Substantive and procedural criminal-law protection of human rights in practical legal reasoning

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1. Introduction

There is an increasing trend of acceptance that in some instances human rights must be protected through criminal law. This *trend*, however, marks a gradual development.[1] Even the most adamant believers in the conceptual and operational correctness and appropriateness of the human rights protection through the mechanisms of criminal law must accept that those versed in the precepts of the traditional human rights law doctrine or the doctrine of criminal law, respectively, will have some difficulties in putting the concepts of 'human rights protection' and 'the duty to put criminal law in action' in the same equation.[2] Indeed, some have seen the correlation between these two concepts as an expression of a paradoxical relationship.[3]

A radical pursuit to propagate the idea of coercive human rights law is thus ill-advised. It is arguably more appropriate to attempt to elucidate its doctrinal foundations and the manner in which

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[1] On a historical reflection, it is worth noting that the *due process* rights of the accused have passed through a similar process of recognition in criminal law. In the traditional criminal law doctrine these rights were seen as an obstacle course designed to present formidable impediments to carrying the accused any further along in the process. As such, they were opposed to an effective mechanism of *crime control* exercised through the application of criminal law (see further, H.L. Packer, *The Limits of the Criminal Sanction* (Stanford, Stanford University Press 1968)). Gradually, however, the criminal law doctrine has abandoned this dialectic of due process rights and crime control. Now the due process rights of the accused are seen as internationally recognised 'general principles of law' which are immanent to the very concept of democracy and as such deserve a special recognition and protection in criminal process (see further, M.C. Bassiouni, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions", 3(235) *Duke Journal of Comparative & International Law* (1993), pp. 235-297; S. Zappalà, "The Rights of Victims v. the Rights of the Accused", 8 *Journal of International Criminal Justice* (2010), pp. 137-164).

[2] See further, K. Kamber, *Prosecuting Human Rights Offences: Rethinking the* Sword *Function of Human Rights Law* (Leiden, Brill 2017), pp. 6-15.

[3] F. Tulkens, "The Paradoxical Relationship between Criminal Law and Human Rights", 9 *Journal of International Criminal Justice* (2011), pp. 577-595.

its various elements interact in making a functional whole. With this in mind, this contribution will concentrate on a very narrow segment of the latter aspect of the endeavour to understand the concept of coercive human rights law. More specifically, it will seek to expound an *interaction* between the substantive and procedural protection of human rights through the mechanisms of criminal law in the practical reasoning of human rights law.

The term 'practical reasoning of human rights law' in this context must be understood, for all practical purposes, as the examination of individual complaints in the exercise of quasi-criminal jurisdiction by international human rights courts.[4] Such a jurisdiction is essentially the international supervisory bodies' actual capacity effectively to review national criminal procedures and, where needed, to trigger local prosecutions.[5]

It has been shown elsewhere that this quasi-criminal jurisdiction exists in the operation of the European Convention on Human Rights (hereinafter: 'the Convention').[6] This contribution will therefore assume that it is accepted that through the adjudication of the Convention rights by the European Court of Human Rights (hereinafter: 'the Court') and the activities of the Council of Europe Committee of Ministers in the execution of the Court's judgments, the Convention system of human rights protection provides for an archetypal of quasi-criminal jurisdiction.

Thus, from this perspective, inquiring into the interaction between the substantive and procedural criminal-law protection of human rights in practical legal reasoning essentially means examining the manner in which this interaction is conceived in the Court's case-law. This will accordingly be the subject of the present discussion.

Before proceeding with this discussion, an excursus is needed into the meaning of 'substantive' and 'procedural' protection of human rights through the mechanisms of criminal law.

2. Substantive and procedural criminal-law protection of human rights

In its interaction with criminal law, human rights law has dual function. First, human rights law vests any person suspected or accused of a criminal offence with legal rights shielding him or her from the state repression in the investigation and prosecution of crime.[7] The function of human rights law is thus to neutralise the application of criminal-law mechanisms against an individual. This function is conveniently denoted as the *shield* function of human rights law. On the other hand, in some instances human rights law mandates the state to criminalise, investigate, prosecute and, if appropriate, punish criminal attacks on human rights. The function of human rights law in this sense is offensive and leads to the triggering, rather than neutralising the effects, of the application of

[4] The same jurisdiction could be conceived within the framework of a national constitutional or some other human rights discourse that has appropriately domesticated the relevant principles of international human rights law.

