THE OVERUSE OF CRIMINAL JUSTICE IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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1. INTRODUCTION

The relationship between human rights and criminal justice has long been considered to be particularly intricate. On the one hand, human rights law may promote change in the criminal justice machinery at both the domestic and international levels. On the other hand, unsuitable national criminal law or wrongful application of the applicable criminal law and procedure provisions may interfere with treaty obligations undertaken by States in respect of human rights. It is therefore of the utmost importance that the existing bond between human rights and criminal justice be clearly defined in the context of the administration of criminal justice so that the objectives of both can be harmonised within the democratic state.[1]

In this context, the European Court of Human Rights (ECtHR) has played an important role as human rights adjudicator in the field of criminal law. An analysis of the Strasbourg case law on criminal matters reveals that the Convention obligations undertaken by the States are twofold: on one hand, the protection of the individual against the overuse of criminal justice and, on the other hand, the use of criminal law for the protection of the rights and freedoms of individuals and legal persons. The former Belgian Judge at the ECtHR, Françoise Tulkens, described these two aspects as the "the defensive role of

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1 Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford: Oxford U.P., 2006, p. 7-8.

human rights" and "the offensive role of human rights" in what she called "the paradoxical relationship between criminal law and human rights".[2]

This contribution aims at exploring the case law of the ECtHR in the light of the traditional "defensive role of human rights", focusing on the overuse of criminal justice against the individual and, in particular, on the overuse of criminalisation and of imprisonment. In other words, this contribution will revisit some of the cases in which the Strasbourg Court has considered the criminalisation of an act and the recourse to imprisonment to be in breach of a Convention right.

2. OVERUSE OF CRIMINALISATION

A manifestation of the overuse of the criminal justice machinery can be first found at the legislative level. When considering the criminal approach to be adopted in relation to a specific conduct, the legislature should take into account that criminal law should only be used as a last resort when no other alternative to a criminal law measure exists.

A look into the case law of ECtHR allows us to identify various group of cases where the Strasbourg Court has criticised the legislative choice on account of the excessive or disproportionate criminalisation of a certain conduct. Examples of this situation can be found in the cases *Dudgeon v. the United Kingdom* (no. 7525/76, 24 February 1983), *Norris v. Ireland* (no. 10581/83, 26 October 1988), *Modinos v. Cyprus* (no. 15070/89, 22 April 1993) and *A.D.T. v. the United Kingdom* (no. 35765/97, 31 July 2000) with regard to private homosexual acts between consenting adults; *S.L. v. Austria* (no. 4533/09, 9 January 2003) regarding homosexual acts of adult men with consenting adolescents between 14 and 18 years of age; *Vajnai v. Hungary* (no. 33629/06, 8 July 2008) on the wearing of red star, symbol of the international workers' movement at a demonstration; *Altug Taner Akçam v. Turkey* (no. 27520/07, 25 October 2011) concerning insults to "Turkishness"; *Mosley v. the United Kingdom* (no. 48009/08, 10 May 2011) regarding the non-compliance with the pre-notification requirement to publish news on private life; *Akgöl and Göl v. Turkey* (nos. 28495/06 and 28516/06, 17 May 2011) with regard to the participation in an unlawful but peaceful demonstration; *Wizerkaniuk v. Poland* (no. 18990/05, 5 July 2011) concerning the publication of unauthorised verbatim

2 Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights', *Journal of International Criminal Justice* 9 (2011), p. 577-595. In this paper F. Tulkens describes the historical role of human rights, which aims at affording protection against criminal law, and contrasts it with a new role in which criminal law is called into play in order to protect human rights.

quotations; *Bayatyan v. Armenia* (no. 23459/03, 7 July 2011) on conscientious objection in the military; *Mallah v. France* (no. 29681/08, 10 November 2011) with regard to the assistance of illegal entry, circulation or stay of a foreigner in the national territory; *Gillberg v. Sweden* [GC] (no. 41723/06, 3 April 2012) concerning the misuse of office due to refusal of access to research material owed by a public university; *Stübing v. Germany* (no. 43547/08, 12 April 2012) on incest; and *Şükran Aydin and Others v. Turkey* (nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09, 22 January 2013) regarding the use of mother tongue in political campaign.

In this context, two issues stand out in view of their recurrence in the case law: 1) the criminalisation of defamation and 2) "crimmigration" or the practice of treating irregular migration as a security and law enforcement question. These two issues will be addressed specifically below.

