conducted by the Kulp District Administrative Council, which was not an independent body, being made up of civil servants hierarchically dependent on an executive officer linked to the very security forces under investigation.⁴¹

In *Aktaş v. Turkey*, the Court, like the Commission, noted that the provincial administrative council does not itself satisfy the requirement of independence and the Court has, moreover, held in the past that such councils are unlikely to initiate effective investigative measures.⁴²

The Turkish Government often tried to impute responsibility for the incidents to the PKK, thereby transferring jurisdiction to the state security courts. However, in *Incal v. Turkey*, the state security courts were found not to be independent due to the participation of a military judge.⁴³

The required independence of the investigations thus has a strong institutional component, but can be deduced from the behaviour of the authorities as well. A strong presumption of bias emerges, if the authorities doggedly stick to their interpretation of the chain of events, without even bothering to investigate alternative readings, as advanced by the complainant. In the case of *Assenov*, for instance, the Court found it particularly unsatisfactory that

³⁹ If the suspected offender was a civil servant and if the offence was committed during the performance of his duties, the preliminary investigation of the case was governed by the Law of 1914 on the prosecution of civil servants, which restricted the public prosecutor's jurisdiction *ratione personae* at that stage of the proceedings. Thus, any prosecutor who received a complaint alleging a criminal act by a member of the security forces had to make a decision of non-jurisdiction and transfer the file to the relevant local administrative council (for the district or province, depending on the suspect's status). That council would appoint an Adjudicator to conduct the preliminary investigation, on the basis of which the council would decide whether to prosecute or not. If a decision to prosecute had been taken, it was for the public prosecutor to investigate the case. A decision not to prosecute was subject to an automatic appeal to the Supreme Administrative Court.

⁴⁰ *Koku v. Turkey*, ECHR, no. 27305/95, § 142, 31 May 2005.

⁴¹ *Orhan v. Turkey*, § 342 (cited above).

⁴² *Aktaş v. Turkey*, ECHR, no. 24352/94, §304, ECHR 2003-V (extracts) and further reference.

⁴³ *Incal v. Turkey*, ECHR, 9 June 1998, § 72, *Reports of Judgments and Decisions*. The State Security Courts were abolished by constitutional amendments introduced on 7 May 2004.

‘the DDIA investigator was prepared to conclude that Mr. Assenov’s injuries had been caused by his father, despite the lack of evidence that the latter had beaten his son with the force which would have been required to cause the bruising described in the medical certificate’.⁴⁴

In the case of *Kaya v. Turkey*, the Government qualified the situation as a ‘clear-cut case of lawful killing by the security forces’, arguing that ‘for that reason the authorities were dispensed from having to comply with anything more than minimum formalities’.⁴⁵

The Court did not share that submission, contending that it was

‘struck in particular by the fact that the public prosecutor would appear to have assumed without question that the deceased was a terrorist who had died in a clash with the security forces. No statements were taken from any of the soldiers at the scene and no attempt was made to confirm whether there were spent cartridges over the area consistent with an intense gun battle having been waged by both sides as alleged. As an *independent* investigating official he should have been alert to the need to collect evidence at the scene, to make its own independent reconstruction of the events and to satisfy himself that the deceased, despite being dressed as a typical farmer, was in fact a terrorist as alleged. There are no indications that he was prepared in any way to scrutinize the soldiers’ account of the incident’.(emphasis added)⁴⁶

The message is clear: each case in which the facts are essentially contested deserves an even-handed and thorough investigation even if the authorities are convinced that their version is the right one. No information should be taken at face value, especially not if it derives from persons who are allegedly involved in the violations.

Another indication of lack of an independent attitude is the reluctance to carry out effective investigations into military operations and logistics which allegedly constitute the background of crimes and violations of human rights. In the case of *Orhan v. Turkey* the Court observed that

‘there was no evidence of any request to the security forces for information concerning their operations at the time in the region or about their activities at Lice Boarding Scholl (where the detention was alleged to have taken place) – an omission which was itself sufficient to warrant describing this investigation as seriously deficient’.⁴⁷

Likewise, in *Yasin Ateş v. Turkey*, the Court criticized the investigation into the killing carried out by the prosecutors. The Court observed in this respect that none of the members of the security forces who arrested Kadri Ateş were questioned by the investigating authorities, nor were those who took part in the armed clash.⁴⁸

⁴⁴ *Assenov and Others v. Bulgaria*, §103 (cited above).

⁴⁵ *Kaya v. Turkey*, § 81 (cited above).

⁴⁶ *Kaya v. Turkey*, § 89 (cited above).

⁴⁷ *Orhan v. Turkey*, § 344 (cited above).

⁴⁸ *Yaşın Ateş v. Turkey*, ECHR, no. 30949/96, § 110, 31 May 2005.

The elucidation of military operations is an indispensable tool to understand the circumstances in which the crimes have been committed and an inevitable first step in the process of identification of the culprits. Failure to act vigorously in this respect casts doubts on the required independence of the investigating authorities and may be indicative of a desire to shield those who are responsible, as clearly emerged in the case of *Khashiyev and Akayeva v. Russia*. In this case, the complainants had contended that their closest family had been killed by members of the ‘205th Brigade’ during an identity check in the town of Grozny. The Court noted that

‘the investigation failed to obtain a plan of the military operations conducted in the S. district of Grozny at the material time, despite strong evidence that such an operation was taking place. Such a plan could have constituted vital evidence in respect of the circumstances of the crimes in question’.⁴⁹

Furthermore, the Court stressed the connection with any subsequent requirement to identify the perpetrators:

‘(...) the Court has not been furnished with evidence of any attempt to establish the location of the “205 the Brigade from Budennovsk”, referred to extensively in the criminal investigation, and to examine its possible involvement in the killings. It does not appear that the investigators tried to establish the exact name and location of this military unit, to contact its commanders or to try to identify the soldiers whom some witnesses mentioned by name with the aim of at least questioning them in relation to the crimes. In the absence of any attempt to establish any details of the military unit which had been referred by name, it is difficult to imagine how the investigation could be described as efficient’.⁵⁰

The need to conduct investigations is particularly acute in case of ‘disappearances’:

‘Bearing in mind the responsibility of the authorities to account for individuals under their control, Article 5 requires them to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since’.⁵¹

The reasons are not hard to grasp. The gap between a credible claim that someone has been detained by state officials and their subsequent denial creates a presumption of bad faith and involvement which can only be dispelled by a candid inquiry in order to prove the opposite. Two specific features of the phenomenon of disappearances aggravate the situation. On the one hand, it should be emphasized that ‘unacknowledged detention’ dramatically increases the risk for the detainee to be exposed to even greater hardship, like bodily assault or even death.

⁴⁹⁾ *Khashiyev and Akayeva v. Russia*, § 159 (cited above).

⁵⁰⁾ *Khashiyev and Akayeva v. Russia*, § 158 (cited above).

⁵¹⁾ *Bazorkina v. Russia*, § 146 (cited above) with further references.