[5] See further, A. Huneeus, "International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts", 107 *American Journal of International Law* (2013), pp. 1-44.

[6] Ibid., pp. 23-26; Kamber, *supra* n. 2, pp. 367-375.

[7] These are the (non-controversial) due process rights.

criminal-law mechanisms. This is thus a coercive or, as descriptively denoted, *sword* function of human rights law.[8]

For the purpose of a conceptual and methodological clarity, it is of a paramount importance to bear in mind that in the context of the coercive function of human rights law the criminal-law mechanisms operate not (only) because they seek to uphold the relevant public-based considerations expressed through the applicable criminal law prohibition but (also) because to criminalise, investigate, prosecute and, if appropriate, punish criminal attacks on human rights is something owed to the individual holding those rights by virtue of international human rights law.

This does not mean that the operation of criminal-law mechanisms is a private facility, disconnected from the relevant public-based considerations related to the administration of criminal law. What is in issue in this context is the enforcement, through the mechanisms of criminal law, of the requisite human rights protection which cannot otherwise be achieved but through the application of those mechanisms, namely through investigation, prosecution and punishment of those responsible for the human rights offence. In practical reasoning of contemporary criminal justice discourse, this (coercive) human rights component of the administration of criminal law operates concurrently with the public-based component of that activity and together with the latter conforms into a functional structure.[9]

The coercive function of human rights law operates at two levels: substantive and procedural.

The first level concerns the *substantive* protection of human rights through the mechanisms of criminal law. It implies criminalisation of a conduct endangering human rights and/or the functioning of the operational capacities of a state to abstain from the infringement of a right or, in some instances, to prevent the risk of infringement of a right from materialising. In general, the substantive level of protection opens complex questions related to, for example, the *ultima ratio societas* argument and the legitimacy of the coercive function of human rights law, the principle of legality, or the adequacy of alternative responses to human rights offences in the context of criminal justice.[10]

The foundational, and most sensitive, consideration in this context is to determine which conduct endangering human rights requires protection through criminal law. In other words, it is necessary to determine what constitutes a *human rights offence*. For the purposes of the present discussion, the following definition, developed elsewhere, will be adopted:

> "The term human rights offences … denotes all criminal breaches of human rights, irrespective of whether they are committed by the state or by a private party, which attain the minimum level of severity necessary to attract the specific heightened protection under international human rights law and which should therefore constitute a criminal offence under the relevant domestic criminal law."[11]

The second level of protection is commonly conceived as being *procedural*. At this level, the criminal law protection functions as an *obligation* on the state to put the substantive criminal-law

[8] See further, Y. Cartuyvels, H. Dumont, F. Ost, M. van de Kerchove and S. van Drooghenbroeck (eds.), *Les droits de l'homme, bouclier ou épée du droit pénal ?* (Brussels, Bruylant 2007).
[9] This theory is developed in detail in Kamber, *supra* n. 2 (for a summary of findings see pp. 3-6).
[10] See further, A. Ashworth, *Positive Obligations in Criminal Law* (Oxford, Hart Publishing 2013).
[11] Kamber, *supra* n. 2, p. 19; see also Section II (3) of the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations of 30 March 2011.

protection into a concrete action through an available and effective *procedure*. It is thus denoted as a *procedural obligation*.

In the most general terms, the procedural obligation has two modalities. In the first form, the procedural obligation designates an *ex officio* duty to investigate, prosecute and, if appropriate, punish human rights offences.[12] In the second form, the procedural obligation operates in the wider context of the positive duties of a state to safeguard the rights of individuals under its jurisdiction. Such a duty presupposes a more general procedural requirement of the existence of an effective independent judicial system capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. However, this does not necessarily imply the resorting to an official criminal investigation and prosecution. It rather requires these legal mechanisms to exist as a range of available procedural avenues.[13]

An inquiry into the distinguishing features of the two models is beyond the reach of the present contribution. Moreover, for the purpose of methodological clarity, the further discussion will concentrate on the first form of the procedural obligation, namely the duty to investigate, prosecute and, if appropriate, punish human rights offences.