A. CRIMINALISATION OF DEFAMATION: THE OLD QUESTION

From the reading of the case law of the ECtHR, it can be inferred that the issue of criminalisation of defamation remains unsolved. Whereas the ECtHR has frequently considered specific criminal sanctions to be in breach of freedom of expression on account of its disproportionality, namely the use of prison sentences in defamation cases, it has not adopted a clear stance against criminalisation of defamation in itself. This in spite of the more straightforward position of the Parliamentary Assembly of the Council of Europe, which opposes any use of criminal sanctions against defamation in view of their substantial – and undesirable – effect on freedom of expression.[3]

For the ECtHR the imposition of criminal sanctions to defamation offences cannot be considered an automatic breach of Article 10 of the Convention.[4] It has however stressed that it raises serious concerns regarding freedom of expression. In the *Šabanović v. Montenegro and Serbia*[5] judgment, for example, the Strasbourg Court recalled that the use of criminal law sanctions in defamation cases was not in itself disproportionate and reiterated, however, that the nature and severity of the penalties imposed were factors to be taken into account. It

3 See, for example, Parliamentary Assembly of the Council of Europe Resolution no. 1577 (2007), "Towards decriminalization of defamation", 4 October 2007 (at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en (last visited 23 march 2017), where the Assembly insisted on the existence of "procedural safeguards enabling anyone charged with defamation to substantiate their statements in order to absolve themselves of possible criminal responsibility."

4 *Lindon, Otchakovsky-Laurens and July v. France* [GC], no. 21279/02 and 36448/02, 22 October 2007, *Radio and Others v. France*, Appl. 53984/00, 30 March 2004; *Rumyana Ivanova v. Bulgaria*, no. 36207/03, 14 February 2008.

5 *Šabanović v. Montenegro and Serbia*, no. 5995/06, 31 May 2011.

further recalled the Resolution of the Council of Europe calling on the member States which still provided for prison sentences for defamation – even if they were not actually imposed – to abolish them without delay. In the *Šabanović* judgment the fact that the applicant had been given a suspended sentence was seen with particular concern given that it could have been transformed into a prison sentence. Moreover, in the context of the penalties applied, the amount of the fine that an applicant is ordered to pay – and, when it occurs, the accumulation with the payment of compensation to the victim[6] – is carefully examined by the ECtHR.

In the case *Raichinov v. Bulgaria*[7] the Strasbourg Court held in particular that recourse to criminal proceedings in order to protect a person's reputation or pursue another legitimate aim under paragraph 2 of Article 10 had to be based on an assessment of the proportionality of an interference with the rights protected which implied considering whether the authorities could have resorted to means other than a criminal penalty, such as civil and disciplinary remedies. In that particular case, the ECtHR concluded that the criminal proceedings against the applicant had been a disproportionate response to the incident in issue (a remark about a deputy Prosecutor-General) and that the applicant's resulting sentence (a fine and a public reprimand), while being in the lower range of the possible penalties, was still a sentence under criminal law, registered in the applicant's criminal record and therefore not necessary in a democratic society.

By contrast, situations could exist where the ECtHR accepts the need to apply a criminal sanction to defamatory statements whenever those are capable of undermining an individual's right to presumption of innocence protected under Article 6 § 2 of the Convention. In the case *Ruokanen and Others v. Finland*[8], the Strasbourg Court noted that in view of the margin appreciation accorded to States, a criminal measure as a response to defamation could not, as such, be considered disproportionate to the aim pursued. In addition, it highlighted, however, that the imposition of a prison sentence for a press offence would be compatible with Article 10 "*only in exceptional circumstances, notably where other fundamental rights had been impaired, as for example, in the case of hate speech or incitement to violence*". In this case the ECtHR considered that a journalist who had been convicted of defamation should had verified the accuracy of a rape accusation. It further noted that, although quite severe, the penalties imposed, seen against the background of the circumstances of the case, had been proportionate in regard to the competing interests at stake. The ECtHR thus reiterated the need, in the context of defamation cases, to assess the necessity of a given specific criminal sanction on a case-by-case basis.

6 *Do Carmo de Portugal e Castro Câmara v. Portugal*, no. 53139/11, 4 October 2016.
7 *Raichinov v. Bulgaria*, no. 47579/99, 20 April 2006.
8 *Ruokanen and Others v. Finland*, no. 45130/06, 6 April 2010.