On the other hand, it offers the culprits a splendid opportunity to cover up their deeds. Deficiencies in prison administration may be extremely helpful in accomplishing this goal, as the European Court has readily acknowledged. In cases where a detention has not been logged in any custody records and no official trace of subsequent whereabouts or fate of the detainee exist the Court holds that

‘this fact in itself must be considered a most serious failing, since it enables those responsible for an act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of the detainee. Furthermore, the absence of detention records, noting such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it, must be seen as incompatible with the very purpose of Article 5 of the Convention’.⁵²

Lack of prompt and effective investigations perpetuates the gnawing uncertainty for the applicant and completes the scheme to shield those responsible from (criminal) responsibility:

‘Further, given the deficiencies in the investigations into the applicant’s early, consistent and serious assertions about the apprehension and detention of the Orhans by the security forces and their subsequent disappearance, the Court concludes that the Orhans had been held in unacknowledged detention in the complete absence of the most fundamental of safeguards required by Article 5’.⁵³

Our interim conclusion is that the European Court recognizes the need for independent and impartial investigations into massive human rights and identifies situations in which this independence is jeopardized. Most of the situations described could easily be denounced as deliberate efforts to shield the persons concerned from criminal responsibility in the sense of Article 17(2) under (a) of the Rome Statute. After all, it is difficult to interpret manipulation of the facts and circumstances or the outsourcing of investigations to units which are subordinate to the main suspects otherwise. But even if malicious intent to conceal involvement of state officials could not be proven, the investigations could be qualified as not being conducted independently or impartially and inconsistent with intent to bring the person concerned to justice (Article 17(2) under (c)).

It is remarkable that in a number of cases the authorities did not pursue an active policy to disguise official involvement in human rights violations. It was rather the passive attitude after suspicion had arisen that ignited the Court’s criticism. However, half hearted investigations putting up a smoke screen would suffice to sustain the conclusion that the investigations did not meet the expected standards and were not conducted independently or impartially. Moreover, we

⁵² *Baysayeva v. Russia*, ECHR, no. 74237/01, § 146, 5 April 2007 and *Orhan v. Turkey*, § 371 (cited above).

⁵³ *Orhan v. Turkey*, § 372 (cited above).

may recall that absolute inactivity does not even trigger the application of the complementarity principle and would automatically authorize the ICC to exercise jurisdiction.

3.2. *On the Quality of Investigations into Violations of the Right to Life and Freedom From Torture in General*

Deficient investigations need not necessarily be indicative of intent to cover up involvement of state agents. It may often be attributed to apathy, clumsiness or incapacity of prosecutorial authorities. The case law of the European Court of Human Rights is replete with instances of insufficient and ineffective investigations, by implication espousing the standards which should be observed in this respect.

The measures of investigation concern familiar police methods in case of serious crimes, like hearing of (key) witnesses, inquiries into forensic evidence and autopsies.

Regarding questioning of (key) witnesses, the Court has in many cases found inadequacies concerning insufficient evidence obtained from eye-witnesses or other key witnesses⁵⁴ and inadequate questioning of police, security forces and/or state officials.⁵⁵ The poor performance in respect of identification and hearing of witnesses in the aftermath of mass atrocities in Chechnya are particularly illustrative. In the case of *Musayev and Others v. Russia*, the Court notes that

‘A further element of the investigation which calls for comment is the failure to promptly identify other victims and possible witnesses to the crimes and to take statements from them. For example, the fourth applicant, who was an eyewitness to the events and survived an attempt on her life, was not accorded the status of a victim in the proceedings. It appears that she was never questioned either. There is no indication that the investigators attempted to create a comprehensive picture of the circumstances of the killings. For example, the case file examined by the Court does not contain a single list of those who were killed or of the persons granted victim status in the proceedings, there is no map or plan of the district which might show the locations of the bodies and important evidence, and no attempt seems to have been made to draw up a list of the local residents who remained in the district in the winter of 1999 to 2000’.⁵⁶

⁵⁴ See, for example, *Şemsi Önen v. Turkey* (ECHR, no. 22876/93, § 88, 14 May 2002) regarding failure to show photos of suspect to the applicants or to carry out a formal confrontation; and *Orhan v. Turkey* (§ 340, cited above) regarding inadequacy by ‘taking of the briefest statements’.

⁵⁵ See, for example, *Aktaş v. Turkey* (§ 306, cited above) regarding inadequacy by delay in taking statements and not asking the gendarmerie officers involved in the interrogation of Yakup Aktaş to account for bruising and injuries found on the body; and *Demiray v. Turkey* (ECHR, no. 27308/95, § 61, ECHR 2000-XII) where none of the gendarmes present at the scene of Ahmet Demiray’s death appears to have been questioned).

⁵⁶ *Musayev and Others v. Russia*, ECHR, nos. 57941/00, 58699/00 and 60403/00, § 162, 26 July 2007. Similar conclusions were reached in *Khashiyev and Akayeva v. Russia*, §§ 160-161 (cited above).

The Court tends to assess the investigations against the backdrop of the question whether these would be particularly cumbersome. In the case previously mentioned, the Court continues:

‘The Court considers that in the present case the investigation body faced a task that could by no means be considered impossible. The killings were committed in broad daylight and a large number of witnesses, including some of the applicants, saw the perpetrators face to face. Their detailed accounts of the events were made public by various sources. The relatives of the victims demonstrated their willingness to cooperate with the authorities by allowing the exhumation and forensic analysis of the bodies and by forming an action group to coordinate their efforts’.⁵⁷

In *Rasayev and Chankayeva v. Russia*, the Stichting Russian Justice Initiative (SRJI),⁵⁸ representative of the applicants, filed a complaint with the Grozny District Court challenging the inaction of the Grozny District Prosecutor’s Office. SRJI asked the Grozny District Court to order the prosecuting authorities to conduct a thorough investigation, to question fifteen witnesses named in the complaint and to allow the first applicant to make copies of documents contained in the case file. The Grozny District Court ordered the Grozny District Prosecutor’s Office to resume the investigation, to question the witnesses named and to allow the first applicant to make copies of the documents contained in the case file. The prosecutor’s office appealed and three months later the Supreme Court of the Chechen Republic amended the decision by removing the order allowing the first applicant to make copies of documents from the case file.⁵⁹ The European Court found it ‘particularly appalling that the investigative authorities failed to question the witnesses even after the domestic courts ordered them to do so’.⁶⁰

Inadequate inquiries into forensic evidence surface in the case of *Gül v. Turkey*. A special operation team, taking part in a house search operation, had killed the son of the applicant, invoking self defence, as the victim had allegedly fired one pistol shot at them. However, this allegation was not substantiated by evidence and the Court agreed with the Commission that ‘opening fire with automatic weapons on an unseen target in a residential block inhabited by innocent civilians, women and children was grossly disproportionate for the purpose of securing entry to the flat’.⁶¹

With respect to the investigations, the Court’s judgement was particularly virulent:

‘While an investigation into the incident was carried out by the public prosecutor, there were a number of significant omissions, including: no attempt to find the bullet allegedly fired by Mehmet Gül at the police officers, no proper recording of the alleged finding of two guns

⁵⁷ *Musayev and Others*, § 164 (cited above).

⁵⁸ NGO based in the Netherlands with a representative office in Russia.