In each case, it should be noted that the procedural obligation has developed as a separate and autonomous duty of the state, with a distinct content and underlying rationale from that of the protection at the substantive level.[14] Put in a broader picture of contemporary human rights law, the procedural obligation can be seen as an expression of the *proceduralisation* of human rights.[15] However, for the purpose of the present discussion, it is important to note that there are three specific aspects of its underlying rationale, which at the same time determine its distinctive purposes.[16]

First, the procedural obligation designates a duty of the state to put in place an institutionalised mechanism for the actual implementation of the state's positive obligations to protect the rights of an individual through the mechanisms of criminal law. The procedural obligation exists whenever the framework of positive obligations requires that a human right be protected by criminal law. The purpose of such procedural obligation is to implement the substantive criminal-law protection construed through the concept of positive obligations.[17]

Second, the procedural obligation relates to the duty of provision of effective remedies for human rights offences. It designates a form of *ex post* human rights protection through the mechanisms of criminal law flowing from the necessity to repair the infringed right. In this context, the purpose of

[12] See, for instance, *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, 24 March 2011, para. 301.
[13] See, for instance, *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, 19 December 2017, paras. 214-216.
[14] *Šilih v. Slovenia* [GC], no. 71463/01, 9 April 2009, para. 159; *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, 30 March 2016, para. 231.
[15] See further, E. Brems, "Procedural protection: An examination of procedural safeguards read into substantive Convention rights", in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR* (Cambridge, Cambridge University Press 2013), pp. 137-161.
[16] For a more developed discussion see Kamber, *supra* n. 2, pp. 29-77.
[17] See, for instance, *M.C. v. Bulgaria*, no. 39272/98, 4 December 2003, paras. 149-153.

the procedural obligation is not to reinforce a right but to remedy the existing infringement of the right in question.[18]

Lastly, the procedural obligation operates as an implied instance or inherent component of rights guaranteed under international human rights law. The procedural obligation can be deduced from every substantive right which, in the given circumstances, may be subject to a criminal infringement. In this context, the procedural obligation is regarded as an aspect of the criterion of 'protected by law.' It is an *ex post facto* guarantee that the recognition and protection of a right is taken seriously and that any instance in which such a protection is denied will be met with an adequate procedural response by the state adhering to the principles of the rule of law.[19]

In practice of human rights adjudication, the complaints raised by the victims of crime – who are at the same time holders of human rights – do not necessarily fit easily into the substantive and procedural dichotomy.[20] The victims often simply complain that their human rights have been infringed through a criminal offence and that the state bears responsibility for what has happened. When such a complaint is made, three scenarios are possible. In order to facilitate the discussion, an example of a prohibition of ill-treatment by state agents under Article 3 of the Convention will be used to demonstrate their different features and outcomes.

The first scenario concerns a situation in which all the relevant facts for the substantive and procedural limb of the assessment are clear. Here the Court, in conducting its review of the state's compliance with its human rights obligations towards the victim of the ill-treatment, finds that the state, through the actions of its agents, infringed the substantive protection from ill-treatment under Article 3.[21] On a separate note, the Court finds that, by failing to respond appropriately to such an occurrence by investigating, prosecuting and punishing those responsible, the state breached its procedural obligation arising under the same provision. There is thus a double breach of Article 3 of the Convention.[22]

In the second scenario, the Court finds that the victim has made an arguable claim[23] of ill-treatment by state agents and that the state was under a duty to investigate, prosecute and, if appropriate, punish those responsible. As the state has failed to do that, the Court finds a breach of the procedural obligation under Article 3. However, given that such a state of affairs normally creates the consequence that the circumstances of the ill-treatment itself – and thus compliance with the state's substantive duties under Article 3 – remain unclear, the Court finds that the victim has failed to make a case of ill-treatment and thus finds no violation of Article 3 of the Convention.[24]

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[18] See, for instance, *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010, para. 116.

[19] See, for instance, *McCann and Others v. the United Kingdom* [GC], no. 18984/91, 27 September 1995, para. 161.

[20] Nor is it always easy to differentiate between the different sub-forms of the substantive and procedural protection. However, that is not the subject matter of the current discussion.

[21] Of course, the finding of a no violation of Article 3 is also possible.

[22] See, for instance, *Vasile Victor Stanciu v. Romania*, no. 70040/13, 9 January 2018, paras. 46 and 53.

[23] In the absence of an arguable claim or credible assertion of ill-treatment, a complaint related both to the substantive and procedural aspects of the protection is manifestly ill-founded (see, for instance, *Igars v. Latvia* (dec.), no. 11682/03, 5 February 2013, para. 72; *Gavula v. Ukraine*, no. 52652/07, 16 May 2013, para. 59).