B. CRIMMIGRATION: A NEW TREND

Irregular migration into Europe has surged in the last two decades and, in particular, in the wake of the recent migration crisis. Europe's response to this surge has notoriously emphasised the role of criminal law in this area. On the one hand, the State criminal-law machinery, including detention, prosecution and sentencing to imprisonment terms, has been used for the purpose of immigration enforcement and, on the other hand, expulsion and deportation measures and detention for that purpose are imposed as a method of crime control.[9]

This has been called the *crimmigration* trend; a policy which perceives the migrant as the newest "enemy", a social outcast whose presence is no longer a valuable contribution to the European melting pot and its booming economy, but instead endangers social order, the social-security balance and the organisation of the labour market, if not the continent's ethnic and religious fabric.

No better lens through which to observe the current fusion of criminal and immigration law exists than the imprisonment and detention of migrants. The number of refugees, asylum-seekers, rejected asylum-seekers, stateless persons, trafficked persons and irregular migrants who have been jailed is at unprecedented levels in Europe. In some jurisdictions, detention is mandatory or based on presumptions in favour of detention. When the domestic legal framework is vague and open-ended, immigration authorities rely on discretionary administrative practices. Furthermore, detention is frequently applied as part of a policy to deter future asylum-seekers or to dissuade those who have commenced their claims from pursuing them. Sometimes it is even used as a punitive measure for irregular entry or presence in the country, lack of documentation or failure to comply with administrative requirements or other restrictions related to residency in the host country. The ECtHR has already had opportunity to deliberate on the issue and has reiterated in many occasions that detention of migrants has to have a legal basis in domestic law and must be necessarily demanded by the circumstances of the case.

Practice demonstrates that asylum-seekers are detained for indefinite or very prolonged periods of time, placed at best in mid-security, special detention centres, at worst in police stations and common prison facilities, but in any event treated as if they were convicted criminals. In Europe, as elsewhere, the *crimmigration* trend has led to the excessive detention of asylum-seekers. Unfortunately the Court failed to resist this trend. *Saadi v. the United Kingdom*[10] is the regrettable landmark in this trend in the Court's case-law. According to that judgment, a State may detain an asylum-seeker to prevent unauthorised entry

9 See my opinion attached to *Abdullahi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13, 22 November 2016, with further references to the relevant materials.

10 *Saadi v. the United Kingdom [GC]*, no. 13229/03, ECHR 2008-I.

and to expedite the asylum claim, and it is not relevant whether detention is necessary in order to prevent that irregular entry. Efficiency considerations prevail over liberty, in the Grand Chamber's view.

Quite remarkably, some Chambers of the Strasbourg Court have departed from such rationale in what has now become a silent but growing revolt against *Saadi*. In a succession of cases, various Chambers of the ECtHR held the view that detention of asylum-seekers and, in general, of migrants breaches Article 5 § 1(f) when it is applied automatically and no other less drastic measure was sought. In *Louled Massoud*[11], which concerned a detention which lasted for more than eighteen months after the determination of the applicant's asylum claim, the ECtHR found "*it hard to conceive that in a small island like Malta, where escape by sea without endangering one's life is unlikely and fleeing by air is subject to strict control, the authorities could not have had at their disposal measures other than the applicant's protracted detention to secure an eventual removal in the absence of any immediate prospect of his expulsion.*" In *Suso Musa*[12], the ECtHR cited the passage of Recommendation Rec (2003) 5 of the Committee of Ministers referring to the "*careful examination of their necessity in each individual case*", in order to conclude that it had "*reservations as to the Government's good faith in applying an across-the-border detention policy (save for specific vulnerable categories) with a maximum duration of eighteen months.*" Oddly enough, the necessity principle implicitly came into play in the assessment of the Government's good faith and the Court held that the applicant's detention up to the date of the determination of his asylum application was not compatible with the first limb of Article 5 § 1(f).

In *Rahimi*[13], a case concerning the detention pending his expulsion of an unaccompanied minor who had presented a request for political asylum, the Chamber reproached the national authorities because "*they [had] not [sought] to establish whether the applicant's placement in the Pagani detention centre had been a measure of last resort or whether another less drastic measure might have sufficed to secure his deportation*". In *Raza*[14], a case concerning the detention of an adult pending deportation, the Court noted that *"[i]t should also be observed that after his release on 15 July 2008 Mr Raza was placed under an obligation to report to his local police station at regular intervals… This shows that the authorities had at their disposal measures other than the applicant's protracted detention to secure the enforcement of the order for his expulsion.*" In *Mikolenko*[15], another case concerning the detention of an adult pending deportation, the Court concluded that the grounds for the applicant's detention, imposed with a view to his

11 *Louled Massoud v. Malta*, no. 24340/08, 27 July 2010.
12 *Suso Musa v. Malta*, no. 42337/12, 23 July 2013.
13 *Rahimi v. Greece*, no. 8687/08, 5 April 2011.
14 *Raza v. Bulgaria*, no. 31465/08, 11 February 2010.
15 *Mikolenko v. Estonia*, no. 10664/05, 8 October 2009.

deportation, did not remain valid for the whole period of his detention because the Estonian authorities had at their disposal measures other than the applicant's protracted detention in the deportation centre, since after his release he was obliged to report to the Board at regular intervals.