⁵⁹ *Rasayev and Chankayeva v. Russia*, ECHR, no. 38003/03, §§ 42–44, 2 October 2008.

⁶⁰ *Rasayev and Chankayeva v. Russia*, § 73 (cited above).

⁶¹ *Gül v. Turkey*, ECHR, no. 22676/93, § 82, 14 December 2000.

and a spent cartridge inside the flat, no photograph taken of the weapons at the alleged location, no testing of Mehmet Gül's hands for traces that would link him with the gun and no testing of the gun for prints. Further, although the actions of the officers involved required careful and prompt scrutiny by the responsible authorities, the public prosecutor did not take any statements from them. Nor were the officers required to account for the use of their weapons and ammunition'.⁶²

The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye-witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings including the cause of death. Any deficiency in the investigation which undermines the ability to establish the cause of death, or the person or persons responsible, will risk falling foul of this standard.⁶³

Thorough autopsies, performed by competent medical staff, are an indispensable method to divulge the cause of death in essentially contested situations. In the case of *Salman v. Turkey*, the applicant and father of the deceased alleged that Agit Salman had perished as a result of torture while he remained in police custody. The Court observed that

'the autopsy examination was of critical importance in determining the facts surrounding Agit Salman's death. The difficulties experienced by the Commission in establishing any of those facts, elements of which are still disputed by the parties before the Court, derives in a large part from the failings on the post-mortem medical examination. In particular, the lack of proper forensic photographs of the body and the lack of dissection and histopathological analysis of the injuries and marks on the body obstructed the accurate analysis of the dating and origin of those marks, which was crucial to establishing whether Agit Salman's death had been provoked by ill-treatment in the twenty-four hours preceding his death. The unqualified assumption by Dr. Şen that the broken sternum could have been caused by cardiac massage was included without seeking any verification as to whether such massage had been applied and was in the circumstances misleading'.⁶⁴

In *Yasin Ateş*, the Court observed that the Government had not submitted any information to suggest that the scene of the shooting was forensically searched for any evidence which might have assisted in the establishment of the identity of the killer(s). The autopsy report merely recorded the number of bullet entries and exit wounds; no thought was apparently given to the possibility that traces of bullets, shrapnel or other evidence might be lodged in the bodies (and this despite Dr. Varol's own conclusion that some of the injuries had been caused by shrapnel).⁶⁵

⁶² *Gül v. Turkey*, §§ 89-90 (cited above).

⁶³ *Yaşın Ateş v. Turkey*, § 96 (cited above).

⁶⁴ *Salman v. Turkey*, ECHR [GC], no. 21986/93, § 106, ECHR 2000-VII.

⁶⁵ *Yaşın Ateş v. Turkey*, §§ 108-109 (cited above).

The Court has also found a failure in the investigation if the autopsy was performed by a general practitioner. In *Demiray v. Turkey*, the autopsy was performed by a general practitioner and contained little forensic evidence. The authority's conclusion that a classic autopsy by a forensic medical examiner was not necessary was, in the Court's view, inadequate given that a death occurred in the circumstances described in the case at hand.⁶⁶

It would obviously be impossible to assess in general whether such poor performances in the realm of criminal investigation are a matter of sheer incompetence, or rather point at some devious attempt to conceal the responsibility of the true culprits. Nor is it always easy to judge from the facts whether deficient investigations are incidental or endemic. Nevertheless, in conflict ridden situations, where protracted animosities between the authorities and ethnic minorities are conducive of high rates of violence and systematic infringements of fundamental human rights, the general legal climate may easily erode or deteriorate, impeding access to fair justice. In the context of the conflict between Turkey and the Kurds, for instance, the former European Commission on Human Rights referred to the Susurluk Report which, apart from revealing a conspiracy between government institutions and clandestine groups, bent on eliminating well-known figures or supporters of the Kurds, professed that in or about 1993 the legal structures in the south-east of Turkey operated in a manner incompatible with the rule of law.⁶⁷ For the purpose of our research such findings are highly relevant, as they may equally be indicative of a substantial collapse of the national judicial system, preventing the state from obtaining the accused or the necessary evidence. On several occasions, applicants have moved to draw the attention of the Court to 'a pattern of denial by the authorities of allegations of serious human rights violations as well as a denial of remedies, which aggravated the breach of which they had been a victim'.⁶⁸ The Court, however, has been cautious and reluctant to accept these sweeping statements, arguing that 'the scope of the examination of the evidence undertaken in this case and the material in the file are not sufficient (...) to enable it to determine whether the authorities have adopted a practice of violating Articles 2 and 13 of the Convention'.⁶⁹

3.3. *The Need for Prompt Investigations*

A final element in the case law of the European Court which deserves our attention is the requirement that the investigations must be carried out promptly and with reasonable expedition. There is an obvious analogy with the Rome Statute,

⁶⁶ *Demiray v. Turkey*, § 51 (cited above).

⁶⁷ *Tanrikulu v. Turkey*, ECHR [GC], no. 23763/94, § 105, ECHR 1999-IV.

⁶⁸ *Tanrikulu v. Turkey*, § 120 (cited above); *Salman v. Turkey*, § 124 (cited above).

⁶⁹ *Tanrikulu v. Turkey*, § 121 (cited above).

as Article 17 (2), sub b depicts ‘an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice’ as one of the indicia of ‘unwillingness’. Although the Court acknowledges that ‘there may be obstacles or difficulties which prevent progress in an investigation in a particular situation’, it nevertheless stresses that ‘a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts’.⁷⁰ In *Ergi v. Turkey*, the Court stated that ‘neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into the deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear’.⁷¹

Whether an investigation is considered sufficiently prompt obviously depends on the specific circumstances of the case and the seriousness of the allegations. In view of the potentially disastrous consequences, urgent action appears to be especially warranted in case of arrests and subsequent ‘disappearance’.⁷² In the case of *Luluyev v. Russia*, servicemen had witnessed the apprehension of a woman by ‘unidentified’ security forces. They had not interfered because they believed at the time that they were witnessing a lawful arrest by a competent law-enforcement body. Given the secretive and suspicious character of the whole operation, ‘the very least the police could have been expected to do was to verify *as rapidly as possible* which authority, if any, had taken the women into custody. If within a few hours or, at the most, within the next few days, the action could not be attributed to any authority, this should have provided grounds to suspect kidnapping and to open an investigation without further delay’.(emphasis added)⁷³ As the first official enquiries were only made a fortnight after her apprehension, the Court observed that there was no reasonable explanation for such long delays in a situation where prompt action was vital’.⁷⁴ One example of a case where the Court has found the response of the authorities to be sufficiently prompt, is *Lyanova and*

⁷⁰ *Yaşa v. Turkey*, ECHR, 2 September 1998, §§ 102–104, *Reports of Judgments and Decisions* 1998–VI; confirmed in *Luluyev and Others v. Russia*, ECHR, no. 69480/01, § 92, 9 November 2006 (extracts) and *Bazorkina v. Russia*, §119 (cited above).

⁷¹ *Ergi v. Turkey*, § 85 (cited above).

