



THE IMPACT OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON DOMESTIC INVESTIGATIONS AND PROSECUTIONS OF SERIOUS HUMAN RIGHTS VIOLATIONS BY STATE AGENTS

BY SILVIA BORELLI, WITH THE ASSISTANCE OF SANDRA
LYNGDORF

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ABOUT DOMAC

THE DOMAC PROJECT focuses on the actual interaction between national and international courts involved in prosecuting individuals in mass atrocity situations. It explores what impact international procedures have on prosecution rates before national courts, their sentencing, policies, award of reparations and procedural legal standards. It comprehensively examines the problems presented by the limited response of the international community to mass atrocity situations, and offers methods to improve coordination of national and international proceedings and better utilization of national courts, inter alia, through greater formal and informal avenues of cooperation, interaction and resource sharing between national and international courts.

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REYKJAVÍK UNIVERSITY
HÁSKÓLINN Í REYKJAVÍK



ABOUT THE AUTHORS

DR SILVIA BORELLI is a Research Fellow in Public International Law at the Faculty of Laws, University College London (UCL). She holds a doctorate in International Law awarded by the University of Milan and is qualified as an attorney (*avvocato*) in Italy. Silvia also retains an association with the Department of International Law of the University of Parma. Silvia was previously a Research Fellow at the Catholic University of Milan. She has been a Visiting Fellow at the British Institute of International Law (BIICL), the Lauterpacht Centre for International Law at the University of Cambridge. The present report was completed while the author was a visiting fellow at the School of Law at Reykjavik University, Iceland.

SANDRA LYNGDORF is a PhD candidate at the University of Amsterdam and she received her law degree from Uppsala University. Sandra was responsible for the preparation of the original case studies on Chechnya, Turkey and the PKK, and Northern Cyprus.

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LIST OF ABBREVIATIONS

CETS	<i>Council of Europe Treaty Series</i>
CMP	Committee on Missing Persons (Cyprus)
CoE	Council of Europe
Convention/ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
Court	European Court of Human Rights
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DOMAC Project	Project on the Impact of International Courts on Domestic Criminal Procedures in Mass Atrocity Cases
EU	European Union
FSB	Russian Federal Security Services
HET	Historical Enquiries Team (United Kingdom)
ICRC	International Committee of the Red Cross
İHD	<i>İnsan Hakları Derneği</i> (Turkish Human Rights Association)
IRA	Provisional Irish Republican Army
JIHIDEM	Human Rights Violations' Investigation and Evaluation Center of the Turkish Gendarmerie
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PKK	Kurdistan Workers' Party
PSNI	Police Service for Northern Ireland
RUC	Royal Ulster Constabulary
TRNC	"Turkish Republic of Northern Cyprus"
UN	United Nations
UNCIVPOL	UN Civil Police
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNTS	<i>United Nations Treaty Series</i>

EXECUTIVE SUMMARY

The present Report addresses the role played by the European Court of Human Rights in improving the capacity of Member States of the Council of Europe as regards the investigation and punishment of serious violations of human rights committed by State agents.

The aim of the Report is twofold. First, it assesses the extent of compliance by State Parties to the European Convention of Human Rights (ECHR) with judgments of the European Court finding a violation of the procedural obligation under Articles 2 and 3 ECHR to investigate and prosecute abuses committed by State agents. Second, it purports to assess the impact of those judgments within the domestic legal systems of the respondent States, with a view to determine whether the measures adopted to give effect to the judgments have resulted in the improved capability of the domestic authorities to investigate and prosecute serious violations of human rights committed by state agents.

The Report is based on the findings of four case studies dealing with situations of widespread and serious violations of human rights. The four situations examined are:

- the events in Chechnya during the “Second Chechen War” 1999-2001 , in particular the acts of servicemen of the Russian Federation in that context;
- the actions of members of the Turkish security forces in the context of the conflict with the PKK;
- the actions of the Turkish security forces (and forces loyal to the TRNC) in northern Cyprus;
- the actions of the United Kingdom security forces in the context of the “Troubles” in Northern Ireland.

In relation to each of the above situations, analysis has been limited to cases where the alleged substantive violations of the ECHR involve either the right to life protected under Article 2, or the prohibition of torture and other ill-treatment under Article 3 of the Convention.

In each of the situations examined in the case studies, the European Court has found substantive violations of Articles 2 and/or 3, due to unlawful killings or acts of torture and ill-treatment perpetrated by State agents. In addition, and more importantly for the purpose of the present study, the Court has also found various violations of the positive procedural obligations deriving from Articles 2 and 3. In particular, in a number of cases, the Court’s judgments identify serious and systemic problems with the implementation of

the obligation to investigate allegations of violations of Articles 2 and 3 ECHR and to prosecute those responsible. The Report considers the measures adopted by the respondent States to remedy those procedural violations, with a view to assessing the extent of compliance with the Court's judgments, as well as the specific impact of those judgments within the relevant domestic legal system.

At a very general level, the case studies show that there has been a high degree of compliance by the United Kingdom with the relevant judgments of the Court in relation to Northern Ireland. Further, there has been a certain amount of formal compliance by Russia in relation to the judgments concerning Chechnya and by Turkey in relation to the judgments arising out of the conflict with the PKK. By contrast, Turkey has so far failed to comply with the Court's judgments finding violations of Article 2 and 3 in relation to disappeared persons in northern Cyprus and has complied to only a limited extent as regards the judgments of the Court concerned with more recent killings by the security forces.

Despite the adoption of various pieces of legislation or other measures which may be regarded as formally constituting general measures designed to give effect to the judgments of the Court, it appears that in the case of both Turkey in relation to the PKK, and the Russian Federation, those measures have in practice been far from adequate. In particular, the mere formal adoption of legislation or of other measures appears not to have been accompanied by a genuine desire to ensure that they are actually implemented in practice, or any change in attitudes. As a consequence, as far as the situations in Russia and Turkey with relation to the conflict with the PKK are concerned, it appears that the impact of the Court's judgments on the ability of the domestic legal system to ensure effective investigations and prosecutions of State agents responsible for serious abuses has not been great. As regards northern Cyprus, given the significant lack of compliance by Turkey with the Court's judgments, in particular those relating to disappeared persons, the impact of those judgments has also been minimal.

With regard to all three situations where compliance has been limited, it is obvious that the principal reason underlying the substantial lack of compliance with some aspects of the Court's judgments is the lack of political will to hold State agents to account for abuses committed in politically sensitive contexts such as the conflict in Chechnya or the situation in South East Turkey and in Northern Cyprus. The Turkish and Russian authorities appear to be reluctant to take certain obligations under the Convention seriously and, to date, they simply have not been placed under sufficient pressure to persuade them to do so. Conversely, the far greater degree of compliance by the United Kingdom with judgments arising out of serious violations of fundamental rights occurring during the Troubles can be attributed to a greater degree of political will of the authorities in that regard, a more deeply ingrained acceptance of the rule of law, and reputational issues.

Although compliance by States with the Court's judgments is of course always to a greater or lesser degree a political matter, the Report identifies a range of measures which have the potential to engender greater compliance by recalcitrant States.

SUMMARY OF RECOMMENDATIONS

FOR THE COURT

- **A more robust approach to just satisfaction**

The Court can and should adopt a more robust approach to just satisfaction under Article 41 of the Convention. Although the possibility of the imposition of increased damages in the event of a lack of compliance has been decisively rejected by the Court, the possibility of ordering specific measures to be taken by way of just satisfaction is open to the Court. Setting out clearly and specifically what remedial measures should be adopted by the respondent State would undoubtedly improve compliance, insofar as what the respondent State is actually required to do would be clearly enunciated. Such an approach would reduce the ability of States to prevaricate or to claim, in the context of monitoring of compliance by the Committee of Ministers, that the minimal measures they have adopted constitute adequate compliance.

- **Expansion of the “pilot judgment” procedure.**

The “pilot judgment” procedure should be adopted in appropriate cases involving multiple and similar violations of the procedural duty to investigate allegations of abuses by State agents or other individuals. Such an approach would have the advantage of reducing the burden on the Court in having to deal with numerous essentially similar cases, as well as resulting in more expedited assessment of individual cases. Further, in pilot judgment cases the Court goes beyond its normal approach to remedies and actually recommends the measures which should be adopted by the respondent State in order to put an end to the violations identified. Again, such approach is likely to improve compliance and facilitate the monitoring function of the Committee of Ministers.

- **Infringement proceedings under Protocol No. 14**

The new enforcement procedures introduced by Protocol No. 14 provide for the possibility for the Committee of Minister to refer to the Court the issue of whether a State has adequately complied with a judgment. In this context, the Court has the

potential to play an important role in enunciating precisely what is required of the respondent State by way of compliance with its previous judgment. Any such ruling has obvious implications for improved compliance in the specific case, but also for the impact of the judgment in question within the domestic legal system. The possibility for the Court to rule on those cases depends on the will of the Committee to initiate infringement proceedings. However, whenever a case is referred back to it for non-compliance, the Court should go beyond the assessment of formal compliance by the State, and assess the extent to which the measures adopted are in practice apt to prevent future similar violations and are in fact effective.

FOR THE COMMITTEE OF MINISTERS

- **More rigorous examination of measures adopted and their effect**

The Committee of Ministers should be far more rigorous in its examination of compliance by the respondent State before deciding to close its consideration of the execution of the Court's judgments. This would require an assessment not only of the formal adoption of general measures in compliance with a judgment, but also as whether those measures had in fact resulted in a concrete improvement of the ability of the domestic system to prevent and address similar violations in the future.

- **Imposing sanctions for non-compliance**

The possibility of suspension or withdrawal of membership pursuant to Article 8 of the Statute of the Council of Europe, although theoretically available, constitutes an extreme measure. In practice, the threat of its invocation is unlikely to exert much pressure on Member States to comply with judgments of the Court. Further, expulsion of a Member State would, in all probability, be counterproductive to compliance insofar as it would imply a complete disengagement of the State in question from the Council of Europe system. In such circumstances, the threat or invocation of suspension of voting rights within the Committee of Ministers, and, to an even greater extent, the power to expel a Member State, should be contemplated only in the most serious cases and where it is likely to be effective.

- **Use of the additional enforcement procedure under Protocol No. 14**

The Committee of Ministers should ensure that it makes effective use of the new additional enforcement mechanisms introduced by Protocol No. 14 ECHR. In particular, it should ensure that it makes appropriate use of the possibility of referring instances of failure to comply with final judgments back to the Court. Obviously, the

decision whether or not to refer a case back to the Court will be subject to political considerations. However, where a State consistently denies that it is required to adopt the measures recommended by the Committee, or argues that the measures it has already adopted are sufficient to give effect to a judgment, the effectiveness of the Convention system requires that the Court should be given the opportunity to resolve the dispute authoritatively, rather than the matter being allowed to be dragged out over prolonged periods of time.

FOR MEMBER STATES OF THE COUNCIL OF EUROPE

- **Increased resort to the inter-State complaint procedure under Article 33 ECHR**

Historically, inter-State applications have been among the most politically-charged cases and it is this factor which, to a large extent, would seem to explain the poor record of compliance with the judgments which issue from them. Nevertheless, the bringing of an inter-State case by one or more disinterested third parties has the potential to exert substantial pressure on respondent States. That suggestion is admittedly not without its difficulties, given that the taking of such action depends upon the political will of the other Member States which may not wish to endanger their relations with the respondent State by initiating legal proceedings against it. Those problems could be avoided by the bringing of cases jointly by coalitions of States.

1. Introduction

1.1 Focus of the report

The present report addresses the role played by the European Court of Human Rights (“the European Court” or “the Court”) in enhancing the capability of domestic legal systems of the State Parties to the European Convention on Human Rights¹ (“ECHR” or “the Convention”) to effectively investigate and prosecute serious abuses committed by State agents. In light of the overall aim of the DOMAC project, the report analyzes – through the medium of four case studies – the way in which the interaction between the European Court (and other relevant organs of the Council of Europe, in particular the Committee of Ministers) and the relevant authorities of States Parties to the ECHR has fostered the development of domestic institutional structures, legislation and procedures aimed at ensuring effective accountability for serious human rights violations. In addition, it examines the extent to which these developments have been effective in practice in ensuring that prosecutions are brought, and meaningful sanctions imposed on those responsible.

More specifically, the first objective of the present report is to examine whether, to what extent and how the States Parties to the ECHR have complied, or are currently complying, with judgments of the Court relating to situations of gross human rights violations. Second, the report seeks to assess whether, quite apart from the question of direct compliance with specific judgments in individual cases, the Court’s judgment have had a broader impact on the capability of the domestic legal systems in question to investigate serious violations of fundamental rights and prosecute those responsible.

Given the focus of the DOMAC project on serious violations of human rights, the decisions of the Court which have been taken into consideration for the purposes of the present study are those concerning violations of the right to life, protected under Article 2 ECHR, or the prohibition of torture and other ill-treatment enshrined in Article 3. The report focuses in particular on violations committed in the context of armed conflicts, military occupation or situations of prolonged and intense internal unrest.

¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 4 November 1950), CETS No. 5 (hereinafter “the European Convention” or “ECHR”).

1.2 The notions of “compliance” and “impact”

In the present report, the concept of “compliance” is used to indicate the conformity of the measures taken by the respondent State in response to a judgment of the Court with the legal rules set out in the judgment in question.²

In order to assess the degree of compliance in each case, the present study takes into account the broad range of measures adopted by States in order to give effect to the Court’s judgments and to remedy the violations therein identified. In particular, adopting the classification utilized by the Committee of Ministers, both “individual” and “general” measures will be considered.³ “Individual measures” may include, most obviously, payment of sums awarded by the Court to applicants by way of just satisfaction for pecuniary or non-pecuniary damage. Although such sums are frequently awarded by the Court, and play an important role in cases involving violations of Articles 2 and 3 ECHR, the extent to which States pay such awards is not examined by the present report, as they are of no relevance to the impact of the judgments upon the ability of the domestic legal system to prosecute and punish the perpetrators of violations. On the other hand, other individual measures, including in particular, the reopening of investigations, are very relevant. As far as “general” measures are concerned, although measures of a general nature which are clearly attributable, at least in part, to judgments of the Court are taken into consideration where relevant, the analysis focuses in particular on:

- (a) measures which, although adopted prior to consideration by the Committee of Ministers, have been taken by a respondent State with the stated aim of giving effect to a judgment by the Court, and
- (b) as is more common, measures adopted by a State which have been recommended by the Committee of Ministers in its supervisory role as being necessary for compliance with the Court’s judgment.

² Although this use of the notion of compliance is relatively common and uncontroversial (see, e.g., K. Raustiala and A.M. Slaughter, “International Law, International Relations and Compliance”, in W. Carlsnaes, T. Risse and B.A. Simmons (eds.), *Handbook of International Relations* (Sage, 2002), 538, at 539, defining compliance as “a state of conformity or identity between an actor’s behavior and a specified rule”), the concept of “compliance” with international legal rules and judgments is far from being a clear-cut notion. For detailed discussion, see B. Kingsbury, “The Concept of Compliance as a Function of Competing Conceptions of International Law”, *Michigan Journal of International Law*, vol. 19 (1997-98), 345; H.H. Koh, “Why Do Nations Obey International Law?”, *Yale Law Journal*, vol. 106 (1997), 2599; M. Janis, “The Efficacy of Strasbourg Law”, *Connecticut Journal of International Law*, vol. 15 (2000), 39.

³ The measures which States are required to adopt in compliance with their obligations under Article 46(2) to give execution to the Court’s judgments are generally analysed by the Committee of Ministers in terms of “individual” and “general” measures. The purpose of individual measures is to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as prior to the violation of the Convention (*restitutio in integrum*). By contrast, the aim of general measures is to prevent new and further violations similar to those found in the judgment in question, or the putting an end to continuing violations where they result from wider problems. For a brief overview of the Committee’s practice in this regard, see Annex, Section 1.2.5.

It is to be noted at the outset that, notwithstanding the supervision by the Committee of Ministers and the obligation to submit information on measures taken, which is then often made public, with respect to some States it is extremely difficult to obtain a clear picture of the legislation adopted to give effect to a judgment, or its application by the relevant domestic authorities in practice. In particular, these difficulties may arise not only to linguistic problems and lack of accessibility, but also simply due to the lack of clarity of the information submitted to the Committee by the State authorities.

As noted by the authors of one of the most comprehensive studies of compliance with decisions of the Strasbourg institutions to date, specifically examining compliance by the United Kingdom in the period 1975-1987, certain difficulties are posed in assessing compliance with judgments of the Court and decisions of the Committee of Ministers, as “[t]he relevant law is not always very accessible [...], nor it is easy to ascertain how the law applies in practice [...]”.⁴ Those observations are equally applicable, if not to an even greater extent, as regards countries such as Turkey and the Russian Federation in which there is often little transparency at the domestic level, problems exist as regards access by NGOs, and there is a notable tendency on the part of the authorities to manipulate or provide incomplete, misleading or incomprehensible statistics and data to international bodies.⁵

The notion of “impact” refers to the extent to which the judgments of the Court, as a result of the measures taken by the State in order to give effect to them, have resulted in an improvement of the capability of the domestic legal system to effectively investigate and prosecute serious violations committed by State agents.⁶ The principal way in which the impact of the Court’s judgments may be assessed is by looking at the variations in investigation, prosecution and conviction rates in relation to allegations of abuses committed by state officials. Such an assessment must take into account variations in the actual number of incidents and of complaints. Once again, the task is not easy, as the official figures and statistics for some States tend not to be public, or, where they are released, lack clarity as to the underlying data, or are insufficiently detailed. Further problems arise due to the unavailability of statistics over a continuing period of time, a dearth of any official statistics relating to periods prior to the relevant Court’s judgment

⁴ See R.R. Churchill and J.R. Young, “Compliance with Judgments of the European Court of Human Rights and Decisions of the Committee of Ministers: The Experience of the United Kingdom, 1975-1987”, *British Yearbook of International Law*, vol. 62 (1991), 283, at 346.

⁵ With regard to the Russian Federation, for instance, the International Helsinki Federation has noted that “[...] the authorities of the Russian Federation (and of the Chechen Republic) [...] are [...] restrained in giving details of how the law enforcement system deals with those crimes against civilians, where the alleged perpetrators are either members of the federal forces or of the pro-Moscow Chechen authorities” (International Helsinki Federation for Human Rights (IHF), “Impunity: A Leading Force behind Continued Massive Violations in Chechnya” (19 May 2005), available at <http://www.mhg.ru/english/1E11107>).

⁶ As to the supervisory role of the Committee of Ministers, see Annex, Section 1.2.3 and on the distinction between individual and general measures, see Annex, Section 1.2.5.

with which to make a comparison, or the use of parameters and criteria which change from year to year, making any comparison over time difficult.

In the absence of reliable, accurate and/or conclusive data, an alternative manner in which to assess the impact of the Court's jurisprudence is by adopting an "anedoctal" approach. By analysing the effect of measures adopted further to a judgement of the Court in a few test cases, it is possible to verify, at least to a certain extent, whether the measures in question have led to more effective investigations and prosecutions. In that regard, however, quite apart from the factual specificities of each individual case, a major factor to be taken into consideration is the extent of the willingness of the relevant domestic authorities (police, prosecutors, judges, etc) to actually apply the measures adopted. Of course, a certain amount of care is required so as to ensure that isolated instances of imperfect application of legislation are not erroneously treated as demonstrating general ineffectiveness of the measures. Nevertheless, the greater the number of instances reported of cases in which implementation has been problematic, the stronger the grounds for a conclusion that particular measures have not been effective in practice.

1.3 Selection of the case studies

The following four situations have been chosen as case studies:

- the events in Chechnya during the "Second Chechen War" 1999-2001 , in particular the acts of servicemen of the Russian Federation in that context;
- the actions of members of the Turkish security forces in the context of the conflict with the PKK;
- the actions of the Turkish security forces (and forces loyal to the TRNC) in northern Cyprus;
- the actions of the United Kingdom security forces in the context of the "Troubles" in Northern Ireland.

The case studies were selected on the basis of some common characteristics which render them particularly suitable for the purpose of assessing the impact of the Court's judgment on the capability of domestic systems to punish serious violations of human rights.

- First, each of the situations in question is characterized by a certain **degree of "permanence" and duration**;
- Second, they are situations which have **increased potential for the commission of serious violations**, in that they are characterized by a (real or perceived)

emergency and threats to national security.⁷ Indeed, the four situations have been characterized by repeated occurrence of abuses of varying degrees of gravity, including disappearances, excessive use of force by State agents, extra-judicial killings, indiscriminate bombings of civilians, torture and other forms of ill-treatment. Those abuses amount to serious violations of the most fundamental rights protected under the European Convention, i.e. the right to life (Article 2 ECHR) and the right not to be subjected to torture or other forms of ill-treatment (Article 3 ECHR). Further, in most cases, those substantive violations were accompanied by violations of the procedural obligations of investigation and prosecution deriving from Articles 2 and 3 ECHR, as well as the obligation to provide an effective remedy for violations under Article 13.

- Third, in all four situations there has been a degree of **involvement of the State's security forces** in the violations at issue, either because members of the security forces were directly responsible for the violations, or because they are alleged to have connived in the actions of private actors.
- Fourth, with the partial exception of Northern Ireland, the abuses committed by the security forces have to a great extent been accompanied by a **large measure of impunity** for the perpetrators.
- Fifth, the case studies have been selected so as to cover a **variety of legal systems** having different characteristics, different traditions of judicial protection of fundamental rights and different levels of "maturity" as regards the acceptance and internalisation of international human rights standards. For instance, the study of the reaction of the United Kingdom to judgments relating to the anti-terrorism measures adopted in Northern Ireland is of particular use as it is illustrative of the attitude of what is generally regarded as a "mature" democracy to the obligations imposed by the Convention, as interpreted by the Court and Committee of Ministers.
- Sixth, the four situations have been the object of long and developed series of judgments from the Court and of long-running involvement of the Committee of Ministers in its monitoring role.⁸ Accordingly, due to such **sustained and prolonged involvement of the Convention bodies** those situations provide a fertile ground for assessing the impact of the Court's judgments on the domestic

⁷ Two of the case studies relate to abuses committed during internal armed conflicts (Turkey/PKK and Chechnya), one concerns military occupation (northern Cyprus), and the fourth relates to abuses committed during a prolonged period of civil unrest punctuated by terrorist action (Northern Ireland).

⁸ Directly or through the Department for the Execution of Judgments of the European Court of Human Rights. The Department for the Execution of Judgments, part of the Directorate of Human Rights and Legal Affairs (DGHL), is a specialised section of the Secretariat of the Council of Europe, providing support to the Committee of Ministers in its supervision of execution of judgments of the Court. See further, Annex, Section 1.2.4.

legal systems of the respondent States.⁹ In particular, helpful insight is gained from the fact that the execution of at least some of the judgments has been under active consideration by the Committee of Ministers for extended periods of time and has been characterized by frequent exchanges of views between the State involved and the Committee of Ministers.

- Finally, the fact that the situations at issue have given rise to a number of **“repetitive” cases**, i.e. cases concerning issues similar to those addressed by the Court in previous cases against the same respondent State, makes it possible to evaluate the extent to which the approach of the Court has evolved as the result of the persistent lack of compliance by the respondent State.

1.4 Structure of the report

The Report pulls together the conclusions drawn from the four individual case studies, which are reproduced in full in the Annex. Following the present introductory section, Section 2 examines the categories of procedural violations of Articles 2 and 3 ECHR concerning investigations and prosecutions which have been identified by the Court and provides examples of the measures which have been taken in order to address those violations. Section 3 provides a general assessment of the levels of compliance and impact in the context of each of the situations covered in the case studies. Section 4 assesses the reasons for the limited compliance by some States with certain aspects of the Court’s judgments. Finally, in light of the conclusions as to the reasons underlying non-compliance, Section 5 canvasses possible solutions and makes recommendations as to measures which may be adopted in order to increase compliance and improve impact in the future.

The Annex to the Report contains an introductory part, which outlines the Convention mechanisms for monitoring compliance with the judgments of the Court and provides a concise overview of the relevant ECHR standards on investigation and

⁹ The extent of the involvement of the Convention bodies in the situations in question is clear if one considers that, to date, over one-hundred judgments have been rendered by the Court in relation to violations in Chechnya and many more cases are still pending (see Annex, Section 2.3). Similarly, complaints of violations in the context of the Turkey/PKK conflict have given rise to over 175 judgments, as well as 69 friendly settlements or strike-out judgments involving recognition of responsibility by Turkey in relation to the actions of its security forces (see Annex, n. 659 and accompanying text). The military intervention and occupation of the north of Cyprus by Turkey in 1974 has resulted in four important inter-State cases following applications brought by the Republic of Cyprus against Turkey, as well as a number of individual applications relating to the deaths and disappearances which have taken place at the time of the Turkish invasion and the initial years of the occupation (see Annex, n. 862 and accompanying text). Although the situation in Northern Ireland has given rise to comparatively fewer cases, the conduct of UK security forces in that context has been at issue in the first inter-State case decided by the Court in 1978 (*Ireland v. United Kingdom* (App. no. 5310/71), *Series A, No. 25* (1978)). Since then, the Court has had the opportunity to consider a large number of cases arising out of the Troubles. Although many of these have related to the exercise of powers of detention, raising issues under Article 5 ECHR, a significant number have involved allegations of violations of Article 2 (see Annex, Section 5.3).

prosecution of violations of the right to life or the prohibition of torture. The second part of the Annex collects the four case studies, each of which assesses in detail the relevant decisions of the Court, the measures adopted by the respondent States, and the approach taken by the Committee of Ministers in supervising execution of the judgments, before providing an assessment of the practical impact of those measures on the capability of the relevant legal system to prosecute state agents responsible of serious human rights abuses.