Such use of criminal sanctions within the framework of border controls has prompted criticism from different entities, including non-governmental organizations and international organisations.[16] In this regard, the issue paper prepared in 2010 by the Commissioner for Human Rights of the Council of Europe is noteworthy and in which he stressed that

> "the criminalisation of persons seeking international protection is a matter of substantial concern in Europe. This takes place in a number of ways – measures which make access to European territory extremely difficult for refugees, such as visa requirements, carriers sanctions, interdiction at sea, criminal sanctions on the using of false documents etc. Secondly, when asylum seekers manage to arrive in Europe, they often face further criminal sanctions – criminal charges in respect of the manner of their arrival, prohibition on employment and criminalisation of unauthorised employment when there if no functioning reception system which will permit asylum seekers to eat and have shelter. Criminal penalties for changing address without authorisation, failing to notify state authorities of changes of circumstances and detention are all increasingly common and permitted in the EU acquis."[17]

3. OVERUSE OF IMPRISONMENT

Mass incarceration is a worldwide growing concern and is deeply linked to criminal policy and sentencing practice. The UN Special Rapporteur on Torture, Juan E. Méndez, has characterised the overuse of imprisonment as "*one of the major underlying causes of overcrowding which results in conditions that amount to ill-treatment or even torture*."[18]

According to the latest SPACE Statistics, despite some signs of decline such as the fact that the prison population rate has decreased by 7 % in 2014, the ratio of

16 Among others, Alan Desmond, 'The Development of a Common EU Migration Policy and the Rights of Irregular Migrants: a Progress Narrative?', Human Rights Law Review, 2016, 16, p. 247-272.

17 Council of Europe, Commissioner for Human Rights, 'Criminalisation of Migration in Europe: Human Rights Implications', CommDH/IssuePaper(2010)1.

18 United Nations General Assembly, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/68/295, 9 August 2013 (at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/422/85/PDF/N1342285.pdf?OpenElement (last visited xx).

inmates being of 124 inmates per 100,000 inhabitants, overcrowding remains a problem in Europe.[19]

The root causes of prison overcrowding in Europe were recently summarised in the "White Paper on Prison Overcrowding", prepared by the Council of Europe[20]: they included penal policy and legislation leading to overuse of the penal system; the limited use of alternatives to detention on remand; length of detention on remand; and limited use of community sanctions and measures. This has led to what the Open Society Foundation has called "the most overlooked human rights crisis in our time".[21] In this regard the Parliamentary Assembly of the Council of Europe has recently observed that the high number of pre-trial detainees in Europe was an indication that the permissible grounds for pre-trial detention were being to widely interpreted in order to justify pre-trial detention for abusive purposes aiming, inter alia, to put pressure on detainees in order to coerce them into confessing to a crime, to neutralise political competitors, to intimidate civil society and to silence critical voices.[22]

The ECtHR has also highlighted the existing relationship between prison overcrowding and the excessive recourse to pre-trial. In the pilot judgments *Torreggiani and others v. Italy*[23] and *Varga and others v. Hungary*, for example, the ECtHR observed that the solution to the problem of overcrowding lied in the *"reduction of the number of prisoners by more frequent use of non-custodial punitive measures and minimising the recourse to pre-trial detention."*[24]

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19 2014 Council of Europe Penal Statistics, at https://wcd.coe.int/ViewDoc.jsp?p=&id=2423393&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE&direct=true (last visited xx)

20 Council of Europe, Directorate General Human Rights and Rule of Law, White Paper on Prison Overcrowding, 30 June 2016 (at: www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/PCCP%20documents%202016/PC-CP%20(2015)%206_E%20Rev%207 %20White%20Paper %2030 %20June%202016.pdf (last visited xx).

21 Open Society Justice Initiative, Presumption of Guilt: The Global Overuse of Pretrial Detention, 2014 (at https://www.opensocietyfoundations.org/sites/default/files/presumption-guilt-09032014.pdf (last visited xx).

