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Concluding Remarks – Collective Punishment, Human Rights and Conflict Resolution

This conference on collective guilt went beyond just offering interesting insights on the historical context of certain punitive actions that affected many communities in Central and Eastern Europe after the Second World War. The presentations and discussions also highlighted the present-day legal and political effects of these events. From a broader perspective, we may say that for a long time in history, collective punishment was part of conflicts and even emerged in conflict resolutions as well. As our keynote speaker Professor De Zayas pointed out, collective punishment is and was often part of warfare, and it is deeply rooted in social attitudes and prejudices. Even if we have seen various attempts for breaking with this legacy already as early as the Westphalian peace treaties in 1648, we had to witness horrible examples of collective punishment, mass deportations, genocide, deprivation of human rights, etc. even in the 20th and 21st century. Apparently, political manipulation and indoctrination recurrently reinforce hatred and discrimination against one or another group of the society that may result in creating a social attitude in which collective punishment becomes an acceptable tool for revenging previous injustices. As Bibó quoted (or invented) an old proverb from the Middle East, "no one is more inclined to commit injustices than someone, who sees him/herself as innocent victim of injustices".[1]

If collective guilt is so much deeply rooted in a wider social context, how can we understand what it entails under international law? From a strictly legal stand, collective punishment is a concept deriving from the law of armed conflict. It describes the punishment of a group for an act allegedly committed

[1] Bibó 1990: 588.

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by one of its members and is prohibited in times of armed conflict. Article 33 of the 4th Geneva Convention in 1949[2] gives a clear statement on this: "No protected person may be punished for any offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property is prohibited." Not only the Geneva Conventions, but also the practice of international criminal court procedures confirm that international criminal law focuses on individual responsibility only and denies any collective character of criminal responsibility. So, from a legal point of view, in the context of armed conflicts, the issue seems to be properly addressed. Still, the other side of the same coin is missing: human rights instruments do not explicitly address collective punishment. Consequently, there is a genuine gap in the protection of affected groups in situations outside of or short of armed conflict.

However, as the presentations of this conference proved, the imposition of collective punishment has been witnessed in situations outside armed conflict as well, and such actions, tragically, are not only part of our human history, but also an experience of our days.

After the Second World War, deprivation of property, of citizenship, and mass deportations were introduced against Hungarians and Germans living in Czechoslovakia, and similar measures were applied also in post-war Yugoslavia under Tito as we could see in Professor Korhecz's presentation. And yet, as we all know, these tragic experiences and memories of the post-WWII Tito era could not prevent similar tragedies to happen in the 1990s wars during the break-up of Yugoslavia and even today elsewhere.

What makes these actions even more threatening is that there have been clear examples when those who agreed to apply collective punishment were convinced of contributing to social justice, creating a more peaceful society. In a broader context, the elimination of German minorities from Central Europe after the Second World War was seen as a lasting and appropriate

[2] Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 U.N.T.S. 973.

solution for preventing future conflicts in the region, as Réka Marchut's presentation proved it.

Regarding the long shadow of the so-called Beneš Decrees, both Professor Rychlík and Professor Marušiak highlighted the symbolic position that these post-war legal measures have in the modern history of Czechoslovakia and its successor States, the Czech Republic and Slovakia. In Slovakia, attempts for a historical reconciliation were only partly successful. Largely fruitful initiatives were launched regarding the Carpathian Germans, when in 1991 reconciliatory declarations were adopted in the Slovak Parliament. But no such initiative was made vis-à-vis the Hungarian minority living in Slovakia, and as Professor Fiala-Butora proved it convincingly in his presentation, despite the officially declared historical character of these restrictive measures, there are many examples for their application even today that result in land confiscations or other restrictions.

But even without legal uncertainties, historical memory may have present-day implications. As Professor Lönhárt pointed it out in a Romanian context, even the identification of perpetrators and victims can be debated for long decades, as it happens in Romania regarding the evaluation of the tragic events of the Second World War.

Can we simply conclude from the presentations of this conference that we can learn from history, but we only learn that we never learn from history? Or should we be a bit more optimistic?