2. Measures adopted in compliance with the judgments of the Court

The present section examines the measures adopted by the respondent States in order to address the problems identified by the Court in judgments concerning serious abuses (allegedly) committed by State agents. In particular, it addresses the measures taken to remedy the shortcomings in relation to investigations and prosecutions of unlawful killings, disappearances and acts of torture/ill-treatment. In order to facilitate a comparison between the different case studies, the measures are examined under two broad thematic headings, reflecting particular recurring problems which emerge in the vast majority of the judgments analysed in the case studies. In particular, the issues which have been identified as cross-cutting thematic issues relate to:

- (a) shortcomings in the normative framework concerning criminalization of conduct amounting to a violation of Articles 2 and/or 3 ECHR; and
- (b) shortcomings relating to investigative procedures.

2.1 Effective repression of conduct in violation of Articles 2 and 3

The case-law of the Court makes clear that States are required, where appropriate, to prosecute those identified as responsible for violations of Articles 2 and/or 3 ECHR. In addition, where a conviction is obtained, the sanctions imposed must be sufficiently severe.¹⁰ As far as the effective repression of violations committed by members of the security forces is concerned, the shortcomings identified by the Court in the judgments analyzed in the case studies can be grouped in the following broad categories:

¹⁰ For a brief overview of the jurisprudence of the Court in this regard, see Annex, Section 1.3.3(b).

- issues relating to the effective criminalization of conduct raising issues under Articles 2 and 3 ECHR (including the imposition of meaningful sanctions);
- issues relating to the availability of criminal law remedies, including the possibility of challenging a decision not to prosecute; and
- problems arising from the potential applicability of statutes of limitation.

2.1.1 Adoption of legislation foreseeing adequate criminal sanctions

The obligation to protect the right to life under Article 2 ECHR and the prohibition of torture and inhuman and degrading treatment under Article 3 impose on the State the obligation to enact legislation aimed at the criminalization and effective punishment of conduct in violation of the rights in question.¹¹ In most of the cases analyzed by the Court, the penal system of the respondent State contained provisions criminalizing conduct in violation of Articles 2 and 3 ECHR at the time in which the violations in question took place. However, the Court has also on occasion identified deficiencies in the substantive criminal law rules which have had as a result reduced accountability for serious abuses committed by State officials.

With respect to Russia, although torture has for a long time been prohibited, including under the Constitution, it was not until 2003 that a definition of “torture” was introduced in Article 117 of the Criminal Code.¹² However, although some criticism of the definition of the offence of torture under domestic law has been made by human rights groups, and some concerns have been raised in that regard by the Committee Against Torture,¹³ the European Court has never found a violation of Article 3 of the Convention on the basis of any deficiency in the definition of torture contained in the relevant law, whether in relation to cases arising in Chechnya, or elsewhere. Rather, cases have typically involved not the quality of the law as such, but the lack of any investigation, or deficiencies in and a lack of effectiveness of those investigative activities which did take place.

As far as Turkey is concerned, the concerns expressed by the Court in relation to the obligation of criminalization have concerned not so much the total absence of legal

¹¹ On the obligation to criminalize, see Annex, Section 1.3.1.

¹² Criminal Code of the Russian Federation, Law No. 63-FZ of 13 June 1996 (hereinafter “RF Criminal Code”); unofficial English translation available at <http://www.legislationline.org/download/action/download/id/1697/file/0cc1acff8241216090943e97d5b4.htm/previous>. The amendment to Art. 117 of the Code was introduced by the “Federal Law on the Introduction of Changes and Amendments to the Criminal Code of the Russian Federation” of 8 December 2003.

¹³ For more detailed discussion of these criticisms, see Annex, Section 2.5.1(a).

norms criminalizing conduct in violation of Articles 2 and/or 3 ECHR, but rather the fact that the relevant legislation permitted the imposition of extremely lenient sanctions on members of the armed forces who were found responsible for acts of torture or ill treatment.¹⁴ Those concerns were repeatedly echoed by the Committee of Ministers in the context of supervision of execution of the judgments concerning actions of the Turkish security forces.¹⁵

In order to address, *inter alia*, the shortcomings identified by the Court in cases arising out of the conflict with the PKK, the Turkish Government has implemented a broad programme of legal reforms. Such programme has intensified after the coming to power of the Justice and Development Party (*Adalet ve Kalkınma Partisi* or “AKP”) in late 2002.¹⁶ With regard to the normative framework concerning criminalization of abuses committed by the security forces and other state officials, starting in 2002, a number of amendments to the relevant domestic rules were introduced in the context of the adoption of so-called “EU Harmonization Packages”. Although the primary reason for the adoption of the harmonization legislation is the process of negotiation relating to possible future accession of Turkey to the EU, it bears noting that the EU has conditioned membership, *inter alia*, upon compliance by the potential candidate State with its obligations under the Statute of the Council of Europe. In the case of Turkey, this most obviously includes compliance with judgments of the Court against it.¹⁷ The harmonization legislation thus brought about important legal changes which were directly and expressly aimed at addressing the shortcomings in the Turkish legal system identified by the European Court, including in the context of repression of abuses committed by members of the police and security forces.¹⁸ Quite apart from the various minor amendments progressively introduced by the various Harmonization Packages, the most important and relevant legislative changes for present purposes are undoubtedly those introduced by the new Criminal Code, which entered into force on 1 June 2005,¹⁹ and the changes to the procedures governing investigations and prosecutions introduced by a new Code of Criminal Procedure, which entered into force on the same date.²⁰

¹⁴ See Annex, Section 3.5.1(a).

¹⁵ See, e.g., Interim Resolution CM/ResDH(2002)98 (above n. 685), quoted in Annex, text accompanying n. 700.

¹⁶ See, in general, Annex, Section 3.5.

¹⁷ See Annex, Section 3.5.1.

¹⁸ See Annex, Section 3.5.

¹⁹ Criminal Code, Law no. 5237 of 26 September 2004, Official Gazette No. 25611 (12 October 2004), entered into force on 1 June 2005 (hereinafter “2005 Turkish Criminal Code”); unofficial English translation available at <<http://legislationline.org/documents/action/popup/id/6872/preview>>.

²⁰ Criminal Procedure Code, Law no. 5271 of 4 December 2004, entered into force 1 June 2005 (hereinafter “2005 Turkish Criminal Procedure Code”); unofficial English translation of selected articles available at <<http://legislationline.org/documents/action/popup/id/8976>>.

The legislative changes concerning the criminalization of specific acts have been comparatively minor: both the protection of the right to life and physical integrity, and the prohibition of torture and ill-treatment were already enshrined in the Turkish Constitution at the time of the events relevant for the various judgments.²¹ Further, the infliction of torture or ill-treatment by public officials was already clearly punishable under criminal law at the relevant time.²² Still, with a view to addressing the concerns expressed by the Court and the Committee of Ministers, those provisions have been expanded and reinforced in the 2005 Criminal Code, which, *inter alia*, sets out a clear definition of “torture” and also provides for the offence of “aggravated torture”.²³ More importantly, measures have been progressively adopted by Turkey in order to address the criticisms of the Court and recommendations of the Committee of Ministers in relation to the excessive leniency of the sentences imposed on public officials responsible for torture or ill-treatment. In particular, the maximum sentences which could be imposed on officials found guilty of torture or ill-treatment were increased in 1999.²⁴ In 2003, the relevant provisions were subsequently further amended in order to ensure that the penalties in question could no longer be converted into fines or be suspended; this latter limitation on the possibility of conversion of sentences has been maintained in the 2005 Criminal Code.²⁵ Further, the 2005 Criminal Code introduced harsher penalties for human rights abuses, including torture and ill-treatment. In particular, whilst until 2005 the domestic legislation made no provision for any minimum penalty for torture and a minimum sentence of only three months for ill-treatment, the 2005 Criminal Code introduced a minimum sentence of three years for the crime of torture and, in the case of the new offence of “aggravated torture”, provided for a scale of sentences commensurate to the level of damage inflicted on the body and the existence of any lasting health conditions caused as a result of the torture.²⁶ Under the new norms, a sentence up to life imprisonment may be imposed where death is caused by torture.²⁷ In 2005, the Committee of Ministers welcomed “the enhanced accountability of the security forces in

²¹ See Art. 17, 1982 Turkish Constitution, available at http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf.

²² Provisions criminalizing torture and ill-treatment were contained in the old Criminal Code adopted in 1926.

²³ Under Art. 94 of the 2005 Turkish Criminal Code (above n. 19), torture is defined as actions by a public official which “cause [...] severe bodily or mental pain, or loss of conscious [*sic*] or ability to act, or dishonour [...] to a person”. For commentary, see Human Rights Watch, “Closing Ranks against Accountability: Barriers to Tackling Police Violence in Turkey” (2008), available at <http://www.hrw.org/en/reports/2008/12/05/closing-ranks-against-accountability-0>, p. 16. On “aggravated torture”, see Art. 95 of the 2005 Turkish Criminal Code (above n. 19).

²⁴ See Law of 26 August 1999, which modified Arts 243(1) and 245 of the old Criminal Code (now Arts 94 and 95, 2005 Turkish Criminal Code (above n. 19) respectively) to increase the maximum sentences from 5 to 8 years’ imprisonment for torture and from 3 to 5 years’ imprisonment for ill-treatment (see Interim Resolution CM/ResDH(2002)98 (above n. 86), Appendix I, § 18).

²⁵ See Annex, Section 3.5.1(a), text accompanying n. 714 et seq.

²⁶ Art. 94, 2005 Turkish Criminal Code (above n. 19).

²⁷ Art. 95, 2005 Turkish Criminal Code (above n. 19). For comment, see Human Rights Watch, “Closing Ranks” (above n. 23), p. 16.

the new Criminal Code as a result of the introduction of minimum prison sentences for crimes of ill-treatment and torture, which may no longer be converted into fines or suspended”.²⁸

In relation to the United Kingdom, no problems have been revealed in cases before the Court in relation to the question of criminalisation of conduct contrary to Articles 2 and 3 *per se*; at the relevant time, the conduct in question was prohibited as a matter of the criminal law of the United Kingdom and entailed appropriate penalties.²⁹ Rather, as discussed in more detail below, issues have arisen in particular as to the quality of the investigations into deaths as a result of actions of the security forces or the ability to challenge the decision not to prosecute in individual cases, including in relation to newly-emerging allegations of collusion of the security forces in killings by paramilitary groups.³⁰

2.1.2 Possibility of challenging a decision not to prosecute

The Court has reiterated on a number of occasions that the possibility of appealing to a court against a refusal by the investigating authorities to open criminal proceedings may, in principle, offer a substantial safeguard against the arbitrary exercise of power by the investigating authority.³¹ Similarly, in the practice of the Committee of Ministers, the possibility of judicial review or an appeal against a decision by the prosecuting authorities not to prosecute is also regarded as an important safeguard to ensure adequate information and public scrutiny.³²

In Turkey, pursuant to Article 173 of the 2005 Code of Criminal Procedure (and previously under Article 165 of the old Code), decisions of public prosecutors not to prosecute can in theory be challenged by interested persons before the competent assize court. There are at least two examples of applications which have come before the Court in which the applicants successfully appealed against the public prosecutors'

²⁸ See Interim Resolution CM/ResDH(2005)43, “Actions of the security forces in Turkey: Progress achieved and outstanding problems. General measures to ensure compliance with the judgments of the European Court of Human Rights in the cases against Turkey concerning actions of members of the security forces (listed in Appendix III) (Follow-up to Interim Resolutions DH(99)434 and DH(2002)98)”, adopted by the Committee of Ministers on 7 June 2005 at the 928th meeting of the Ministers’ Deputies.

²⁹ For instance, the conduct involved in the Five Techniques at issue in *Ireland v. United Kingdom* was illegal under the law of the United Kingdom at the relevant time; it appears that at least some members of the security forces were prosecuted; see Annex, Section 5.6.

³⁰ See below, Section 2.2.3. For a more detailed discussion, see Annex, Section 5.5, text accompanying n. 1136 et seq.

³¹ *Chitayev and Chitayev v. Russia* (above n. 160), § 139.