22 Parliamentary Assembly of the Council of Europe, Abuse of pretrial detention in States Parties to the European Convention on Human Rights, Summary of the Draft Resolution, 7 September 2015 (at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21992&lang=en (last visited xxx)

23 *Torreggiani and Others v. Italy*, Appls. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, 8 January 2013. It is important to highlight the effects of a good execution of the *Torreggiani* judgment by the Italian authorities in so far as they adopted a group of structural measures in view of complying with the judgment which resulted in an important and continuing drop in the prison population (see, in this regard, the 2014 Report on Supervision of the Execution of Judgments and Decisions (https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680592ae9) and the Action Plan submitted by the Italian Authorities to the Committee of Ministers (http://hudoc.exec.coe.int/ENG?i=DH-DD(2014)1143E).

24 *Varga and Others v. Hungary*, Appls. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, 10 March 2015.

An integrated approach to the problem of prison overcrowding requires long-term solutions, including changes to the legal framework, practices and attitudes. Penal policies that over-criminalise and over-punish must be subjected in penalties for minor offences, an increase in punishment suspension, parole and early release possibilities, a reduction in custodial measures, diversion of mentally-ill offenders and drug-addicted offenders to therapy thus replacing the autopilot cycle of arrest, prosecution and incarceration – all these are well-known alternatives to a strict penal policy.[25]

A. ABUSE OF PRE-TRIAL DETENTION

The right to liberty is protected by Article 5 of the Convention and has been considered to be "*in the first rank of the fundamental rights that protect the physical security of an individual*".[26] According to the ECtHR, the list provided by Article 5 regarding the situations in which recourse to detention may occur has to be strictly interpreted.[27]

Within the framework of the Council of Europe, the Parliamentary Assembly has recently stressed the importance of the presumption of innocence in criminal proceedings and reiterated that pre-trial detention should be used only in exceptional circumstances[28], as a last resort, "*when alternative measures of restraint are insufficient to safeguard the integrity of the proceedings*."[29] That is not, however, what the practice within many of the Contracting States of the Council of Europe has shown.

In the case *Nart v. Turkey*[30] the Court recalled that pre-trial detention of minors should be used only as a measure of last resort and added that, if such a measure was to be applied, it had to be for the shortest period of time. In that case, the Court additionally observed that the domestic authorities had not taken into consideration the applicant's age when ordering his detention. Following the same approach, in the *Güvec v. Turkey*[31] judgment the ECtHR held that the

25 See my opinion joined to *Mironovas and Others v. Lithuania*, nos. 40828/12, 29292/12, 69598/12, 40163/13, 66281/13, 70048/13 and 70065/13, 8 December 2015.

26 *McKay v. Uk (GC)*, no. 543/03, 3 December 2006.

27 See, for example, *Guzzardi v. Italy*, no. 7367/76, 6 November 1980.

28 The elements concerning a reductionist policy on the use of pre-trial detention as a preventive measure can be found already in Recommendation R(99) 22 concerning prison overcrowding of the Committee of Ministers of the Council of Europe (at www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/PCCP%20documents%202016/Recommandation %20(99)%2022 %20F.pdf (last visited xxx).

29 See Parliamentary Assembly of the Council of Europe, Abuse of pretrial detention in States Parties to the European Convention on Human Rights, Summary of the Draft Resolution, 7 September 2015 (at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21992&lang=en (last visited xxx).

30 *Nart v. Turkey*, no. 20817/04, 6 May 2008.

31 *Güvec v. Turkey*, no. 70337/01, 20 January 2009.

applicant's detention in an adult prison had been in contravention of the applicable regulations in force in Turkey at the material time and of the country's obligation under international treaties. In addition, the ECtHR also found a violation of Article 3 of the Convention due to the fact that the applicant's detention had increased his psychological problems for which he did not receive adequate medical care. In *Kandzhov v. Bulgaria*[32] the ECtHR was called to analyse the (un)lawfulness of the applicant's arrest and detention for 72 hours for putting up two posters allegedly insulting the Minister of Justice and gathering signatures calling for the Minister's resignation. On account of those acts, criminal proceedings had been instituted against the applicant for insult and for hooliganism under the relevant provisions of the Criminal Code. The ECtHR firstly held that, at the material time, the charge of insult was a privately prosecutable offence and could not attract a sentence of imprisonment; therefore, there had been no basis for the applicant's detention and the ECtHR highlighted that the Prosecutor's Office had "*blatantly ignored the clear and unambiguous provisions of domestic law*." In so far as the charges of hooliganism, the Court observed that the applicant's actions had not amounted to the constituent elements of that offence. His detention and arrest on that account had also been unlawful. Furthermore, in finding a violation in respect of Article 10 on account of the applicant's arrest and detention, the ECtHR reiterated the need for Governments' to *"display restraint in resorting to criminal proceedings, and the associated custodial measures, particularly where other means are available for replying to the unjustified attacks and criticism of their adversaries (see, mutatis mutandis, Castells v. Spain, judgment of 23 April 1992, § 46, Series A no. 36)."*