Against this background, I believe we need to take a look at the legal circumstances in which these events and actions took place in Central Europe and how international law developed in the past decades in this field. In our region, most cases of collective punishment were introduced during or immediately after the Second World War, when the major international instruments on human rights and humanitarian law were not yet adopted. It can be argued that the traumas of the Second World War created a feeling of strong revenge that led decision-makers to the adoption of such collective restrictive measures. But we also know that during these years many atrocities were committed or tolerated by State authorities that went far beyond the legal measures adopted

on collective punishment. It seems to be clear that under international treaties, such as the Geneva Conventions or the most important human rights treaties (i.e. the International Covenant on Civil and Political Rights, the European Convention on Human Rights, etc.) adopted after 1949, there has not been any legal basis for applying such measures based on collective guilt. That is true, even if we know that international human rights treaties do not directly address this question.[3] Nevertheless, there are a few statements from which we may derive that States do have a responsibility to prevent collective punishment and address its consequences. The UN Human Rights Committee in its General Comment 29[4] explicitly mentioned certain elements of "the international protection of the rights of persons belonging to minorities" that "must be respected in all circumstances", such as the prohibition of genocide, the principle of non-discrimination and the prohibition of deportation or forcible transfer of population constituting a crime against humanity.[5] In specific cases, when under a state of emergency Turkey apparently applied collective punitive measures against Kurdish villages, the European Court of Human Rights also stated that there cannot be any justification for so serious ill-treatment of innocent people.[6] What may be important here is that while such actions may violate international human rights obligations,

> "human rights law at present is unable to encompass the particular wrong done by collective punishment, the imposition of sanctions on a group as such for an act allegedly committed by one or some of its members, leaving affected groups not only without protection, but without tools to bring about change and seek redress for collective punishment".[7]

3 Klocker 2020.

4 CCPR/C/21/Rev.1/Add.11 General Comment No. 29: States of Emergency (Article 4), 31 August 2001.

5 CCPR/C/21/Rev.1/Add.11 General Comment No. 29: States of Emergency (Article 4), paragraphs 13 (c)–(d).

6 *Yöyler* v. *Turkey* (Merits and Just Satisfaction) no. 26973/95, Court (Fourth Section), 24 July 2003.

7 Klocker 2020: 66.

Regarding the historical injustices in Central and Eastern Europe, it would be difficult to argue that States have any legal obligation under international law to compensate collectively the victims of such injustices. Nevertheless, States today do have an obligation to refrain from the application of collective discriminative legal measures. In this context, addressing the lasting consequences of collective punishment is not only a political, but also a legal question. There may be a need to realise and understand a certain logic of reparative actions in every post-conflict situation. Recognition of the facts, moral compensation and material compensation are equally important elements in this.

First of all, as it was recurrently highlighted in most of the presentations of this conference, there cannot be any reconciliation without recognition – the injustices committed by the State against a certain group or minority shall be recognised as an injustice, even if it is seen as part of turmoiled historical events. As a consequence, the elimination of normative collective restrictions from the legal system is inevitable. Even if – for any political or historical reason – such norms are still present in the legal system, State authorities should certainly refrain from referring to or applying them in present-day circumstances. A similarly important element is to face the moral consequences; no one can expect a true social reconciliation between different groups of the society without an apology from State authorities, even if long time has passed since these actions. There should also be government initiatives to raise awareness of the events, and to open public discussion on the consequences of collective punishment with the participation of the victims or their descendants. What seems to be the most problematic question, and what often hinders the previous steps, is that of legal material compensation. How to restore property, what costs will the State face if it recognises such injustices committed in the name of the State? These are certainly very difficult, complex and delicate issues, but it is also true that the question of material compensation may only be the last step and not the first one. It seems to be reasonable to argue that if there is a chance to recognise injustices and to address the moral aspects, a consensus may be reached on material compensation as well.

But before any of these three legal–political steps can take place, the academia also has an outstanding responsibility to open forgotten issues related to historical injustices and initiate discussions. I believe this conference proved to be a useful forum for genuine dialogue between various academic fields and different narratives. Hopefully such academic discussions could lead to influencing the public discourse, and potentially also reconciliation.

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