³² Interim Resolution CM/ResDH(2007)73, Action of the Security Forces in Northern Ireland (case of McKerr against the United Kingdom and five similar cases). Measures taken or envisaged to ensure compliance with the judgments of the European Court of Human Rights in the cases against the United Kingdom listed in Appendix III. Adopted by the Committee of Ministers on 6 June 2007 at the 997th meeting of the Ministers’ Deputies.

decision not to prosecute.³³ In this regard, it bears noting that, where no recourse is made to such remedies, if available, there is a risk that the Court may find that the applicant has failed to exhaust domestic remedies under Article 35(1) of the Convention.³⁴

In Chechnya, at the material time of the events of the “Second Chechen War” in 1999-2001, the relevant legislation was represented by the 1960 Code of Criminal Procedure. Under Article 113 of the 1960 Code of Criminal Procedure, if the investigating body refused to open a criminal investigation, a reasoned decision had to be given. The complainant was to be notified of the decision and was entitled to appeal against it to a superior prosecutor or to a court. In some of the Chechen cases, the Court recognized that, at least as far as the possibility of challenging the decision not to prosecute before a court was concerned, the remedy contained in Article 113 was to be regarded as an effective remedy, which an applicant had to exhaust prior to lodging an application with the Court.³⁵ However, in several other cases, the Court expressed strong doubts as to whether, in light of the conduct of the prosecution authorities, that remedy would have been effective in the circumstances of the case at hand, and concluded that the applicants had had no realistic opportunity of effectively challenging the decision to dispense with the criminal proceedings.³⁶

However, the situation in many of the Chechen cases is complicated by the fact that, given the entry into force of the new Code of Criminal Procedure in 2002, the domestic legislation relating to the possibility of challenging decisions not to institute criminal proceedings changed shortly after the end of the Chechen conflict, at a time when investigations in many of the cases were still pending. Article 125 of the 2002 Code of Criminal Procedure provides for judicial procedures for considering complaints regarding, inter alia, the refusal to institute a criminal case, the decision to terminate a criminal case or lack of action by the authorities.³⁷ In a number of the Chechen cases, the Court has held that, although the procedure envisaged by Article 125 of the Code of Criminal Procedure might theoretically be regarded as constituting an effective remedy against a decision not to prosecute, the prior inaction of the investigative authorities or the deficient nature of the investigation meant that the procedure in question did not, in

³³ See *Keçeci v. Turkey* (dec) (App. no. 38588/97), ECtHR 17 October 2000; and *Fidan v. Turkey* (dec) (App. no. 24209/94), ECtHR 29 February 2000, both unreported.

³⁴ See, e.g., *Epözdemir v. Turkey* (dec) (App. no. 57039/00), ECtHR 31 January 2002.

³⁵ See, e.g., *Medov v. Russia* (App. no. 1573/02), ECtHR 8 November 2007, § 105. For discussion, see Annex, Section 2.5.2(f).

³⁶ See, e.g., *Chitayev and Chitayev v. Russia* (above n. 160), § 140. The authorities had notified the applicants of the decision not to prosecute without providing them with a copy of the decision in question. The Court found that it was highly unlikely that, in the absence of a copy of the decision, the applicants would have been able to detect possible defects in the investigation and bring them to the attention of a domestic court, or to present, in a comprehensive appeal, any other arguments they might have considered relevant. For discussion, see Annex, Section 2.5.2(f).

³⁷ See Annex, Section 2.5.2(f).

practice, constitute an effective remedy available in the circumstances of the case.³⁸ In this regard, the Committee of Ministers has expressed the view that the effectiveness of that remedy remains to be assessed in practice and has called upon Russia to provide further information.³⁹

In relation to the situation in Northern Ireland, the prosecuting authorities were at the relevant time under no obligation to give reasons for a decision not to prosecute, and such a decision could not, at least in Northern Ireland, be made the subject of an application for judicial review.⁴⁰ That situation was criticized by the Court in several decisions, with the Court finding that those defects violated the procedural obligations arising under Article 2. In order to comply with those judgments, changes were made to the Code for Public Prosecutors applicable in Northern Ireland, requiring reasons to be provided in certain circumstances. As a consequence, and following the entry into force of the Human Rights Act 1998, decisions of the Public Prosecutor in Northern Ireland not to prosecute are now subject to judicial review. Furthermore, the decisions of the Court have also had a somewhat wider impact on the law elsewhere in the United Kingdom more generally. Although there had been parallel developments of the law in that direction by the domestic courts following the entry into force of the Human Rights Act 1998,⁴¹ the decisions of the Court have contributed to the introduction of similar obligations to give reasons in the relevant Code of Practice for prosecutors in England and Wales.⁴²

2.1.3 Statutes of limitation

As the Court has made clear, criminalization of unlawful killings and acts of torture and ill-treatment is not sufficient on its own. Quite apart from the need to effectively investigate and, if appropriate, punish those responsible for serious violations, investigations and prosecutions must be conducted with sufficient expedition, since, otherwise, the application of statutes of limitation may have the *de facto* effect of preventing prosecution of individuals responsible for mass atrocities.

³⁸ See e.g. *Kukayev v. Russia* (App. no. 29361/02), ECtHR 15 November 2007, § 73 and Annex, Section 2.5.2(f).

³⁹ “Decisions adopted at the 1059th (DH) meeting, 2-4 and 5 (morning) June 2009”, CoE doc. CM/Del/Dec(2009)1059, 8 June 2009, Decision §§ 6 and 7.

⁴⁰ Although since at least 2001 judicial review was available under the law of England and Wales: see *R v. DPP (ex parte Manning)*, [2001] QB 330, and see *R (on the application of Corner House Research and another) v. Serious Fraud Office* [2008] UKHL 60, [2008] 3 WLR 568, at [30].

⁴¹ See, in particular, *R v. DPP (ex parte Manning)* (above n. 40), a decision under the Human Rights Act 1998 delivered shortly before the decisions of the European Court in the *McKerr* group of cases.

⁴² See e.g. Code of Practice for Crown Prosecutors, available at <<http://www.cps.gov.uk/publications/docs/code2004english.pdf>>, § 2.6

Given the frequent deficiencies in the investigation and prosecution of conduct amounting to a violation of Articles 2 and/or 3 of the Convention, an effective investigation leading to the identification of perpetrators may only take place many years after the acts in question. As a result, issues relating to prescription and the application of statutes of limitation often arise. Further, in light of the duty to impose adequate punishment on those responsible for conduct in violation of Articles 2 and 3, further issues may arise if the domestic authorities have purported to grant an amnesty or pardons for those involved.

As far as the applicability of limitation periods is concerned, in its observations submitted to the Committee of Ministers, the Russian Government noted that, under the relevant domestic criminal legislation, a fifteen-year limitation period applies to “especially grave crimes”.⁴³ However, not all of the crimes committed by the Russian security forces in Chechnya would appear to fall within that category as defined in the relevant domestic legislation and thus are not subject to the longer limitation period indicated by the Government.⁴⁴

Under Article 15 of the Criminal Code of the Russian Federation, “especially grave crimes” are defined as those offences which are sanctioned with a deprivation of liberty for a term exceeding 10 years, or a more severe punishment. However, under the domestic legislation, some of the offences typically committed by Russian servicemen in Chechnya, including torture, are punishable with deprivation of liberty for a period of less than ten years.⁴⁵ In particular, whilst “killings” under Article 105 of the Criminal Code fall within the category of “especially grave crimes”, other relevant offences, such as, for instance, “compulsion to give evidence” and “excess of official powers” are punished with lesser penalties⁴⁶ and therefore are considered only as “grave crimes” under Article 15 of the Criminal Code with the result that they are subject to a ten-year limitation period.⁴⁷ The crime of “illegal detention”, sanctioned by detention for a period of up to three

⁴³ The statement is reported in “Memorandum to the Committee of Ministers, Observations of the European Human Rights Advocacy Centre (EHRAC) and Memorial in response to the Government’s Observations on execution of judgments in cases concerning the security forces in the Chechen Republic”, 8 September 2008, available at <http://www.londonmet.ac.uk/londonmet/library/l10114_3.pdf> [last accessed 15 May 2010], § 14. For discussion of the issue of applicability of statutes of limitation to the crimes committed by Russian servicemen in Chechnya, see Annex, Section 2.5.1(b).

⁴⁴ The relevant domestic provision in this regard is constituted by Art. 78 (Release from Criminal Responsibility in Connection with the Expiration of Statutes Limitation on Actions), RF Criminal Code (above n. 12), which provides that “a person is relieved from criminal responsibility if the following periods have elapsed from the day of commission of the crime: (a) 2 years after the commission of a crime of minor gravity; (b) 6 years after the commission of a crime of average gravity; (c) 10 years after the commission of a grave crime; (d) 15 years after the commission of an especially grave crime”.

⁴⁵ See, in particular, Art. 117 (Torture), Art. 301 (Illegal Detention, Taking into Custody, or Keeping in Custody), Art. 302 (Compulsion to Give Evidence) and Art. 286 (Exceeding Official Powers) of the RF Criminal Code (above n. 12). For discussion, see Annex, text accompanying n. 436 et seq.

⁴⁶ See, respectively, Art. 302 and Art. 286 RF Criminal Code (above n. 12).

⁴⁷ See Art. 78(1)(c), RF Criminal Code (above n. 12).

years,⁴⁸ falls within the category of “medium gravity crimes” (according to Article 15(3) of the Criminal Code of the Russian Federation) and, as such, is subject to a six-year limitation period.⁴⁹ The existence of these limitation periods applicable to the crimes committed by the Russian security forces in Chechnya, most of which date back to the period between 1999 and 2001, requires urgent action by the prosecuting authorities in order to meet their obligations and carry out effective investigations into these cases.

Similarly, there are examples of Turkish cases regarding torture where the statute of limitation has come into play. In these cases, the Court has found that the judicial authorities have failed to act with sufficient promptness or reasonable diligence, with the result that the perpetrators had enjoyed impunity. In the case of *Batı and Others v. Turkey*, which concerned a series of abuses suffered by fifteen applicants following their arrest during a police operation in 1996, the Court found it established that the applicants had been subjected to torture and that the investigation into the applicants’ allegations of torture had been very lengthy. In particular, the Court noted that the criminal proceedings against the police officers involved in the abuses were still pending before the Turkish Court of Cassation in 2004, i.e. eight years after the events, when the Court of Cassation decided to discontinue the proceedings against the accused because the limitation period had expired.⁵⁰ Likewise, in *Türkmen v. Turkey*, the charges against the police officers were discontinued by a decision of the Court of Cassation in 2000 on the ground that the prescription period of 5 years had expired in 1999.⁵¹ Further to those judgments, some measures have been taken by the Turkish authorities in order to limit the risk that serious violations may go unpunished due to the application of limitation periods. In particular, the 2005 Criminal Code provides for longer limitation periods for the crimes of torture and ill-treatment.⁵² The Turkish Ministry of Justice has also issued a circular to judges and public prosecutors, stating that “public prosecutors should calculate with diligence the prescription periods and should do all that is necessary in order to finalise the investigations pending without any outcome”.⁵³ The Committee of Ministers has asked Turkey to provide information regarding limitation periods in cases of the death of individuals in circumstances which engage the responsibility of the security forces, as well as in cases where victims are killed by unknown perpetrators.⁵⁴ The question of

⁴⁸ See Art. 301, RF Criminal Code (above n. 12); note however that if the crime entails “grave consequences”, the provision provides for “deprivation of liberty for a term of three to eight years”.

⁴⁹ See Art. 78(1)(b), RF Criminal Code (above n. 12).

⁵⁰ *Batı and Others v. Turkey* (App. no. 33097/96 and 57834/00), Reports 2004-IV.

⁵¹ *Türkmen v. Turkey* (above n. 164). See also *Yaman Abdülsamet v. Turkey* (App. no. 32446/96), ECtHR 2 November 2004; *Yeşil and Sevin v. Turkey* (above n. 164); and *Tamer Fazıl Ahmet v. Turkey* (above n. 164).

⁵² The limitation periods under the 2005 Turkish Criminal Code (above n. 19) range from a minimum of fifteen years for torture, to a maximum of thirty years if the victim dies as a result of the infliction of torture. See Annex, Section 3.5.1(b).

⁵³ Circular No. 2, issued on 1 June 2005; see Interim Resolution CM/ResDH(2008)69 (above n. 89), Appendix I.

⁵⁴ See, most recently, “Annotated Agenda and Decisions, 1078th (DH) Meeting, 2-4 March 2010”, CoE doc. CM/Del/OJ/DH(2010)1078 section 4.2 publicE, 18 March 2010.

statute of limitations in relation to those types of crimes remains particularly important, given that, although the new 2005 Criminal Code provides for longer prescription periods, the fact that the events at issue took place in the 1990s may mean that even those longer prescription periods may not be sufficiently long to ensure accountability of perpetrators.

In the United Kingdom, there is generally no limitation period for the prosecution of offences, although exceptionally, in relation to certain specific offences, proceedings may not be brought after a period of time laid down by the relevant legislation.⁵⁵ Prolonged delay in the bringing of a prosecution, for instance due to an improper use of court procedures, or inefficiency on the part of the prosecution, may exceptionally constitute an abuse of process requiring a stay of proceedings; however, the stay of proceedings on this basis is comparatively rare.⁵⁶ Accordingly, in situations covered by the case study on Northern Ireland, in general, no obstacles bar the bringing of proceedings on the basis of the effluxion of time.

2.2 Investigations

The European Court has recognized that Articles 2 and 3 ECHR impose upon State Parties to the Convention an obligation to conduct a prompt, independent and effective investigation whenever facts come to their attention which suggest a violation of either the right to life, or of the prohibition of torture and other ill-treatment.⁵⁷

In the situations analyzed in the case studies, the problem identified by the Court was not as such the non-existence, within the domestic legal system, of appropriate procedures or bodies responsible for the investigation of abuses by the security forces. Rather, the problems which have arisen in practice relate to the genuine nature of the investigation, the effectiveness of the investigative procedures, or the degree of independence of the investigating body. In this regard, the shortcomings identified by the Court may be divided into two broad categories:

- (a) inadequacies in the pre-existing institutional framework within which investigations are carried out; and,
- (b) flaws in the investigative procedures in place, or in the way in which those procedures are implemented in practice.