The ECtHR has also, on a multitude of occasions, set out its position on the length of pre-trial detention. The Strasbourg Court has, in this regard, adopted what could be called a strict approach. The ECtHR has noted that the reasonability for an accused to remain in detention must be assessed on the facts of each case. In addition, it has stated that "*Continued detention can be justified in a given case only if there are actual indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention.*"[33] Moreover, the ECtHR has emphasised that "*the existence and persistence of a reasonable suspicion that the person arrested has committed an offence is a prerequisite for the lawfulness of the continued detention. However, after a certain amount of time has elapsed it no longer suffices.*"[34] Furthermore, the ECtHR requires that "relevant" and "sufficient" grounds justify continued detention and that authorities have

32 *Kandzhov v. Bulgaria*, no. 68294/01, 6 November 2008.
33 *Kudla v. Poland*, no. 30210/96, 26 October 2000.
34 *Qing v. Portugal*, no. 69861/11, 5 November 2015.

displayed "special diligence" in the conduct of proceedings.[35] Additionally, the Court requires that arguments for and against release be not "general and abstract"[36] and imposes on the authorities the obligation to consider alternative measures of ensuring an individual's appearance on trial when considering whether he or she should be released or detained.[37] Hence, the ECtHR has on many occasions found a violation on account of the general terms reasons adduced by authorities justifying the length of pre-trial detention and where authorities had not considered alternative measures for pre-trial detention: for example, *Ignatov v. Ukraine*[38], in which the applicant had been in pre-trial detention for nearly a year and eight months; or *Qing v. Portugal*, where the applicant stayed in pre-trial detention for one year and seven months.[39]

In the context of pre-trial detention special attention should be given to situations in which individuals were subject to criminal proceedings and, ultimately, to detention on account of abusive reasons (e.g. political grounds). The use of the criminal justice machinery in such a way is an obvious problem to the democratic values protected by the Convention and undertaken by the Council of Europe Member States. Under the Convention, rule of law and democracy are protected by Article 18, which primarily aims at prohibiting the abusive restriction of the rights established in the European Convention.[40]

There are not many examples of cases in which the ECtHR had to address Article 18 and the case law is therefore still flourishing in this regard. The first violation of Article 18 was found in 2004 in the *Gusinskiy*[41] judgment. The case concerned the arrest of a Russian and Israeli national who, at the material time, was the Chairman of the Board and majority shareholder of a Media company, which included a popular Russian television channel. He had been arrested on suspicion of fraud for which he was subsequently charged. He was released from detention in exchange for an undertaking that he would not leave the country. In addition, during his detention, the Acting Minister for Press and Mass Communications had offered to drop the criminal charges against the applicant if he would sell his Media company to Gazprom (a State-controlled company which was in dispute with the Media company about the latter's debts in its favour) at a price to be determined by Gazprom. Following the signing of such an agreement, criminal proceedings against the applicant were discontinued. Before the

35 *Labita v. Italy (GC)*, no. 26772/95, 6 April 2000.

36 *Smirnova v. Russia*, nos. 46133/99 and 48183/99, 24 July 2003.

37 *Suslov v. Russia*, no. 2366/07, 29 May 2012.

38 *Ignatov v. Ukraine*, no. 40583/15, 15 December 2016.

39 *Qing*, cited above.

40 For an in-depth analysis on how the abuse of criminal proceedings undermine democracy in the Strasbourg's Court's case-law, see Helen Keller and Corina Heri, 'Selective Criminal Proceedings and Article 18 of the ECHR. The European Court of Human Rights Untapped Potential to Protect Democracy', *Human Rights Law Journal*, Vol. 36, no. 1-6, p. 1-10, 30 June 2016.

41 *Gusinskiy v. Russia*, no. 70276/01, 19 May 2005.

Strasbourg Court, the applicant argued that his detention had been unlawful and arbitrary as it had intended to force him to sell his media business on unfavourable terms and conditions. When analysing the applicant's complaint under Article 18 of the Convention, the Court had to assess whether the applicant had been detained for any other purpose than that provided for in Article 5 § 1(c). The ECtHR observed that it had not been disputed that the agreement linked the termination of the criminal investigation against the applicant to the sale of his media organisation to Gazprom, a company controlled by the State. In the Court's opinion, it was not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies.