⁷² In *Takhayeva and Others v. Russia* (ECHR, no. 23286/04, § 90, 18 September 2008), the Court was of the opinion that the investigative authorities failed to promptly commence the investigation of the kidnapping in life-threatening circumstances, *where crucial action has to be taken in the first days after the event* (emphasis added). Also, in *Yusupova and Zaurbekov v. Russia* (ECHR, no. 22057/02, § 62, 9 October 2008), the Court noted that the authorities did not institute criminal proceedings until three weeks after the applicant’s relative has disappeared and that the Government did not provide any explanation for such delay *in a situation where prompt action was vital* (emphasis added).

⁷³ *Luluyev and Others v. Russia*, § 95 (cited above).

⁷⁴ *Luluyev and Others v. Russia*, § 96 (cited above).

Aliyeva v. Russia, as the investigator from the Leninskiy VOVD⁷⁵ questioned the applicants, inspected the crime scene and visited Obron-8⁷⁶ headquarters on the same day that the applicants submitted the application concerning their sons' abduction.⁷⁷ However, the Court still found a breach of Article 2 in its procedural aspect due to, *inter alia*, the fact that the Russian authorities failed to clarify discrepancies between statements which could 'only be attributed to the reluctance of the prosecuting authorities to pursue the investigation'.⁷⁸

The requirement of promptness continues beyond the initial opening of the investigation. In the case of *Musayev and Others v. Russia* which emerged from a situation in which dozens of civilians had perished due to military operations in civil strife, the Court found the opening of the investigations one month after the killings 'unacceptable', adding that it was 'struck by a series of serious and unexplained delays and failures to act once the investigations had commenced'.⁷⁹

Frequent adjournments of the investigations tend to compound the delay and will be especially detrimental for the applicant, if they are not properly informed of those steps. In *Yusupova and Zaurbekov v. Russia*, the investigation had been ongoing since November 2000 during which period it was stayed and resumed on at least fifteen occasions.⁸⁰ In the same case, there was a substantial delay in granting the status of victim to the first applicant which afforded her minimum guarantees in the criminal proceedings. The Court stated that 'it does not appear that before – or even after – the said decision was taken, the first applicant was properly informed of the progress in the investigation, or given access to the case file. In this connection, the Court noted that the Government did not produce a copy of any single letter informing the applicants of the developments in the criminal proceedings, or inviting them to have access to the case file'.⁸¹

In the majority of cases, the Russian and Turkish governments have contended that the complaints to the Court should be declared inadmissible for non-exhaustion of domestic remedies since the investigations have not been completed.⁸² In *Khalidova and Others v. Russia*, a case concerning the disappearance of Isa and Shamil Khalidov in November 2002, the Court concluded that the investigative authorities remained inactive for more than four years.⁸³ After all, in such cases applicants may have no possibility of appealing to a higher prosecutor.⁸⁴

⁷⁵ Leninskiy District Department of the Interior.

⁷⁶ Special Mission Brigade No. 8 of Interior Ministry troops.

⁷⁷ *Lyanova and Aliyeva v. Russia*, ECHR, nos. 12713/02 and 28440/03, § 103, 2 October 2008.

⁷⁸ *Lyanova and Aliyeva v. Russia*, § 106 (cited above).

⁷⁹ *Musayev and Others v. Russia*, § 160 (cited above).

⁸⁰ *Yusupova and Zaurbekov v. Russia*, § 65 (cited above).

⁸¹ *Yusupova and Zaurbekov v. Russia*, § 64 (cited above).

⁸² See for example, *Lyanova and Aliyeva v. Russia*, § 75 (cited above) and *Khalidova and Others v. Russia* ECHR, no. 22877/04, § 60, 2 October 2008.

⁸³ *Khalidova and Others v. Russia*, § 96 (cited above).

⁸⁴ *Khashiyev and Akayeva v. Russia*, § 164 (cited above); *Bazorkina v. Russia*, § 124 (cited above).

4. Criminal Law and Human Rights Law: Affinities and Contradictions

The previous section has amply demonstrated that the case law of the European Court of Human Rights provides useful guidelines for the assessment of a state's willingness and ability to carry out effective criminal investigations into massive violations of human rights. Those standards, we submit, may serve the ICC as an excellent frame of reference in the determination of its own jurisdiction in view of the principle of complementarity. This interim-conclusion is not coincidental, nor need it surprise us. The European Court and the ICC share a common goal in putting an end to impunity for the perpetrators of mass violations of fundamental human rights which, from a criminal law perspective, amount to international crimes. For the ICC, this goal constitutes its very '*raison d'être*'.⁸⁵ For the European Court, impunity perpetuates the violation it is supposed to counter.

In Section 4 we will rather focus on the distinctions in scope, purpose and nature between the European Court and the ICC, putting the hypothesis that the standards which are developed by the ECHR are readily applicable for the ICC to a critical test. We will investigate whether the ICC, despite the apparent and striking appropriateness of the European Court's standards, has still good reasons to question the applicability of those standards for its own purposes, due to these differences in aims and nature. The issue has two related aspects which perfectly capture the distinctions between the courts.

For one thing, the European Court's case law on the procedural limb of Articles 2, 3 and 5 of the European Convention on Human Rights concerns obvious failures in the initial phases of criminal investigation. We have not been able to detect case law in which the Court denounced a national court's acquittal of a suspect of mass violations of human rights on the basis of lack of evidence or a spurious legal qualification. Nor have we found instances of the Court's censuring an exceptionally lenient punishment which blatantly ignored the seriousness of the crime. We submit that the absence of such decisions is no coincidence, but is inherent to the Court's functions and competence. These judgements would imply a substantive assessment of the domestic court's application of criminal law and by doing so, the European Court would overstretch its mandate. After all, the European Court is not a criminal tribunal.⁸⁶

⁸⁵ Compare the Preamble to the Rome Statute in which the States Parties 'Affirm that the most serious crimes of concern to the international community as a whole must not go unpunished (...) are determined to put an end to impunity for the perpetrators of these crimes (...) and are determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court (...) with jurisdiction over the most serious crimes of concern to the international community as a whole'.

⁸⁶ More generally, the European Court considers itself unauthorized to question the domestic authorities' assessment of their own national law unless it is flagrantly and manifestly arbitrary, *García Ruiz v. Spain*, ECHR [GC], no. 30544/96, §§ 28-29, ECHR 1999-I and *Kononov v. Latvia*, no. 36376/04, § 108, 24 July 2008.

The International Criminal Court, on the other hand, might, precisely because it *is* a criminal tribunal, cherish a somewhat broader interpretation of its mandate and include an assessment of the national prosecutor's and court's performance in its overall judgement of the state's willingness and ability. Anticipating on its own opinion on factual and legal issues, the ICC might be inclined to conduct a perfunctory inquiry into a national court's trials and sentencing and arrogate jurisdiction, if those decisions manifestly fail to live up to expected standards. Whether and to what extent the principle of complementarity, as understood by the States Parties to the Rome Statute, allows the ICC to pursue such slightly more intrusive investigations is an issue which deserves somewhat closer scrutiny. Suffice here to observe that the potential differences in approach derive from the distinctions in nature and purpose between the two courts.