⁵⁵ Although proceedings in the Magistrates Courts in relation to summary offences may not be brought more than six months after the offence was committed: Magistrates' Courts Act 1980, s 127(1). Summary offences are minor offences, so that this exception is not relevant for present purposes.

⁵⁶ *R v Grays Justices, ex p Graham* [1982] QB 1239; 75 Cr App Rep 229.

⁵⁷ For an overview of the applicable standards developed by the Court, see Annex, Section 1.3.2.

As regards institutional problems, one recurring major shortcoming concerns the inadequacy of investigative bodies, including issues relating to the lack of institutional independence of the investigative authorities (Section 2.2.1). As to the second category, concerning problems in the proper implementation of procedures already in place, the major shortcomings relate to the lack of promptness of the investigation (Section 2.2.2), problems relating to the overall effectiveness of the investigation (Section 2.2.3), the lack of adequate public scrutiny and participation of victims and their relatives in the investigation (Section 2.2.4) and, finally, problems relating to the extent to which investigations which have been characterized as defective by the Court may be reopened (Section 2.2.5).

2.2.1 Inadequacy of investigative bodies

The lack of an appropriate institutional framework for investigative activities is likely to result in the investigation being flawed, for instance due to a lack of independence of the investigating authorities from those alleged to have committed the acts in question, or because of the poor quality of the investigation. For instance, problems of this kind were identified by the Court in a number of judgments concerning allegations of serious violations committed by Russian servicemen in Chechnya.⁵⁸ In particular, the Court criticized the initial rejection by military prosecutors of complaints by the applicants alleging that their relatives had been unlawfully killed by the military, despite the existence of compelling evidence, delays in the opening of investigations, and a “series of serious and unexplained failures to act”, including failure to establish crucial facts and to identify other victims and witnesses.⁵⁹

In response to the various findings of violation by the Court, the Russian Federation has adopted a number of measures, which, at least in theory, should guarantee a higher degree of independence of the investigating authorities, and therefore more effective investigations. In particular, the “institutional” measures adopted by the Russian Federation have included the decentralization of investigative activities, the creation of relevant bodies or offices at the local level⁶⁰ and the creation of interagency working groups in order to improve the efficiency of investigations.⁶¹

⁵⁸ See Annex, Section 2.5.2(a).

⁵⁹ See, e.g., *Isayeva, Yusupova and Bazayeva v. Russia* (App. no. 57947/00, 57948/00 and 57949/00), ECtHR 24 February 2005, § 215-225 and the cases discussed in Annex, Section 2.5.2(a).

⁶⁰ These decentralized investigative and prosecutorial authorities include the Prosecutor’s Office of the Chechen Republic, established in February 2000, the Military Prosecutor’s Office of the Joint Group of Forces in the North Caucasian region, established in September 2002. Further, the local department of the Ministry of the Interior, created in December 1999, was transformed in 2002 into the Ministry of the Interior of the Chechen Republic. See Annex, text accompanying n. 485.

⁶¹ In particular, pursuant to a decision of the Prosecutor of the Chechen Republic of 30 November 2002, interagency investigative groups were created with a view to investigate grave crimes; further an interagency

Whilst some of those changes were adopted prior to the handing down of the first judgment of the Court on the Chechen cases,⁶² the majority of the changes can be seen as being directly linked to the criticisms made by the Court. In that regard, although the Committee of Ministers has yet to adopt an interim resolution, the Department for the Execution of Judgments initially expressed the view that measures adopted by the Russian Federation “should doubtlessly contribute to the establishment of effective remedies in the Chechen Republic, inasmuch as they provide the necessary infrastructure which was deficient at the time of events impugned by the Court”.⁶³

Other structural measures have been adopted to address issues concerning the independence of the investigative authorities identified by the Court. As from September 2007, the investigation of offences committed by servicemen, which previously fell within the jurisdiction of individual prosecutors, now falls within the jurisdiction of an Investigating Committee set up within the *Prokuratura*. The Investigating Committee has been set up so as to separate the functions of investigation and oversight of investigation and in order to ensure greater independence of the authorities in charge of investigations.⁶⁴ In that regard, the Committee of Ministers has “noted with particular interest the recent reform of the *Prokuratura* separating the authorities responsible for investigation from those responsible for supervision of the lawfulness of investigations and encouraged the Russian competent authorities further to enhance their control of investigations’ compliance with the requirements of the Convention”.⁶⁵ Instructions and orders have also been issued to prosecutors and other authorities in the Chechen Republic specifying the matters which are to be dealt with as a matter of priority in investigations relating to offences allegedly committed by members of the security forces.⁶⁶

However, the Department for the Execution of Judgments has noted that, notwithstanding the measures taken to date, reports of various international monitoring bodies show that further efforts are still needed in order, in particular, to provide the prosecution services with the staff, resources and facilities needed for the effective investigation of cases involving allegations of ill-treatment, illegal detention and

working group was created in June 2005, headed by the Deputy Prosecutor of the Chechen Republic and including the heads of law enforcement bodies and of the security forces, to coordinate their action in cases concerning serious human rights abuses. See Annex, text accompanying n. 486 and 487.

⁶² For instance, an inter-agency program providing for a set of measures aimed at ensuring the effective investigation into disappearances was adopted in 2004 by the Office of the Prosecutor of the Republic of Chechnya in cooperation with the Ministry of Interior of the Republic, the local Federal Security Services (FSB) department and the Prosecutors’ Office of the Russian Federation. The programme was amended in January 2005; see Annex, Section 2.5.2(c), text accompanying n. 489.

⁶³ CoE doc. CM/Inf/DH(2006)32 rev. 2 of 12 June 2007, § 85.

⁶⁴ See Annex, Section 2.5.2(c), in particular text accompanying n. 492 et seq; see also CoE doc. CM/Inf/DH(2008)33 of 11 September 2008, §78.

⁶⁵ CoM, “Decisions adopted at the 1051st (DH) meeting, 17-19 March 2009”, CoE doc. CM/Del/Dec(2009)1051, 23 March 2009, Decision, § 4.

⁶⁶ See Annex, Section 2.5.2(a), text accompanying n. 462.

disappearances.⁶⁷ The concerns of the Department for the Execution of Judgments are shared by the Committee for the Prevention of Torture (CPT), which, following a visit to the Republican Forensic Medical Bureau in Chechnya in 2006, reported that, although significant investments had been made in equipment and the physical facilities of the forensic bureau in Grozny, and the structure was now without doubt one of the best within the North Caucasian region, no progress had been made in establishing certain essential functions, such as an autopsy service.⁶⁸

Finally, and quite apart from institutional deficiencies and lack of infrastructure, the lack of prosecutions is to some extent due to the attitudes of prosecutors, who appear to be unwilling to carry out investigations into alleged abuses by the security forces. In that regard, local human rights NGOs have noted that reports of the Office of the Public Prosecutor demonstrate a completely different approach to investigations of crimes, depending on whether the accused are members of the Federal Forces, or rebel fighters.⁶⁹

Analysis of the United Kingdom's response to the judgments of the Court in six cases relating to Article 2 (concerning killings committed either by police officers or with the alleged connivance of members of the security forces) provides another example of how a finding of violations of the procedural obligations under Article 2 may lead to institutional changes. In the cases in question the Court found no violation of the substantive limb of Article 2. However, under the procedural limb of that provision, the Court held that there had been various deficiencies in the investigations carried out by the authorities.⁷⁰ In particular, the six cases raised a number of recurring issues relating to the lack of independence of the police investigations into the deaths, the lack of reasonable expedition of the police investigation, the inadequacy of the inquest procedure in securing evidence on which a prosecution could be brought in respect of any relevant criminal offence, the limited scope of the inquest, the inability to compel the testimony of members of the security forces who had carried out the shootings in some of the cases, and the lack of promptness and reasonable expedition of the inquest proceedings.⁷¹ As far as institutional changes are concerned, in the context of the supervision of enforcement by the Committee of Ministers the United Kingdom has

⁶⁷ CoE doc. CM/Inf/DH(2008)33 (above n. 64), § 95.

⁶⁸ See CPT, "Public statement concerning the Chechen Republic of the Russian Federation" (2003) CPT Doc CPT/Inf(2003)33, § 8; and CPT, "Public statement concerning the Chechen Republic of the Russian Federation", (2007) CPT Doc CPT/Inf(2007)17, § 55.

⁶⁹ See, e.g., Memorial, "Deceptive Justice. Situation on the investigation on crimes against civilians committed by members of the Federal Forces in the Chechen Republic during military operations 1999-2003" (Moscow, 2003), available at <http://www.memo.ru/hr/hotpoints/N-Caucas/do100603/orlov_2003_engl.pdf>, Section 4; for discussion, see Annex, Section 2.6.2.

⁷⁰ See, e.g., *McKerr and Others v. United Kingdom* (Annex, n. 1070), §§ 157-161. For a summary of the various shortcomings identified in each of the cases, see Interim Resolution CM/ResDH(2005)20, adopted by the Committee of Ministers at its 914th meeting on 23 February 2005, Appendix III, discussed in Annex, Section 5.5.

⁷¹ *Ibid.*

provided information as to a range of general measures adopted in order to address the shortcomings identified by the Court in those cases.⁷² With regard to the issue of independence of police investigations into cases alleging violations by police officers in Northern Ireland, the UK has referred to the creation of “calling in” arrangements for police investigations, pursuant to which an investigation in Northern Ireland into actions of members of the police may be conducted by officers from another force.⁷³ A further major institutional change which has been implemented, at least in part as a consequence of the Court’s criticism as to the efficiency of internal police investigations in Northern Ireland, has been the creation of a Serious Crimes Review Team (SCRT) to examine historic unresolved cases.⁷⁴ The adoption of that measure was not considered sufficient by the Committee of Ministers in 2005 to permit it to close its examination of the issue.⁷⁵ However, in its further consideration of the measures adopted by the UK, the Committee of Ministers took particular note of the creation in late 2005 of the Historical Enquiries Team (HET) within the SCRT, a special independent investigative unit with power to reinvestigate historical unresolved cases relating to the security situation in the period between 1968 and 1998. The HET has a particular mandate to conduct the investigations using a “family-centred” approach, working in close cooperation with the families of the victims to resolve issues of particular concern to them. Having further monitored developments, including the progress in the work of the HET, the Committee of Ministers decided to close its examination of the issue in 2009.⁷⁶ In addition, various steps have been taken by the United Kingdom in order to ensure that inquest proceedings are commenced promptly and pursued with reasonable expedition, including the appointment of additional Deputy Coroners in Northern Ireland, and the initiation of a review of the entire system of Coroner’s Courts.⁷⁷ In its consideration of compliance by the United Kingdom with the relevant judgments of the Court in 2007, the Committee of Ministers stated that it continued to have some concerns as to the length of inquest proceedings as well as in relation to their prompt conclusion (notwithstanding modifications in staffing levels and a reform of the Coroner’s Service in Northern Ireland) and therefore asked to be kept informed in that regard.⁷⁸ Having received further

⁷² For discussion of the general measures adopted by the UK, see Annex, Section 5.5.

⁷³ See Interim Resolution CM/ResDH(2005)20 (above n. 1090), Appendix I.

⁷⁴ Ibid.

⁷⁵ See Interim Resolution DH (2005) 20 of 23 February 2005.

⁷⁶ See Annex, Section 5.5, text accompanying n. 1110 *et seq.*

⁷⁷ See Annex, Section 5.5, text accompanying n. 1101.

⁷⁸ See Committee of Ministers, Resolution DH (2007) 73, 6 June 2007, discussed in Annex, Section 5.5, text accompanying n. 1115.

information, it eventually closed its consideration of this aspect of the judgments in 2008.⁷⁹

In a number of cases regarding actions of the Turkish security forces in South East Turkey, the Court has found that the investigation into allegations of abuses committed by servicemen did not comply with the requirement of independence. In particular, deficiencies have been found as a result of the fact that the investigation was delegated to officers belonging to the same unit as those accused, or to units under the same hierarchical command as the unit to which those suspected of having committed the acts belonged.⁸⁰ The main measure adopted by Turkey in this regard has been the issuing of a number of circulars by the Ministry of Justice, which specify that the investigations into allegations of abuses committed by law-enforcement officers should be carried out by public prosecutors and not by members of the security forces.⁸¹

2.2.2 Duty to investigate and promptness of the investigation

The jurisprudence of the Court under Articles 2 and 3 ECHR indicates clearly that, whenever the national authorities are informed or become aware of facts potentially suggesting a violation of those provisions, they must *promptly* carry out an investigation into the facts in question. In this regard, the national authorities are not permitted to await a specific and/or formal request from the victim or relatives of the victim to open an investigation; rather, they are required to act promptly and of their own initiative to open an investigation upon receiving information giving rise to a credible suspicion of death or of ill-treatment.⁸² The lack of prompt investigative action by the competent authorities is a frequent theme in the vast majority of cases involving allegations of violations as the result of actions of the security forces. The case studies reveal that the Russian Federation, Turkey and the United Kingdom have taken a variety of measures in order to remedy the omissions identified by the Court in this regard, both by way of compliance with the judgments in individual cases, as well as by adopting measures of a more general application which have a much wider impact in the legal system.