[24] See, for instance, *Ion Bălăşoiu v. Romania*, no. 70555/10, 17 February 2015, paras. 101-102; *Etxebarria Caballero v. Spain*, no. 74016/12, 7 October 2014, para. 59; *Mehdiyev v. Azerbaijan*, no. 59075/09, 18 June 2015, para. 75.

The third scenario is similar to the second. However, in this case the outcome is different. The Court finds that because of the state's duty to comply with its procedural obligation concerning an arguable claim of ill-treatment under Article 3, the state has created a situation in which it failed to dispel any doubts as to its responsibility for the ill-treatment and is thus liable for the substantive breach itself. The Court therefore finds a double breach of Article 3 in its substantive and procedural aspect.[25]

The different scenarios essentially turn around the question of the allocation of precedence, both in terms of importance and practical examination, to the substantive or procedural protection. In the second and third scenario the emphasis is on the procedural protection, which then becomes instrumental for the determination of a compliance with the requirements of the substantive protection. Thus, in practical reasoning the considerations of a procedural protection have precedence over otherwise conceptually preeminent substantive protection.

On the other hand, in the first above-noted scenario, the substantive and procedural protection operate as two distinctive requirements capable of leading to two separate examinations and findings. In this case, the substantive protection preserves its actual precedence and has a priority in the assessment. The assessment of the procedural aspect is present but is ancillary.

A practical consequence of the different scenarios in twofold. First, the breach of the substantive aspect of a right carries a particular stigma for the state which bears the responsibility for the breach in question. Indeed, the finding that a state has subjected an individual to torture is not of a same nature and degree as the finding that a state has failed to investigate an arguable claim of ill-treatment, which may have in reality been unfounded. Secondly, the just satisfaction awards for moral damage related to the substantive breach of a right are normally much higher than for the procedural breach of the same right.[26]

It could be accepted that each of these scenarios has a certain doctrinal foundation and logic and that it is underpinned by sound practical considerations. However, the different approaches have practical consequences flowing from the adoption of a particular approach in the allocation of precedence to the substantive or procedural assessment. Moreover, the different approaches have been perceived as a confusion in the Court's reasoning and even labelled as 'schizophrenic' by some authors.[27]

Against this background, in the discussion that follows, an attempt will be made to suggest the most appropriate solution for the assessment of the substantive and procedural criminal-law protection of human rights from the perspective of legal doctrine and to ascertain the current trends in the Court's case-law in this context.

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[25] See, for instance, *Anzhelo Georgiev and Others v. Bulgaria*, no. 51284/09, 30 September 2014, para. 78; *Mafalani v. Croatia*, no. 32325/13, 9 September 2015, para. 126; *Cangöz and Others v. Turkey*, no. 7469/06, 26 April 2016, paras. 138-139, 148-149; *Seagal v. Cyprus*, no. 50756/13, 26 April 2016, para. 121.

[26] Compare, for instance, *Igoshin v. Russia*, no. 21062/07, 21 June 2016, para. 77, and *Bambayev v. Russia*, no. 19816/09, 7 November 2017, para. 60.

[27] H. Tran, "'Schizophrénie' de la Cour européenne des droits de l'homme en matière d'obligations procédurales (quelques considérations en marge des arrêts *Silih c. Slovénie* du 9 avril 2009, et *Ersoy et Aslan c. Turquie* du 28 avril 2009)", 9(29) *L'Europe des Libertés* (2009), pp. 20-22.

3. Some thoughts on the substantive or procedural prevalence

In the abstract, the relationship between the two levels of protection – substantive and procedural – is the one of autonomy and connectedness. The *autonomy* is expressed in the fact that each level of protection can operate as a separate and autonomous set of requirements. At the same time, legal requirements developing within the substantive level are preeminent to those of the procedural but they become, or are capable of becoming, fully effective only through the relations established within the framework of the relevant procedure. There is thus a *connectedness* between the two levels of protection.[28]

The above assertion should not be particularly controversial. It, however, does not resolve the difficulty over the allocation of precedence to the substantive or procedural assessment in practical legal reasoning. It also fails to explain how to deal with the effects created by the preferred allocation of precedence. Nevertheless, this assertion, which is neutral from the perspective of substantive or procedural prevalence, is helpful for setting the scene for an overview of some of the legal theories that have directly or indirectly tried to explain the operation of the two levels of protection of human rights – substantive and procedural – in practical legal reasoning.