The second 'prong' of our investigation constitutes to a certain extent the mirror image of the previous one and concerns the human rights commitments of the European Court. Although this Court is not equipped to address issues of substantive criminal law, it belongs to its core business to assess whether national criminal proceedings are in accordance with the principle of fair trial (Article 6 ECHR) and do not impinge on the prohibition of the retroactive application of (criminal) law (Article 7 ECHR). If a suspect of international crimes were to face criminal proceedings which do not qualify as a fair trial or would be exposed to a retroactive application of criminal provisions, the Court would conclude that his rights under the Convention had been impaired.⁸⁷

Despite the fact that Article 17 enjoins the International Criminal Court to have regard to the principles of due process recognized by international law, it is highly doubtful that the ICC will in such cases of violations of due process to the *detriment* of the accused, but which do not bear evidence of unwillingness, will dismiss the national court's decision and assume jurisdiction. Obviously, this raises the broader issue whether the ICC should, in its assessment of the performance of national courts, also take violations of due process which are prejudicial to the accused into account.⁸⁸

The question is essentially contested. Most authors are inclined to find that unfair proceedings reflect a lack of willingness or ability to investigate and prosecute international crimes genuinely.⁸⁹ Others, however, argue, usually to their

⁸⁷ A good example is the case of *Jorgić v. Germany* (ECHR, no. 74613/01, ECHR 12 July 2007 (extracts) in which the Court actually held that Article 7 had not been violated, (*Jorgić v. Germany*), *European Human Rights Cases*, 10 October 2007, 116 (p. 1141), annotated by H. van der Wilt.

⁸⁸ Compare Kleffner (2007), 168-170, E. Carnero Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace without Justice" to "No Peace with Victor's Justice"?' 18 *Leiden Journal of International Law* 829-869 and K.J. Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process', in: 17 *Criminal Law Forum* (2006), 255-280.

⁸⁹ Compare, for instance, Heller (2006), 257 and M. Cherif Bassiouni, *Introduction to International Criminal Law*, New York 518.

regret, that the ICC will only take over the case if the unfair proceedings were concocted to blame the person concerned for crimes which were actually committed by others, thus shielding the latter from responsibility.⁹⁰ The present authors tend to agree with the latter that the states representatives who drafted the Statute did not intend to equip the ICC with the power to intervene whenever due process rights in general are at stake.

Put succinctly and connecting the two aspects expounded above: the case law of the European Court may provide both too little – by focusing only on the minimum requirements in respect of preliminary criminal investigations – and too much – by expecting that the procedural rights of the suspect of international crimes are observed.

A third issue does not relate to the distinctive in nature between the courts, but rather to their differences in geographical scope. Whereas the International Criminal Court has at least theoretically universal jurisdictional pretensions, the European Court on Human Rights has by definition only a regional scope. The pertinent question is whether the ICC could apply and internalize standards which have been developed within a limited geographical and legal context.

We will shortly discuss whether these considerations stemming from the differences in nature and geographical scope of both courts require us to qualify or even renounce or initial hypothesis.

4.1. The Scope of the Principle of Complementarity

As already mentioned in the introduction, it is indeed a matter of conjecture how the International Criminal Court will exactly interpret the standards, propounded by Article 17 of the Rome Statute, that a state is ‘unwilling’ or ‘unable’ to carry out investigations or prosecutions genuinely. The issue has triggered preliminary and perhaps premature controversies, especially in American literature. In a provocative contribution, *Gurule* vents his apprehension that the International Criminal Court might substitute the national prosecutor’s or court’s findings for its own assessment of factual and legal issues. This might occur at different levels of the criminal proceedings. For one thing, the ICC might disagree with the national prosecutor’s decision that ‘the quantity or quality of evidence is insufficient to convince a unanimous jury of the accused his guilt beyond a reasonable

⁹⁰ *Kleffner*, (2007), 169; *Carnero Rojo* (2005), 854. *Van den Wyngaert* and *Ongena* argue more generally that the ICC is not supposed to intervene in cases of human rights violations to the detriment of the accused, because ‘this would give the task of the Court a totally different dimension and make it a body for the protection of individuals and their basic rights against States.’ *Chr. Van den Wyngaert & T. Ongena*, ‘Ne bis in idem principle, including the issue of amnesty’, in: *A. Cassese, P. Gaeta & J. Jones* (eds.) *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, 705, 725.

doubt'.⁹¹ In a similar vein, the ICC might harbour different interpretations of a specific legal concept, the intricate doctrine of superior responsibility providing a case in point. Such legal niceties might prompt the Court to overrule a national court's verdict, especially if it is predicated on a more narrow reading of the concept, excluding responsibility for negligence. These concerns drive *Gurule* to put the following rhetorical question:

'Stated differently, in the case of a good faith disagreement on questions of law or the proper exercise of prosecutorial discretion, should a State's decision not to prosecute be afforded deference by the ICC? If not, then the ICC's role with respect to national criminal jurisdictions would be more analogous to that of a "super" international appellate court, vested with de novo review authority, rather than a court intended to complement States with primary jurisdiction'.⁹²

At first sight, such qualms seem to be slightly exaggerated. After all, the bottom-line and main interpretative tool for a correct assessment of the principle of complementarity is the grave concern of the drafters of the Rome Statute that the International Criminal Court should *not* serve as a supra-national court of appeal.⁹³ On closer scrutiny and in view of recent developments, however, *Gurule's* apprehensions may not be too far-fetched. In the first and until now only decision on admissibility, the Pre Trial Chamber held that the case against Lubanga was admissible before the International Criminal Court, because the accused was not prosecuted for the international crime of conscription of child soldiers, but for other offences. The Pre-Trial Chamber commented that 'For a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court'.⁹⁴ A somewhat similar approach was followed by the ICTR, when it barred the transfer of a case to Norway, arguing that, while the Norwegian courts could prosecute the accused for murder, he could not be held responsible for committing genocide, as Norway had failed to implement this offence in national law.⁹⁵ Both decisions have in common that they involve lack of legislation or institutional capacity and point at 'inability' rather than 'unwillingness'.

⁹¹ J. *Gurule*, 'United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal's Jurisdictions?' 35 *Cornell International Law Journal* (2001/2002), 1, 23.

⁹² *Gurule* (2001/2002), 9.

⁹³ Compare J.T. *Holmes*, 'The Principle of Complementarity', in: R.S. *Lee* (ed.), *Introduction to the International Criminal Court: The Making of the Rome Statute*, Oxford 1999, 49: 'Many delegations were sensitive to the potential for the Court to function as a kind of court of appeal, passing judgements on the decisions and proceedings of national judicial systems'.

⁹⁴ *Prosecutor v. Lubanga*, Decision on the Prosecutor's Application for a Warrant (ICC-01/04-01/06-8), 10 February 2006, §§ 37.

⁹⁵ *Prosecutor v. Bagaragaza*, Decision on the Prosecution's Motion for Referral to the Kingdom of Norway, Case No. ICTR-05-86-R11 *bis*, 19 May 2006; upheld in Appeal, Decision on Rule 11 *bis* Appeal (ICTR-05-86-AR 11 *bis*) 30 August 2006.