As far as the failure of the authorities to investigate credible allegations of abuses by the security forces is concerned, the Turkey/PKK case study is a good example of

⁷⁹ See "Decisions adopted at the 1020th (DH) meeting, 4-6 March 2008", CoE doc. CM/Del/Dec(2008)1020, 27 March 2008; see also CoE doc. CM/Inf/DH(2008)2 rev., 19 November 2008, Section II.A.2, discussed in Annex, Section 5.5.

⁸⁰ See, e.g., *İpek v. Turkey* (App. no. 25760/94), Reports 2004-II, § 174, and the other cases cited in Annex, Section 3.5.2(b), n. 752 and accompanying text.

⁸¹ See Interim Resolution CM/ResDH(2005)43 (above n. 28). For discussion of some of the circulars, see Annex, Section 3.5.2(b).

⁸² For an overview of the Court's jurisprudence relating to the requirements of the promptness and effectiveness of the investigation, see Annex, Sections 1.3.2(b) and 1.3.2(c).

how procedural obstacles may hamper the effective exercise of investigative activities by the competent authorities. One reason for complaints of abuse not being investigated in Turkey has undoubtedly been the existence of a requirement in the domestic legal system that investigations and prosecutions concerning offences committed by public servants, including members of the security forces, required authorization by the administrative authorities. Despite the fact that prosecutors are under a duty to investigate allegations of serious offences which come to their attention, at the time of the events discussed in the judgments regarding the PKK conflict, it was for the relevant local administrative council (for the district or for the province, depending on the suspect's status) to conduct the preliminary investigation and decide whether to prosecute if the suspect was a civil servant and the offence was committed in the performance of his/her duties.⁸³ The Court found that procedure to be incompatible with the right of victims to an effective remedy in numerous cases.⁸⁴ In particular, the Court has consistently held that the preliminary investigations carried out by the administrative councils for the purpose of granting authorization could not be regarded as independent since they were chaired by the governors, or their deputies, and composed of local representatives of the executive, who were hierarchically dependent on the governors.⁸⁵ In 1999, the Committee of Ministers called upon the Turkish authorities to rapidly complete reforms of the system of criminal proceedings brought against members of the security forces, in particular by abolishing the special powers of the local administrative councils in relation to criminal proceedings.⁸⁶

The requirement of authorization of criminal investigations initiated against members of the security forces in cases of alleged torture or ill-treatment was abolished in 2003.⁸⁷ As for other offences, the Turkish Government has stressed that, in line with the requirements of the Convention, criminal investigations into all violations of the Convention (e.g., unlawful killings, destruction of property, etc.) by members of the security forces are likewise no longer subject to any administrative authorization. The Government also stated that it has encouraged the developing practice of administrative courts of quashing administrative decisions that refused to indict members of the security forces for other unlawful actions, such as unintentional homicide, causing bodily harm, causing death in traffic accidents and the burning of houses.⁸⁸ However, the accuracy of the account given by the Turkish government remains open to doubt; the Committee of

⁸³ See Annex, Section 3.5.3(a).

⁸⁴ See Annex, Section 3.5.3(a).

⁸⁵ Ibid.

⁸⁶ See Interim Resolution DH(99)434, adopted by the Committee of Ministers on 9 June 1999 at the 672nd meeting of the Ministers' Deputies. This call was repeated in Interim Resolution CM/ResDH(2002)98, adopted by the Committee of Ministers on 10 July 2002 at the 803rd meeting of the Ministers' Deputies.

⁸⁷ See Annex, text accompanying n. 765 et seq. See also the information provided by Turkey, summarized in Interim Resolution CM/ResDH(2005)43 (above n. 28), Appendix I, § 20.

⁸⁸ Ibid., § 21.

Ministers has noted that, although there are some instances of prosecutions of serious crimes other than torture and ill-treatment that were commenced without administrative authorisation being sought, the 2003 amendment appears to have lifted the requirement of authorization *only* with respect to allegations of torture and ill-treatment.⁸⁹ In that regard, it has called upon Turkey to take measures in order to remove any ambiguity in this regard.⁹⁰ The Committee has also noted that the highest ranking members of the security forces remain subject to the special prosecution procedures applicable to judges.⁹¹

Whilst it is encouraging that Turkey has abolished the administrative authorization required for investigations into crimes committed by certain members of the security forces (at least in relation to allegations of torture and ill-treatment), there are indications that the relevant authorities are still unwilling to charge senior members of the security forces, and therefore refuse to give permission to investigate some allegations of serious human rights violations.⁹²

As far as measures adopted to ensure compliance with the requirement of “promptness” of the investigation are concerned, a further measure adopted by the Turkish authorities was the amendment in 2003 of the Criminal Procedure Code, resulting in the introduction of provisions aimed at prioritizing the investigation and prosecution of allegations of torture and ill-treatment.⁹³ However, those provisions reportedly proved difficult for some courts to comply with, mainly because of their workload, and they were not reproduced in the new Criminal Procedure Code which entered into force in 2005. Accordingly, lengthy delays between hearing dates, resulting in long and drawn-out trials that may ultimately fail to secure a conviction, apparently still occur.⁹⁴

The situation in Cyprus as regards the cases of historical disappearances provides a particularly striking case of non-compliance with a judgment of the Court in relation to the obligation to carry out investigations. In its judgment consequent on the fourth inter-State application brought by Cyprus against Turkey, the Court found, *inter alia*, that there had been a total lack of investigations and as a result, a violation of the procedural duty to conduct effective investigations under Article 2 of the Convention in relation to disappearances arising from the fighting and occupation of Northern Cyprus by Turkey in

⁸⁹ Interim Resolution CM/ResDH(2008)69, adopted by the Committee of Ministers at the 1035th meeting on 18 September 2008, at § E.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² See Amnesty International, “Turkey: The Entrenched Culture of Impunity Must End” (2007), AI Index: EUR 44/008/2007; and see Annex, Section 3.7.

⁹³ The amendment was introduced by Law no. 4778 of 10 January 2003 and Law no. 4963 of 7 August 2003, see Annex, text accompanying n. 729 et seq.

⁹⁴ See Annex, text accompanying n. 729 et seq, and see Human Rights Watch, “Closing Ranks” (above n. 23), p. 17.

1974. In addition, it found that there was a continuing violation of Article 3 as a result of the effects upon the relatives of the victims of the failure to carry out any investigations.

In the years since the rendering of that judgment in 2001, Turkey has consistently refused to take any measures by way of compliance in relation to the issue of missing persons. In order to justify its failure to carry out any investigations, Turkey has repeatedly asserted that the work of the Committee on Missing Persons (CMP) should be regarded as constituting an adequate investigation for these purposes; in that regard, it has stated that “[...] any unilateral action such as the introduction of a new system of investigations would be detrimental to the overall solution of the missing persons issue for both Greek Cypriots and Turkish Cypriots [...]”.⁹⁵ Turkey has maintained that position despite the fact that the Court in *Cyprus v. Turkey* expressly held that the work of the CMP was not sufficient to comply with the procedural obligation under Article 2 of the Convention,⁹⁶ and despite the Court’s affirmations in later judgments that the reactivation of the CMP and its new Exhumation and Identification Programme does not change matters.⁹⁷

The Committee of Ministers has to date adopted two Interim Resolutions relating to Turkey’s execution of the judgment in *Cyprus v. Turkey* as regards missing persons.⁹⁸ In the second Interim Resolution, adopted in 2007, the Committee recalled that the Court had found that the procedures of the CMP were not *per se* sufficient to meet the standard of an effective investigation required under Article 2, in particular due to the “narrow scope” of the CMP’s investigations and the fact that its territorial jurisdiction was limited to the island of Cyprus.⁹⁹ Accordingly, whilst welcoming the work of the CMP and noting with satisfaction the operation of the Exhumation and Identification Programme,¹⁰⁰ the Committee emphasized that “additional measures are required in order to ensure full compliance with the Court’s judgment as regards the requirements of effective investigations, aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances or of whom there is an arguable claim that they were in custody when they disappeared”.¹⁰¹ The Committee,

⁹⁵ See CoE doc. CM/Inf/DH(2004)4/1 rev 4.

⁹⁶ See *Cyprus v. Turkey* [GC] (App. no. 25781/94), Reports 2001-IV, at § 135: “although the CMP’s procedures are undoubtedly useful for the humanitarian purpose for which they were established, they are not of themselves sufficient to meet the standard of an effective investigation required by Article 2 of the Convention, especially in view of the narrow scope of that body’s investigations”.

⁹⁷ See *Varnava and Others v. Turkey* (Chamber Judgment) (App. no. 16064-16066/90 and 16068-16073/90), ECtHR 10 January 2008, at §§ 130-131, and the decision of the Grand Chamber, *Varnava and Others v. Turkey* [GC] (App. no. 16064-16066/90 and 16068-16073/90), ECHR 18 September 2009, §§ 187-194.

⁹⁸ Interim Resolution CM/ResDH(2005)44, adopted by the Committee of Ministers at the 928th meeting on 7 June 2005; Interim Resolution CM/ResDH(2007)25, adopted by the Committee of Ministers at the 992nd meeting on 4 April 2007. See also the most recent memorandum concerning the issue of missing persons prepared by the Department for Execution of Judgments, CoE doc. CM/Inf/DH(2007)10 rev. 4, 3 October 2007.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

noting that the in the period since the first Interim Resolution Turkey had provided no further information in that regard, called upon the Turkish authorities to rapidly provide information on additional measures required to ensure effective investigations on the fate of the missing persons.¹⁰²

An important recent development potentially impacting upon execution of the judgments concerning missing persons is the recent decision in *Varnava and Others v. Turkey*,¹⁰³ in which the Grand Chamber, upholding the decision of the Chamber, reaffirmed its holding in *Cyprus v. Turkey* that the work of the CMP does not constitute an adequate procedure so as to satisfy the requirements of an effective investigation under Article 2 of the Convention.¹⁰⁴ As a consequence, the Court held there had been a continuing violation of Article 2 on account of the failure of Turkey to provide for an effective investigation aimed at clarifying the fate of nine men who had gone missing in 1974.¹⁰⁵

The approach adopted by the Committee of Ministers at recent meetings appears to be aimed at ensuring Turkey's continued engagement with the CMP, in spite of the reaffirmation by the Chamber and subsequently, the Grand Chamber, in *Varnava* that the work of the CMP cannot constitute fulfilment of Turkey's obligation to carry out an effective investigation. In a decision in June 2009, the Committee of Ministers reiterated the urgency for the Turkish authorities "to take concrete measures, having in mind the effective investigations required by the judgment".¹⁰⁶ However, the Committee also reaffirmed the importance of the CMP's work and drew attention to the fact that "the sequence of measures to be taken in the framework of the effective investigations required by the judgment and the continuing work of the CMP should take into consideration both the obligation of the respondent state to conduct such investigations and the necessity for the CMP to carry out its work under the best conditions and as speedily as possible".¹⁰⁷ It appears that the Committee of Ministers envisages that the measures concerning effective investigations should be integrated into the work of the CMP; among the concrete measures to be adopted, it singled out in particular the need to ensure the "CMP's access to all relevant information and places"¹⁰⁸ as well as taking note of the declaration by Turkey that it was "ready to consider any request from the CMP relating to access to information and places relevant for its work".¹⁰⁹ Further, it

¹⁰² Ibid.

¹⁰³ *Varnava v. Turkey* [GC] (above n. 97). For discussion of the case, see Annex, Section 4.3.3.

¹⁰⁴ *Varnava v. Turkey* [GC] (above n. 97), § 189; for the judgment of the Chamber, see *Varnava and Others v. Turkey* (Chamber Judgment) (above n. 97), § 131.

¹⁰⁵ *Varnava v. Turkey* [GC] (above n. 97) § 194

¹⁰⁶ "Decisions adopted at the 1059th (DH) meeting, 2-4 and 5 (morning) June 2009", CoE doc. CM/Del/Dec(2009)1059, 8 June 2009, Decision, § 3.

¹⁰⁷ Ibid., §§ 1 and 2.

¹⁰⁸ Ibid., § 1.