In an illuminating account of the matter, dating from the time when the *proceduralisation* of human rights was still not such a topical issue as it is today, Wolfgang Strasser[29] observed a tendency in international human rights adjudication for the applicants to put forward their substantive complaints and for the international adjudicatory bodies to concentrate on procedural issues. The adjudicatory bodies tend to reject the main (substantive) complaint and subject the procedural issue to a thorough analysis. For Strasser, however, this is a misconceived choice in the adjudication. He believes that when a substantive right has been violated it is somehow presumed that even a valid procedure would not have created a different result. The procedural guarantees thus appear as empty formalities with no bearing on the substantive rights.

In Strasser's view, the relevancy of the procedural obligation lies in the necessity for the national authorities to investigate the circumstances of the case so that the mechanism of international adjudication could conduct a reasonable supervision of all the relevant aspects of the complaints brought before it. He therefore proposes that the procedural issues be examined first and the substantive aspects be reserved. The procedural issues thereby become an indissociable aspect of the substantive right and not an aim in themselves. In practice, under the assumption that only a valid procedure could create a valid outcome, when finding a violation of the procedural right, the international court should confine itself to noting that there is no basis to examine the substantive aspect of the right because a doubt would otherwise remain as to what the outcome of the case would have been had the proceedings been fair and valid. This would, according to Strasser, eventually strengthen international adjudication and enhance the principle of subsidiarity.

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[28] Kamber, *supra* n. 2, p. 15.

[29] W. Strasser, "The relationship between substantive rights and procedural rights guaranteed by the European Convention on Human Rights", in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension, Studies in honour of Gérard J. Wiarda – Protection des droits de l'homme: la dimension européenne, Mélanges en l'honneur de Gérard J. Wiarda* (Köln, Carl Heymanns Verlag KG 1990), pp. 595-604.

Other authors have also raised concerns over the tendency of substituting the procedural assessment for the substantive complaints. Eva Brems[30] has argued, for instance, that detaching the procedural requirement so as to replace the substantive scrutiny essentially weakens substantive human rights protection. Françoise Tulkens[31] has also cautioned that the procedural assessment should not substitute for the Court's duty to examine the substantive aspects of the alleged human rights violations. In her view, the procedural control should be complementary to the substantive aspects. Thus, once a violation of the substantive aspect has been established it may be unnecessary to examine the procedural aspect also.

Edouard Dubout[32] also sees the procedural and substantive protection of a right as two complementary guarantees. He makes a sensible distinction between them by observing the substantive protection as an *obligation of results* and the procedural protection as an *obligation of means*. In practical reasoning, this distinction translates into the fact that in order to find a substantive violation of a right it is necessary to establish a causal link between the action or inaction of the state and the infringement of the right. On the other hand, a procedural violation can be found by identifying failures in the process which have led to the absence of prevention, sanctioning and an effective deterrence of a human rights offence. However, in order to make such a finding it is not necessary to identify whether the state is directly responsible for the commission of the offence infringing the substantive protection of the right.

Against this background, Dubout considers that in the interplay of the substantive and procedural assessment, the substantive should normally be given precedence. The procedural assessment is thus secondary. It may be relevant only in cases where it is impossible to impute the infringement of the right to the state. Otherwise, according to Dubout, if this is not observed and the procedural assessment is conducted out of the context of this exception, there is the risk of a superfluous finding of two violations of the same right.

In a critical assessment of the discussed doctrinal positions on the question of substantive or procedural primacy,[33] at the outset it is useful to recall that criminal procedure, conceived within the framework of human rights protection, has an *autonomous* or *dignitarian* and at the same time *instrumental* value.

The *autonomous* or *dignitarian* aspect concerns the duty of the state authorities to provide for an adequate procedural response to the occurrence of a human rights offence and thus to demonstrate to the victim (and the society as a whole) their adherence to the rule of law and to dispel any appearance of collusion in or tolerance of unlawful acts.[34] For it to come into play, it is immaterial whether the state actually bears responsibility for the substantive breach of the right. The Court's