It is open to question whether the ICC would trump a national court's verdict, if that court, having a choice between qualification of conduct as an international crime or a domestic crime (like murder), were to opt for the latter solution. The ad hoc tribunals would have no reservations in such a case, as their statutes explicitly allow them to retry a person, if the act for which he or she was tried was characterized as an ordinary crime.⁹⁶ Arguably, the ICC would be more reticent, as such an overruling of the national decision would infringe the sovereignty of the state.⁹⁷

Whatever the differences between the tribunals may be, the admissibility decision of the Pre Trial Chamber and the judgement of the ICTR share a bias in favour of prosecution of international crimes. Such an approach has been criticized by *Schabas* who contends that, historically, there has never been an inherent virtue in prosecuting international crimes. The category has primarily been invented to thwart the exclusive sovereignty over crimes committed on the territory of the state and enable both international courts and national courts to prosecute those crimes on the basis of universal jurisdiction. He suspects that the Prosecutor and Pre-Trial Chamber have acted rather impetuously, moved by a strong desire to bring the defendant before the Court. *Schabas* adds that 'they took jurisdiction on the basis of an interpretation of the Statute which may be more intrusive with respect to the criminal justice of States than was ever intended'.⁹⁸

Another issue which continues to raise heated discussions concerns the question whether amnesties or alternative accountability processes, like TRC's, would ever be compatible with the States Parties' obligation to investigate and prosecute international crimes genuinely.⁹⁹ According to *Holmes* the Rome Statute does not provide an antidote against an apparently genuine investigation and prosecution which is shortly followed by parole or pardon of the convicted person, but he assumes that the Court will still pierce the devious scheme of the state, especially if the measure significantly deviates from national practice for similar conduct.¹⁰⁰ More in general, amnesties and alternative accountability mechanisms cannot easily be reconciled with the plain reading of the relevant provisions

⁹⁶ ICTY-Statute, Article 10, section 2, sub (a); ICTR-Statute, Article 9, section 2, sub (a).

⁹⁷ For a similar view, *Pichon* (2008), 197.

⁹⁸ *W. A. Schabas, An Introduction to the International Criminal Court*, 3rd ed. Cambridge, 2007, 184.

⁹⁹ The numerous literature on the topic includes: *C. Cárdenas Aravena*, 'The Admissibility Test before the International Criminal Court under Special Consideration of Amnesties and Truth Commissions', in: *J.K. Kleffner & G. Kor* (eds.), *Complementary Views on Complementarity*, The Hague 2006, 115-139; *J. Dugard*, 'Dealing with Crimes of Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of Int. Law*, 1001-1015; *M.P. Scharf*, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', (1999) 32 *Cornell Int. Law Journal*, 507-527; and *C. Stahn*, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court', (2005) 3 *Journal of Int. Criminal Justice*, 695-720.

¹⁰⁰ *Holmes*, (2002), 678/679.

in the Rome Statute which clearly suggest the duty to embark on *criminal* investigations. Nevertheless, there is growing consensus that not all initiatives can be considered on the same par, while some place their hope on the discretionary powers of the Court's Prosecutor who can decline to initiate if this investigation would not serve the interests of justice.¹⁰¹

A more thorough discussion of the ins and outs of the complementarity principle would obviously extend beyond the scope of this article. For our purpose, the previous succinct discourse clearly demonstrates that the ICC, within the framework of the admissibility procedure, will address a number of issues, which will escape the attention of the European Court, or, even stronger, on which the ECHR is not authorized to decide. This observation, however, does not obviate the International Criminal Court's need for a proper normative framework, in order to assess whether preliminary investigations meet the required standards. 'Unwillingness' or 'inability' will exactly materialize in the initial phases of a criminal investigation, as was demonstrated in paragraph 3. And it is here that the case law of the European Court offers useful guidelines.

4.2. *Lack of Due Process to the Detriment of the Accused*

As already briefly mentioned in the introduction of this section, it is not very likely that the ICC will involve any miscarriages of justice which are prejudicial to the suspect of international crimes in the admissibility proceedings. At least, the drafters of the Rome Statute did not intend to equip the Court with sweeping powers to overrule verdicts of national courts on such grounds. This rather narrow interpretation of the Court's mandate has met with criticism.¹⁰² Besides, it compares unfavourably with recent practice of the ad hoc tribunals.

Within the context of their completion strategy, both ad hoc tribunals have moved to refer cases to national jurisdictions. The purpose of this policy is to reduce the backlog of the tribunals, so they can focus on the prosecution and trial of the 'most responsible leaders, leaving the middle-rank and lower-rank perpetrators to national courts.¹⁰³ For both Tribunals, the legal basis is Rule 11*bis* of the Rules of Procedure and Evidence which has been amended several times. It provides for the installation of a special 'Referral Bench' which is authorized to

¹⁰¹ Article 53, (1) sub c Rome Statute. For this point of view, see especially Scharf (1999), 524.

¹⁰² Compare, apart from the authors mentioned in footnote 89, F. Gioia, 'Comments on Chapter 3 of Jann Kleffner', in: J.K. Kleffner & G. Kor (eds.) (2006), 105, 111-113.

¹⁰³ Commentaries on this policy include M. Bohlander, 'Last Exit Bosnia-Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts' (2003) 14 *Criminal Law Forum*, 59, D. Raab, 'Evaluating the ICTY and its Completion Strategy' (2005) 3 *Journal of International Criminal Justice*, 82-102 and J. Dieckmann & Chr. Kerll, 'UN Ad Hoc Tribunals Under Time Pressure – Completion Strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defence', *International Criminal Law Review* 8 (2008), 87-108.

‘order a referral proprio motu or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after having been satisfied *that the accused will receive a fair trial* and that the death penalty will not be imposed or carried out’ (emphasis added).¹⁰⁴

Perhaps the most interesting aspect of the procedure is paragraph (F) of the Rule which entitles the Referral Bench to revoke its prior order and request the State to defer the case (again) to the ad hoc Tribunal.¹⁰⁵ The Tribunals have, in other words, a stick to chastise the state in case of bad performance and it is precisely at this juncture that they can judge the fairness of the national proceedings, as paragraph (B) renders them the explicit legal tools to do so.

The Referral Bench has taken its task seriously. It has not only investigated, whether a case, in view of its gravity and the rank of the suspects, would qualify for referral to national jurisdiction, but also whether the prospective of receiving a fair trial would warrant such a decision. The case of Janković provides a case in point.¹⁰⁶ In this case the Bench discussed extensively whether the accused would have adequate time and facilities for the preparation of his defence (§§ 75/76), whether his right to be assisted by counsel of his own choosing would be sufficiently observed (§§ 77–79), whether he would have the right to attend trial and examine witnesses (§§ 80–83), whether witnesses would indeed be available at the trial for purposes cross-examination (§§ 84–87) and whether the trial would proceed without undue delay (§§ 88–93). After having been satisfied that those issues gave no rise to great concerns, the Bench ordered the case to be referred to the State Court of Bosnia and Herzegovina.¹⁰⁷

In another case the Referral Bench paid due attention to the question whether the Croatian authorities which would qualify for taking over the prosecution and trial of the accused, would perforce be biased against non-Croat accused. Considering that there were no indications which sustained this apprehension, the Bench referred the case to the Croatian County Courts.¹⁰⁸

The present authors would submit that the ICC should refrain from an overly timid interpretation of its mandate and follow the example of the ad hoc tribunals, at least in cases of blatant travesties of justice in which the procedural rights

¹⁰⁴ Rule 11bis (B).