¹⁰⁹ Ibid., § 4.

reiterated the importance of “preserving all the information obtained during the Programme of Exhumation and Identification carried out by the CMP.”¹¹⁰

At the 1078th meeting, held in March 2010, in considering the question of missing persons the Committee took note with interest of the presentation of the CMP’s activities given by the Turkish delegation,¹¹¹ and recalled its invitation to the Turkish authorities to take concrete measures to ensure the CMP’s access to all relevant information and places, without impeding the confidentiality essential to the carrying-out of its mandate.¹¹² In that regard, the Committee noted with satisfaction that, according to the information provided by the Turkish authorities, they had acceded to several requests from the CMP for access to places situated within military zones.¹¹³ On the other hand, the Committee reiterated and insisted upon its request that the Turkish authorities inform it of the concrete measures envisaged “in the continuity of the CMP’s work” with a view to carrying out the effective investigations required by the judgment.¹¹⁴ The position adopted by the Committee of Ministers in its recent consideration of the execution of judgments by Turkey would therefore appear to show that, given the continuing absence of any willingness on the part of Turkey to adopt any further concrete measures by way of effective investigation into historical disappearances, the Committee is anxious to ensure that at least the progress made due to Turkey’s engagement with the CMP is not jeopardised.

Despite the progress of the CMP and the Exhumation and Identification Programme, the Court has made clear in both *Cyprus v. Turkey* itself, and again in *Varnava*, that the work of the CMP can, at most, only partially fulfill Turkey’s obligation to carry out an effective investigation in accordance with the requirements of the Convention. Nevertheless, despite the fact that the Committee of Ministers has also repeatedly underlined the urgent need for the Turkish authorities to take measures to ensure effective investigations, Turkey continues to rely on the work of the CMP. As with events occurring in Turkey, relating to the PKK, and in Chechnya, time is of essence when it comes to the issue of missing persons in Cyprus. As noted by the Grand Chamber in *Varnava*, “With the lapse of time, memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and the prospects that any effective investigation can be undertaken will increasingly

¹¹⁰ Ibid., § 5.

¹¹¹ “Decisions adopted at the 1078th (DH) meeting, 2-4 March 2010”, CoE doc. CM/Del/Dec(2010)1078, 8 March 2010, Decision, §1.

¹¹² Ibid., §2.

¹¹³ Ibid., §3.

¹¹⁴ Ibid., §4.

diminish.”¹¹⁵. As a result, there is a clear need for action by way of compliance with the judgment of the Court to be taken quickly.

2.2.3 Effectiveness of the investigation

In order to be regarded as “effective” for the purpose of Article 2 ECHR, the investigation into cases of violent death or disappearances must be “adequate”, i.e. capable of establishing the cause of death and identifying the individual or individuals responsible. A similar requirement of effectiveness has been identified by the Court in relation to alleged violations of the prohibition of torture and other ill-treatment under Article 3.¹¹⁶

Numerous and significant shortcomings relating to the quality of the investigations have been identified by the Court in the investigations conducted by the Turkish authorities into abuses allegedly committed by members of the security forces in the context of the conflict against the PKK.¹¹⁷ Of particular relevance in this context are the omissions and flaws identified by the Court in relation to the collection and preservation of evidence by the police and prosecution authorities,¹¹⁸ as well as failings related to the promptness of the investigations, discussed above. With regard to collection and preservation of evidence, the most relevant measure adopted by Turkey in order to ensure the effectiveness of investigations and to address, at least in part, the shortcomings identified by the Court, is undoubtedly the adoption of the 2005 Code of Criminal Procedure.¹¹⁹ Further, in response to the Court’s criticism relating to the limited effectiveness of investigations, and the repeated calls by the Committee of Ministers in this regard, the Turkish Ministry of Justice in 2005 took steps in an attempt to both ensure compliance with the Convention by ensuring that investigations in the future are effective by issuing a number of circulars, drawing the attention of judges and public prosecutors to the newly-enacted legislation giving direct effect to the Convention in the Turkish legal system and recalling Turkey’s obligations flowing from the Convention.¹²⁰ In addition to a general exhortation that all investigations be carried out speedily and

¹¹⁵ *Varnava v. Turkey* [GC] (above n. 97), § 161.

¹¹⁶ On the requirement of “effectiveness” of the investigation, see Annex, Section 1.3.2(c).

¹¹⁷ See the cases discussed in the Annex, Section 3.5.2(a).

¹¹⁸ For instance, the Court criticized the failure on behalf of the prosecutors to take statements from key witnesses (see, e.g., *Şemsi Önen v. Turkey* (App. no. 22876/93), ECtHR 14 May 2002, § 88); the inadequate questioning of police officers, members of the security forces or other officials (see, e.g., *Aktaş v. Turkey* (App. no. 24351/94), Reports 2003-V, § 306), the lack of suitable inspection of the crime scene (see, e.g., *Yasin Ateş v. Turkey* (App. no. 30949/96), ECtHR 31 May 2005, § 96); and the fact that autopsies had been carried out improperly (see, e.g., *Salman v. Turkey* [GC] (App. no. 21986/93), Reports 2000-VII, § 106).

¹¹⁹ See Annex, Section 3.5.

¹²⁰ See the information provided by the Turkish Government in Interim Resolution CM/ResDH(2005)43 (above n. 28), Appendix I, § 19. For more details on the circulars in question, see Annex, Section 3.5.2(a).

effectively in compliance with the requirements of the Convention, the ministerial circulars also addressed the specific shortcomings identified by the Court with respect to the collection and preservation of evidence, noting that such shortcomings should be remedied in order to avoid future violations. In particular, the circulars alluded to problems relating to discrepancies in autopsy reports, the absence of photographic records of the autopsies. and the fact that decisions not to prosecute were being issued by public prosecutors without the necessary investigation being carried out into the facts. The circulars also added that all necessary evidence should be collected from the scene of the crime and should be kept with care and that the rules on ballistic examinations, autopsy reports and identification of bodies should be followed strictly.

With regard to the question of the promptness and expedition of the investigation, the circulars specify that the investigations should be carried out directly by public prosecutors who should examine the investigation files at regular intervals and do their utmost to make sure that the perpetrators are found rapidly and in any case within the limitation period. Finally, the circulars emphasise that investigations into killings where the perpetrator is unknown should be carried out rapidly and effectively taking into account the requirements of the Convention and that the pursuit of such crimes should be carried out in coordination with the security forces. Before the Committee of Ministers, the Turkish authorities have repeatedly undertaken to apply the measures set out in the circulars in compliance with the Convention standards, as well as to strictly supervise the implementation of those measures.¹²¹ As a consequence, in September 2008, the Committee of Minister resolved to close its examination of the issue.¹²²

In relation to the situation in northern Cyprus, as noted above, Turkey has so far consistently declined to investigate any case of disappearances arising from the occupation of northern Cyprus by Turkey in 1974.¹²³ As for measures addressing the shortcomings identified by the Court in relation to investigations of more recent cases of killings of Greek and Turkish Cypriots by security forces of the TRNC, the attitude of Turkish authorities appears to be based on the position that the legislative framework concerning investigations is adequate and the shortcomings identified by the Court generally stemmed from the practice of the authorities rather than from defects in the legislation itself.¹²⁴ Accordingly, when reporting to the Committee of Ministers on the general measures adopted to address the defects in investigative procedures identified by the Court, the Turkish authorities have generally made reference to legislation already in place at the time the flawed investigation was carried out. For instance, with respect to

¹²¹ See, e.g., CoE doc. CM/Inf/DH(2006)24 rev. 2, 10 October 2007.

¹²² See Interim Resolution CM/ResDH(2008)69 (above n. 89).

¹²³ See Annex, Section 4.3.2(c).

¹²⁴ See "Annotated Agenda and Decisions, 1035th meeting (DH), 17-18 September 2008", CoE doc. CM/Del/OJ/DH(2008)1035 Section 4.2 PUBLIC, 8 October 2008, in relation to the general measures adopted in the *Adali* group of cases.

the measures adopted following the *Kakoulli* judgment, the Turkish authorities simply noted that military or civilian persons can complain to the alleged perpetrator's superiors or to the military prosecutor general of any offence they consider has been committed by a serviceman, that such complaints are processed immediately with a view to opening an investigation into the situation, and that the competent court is the Security Forces Tribunal.¹²⁵ Similarly, as regards general measures to improve investigations in relation to the *Adali* group of cases, Turkey mainly referred to pre-existing legislation of the TRNC, which provides that investigations of killings are conducted *ex officio* by investigating magistrates and under their exclusive control and guarantees the right of any interested party to appear at a coroner's inquest.¹²⁶ The only measure which appears to have been adopted following the Court's judgment is the amendment in March 2006 of the relevant domestic legislation such that the Attorney General may supervise or direct investigations carried out by the General Directorate of the Police Forces if he considers it necessary, and can give any necessary orders in that regard.¹²⁷

With regard to Chechnya, the Court's judgments identify numerous serious shortcomings in the investigations of complaints concerning alleged abuses by members of the security forces. In particular, the Court has criticized both the way in which the authorities had reacted to the complaints,¹²⁸ as well as the quality of the investigations eventually carried out, which presented deficiencies in the way in which evidence was collected and preserved, and a lack of meaningful public scrutiny and participation of the victims or their relatives in the investigation.¹²⁹ In addition, the Court has emphasised that a recurrent problem hampering the effectiveness of investigations appears to be the general reluctance on the part of the military authorities to take measures to identify the military units and individual servicemen involved in abuses.¹³⁰ The Russian authorities have indicated to the Committee of Ministers that several legislative and administrative measures have been adopted with a view to ensuring effective investigations and preventing violations resulting from defects in investigative procedures in the future.¹³¹ In addition to the institutional changes outlined above,¹³² the Russian authorities have placed particular reliance upon the new Code of Criminal Procedure, which entered into

¹²⁵ See *ibid.*, under *Kakoulli v. Turkey*.

¹²⁶ *Ibid.*, under *Adali v. Turkey*.

¹²⁷ *Ibid.*

¹²⁸ See, e.g., *Estamirov and Others v. Russia* (App. no. 60272/00), ECHR 12 October 2006, § 89, where the Court criticized the unexplained delays on the part of the authorities in initiating investigations; for discussion and further examples, see Annex, Section 2.5.2(a).

¹²⁹ See below, text accompanying n. 144 *et seq.*

¹³⁰ See, e.g., *Goncharuk v. Russia* (App. no. 58643/00), ECtHR 4 October 2007, § 70, and the other cases discussed in Annex, Section 2.5.2(b), text accompanying n. 469 *et seq.*

¹³¹ For more detailed discussion, see Annex, Section 2.5.2(b).

¹³² See above, Section 2.2.1.

force on 1 July 2002 and provides for new rules relating to investigations.¹³³ However, since the first judgment of the Court in relation to Chechnya was not rendered until 2005, those modifications can not be seen as directly resulting from any finding of violation by the Court in the Chechen cases. Still, Russia has relied upon them extensively in its dialogue with the Committee of Ministers and the Department for the Execution of Judgments in relation to compliance with the Chechen judgments.

In relation to the situation in Northern Ireland, despite the reluctance of the United Kingdom to adopt individual measures so as to comply with the judgments of the Court by reopening investigations in some individual cases, discussed further below, the judgments of the Court which have found deficiencies in investigations have had a marked impact as a result of the general measures adopted by the United Kingdom in response to these findings. For instance, as a result of deficiencies found in respect of the independence of the investigation of cases involving death at the hands of the security services, or of alleged complicity of State agents in killings by private persons and groups, legislation has been adopted and practices modified so that investigations may be carried out by officers which are entirely external to the Northern Irish police force (so-called “calling in” arrangements).¹³⁴

A number of deficiencies were also identified by the European Court in the system of coroners’ inquests as far as the collection of evidence was concerned. Those deficiencies resulted principally from the coroner’s lack of power to compel individuals (including members of the security services) to give evidence in circumstances in which they were allegedly responsible for a death.¹³⁵ Consequent upon the judgments of the Court, the United Kingdom government has adopted secondary legislation which has rectified the problems identified by introducing several changes in the rules of procedure for inquests, so as to make witnesses suspected of involvement in a death (including members of the security services) compellable to appear to give evidence (although they can still not be forced to give self-incriminating answers).¹³⁶

A further serious obstacle to the effectiveness of the investigation, again related to the availability of evidence, was identified by the Court in the practice allowing for the issuing of public interest immunity certificates by the Government in relation to certain

¹³³ See Criminal Procedure Code of the Russian Federation, Federal Law No. 174-FZ of 10 December 2001, entered into force 1 July 2002 (hereinafter “2002 RF Criminal Procedure Code”); unofficial English translation available at <http://www.legislationline.org/download/action/download/id/1698/file/3a4a5e98a67c25d4fe5eb5170513.htm/previous> [last accessed 6 August 2009]; on the main modifications introduced by the 2002 Criminal Procedure Code, see also CoE doc. CM/Inf/DH(2006)32 rev. 2 of 12 June 2007, § 74.

¹³⁴ See Annex, Section 5.5, in particular n. 1091 and accompanying text.

¹³⁵ See the cases discussed in Annex, Section 5.5, text accompanying n. 1087 et seq.