[30] Brems, *supra* n. 15, pp. 138-139.
[31] F. Tulkens, "Le droit à la vie et le champ des obligations des états dans la jurisprudence récente de la Cour européenne des droits de l'homme", in P. Amselek (ed.), *Libertés, Justice, Tolérance : Mélanges en hommage au Doyen Gérard Cohen-Jonhathan, Volume II* (Brussels, Bruylant 2004), p. 1626.
[32] E. Dubout, "La procéduralisation des obligations relatives aux droits fondamentaux substantiels par la Cour européenne des droits de l'homme", 69 *Revue trimestrielle des droits de l'homme* (2007), p. 415.
[33] See further, Kamber, *supra* n. 2, pp. 82-85.
[34] *Mocanu and Others* v. *Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, 17 September 2014, para. 323.

case-law places a particular emphasis on the autonomous value of the procedure, which is, after all, a requirement of means not of results.[35]

On the other hand, the instrumental value of criminal procedure is aimed at the vindication of the infringed substantive right as part of a range of available remedies.[36] It is thus more intrinsically related to the substantive aspect. However, once again, it is immaterial whether the state bears the responsibility for the substantive breach of the right in order for the procedural obligation effectively to operate and achieve its aim.

It therefore follows from the above that there is no obstacle to examining both aspects – substantive and procedural – of the same right. Conceptually, this can be explained by the different aims pursued by the two levels of protection. In the context of the substantive analysis the question to be answered is whether the state bears responsibility for the substantive breach of the right, while under the procedural aspect the question is whether the state failed to react properly to an arguable claim of criminal infringement of a right by identifying, prosecuting and, if appropriate, punishing those responsible.

In each case, the procedural obligation arises as an *ex post* requirement. Whereas Strasser's proposal to reserve the examination of substantive protection pending the outcome of the procedural analysis could appear appropriate to *ex ante* procedural requirements (which could, in some instances, be criminal investigation and prosecution)[37] it is obviously inapt to the procedural requirement of criminal investigation and prosecution as an *ex post* procedural obligation. Thus, for instance, if the state agents have ill-treated an individual, an *ex post* investigation into the circumstances of the case, which aims at identifying and punishing those responsible for the ill-treatment, cannot justify the act of ill-treatment itself.

It is, however, expedient to examine the procedural aspect first for two reasons. Firstly, the analysis of the procedural steps taken to elucidate the circumstances of the case creates a consequential benefit for the international human rights supervision by assisting it in the process of establishing the facts [38] Secondly, the effective and appropriate criminal investigation and prosecution, combined with the adequate compensation, could vindicate the substantive right and thus deprive an individual of his or her victim status for the alleged breach of the substantive right.[39]

In any event, the identified procedural failures in the state authorities' response to an arguable breach of the substantive right cannot eventually work for the benefit of the state. The fact that the state authorities have failed to elucidate the circumstances of the case and thus to demonstrate their adherence to the rule of law and, if appropriate, to vindicate the infringed right should lead to the negative inference to be drawn on the substantive protection itself. In other words, if a victim has made out an arguable claim of ill-treatment by state agents, the fact that the state has failed to

[35] *Paul and Audrey Edwards* v. *the United Kingdom*, no. 46477/99, 14 March 2002, para. 71.
[36] See further, *Gäfgen* v. *Germany* [GC], no. 22978/05, 1 June 2010, para. 116.
[37] See, for instance, *T.M. and C.M.* v. *the Republic of Moldova*, no. 26608/11, 28 January 2014, paras. 59-61.
[38] While it is true that the procedural obligation could be observed from the perspective of an adjudicative tool in international human rights law, there is a conceptual objection to such a proposal as it is insubstantial in justifying the nature and purpose of the procedural obligation. In other words, observing the procedural obligation merely as an adjudicative tool would mean that a human rights guarantee exists in order to facilitate international human rights adjudication, which would turn such adjudication into an end in itself.
[39] *Nikolova and Velichkova* v. *Bulgaria*, no. 7888/03, 20 December 2007, para 56.

investigate the case properly and thus to elucidate the circumstances of the case should be a strong indication that the state is responsible for the ill-treatment itself.

Otherwise, a situation could be created in which the state, as a result of its own failures or, in some instances, deliberate omissions, could avoid a more severe finding of a violation of the substantive aspect of the right. The system of international adjudication could therefore inadvertedly create an incentive for states not to investigate the alleged breaches of the substantive rights by their agents as this would provide for a guarantee that the finding of a violation of the right in question at the international level will be limited to its procedural aspect.

Moreover, it should be accepted that the decision-maker's cognitive abilities are restricted and that his or her process of understanding of a human rights offence as a historical event is compromised by various important social and legal constrains[40] preventing him or her from discovering the 'full truth.' This is particularly true when the decision-maker is an international judge whose knowledge of local conditions may be limited and who is normally, in terms of time and space, dissociated from the circumstances prevailing at the moment of the occurrence of the impugned situation.