More recently, the Court was called to analyse the lawfulness of the arrest and detention pending trial in two cases against Azerbaijan. In *Mammadov*[42], the ECtHR considered that the applicant, an Azeri opposition politician and blogger who had a history of criticising the Government, had been arrested and detained without any evidence to reasonably suspect him of having committed the offence with which he was charged, namely that of having organised actions leading to public disorder. The Court concluded that the actual purpose of his detention had been to silence or punish the applicant for criticising the Government and publishing information it was trying to hide. Therefore, the Court considered that the domestic authorities had not acted in good faith. In *Rasul Jafarov*[43], the ECtHR considered that the arrest and pre-trial detention of a human rights defender and also co-founder of a non-governmental organisation who had been involved in the preparation of various reports relating to human rights issues in Azerbaijan, had been unjustified in so far as a number of factors supported the argument that the actual purpose of the measures against the applicant had been to silence and to punish him for his activities as a human rights defender. In particular, his arrest and detention in 2014 had occurred in the general context of an increasingly harsh and restrictive legislative regulation of NGO activity; there had been numerous statements by high-ranking officials and articles published in pro-Government media which had accused local NGOs and their leaders, including the applicant, of being traitors and foreign agents; and several other notable human rights activists, who had also cooperated with international organisations protecting human rights, had similarly been arrested and charged.

42 *Mammadov v. Azerbaijan*, no. 4762/05, 17 December 2009.
43 *Rasul Jafarov v. Azerbaijan*, no. 69981/14, 17 March 2016.

B. EXCESSIVE CUSTODIAL SENTENCE

The excessive application of custodial sentences is a twofold reality in the Member States of the Council Europe: in some cases, the application of a sentence of imprisonment is disproportional in itself; in others, it is the length of that sentence that raises proportionality problems. With regard to the jurisprudence of the ECtHR, it can be considered that the Strasbourg Court has adopted a proportionality-based approach to custodial sentences by assessing the necessity of its application – or its length – to the offence committed in the light of the circumstances of the case.

The majority of cases in which the ECtHR has been called to pronounce itself on the need to apply a custodial sentence refers to the rights protected by Articles 10 (freedom of expression) and 11 of the Convention (freedom of assembly and association). Recently, in the case *Murat Vural v. Turkey*[44] the ECtHR had to assess whether the prison sentence of thirteen years to which the applicant had been convicted had been excessive and disproportionate to the offence in question under Article 10 of the Convention - pouring paint over statues of Mustafa Kemal Atatürk, the founder of the Republic of Turkey, as a political protest (under Turkish law the applicant had been initially sentenced to twenty-two years and six months' imprisonment, but on appeal the sentence had been reduced to about thirteen years' imprisonment). The ECtHR noted that although the applicant's conviction and the imposition of a prison sentence had been prescribed by a law which criminalised certain conducts considered to be insulting to Atatürk's memory and the damaging to the sentiments of the Turkish society, the thirteen years' imprisonment imposed on him had been extremely severe. The ECtHR considered that while the applicant's acts had involved a psychical attack on property, they had not warranted the imposition of a custodial sentence. The Court further reiterated what it had said in the *Akgöl and Göl* judgment, namely that peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence.

In *Karpyuk and Others v. Ukraine*[45], the ECtHR had to analyse whether the conviction of three applicants for the organisation and participation in a mass protest in Kyiv in March 2001 had interfered with their right to freedom of assembly. The Strasbourg Court first noted that Article 11 only protected the right to "peaceful assembly" and did not cover a demonstration where the organisers and participants had violent intentions. The ECtHR stated that, even considering that a sanction for the applicant's actions in organising an obstructing gathering and inciting violence during the protest could have been warranted by the demands of public safety, the long prison sentences imposed on

44 *Murat Tural v. Turkey*, no. 9540/07, 21 October 2014.

45 *Karpyuk and Others v. Ukraine*, nos. 30582/04 and 32152/04, 6 October 2015.

the applicants had, however, not been proportionate to the legitimate aim pursued. It further considered that the sanction imposed had not only been severe, but had also a chilling effect on the applicants and other persons organising protest gatherings. In addition, to reach its conclusion, the ECtHR also took into account the fact that the applicants' conviction had resulted from a trial that had not met the requirements of Article 6 of the Convention. In *Kakabadze and Others v. Georgia*[46], the ECtHR considered that the application of thirty days of deprivation of liberty to the applicants (the most severe penalty applicable to the offences in question), had been an unreasonable and drastic penalty having regard, in particular, to the absence of any violent behaviour during an authorised picket.