¹⁰⁵ ‘(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Referral Bench may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke an order and make a formal request for deferral within the terms of Rule 10’.

¹⁰⁶ *Prosecutor v. Janković*, Case No. IT-96-23/2-PT, Decision on Referral of Case under Rule 11bis, 22 July 2005.

¹⁰⁷ The decision was upheld on appeal, Case No. IT-96-23/2 AR 11bis1, 1 September 2005.

¹⁰⁸ *Prosecutor v. Ademi and Norac*, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, 14 September 2005, §§ 53-57.

of the accused are entirely ignored.¹⁰⁹ Article 17 of the Rome Statute itself offers some ammunition to sustain this point of view, as it twice refers to ‘proceedings which are inconsistent with an intent to bring the person concerned to *justice*’ (emphasis added). The intention of the states parties which drafted the Statute may not be entirely decisive. The development of human rights is an inherently dynamic affair which, in the words of *Schabas*, ‘also means that the Statute is not locked into the prevailing values at the time of its adoption’.¹¹⁰ In the case of Lubanga, the Appeals Chamber expressed an exceptionally strong commitment in favour of human rights and fair trials, suggesting that they pervaded the operations of the ICC at all levels.¹¹¹

But whatever position one is inclined to take in this debate, it does not distract from our primary point of view that the case law of the European Court may serve useful purposes for the assessment of the admissibility issue under the Rome Statute. With the necessary modifications, the line of reasoning is similar to the one which was advanced in the previous sub-paragraph. The fact that the European Court renders opinions on lack of due process to the detriment of an accused which the ICC is either not willing or unable to apply as a bench mark for the assessment of its own jurisdiction, does not imply that the ICC should equally disdain procedural standards which are developed by the ECHR for other situations. It is highly unlikely that the ECHR will conclude that due process rights of the accused have been violated in situations in which the authorities are under the suspicion of concealing responsibility for human rights violations. Unless, of course, the accused concerned is sacrificed as a scapegoat to protect the truly responsible. But then, as indicated before, the ICC has every reason to scrutinize the deliberations of its fellow court.

Moreover, the European Court’s standards and reasoning which have been discussed at length in the previous part are entirely silent on suspects’ rights. They reflect situations which the ICC is most likely to encounter as well. The International Criminal Court can thus pick and choose the standards which have been developed for those situations, without having to bother about countervailing factors which may be beyond the scope of its jurisdiction.

4.3. Procedural Obligations in Respect of International Crimes: The Claim to Universality

As a universal court, the International Criminal Court will have to develop standards which have universal validity and can be equally applied in all situations,

¹⁰⁹) For a similar point of view *Carnero Rojo*, (2005), 869.

¹¹⁰) *Schabas* (2007), 198.

¹¹¹) *Prosecutor v. Lubanga*, (ICC-01/03-01/06), Judgement on the Appeal of Mr. Thomas Lubanga Dyllo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, § 37.

for the assessments of the question whether states have genuinely carried out criminal investigations or prosecution. This requirement of universal validity and applicability may hamper the ICC from adopting the standards which have been developed by the ECHR for this purpose, because the jurisdiction of the European Court has only a limited geographical scope. It would arguably even impede the ICC from applying those standards to the European states which are subject to the jurisdiction of the European Court, because this would expose the International Criminal Court to the reproach of differential treatment and Eurocentric bias.

We will therefore summarily explore whether the standards as espoused by the European Court are indeed region specific, or rather are shared by other human rights bodies and courts as well. To this purpose, we will examine some decisions of the Inter-American Court of Human Rights (IACHR) and the United Nations' Human Rights Committee which deal specifically with states parties' procedural obligations in case of serious and massive violations of fundamental human rights.

In the landmark case of *Velasquez Rodriguez*, the IACHR addressed the dismal practice of 'disappearances', which, during the seventies and eighties, was frequently employed by authoritarian regimes as a tactic to eliminate political opponents.¹¹² Like its European counterpart, the Inter American Court deduced the State's duty to prevent, investigate and punish any violation of the rights recognized by the American Convention on Human Rights from the States Parties' obligation to "ensure" the free and full exercise of the rights recognized by this Convention to every person subject to its jurisdiction.¹¹³ The Court clearly explained how this procedural obligation fitted into the matrix of human rights protection:

'An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention'.¹¹⁴

Next, the Court specified that this duty compelled the state 'to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation'.¹¹⁵

In applying these standards to the case at hand, the Court noticed 'a complete inability of the procedures of the State of Honduras, which were theoretically

¹¹² IACHR, 29 July 1988 (*Velasquez Rodriguez*), IACtHR, Series C, No. 4.

¹¹³ *Ibid.*, § 166.

¹¹⁴ *Ibid.*, § 172.

¹¹⁵ *Ibid.*, § 176.

adequate, to carry out an investigation into the disappearance of Manfredo Velásquez'.¹¹⁶ The investigations did not deserve the qualification 'serious', as they had been carried out by the Armed Forces, *the same body accused of direct responsibility for the disappearances*' (emphasis added).¹¹⁷ The Court thus hinted at the lack of impartiality and independence. Extrapolating from this, the Court held that it was convinced that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority, adding that 'even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention'.¹¹⁸

Although the Human Rights Committee is generally less elaborate in its reasoning, in essence it shares the opinions of the human rights courts in respect of national remedies and states obligations to conduct effective investigations. In the case of *Muteba v. Zaïre*, it assessed the communication of Mrs Muteba on behalf of her husband, who had been held incommunicado, subjected to various forms of torture and had been deprived of habeas corpus rights. Apart from holding that those facts disclosed violations of the International Covenant on Civil and Political Rights, the Committee stressed the state's obligation 'to conduct an inquiry into the circumstances of Mr. Muteba's torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future'.¹¹⁹

Interestingly, both the Inter-American Court of Human Rights and the Human Rights Committee have taken the opportunity to express their opinions on Amnesty Laws which intended to preclude any criminal investigations and punishment of persons involved in human rights violations. In the Barrios Altos case, members of the Peruvian Army who were acting on behalf of a "death squadron" known as the "Colina Group" had raided a building and killed 15 persons who were allegedly connected to the Maoist guerrilla group *Sendero Luminoso*. The courts had made some headway in the investigation of this case, but were barred from continuing their work by the launching of an Amnesty Law which exonerated members of the army, police force and civilians who had violated human rights or had taken part in such violations from 1980 to 1995.¹²⁰ While the new Peruvian government acquiesced to the facts and recognized its international responsibility, the Inter-American Court denounced the Amnesty Law in a principled decision, considering that

¹¹⁶ *Ibid.*, § 178.