The just procedure – or the diligent compliance with the procedural obligation – thus becomes crucial as the just outcome in the substantive sense is guaranteed only by a just procedure. In other words, the substantive outcome is just only to the extent to which the process aimed at its elucidation is just.[41] Consequently, if there are identifiable failures in the process aimed at elucidating the circumstances of the case and finding accountable those responsible for the human rights offence – which leads to the finding of a breach of the procedural aspect of the right – the only safe solution is to find a substantive breach of the right itself. From this perspective, any other outcome is only a speculation.

4. Current case-law of the Court

Following the Grand Chamber case-law in *Šilih v. Sovenia*,[42] reaffirmed in *Janowiec and Others v. Russia*,[43] it has become uncontroversial and widely accepted in the Court's case-law that the procedural obligation has developed as a separate and autonomous duty, which is always examined as a distinct issue in the assessment of the Convention rights giving rise to the necessity of protection through the mechanisms of criminal law. Indeed, in the recent Grand Chamber case of *Armani Da Silva v. the United Kingdom*,[44] the Court stressed that it has "*consistently* examined the question of procedural obligations separately from the question of compliance with the substantive obligation" (emphasis added).

[40] Such as admissibility of evidence and the operation of the burden of proof.
[41] Admittedly, this argument is inspired by the concept of 'pure procedural justice' as identified by John Rawls and developed in its different variants (see, for instance, P. Ricoeur, *The Just* (Chicago, The University of Chicago Press 2000)).
[42] [GC], no. 71463/01, 9 April 2009, para. 159.
[43] [GC], nos. 55598/07 and 29520/09, 21 October 2013, para. 132.
[44] [GC], no. 5878/08, 30 March 2016, para. 231.

It is true that in some (rare) instances the Court has jointly examined the substantive and procedural aspects of protection.[45] However, this was mandated by the particular circumstances of the case in which the substantive outcome was so closely intertwined with the procedural assessment that it was impossible to draw a clear line between them. In any event, even in such cases, the Court finds a double breach – substantive and procedural – of the relevant Convention right. This therefore reaffirms, rather than denies, the principle of separate examination of the substantive and procedural aspects of protection.

However, the Court's case-law on the allocation of prevalence to the substantive or procedural protection does not demonstrate the existence of a settled law. Indeed, all of the three above-discussed scenarios or outcomes, or their variants, of the interplay between the substantive and procedural protection can be found in some recent rulings.[46]

It should nevertheless be observed that recently in a number of cases the Court dissociated the findings on the procedural aspect of protection from those related to the substantive limb. In particular, the Court tended to conclude that due to the absence of an effective procedural response and/or the lack of clarity concerning the impugned events – which it finds to be in breach of the procedural aspect of the right – it was prevented from finding beyond reasonable doubt that the substantive aspect of the right was breached.[47]

This position, denoted above as the second scenario, has ordinarily given rise to a discomfort on the part on some judges, who in their separate opinions stressed that the obligation is on the respondent state to conduct an effective investigation capable of providing explanation for an arguable claim of the substantive breach of a right. According to them, a failure to do so on the part of the state authorities should lead to the drawing of negative inferences on their responsibility for the substantive breach of the right.[48]

There is little ground to disagree with these arguments. The general rules on the burden of proof,[49] on which the position belonging to the second scenario rests, are insufficient to justify the

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[45] See, for instance, *Anzhelo Georgiev and Others v. Bulgaria*, no. 51284/09, 30 September 2014, paras. 65-78; *Mindadze and Nemsitsveridze v. Georgia*, no. 21571/05, 1 June 2017, paras. 103-110; *Tiziana Pennino v. Italy*, no. 21759/15, 12 October 2017, paras. 55-56.

[46] For the first scenario see, for instance, *Cirino and Renne v. Italy*, nos. 2539/13 and 4705/13, 26 October 2017, paras. 75-77, 87 and 115-116; *Pihoni v. Albania*, no. 74389/13, 13 February 2018, paras. 82 and 97-98 (not final); *Voykin and Others v. Ukraine*, no. 47889/08, 27 March 2018, paras. 103-104 and 118-119 (not final).
For the second scenario see the cases cited below at n. 47.
For the third scenario see, for instance, *Ostroveņecs v. Latvia*, no. 36043/13, 5 October 2017, paras. 80-81 and 94-96; *M.F. v. Hungary*, no. 45855/12, 31 October 2017, paras. 59-50 and 66-56; *Ksenz and Others v. Russia*, no. 45044/06 et al., 12 December 2017, para. 100-101 and 104-106; *Vasile Victor Stanciu v. Romania*, no. 70040/13, 9 January 2018, paras. 44-46 and 47-53.