The ECtHR has also considered a prison sentence of five months in which its execution had been suspended to be a disproportionate sanction to the legitimate aim pursued in the context of Article 10 of the Convention. It said so, for example, in the case *Kanellopoulou v. Greece*[47], which concerned the publication of articles which could have an adverse effect on an individual's image. In the case *Marchenko v. Ukraine*[48], the ECtHR adopted the same reasoning and stressed that the fact that a sentence is suspended *"does not alter that conclusion particularly as the conviction itself was not expunged."*

Lastly, as far as the length of a prison sentence is concerned, a special reference should be made regarding life imprisonment. In the case law of the ECtHR this issue has been addressed under Article 3 of the Convention. The principles concerning the whole life order were recently set out in *Vinter and Others v. the United Kingdom*[49] and clarified in *Murray v. the Netherlands*[50], in which the Grand Chamber of the ECtHR held that the imposition of a whole life prison sentence without the possibility of review would be in breach of Article 3. According to *Vinter*, the Convention as interpreted by the ECtHR requires from States that they have in place a mechanism offering the possibility of review of a whole life sentence at the time a sentence is imposed. In *Vinter*, the ECtHR thus acknowledged the right to parole if and when the legal requisites of parole obtain.[51] The *Vinter* approach was later followed in *Lázló Magyar v. Hungary* (no. 73593/10, 20 May 2014), in *Harakchiev and Tolumov v. Bulgaria* (nos. 15018/11 and 61199/12, 8 July 2014) and *T.P. and A.T. v. Hungary* (nos. 37871/14 and 73986/14, 4 October 2016).[52]

46 *Kakabadze and Others v. Georgia*, no. 1484/07, 2 October 2012.

47 *Kanellopoulou v. Greece*, no. 28504/05, 11 October 2007.

48 *Marchenko v. Ukraine*, no. 4063/04, 19 February 2009.

49 *Vinter and Others v. the United Kingdom (GC)*, nos. 66069/09 130/10 3896/10, 9 July 2013.

50 *Murray v. the Netherlands (GC)*, no. 10511/10, 26 April 2016.

51 See my opinion joined to *Hutchinson v. the United Kingdom (GC)*, no. 57592/08, 17 January 2017.

52 In opposition to the above, there are also situations where the ECtHR has criticised the domestic courts for imposing lenient criminal sanctions where the severity of the crimes committed

4. CONCLUSION

From the above analysis it can be concluded that the ECtHR has adopted a twofold approach in the context of the overuse of criminal justice: in some cases it controls the excessive application of criminal law and criminal sanctions with regard to a specific conduct (which is most visible in the context of Articles 10 and 11 cases); and in other cases, it criticises States for having adopted a lenient sentence with regard to an offender (which will normally be the case in the context of killing or ill-treatment committed by law-enforcement agents). The two perspectives mirror the relationship between human rights and criminal law and the particular function of human rights law in the administration of criminal justice. The majority of the cases, however, demonstrate that the ECtHR has, most of the time, the role of controlling the application of excessive punishment. With regard to the particular aspect of pre-trial detention and custodial sentences, the case law of the ECtHR persists on the compliance with the principle of "last resort" and has been calling on States to consider alternative measures to detention. It further urges States to create mechanisms enabling the possibility of parole in the context of whole life prison sentences. Moreover, the ECtHR has had an important role in controlling the excessive use of criminal law in the context of irregular migration and in reminding Member States that they should not overuse criminal law as an instrument of border patrol; the "*crimmigration*" trend is an example of that.

required the application of a prison sentence. Examples of this can be found in *Kasap and Others v. Turkey*, no. 8656/10, 14 January 2014, where the ECtHR found a violation of Article 2 on account of the suspension of pronouncement of judgment in which an officer considered to be responsible for causing death by negligence had been sentenced to one year and eight month's imprisonment; *Derman v. Turkey*, 21789/12, 31 May 2011, concerning the complaint that criminal proceedings against police officers for torture had been ineffective on account, inter alia, that their sentenced had been suspended on the ground that it was unlikely that they would reoffend; *Shishkin v. Russia*, 18280/04, 7 July 2011, in which the applied sentence below the statutory minimum – and the suspension of its execution – in a case concerning ill-treatment by the police was considered by the ECtHR to be manifestly disproportionate to the gravity of the acts committed; *Enukidze and Girgvliani v. Georgia*, 25091/07, 26 April 2011, where the ECtHR considered that the prison sentences in respect of crimes of abduction, beating and killing by law enforcement agents and the way they had been imposed in practice had been inadequate and that the pardon granted and release on license had been too lenient and unreasonably generous and in which stressed that States had to be stringent when punishing law-enforcement officers in order to combat the sense of impunity.