¹¹⁷ *Ibid.*, § 180.

¹¹⁸ *Ibid.*, § 182. The reasoning of the Court was entirely similar in the parallel case of *Godínez Cruz* (IACHR, 20 January 1989, Series C. No. 5).

¹¹⁹ Human Rights Committee, 24 July 1984 (*Muteba v. Zaïre*), Communication No. 124/1982, § 13.

¹²⁰ IACHR, 14 March 2001 (*Barrios Altos Case*), IACtHR, Series C, No. 75, § 2, sub (i).

‘(...) all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law’.¹²¹

The Court continued that ‘owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible (...)’.¹²²

The Human Rights Committee has essentially taken the same position on amnesty laws. In the case of *Rodriguez v. Uruguay*, which involved a complaint that the victim of torture could not claim an effective remedy, because the alleged perpetrators enjoyed the benefits of an amnesty law, the government contested the obligation to investigate violations by a prior regime. While the Committee disagreed with the government on this point, it referred to its general comment on Article 7 (containing the prohibition on torture):

‘Complaints (on torture) must be investigated promptly and impartially so as to make the remedy effective.... The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future’.¹²³

The Committee noted

‘with deep concern that the adoption of the amnesty law effectively excludes in a number of cases the possibility of investigation into past human rights abuses (...) Moreover, the Committee is concerned that, in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further human rights violations’.¹²⁴

It is remarkable that human rights courts and bodies take a strong and uncompromising stance against amnesties, while the issue is still a matter of controversy in the context of the ICC (compare sub-paragraph 4.1). For the purpose of our topic, this joint rejection is important, because the problem of amnesties is closely connected to failing criminal investigations. A common condemnation of

¹²¹ *Ibid.*, § 41.

¹²² *Ibid.*, § 43.

¹²³ Human Rights Committee, 9 August 1994 (*Rodriguez v. Uruguay*), Communication No. 332/1988, § 12.3.

¹²⁴ *Ibid.*, § 12.4.

amnesties may thus be considered as evidence of the universally shared acknowledgement of the need for proper investigations in case of international crimes. The absence of similar opinions in the case law of the European Court, does, in our view, not imply that this court harbours a different position on the topic, but can simply be attributed to the fact that the European Court has not been confronted with the practice of wide spread amnesty legislation.¹²⁵

This short expose of relevant decisions of other human rights courts and bodies seems to indicate that the need for adequate criminal investigations of international crimes is universally shared. However, the research is admittedly too succinct and superficial to buttress the assumption that the standards to assess those investigations are similar as well and do not substantially differ from region to region. Two observations are apposite in this respect. First of all, it has been the purpose of this essay to focus on the relevant case law of the European Court of Human Rights. We have not intended to conduct an in-depth comparative research into possible region-specific differences. Such research might divulge some interesting distinctions, like the position on amnesties, which arguably would rather point at differences in factual and legal circumstances than evince differences in normative opinions between the human rights bodies inter se. It would, though, be an incentive for the International Criminal Court to broadly and open mindedly consider all relevant case law and decisions in this respect. Secondly, the limited jurisdictional scope of the European Court has not dissuaded the ICTR from extensively quoting its case law and using it as an authoritative normative source to sustain its own findings.¹²⁶ We assume that the ICC will follow the ICTR's example.

5. Conclusion

Due to their distinctive nature, functions and aims, the International Criminal Court and the European Court of Human Rights obviously have different approaches of international crimes and their perpetrators. The primordial task of the ICC is to ensure that perpetrators of international crimes are brought to criminal justice, either through national proceedings, or, if necessary, by doing

¹²⁵ In respect of the situation in Chechnya, the Russian State Duma adopted Decree no, 4124-III by which an amnesty was granted in respect of criminal acts committed by the participants to the conflict on both sides in the period between December 1993 and June 2003. The amnesty does not apply to serious international crimes, such as murder and that is probably the reason why the European Court made no critical comments; *Khashiyev and Akayeva v. Russia*, § 98 (cited above).

¹²⁶ To give one example: in *Prosecutor v. Nahimana, Brayagwiza and Ngeze*, (Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003, §§ 991-999) the Trial Chamber referred to case law of the ECHR on the proper relationship between the freedom of expression and the prohibition of incitement to racial discrimination.

the job itself. This involves a proper assessment of all available evidence and adequate interpretations of legal concepts, in short: the core business of criminal courts.

The ECHR's mandate is to verify whether States Parties to the European Convention observe human rights and secure that the fundamental rights of those residing on their territory are respected. This entails not only that those states should refrain from flagrant violations of those rights, including international crimes, themselves, prevent third parties from indulging in such violations and punish those who flout these basic standards. It also implies that the state should guarantee due process rights of those standing trial on a charge of having committed international crimes.

The gathering and evaluation of evidence is governed by national law and this is not an issue in which the European Court generally takes great interest, unless, of course, fundamental fair trial rights are jeopardized.¹²⁷ Nor would it concern the European Court very much whether persons are charged and convicted for national crimes or for international crimes and on the basis of which concept of criminal responsibility.

The International Criminal Court, on the other hand, starting from the premise that in case of system criminality states are inclined by nature to downplay or excuse international crimes and tend to conceal involvement of state agents, is arguably less sensitive to the risks of overzealous authorities whose closing down on suspects of international crimes may impair their right to a fair trial.

In spite of these conspicuous differences, both courts share considerable common ground in the normative assumption that states are under an obligation to conduct effective and independent criminal investigations into flagrant violations of human rights which amount to international crimes. It has been the purpose of this essay to explore this common ground in order to identify proper standards in the case law of the ECHR on the procedural limbs of state obligations which might equally serve the ICC as a frame of reference for the assessment of its own jurisdiction in the light of the complementarity principle.

In Section 4.3 we discussed in brief the possibility that the standards espoused by the European Court are too region-specific which might restrain the International Criminal Court from fully fledged application, out of fear of being considered too Eurocentric. We think that this apprehension is slightly exaggerated. A short investigation of judgements of the Inter-American Court of Human Rights and the decisions of the UN-Human Rights Committee already demonstrates that the need for adequate criminal investigations of international crimes is universally acknowledged. However, we admit that more extensive and profound research in a comparative perspective, possibly divulging regional particularities

¹²⁷ *Schenk v. Switzerland*, ECHR, 12 July 1988, § 46, Series A no. 140.

and differences, is necessary. It would obviously be recommendable for the ICC to take a broad and unbiased approach and take into account the decisions of other – regional and universal – human rights courts and bodies as well.

Essentially, this essay has been a plea for ‘cross-fertilization’ between courts. There is a golden opportunity for the ICC to reap the benefits of prior standard-setting by a fellow court, in order to find its way in largely uncharted terrain. The ICTY has sought for guidance in the case law of the European Court on Human Rights in order to structure and regulate its own criminal procedure.¹²⁸ The suggestion that the ICC might also draw inspiration from standards which are developed by the European Court for the assessment of procedural obligations of states reinforces this trend while it simultaneously emphasizes that these obligations have a strong human rights connotation as well.

¹²⁸⁾ Compare for instance *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, §24.