[47] See, for instance, *Thuo v. Cyprus*, no. 3869/07, 4 April 2017, paras. 139-140 and 148-149; *Daşlık v. Turkey*, no. 38305/07, 13 June 2017, paras. 52 and 65; *Hentschel and Stark v. Germany*, no. 47274/15, 9 November 2017, paras. 75-78 and 103; *Tadić v. Croatia*, no. 10633/15, 23 November 2017, paras. 61-62 and 74; *Andersen v. Greece*, no. 42660/11, 26 April 2018, paras. 73-75 (not final).

[48] See, for instance, the dissenting opinion of judges I. Cabral Barreto, V. Zagrebelsky and D. Popović in *Ersoy and Arslan v. Turkey*, no. 16087/03, 28 April 2009, and the partially dissenting opinion of Judge L.-A. Sicilianos in the case of *Mehdiyev v. Azerbaijan*, no. 59075/09, 18 June 2015.

[49] In general, the standard of proof before the Court is 'beyond reasonable doubt.' Such proof can follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact. The level of persuasion required to reach a conclusion is intrinsically linked to the specificity of the facts,

risks concomitant to the conceptual discontinuation of the procedural and substantive assessments. Even in terms of the burden of proof, it is the Court's well-established case-law that the principle *affirmanti incumbit probation* (the burden of proof lies on the party which makes the allegation) is not possible in instances when this has been justified by the specific evidentiary difficulties faced by applicants.[50]

Thus, for instance, in the context of Article 3, where it can be assumed that some of an applicant's injuries were caused at the time of his or her arrest, the burden is on the respondent state to demonstrate that the use of force causing the injuries was strictly necessary in the circumstances.[51] The same is true for instances where injuries were caused in the context of the events laying within the exclusive knowledge of the authorities, as in the case of persons under their control in custody.[52]

More importantly, as already noted above, the position belonging to the second scenario seems to rest on weak theoretical and conceptual foundations. It does not sit well with the nature and purpose of the procedural protection, which, although a separate and autonomous duty, comes into play after being triggered by the facts concerning the substantive aspect. It is therefore artificial to dissociate the outcome of the procedural assessment from the substantive assessment as these are in essence simply two sides of the same complaint of a breach of the Convention rights.

Moreover, as discussed earlier, the position belonging to the second scenario is capable of creating an incentive for the state authorities not to investigate properly the arguable claims of breaches of the Convention rights as their failure can serve as a guarantee that the finding of a violation of the state's human rights commitments can eventually exonerate the state from the responsibility for a more serious substantive breach of the right. A paradoxical situation is thus created in which the state benefits from its own mistakes, which is particularly worrying in an area as sensitive as the duty to provide adequate protection from human rights offences.

5. Instead of conclusion

There are still many aspects of the coercive human rights law that are subject to a gradual development and affirmation in legal theory and practice. The current contribution is thus mindful not to reach any firm conclusions on a subtle issue such as the interplay between the substantive and procedural aspects of human rights protection through the mechanisms of criminal law.

It has nevertheless observed certain theoretical and conceptual inconsistencies and gaps arising in this context which are capable of creating serious consequences in practical reasoning of human rights law. The different approaches to the question of the substantive or procedural primacy in the Court's case-law, some of which are based on weak conceptual justification, are sufficient evidence for this assertion.

There are certainly different reasons for these misgivings, which legal doctrine needs to recognise, analyse and put in the right context. This contribution is an attempt in this direction. It is

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the nature of the allegation made, and the Convention right at stake (see *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, 13 December 2012, para. 151).

[50] *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017, para. 311.

[51] *Altay v. Turkey*, no. 22279/93, 22 May 2001, para. 54.

[52] *Bouyid v. Belgium* [GC], no. 23380/09, 28 September 2015, para. 83.

hoped that it will be capable of contributing to a debate on the demanding conceptual considerations underlying the concept of coercive human rights law to the ultimate benefit of an effective protection of victims of human rights offences.