¹³⁶ On these amendments, see Annex, Section 5.5, in particular n. 1097 and accompanying text. On the impact of the amendments on inquests relating to killings by the security forces, see, e.g., BBC News, “Policeman given inquest summons”, 8 March 2002 (available at http://news.bbc.co.uk/1/hi/northern_ireland/1862932.stm).

documents, which restricted the ability of the inquest from examining relevant issues.¹³⁷ The previous line of authority relating to claims by the government to public interest immunity was overruled in 1994, resulting in changes in practice in that regard.¹³⁸ As a result of these modifications of the law, documents are no longer withheld on the basis of particular broad categories and the final decision as to whether specific material is subject to disclosure is now decided by the court or coroner.¹³⁹ The measures taken by the United Kingdom in this regard have been regarded as satisfactory by the Council of Ministers and as constituting compliance with the later decisions of the European Court.¹⁴⁰

In addition, as a result of the decisions of the European Court which criticized the narrow scope of the findings which could be made by the jury at a Coroner's inquest, the UK courts, relying, inter alia, on the decision of the European Court in *Hugh Jordan*, have held that the legislation governing the verdicts which may be adopted by a coroner's jury must be interpreted as meaning that the jury is able to rule not only how a person has died, but also under what circumstances.¹⁴¹ Further, and more generally, following the entry into force in 2000 of the Human Rights Act 1998, it is now unlawful for a coroner (who is regarded as a "public authority" within the meaning of the Human Rights Act) to act in a manner incompatible with Article 2 ECHR. As a consequence, the United Kingdom stated, that "if an issue is now raised at an inquest which, under Article 2 of the Convention, ought to be the subject of investigation (such as an allegation of collusion by the security forces), it is the duty of the coroner to act in a manner compatible with Article 2 and in particular to ensure that the scope of the inquest is appropriately wide."¹⁴²

2.2.4 Public scrutiny and participation of victims and their relatives in the investigation

The case-law of the European Court makes clear that the investigation process must guarantee a certain degree of transparency, openness and access for the victim and/or his or her relatives, as well as for the wider public. In particular, in order for an investigation to secure accountability in practice as well as in theory, there must be a sufficient element of public scrutiny of the investigation process, or at least of its results. This requirement is particularly essential where public officials have allegedly been

¹³⁷ See the cases discussed in Annex, Section 5.5, text accompanying n. 1087 et seq.

¹³⁸ See the decision of the House of Lords in *R (ex parte Wiley) v. Chief Constable of Nottinghamshire Constabulary* [1995] 1 AC 274; [1994] 3 WLR 433.

¹³⁹ See Annex, Section 5.5, text accompanying n. 1099.

¹⁴⁰ See Committee of Ministers, Resolution DH (2007) 73, 6 June 2007.

¹⁴¹ *R (on the application of Middleton) v. West Somerset Coroner's Court* [2004] UKHL 10; [2004] 2 AC 182; [2004] 2 WLR 800; for a more recent application, see also *R (on the application of Smith) v. Assistant Deputy Coroner for Oxfordshire*, [2008] 3 WLR 1284. For discussion, see Annex, text accompanying n. 1094.

¹⁴² Resolution DH(2005)20 (above n. 1090), Appendix I.

involved in the incident in question, as it serves the fundamental objective of maintaining public confidence in the authorities' adherence to the rule of law and preventing suspicions of collusion by the authorities or of tolerance of unlawful acts. Further, the Court has clearly recognized that in all cases the victim or his or her family should be accorded a role in the investigation and must be involved in the procedure to the extent necessary to safeguard their legitimate interests. The victim (or his or her relatives) should, as a minimum, be allowed to access the case file at some point.¹⁴³

Shortcomings concerning the transparency and the degree of public scrutiny of investigative procedures, as well as the lack of access to the investigation for the victims and their relatives have been identified by the Court in cases arising out of each of the situations under consideration. For instance, the Court has identified problems concerning the lack of participation of the victims or their relatives in the investigation in the vast majority of its judgments concerning abuses committed in Chechnya.¹⁴⁴ The principal shortcomings in this regard resulted from delays in granting victim status to the victims' relatives in the domestic proceedings, or from the fact that victims or their relatives were prevented from having any access to the investigative procedure. As regards measures adopted to remedy the situation leading to violations resulting from the lack of participation of the victims or their relatives, Russia has referred to Article 42 of the 2002 Code of Criminal Procedure which sets out the rights and obligations of victims in a criminal case and specifies that, in cases concerning crimes which have entailed the death of a person, the rights of the victim shall pass on to one of his or her close relatives.¹⁴⁵ Under that provision, victims or their relatives have a right, *inter alia*, to familiarize themselves with the protocols of procedural actions taken with their participation, and, in certain circumstances, to have access to decisions ordering an expert report and the report's conclusions, to have full access to the investigation file after the investigation has been completed, to request that certain procedural actions be taken, and to challenge before the courts a refusal by the investigative authorities to grant the aforementioned requests.¹⁴⁶ However, it is noteworthy that Article 42 of the Criminal Procedure Code was already in place when the Court delivered the judgments in which it found violations of the procedural limbs of Articles 2 and 3 ECHR, as well as Article 13, as a result of the authorities' failure to grant the applicants access to the case-files and to provide them with up-to-date and exhaustive information on the investigation. The Department for the Execution of Judgments has in this respect expressed concern as to the fact that, in submissions lodged within the framework of execution of the Court's

¹⁴³ For discussion and reference to the relevant case-law, see Annex, Section 1.3.2(e).

¹⁴⁴ See, e.g., *Musayeva and Others v. Russia*, § 91 (delays in granting victims status); *Lyanova and Aliyeva v. Russia* § 107 (prevention of access of victims to the investigation procedure) and the other cases referred to in Annex, text accompanying n. 499 *et seq.* For discussion, see Annex, Section 2.5.2(d).

¹⁴⁵ For a more detailed examination of the content of the provision in question, see *ibid.*, text accompanying n. 507 *et seq.*

¹⁴⁶ *Ibid.*; see also CoE doc. CM/Inf/DH(2008)33 (above n. 64), at § 101.

judgments, the applicants have claimed that they are still not properly informed of the progress of the investigations, and that they have not had access to relevant materials even after having been granted victim status.¹⁴⁷ In a Decision adopted during its examination of the matter in June 2009, the Committee of Ministers observed that, although Russian criminal law, as interpreted by the Constitutional Court, accorded a number of rights to victims, the “effective implementation” of that legislation “in practice remains to be demonstrated”.¹⁴⁸

With regard to the possibility for victims and their relatives to complain about the failure of the investigating and prosecuting authorities to guarantee meaningful access to investigative procedures, the Russian authorities have made reference to the procedure regulated by Article 125 of the 2002 Code of Criminal Procedure. As noted above, that provision concerns appeals against, *inter alia*, “actions and decisions of the officials conducting the criminal proceedings”.¹⁴⁹ In that regard, the Russian Government has emphasized that the procedure in question allows any party to criminal proceedings to challenge before the domestic courts any inaction on the part of the investigating or prosecuting authorities, wherever the action of omission may harm the constitutional rights and freedoms of the participants in the proceedings, or may interfere with access to the administration of justice.¹⁵⁰ Having taken note of a recent development, consisting of a decision of the Supreme Court aimed at ensuring the effective application of the remedy contained in Article 125 of the 2002 Code of Criminal Procedure for victims whose rights had been infringed during an investigation, the Committee of Ministers noted that the effectiveness of that remedy remained to be assessed in practice.¹⁵¹ More recently, the Department for Execution of Judgments has expressed the view that it is “difficult to reach a conclusion as to the capability of this remedy to rectify the shortcomings of domestic investigations”; and has called for information on the results of the application of Article 125 following the Ruling of the Supreme Court.¹⁵² It further noted that the effectiveness of the remedy provided by Article 125 “cannot be appreciated *in abstracto* but remains closely contingent on other measures which are being taken by the Russian authorities”.¹⁵³

A perhaps more successful example of compliance with judgments of the Court criticizing the lack of public scrutiny and participation of victims and their relative in the

¹⁴⁷ See the submissions of the applicants in relation to execution of the judgments in *Chitayev and Chitayev, Luluyev and Imakayeva*, referred to in CoE doc. CM/Inf/DH(2008)33 (above n. 64), at § 107.

¹⁴⁸ CoE doc. CM/Del/Dec(2009)1059 (above n. 39), Decision, § 5.

¹⁴⁹ On Article 125 of the Code of Criminal Procedure, see above, text accompanying n. 37 and Annex, Section 2.5.2(f).

¹⁵⁰ 2002 RF Criminal Procedure Code (above n. 424), Art. 125(1).

¹⁵¹ CoE doc. CM/Del/Dec(2009)1059 (above n. 39), Decision §§ 6 and 7.

¹⁵² CoE doc. CM/Inf/DH(2010)26 of 27 May 2010, § 71.

¹⁵³ *Ibid.*, § 72.

investigation is, once again, provided by the case study on Northern Ireland. In the group of judgments concerning alleged killings by police officers and connivance of security forces in killings committed by paramilitary groups, the Court found a violation of the procedural obligation under Article 2 by reason of the lack of sufficient public scrutiny and failure to provide information to the victims' families as to decisions not to prosecute. Further, the Court found that the non-disclosure of witness statements to the families of the victims prior to the giving of live evidence by the witness resulted in an inability adequately to prepare or participate, and therefore also gave rise to violations of Article 2 in its procedural aspect.¹⁵⁴ Following those judgments, a number of improvements in the situation of the families of victims in investigations and before the Coroner's Court have been made. Following changes in the rules and practice relating to legal aid, financial assistance may now be granted on an *ex gratia* basis in order to permit the provision of legal representation to the families and relatives of the deceased in the Coroner's Court.¹⁵⁵ Moreover, changes have been implemented with regard to the disclosure of witness statements at inquests, with the result that the families of victims are now given access to those statements prior to the hearing in which live evidence is given, thereby allowing adequate preparation and participation.¹⁵⁶ Further, changes in practice have been introduced relating to the provision of reasons by the Director of Public Prosecutors in certain categories of cases where a decision was taken not to prosecute, so that reasons are provided to families of the deceased.¹⁵⁷

2.2.5 Re-opening of investigations

Although concerning post-judgment measures, it is convenient also to consider here the question of re-opening of investigations in cases where the Court identified deficiencies in an investigation into alleged violations of either Article 2 or Article 3 ECHR. Although the Court has so far refrained from specifically ordering the re-opening of investigations in specific cases,¹⁵⁸ the Committee of Ministers, in supervising

¹⁵⁴ The cases are discussed in Annex, Section 5.5, in particular text accompanying n. 1087 et seq.

¹⁵⁵ See Annex, Section 5.5, text accompanying n. 1100.

¹⁵⁶ See Annex, Section 5.5, text accompanying n. 1098.

¹⁵⁷ In relation to Northern Ireland, see the Public Prosecution Service for Northern Ireland, Code for Prosecutors, available at www.ppsni.gov.uk, § 4, in particular § 4.12.4, cited in full in Annex, n. 1093. In relation to England and Wales, see the Code of Practice for Crown Prosecutors, available at <http://www.cps.gov.uk/publications/docs/code2004english.pdf>, § 2.6 (applicability of the Human Rights Act 1998); The Prosecutor's Pledge (21 October 2005), available at http://www.cps.gov.uk/publications/prosecution/prosecutor_pledge.html; The Code of Practice for Victims of Crime (4 April 2006), available at http://www.cps.gov.uk/victims_witnesses/victims_code.pdf, §§ 7.4, 7.6 and 7.7.

¹⁵⁸ For general discussion of the power of the Court to order non-monetary measures, see Annex, Section 1.2.1. On the reluctance of the Court to order reopening of investigations or new investigations in the cases at issue, see below, Section 5.1.1 and Annex, Section 2.3, text accompanying n. 415 (Russia/Chechnya); Section 3.3, text

compliance with the judgments, has frequently suggested that, where a violation of the procedural obligation to carry out an effective investigation is found, there is a continuing obligation to carry out an investigation which complies with the standards enunciated in the Court's case law.¹⁵⁹

As regards Chechnya, the Committee of Ministers examined individual measures taken in eight of the Chechen cases.¹⁶⁰ The investigations in seven of these cases were re-opened, but only in one case was information submitted by Russia regarding new investigative actions which had been taken, such as the questioning of witnesses, ballistic examinations and the gathering of materials.¹⁶¹ As for the other cases, although investigations were re-opened, two of them were subsequently closed, five were adjourned, and Russia provided no information in relation to *Chitayev and Chitayev* or as to the investigation into the abduction of the applicant's son at issue in *Imakayeva*.¹⁶² Most cases were closed or adjourned due to failure to identify the culprits on the basis of Article 208(1)(1) of the Criminal Procedure Code; the others were closed or adjourned on the basis of Article 24(2)(2) of the Criminal Procedure Code for the lack of a *corpus delicti*.

The failure of the Russian authorities to provide detailed information regarding how the re-opened investigations were carried out makes it difficult to assess whether the investigative activities carried out following the Court's judgments have in fact remedied the defects found in the original investigations and whether the new investigations were carried out adequately or not. However, in light of the fact that in none of the cases examined to date by the Committee of Ministers the re-opened investigation has led to a result different from that of the original investigation and that, in particular, not one of the investigations has led to a prosecution, it would appear that, at least in some of the cases, there are still deficiencies in the investigations which have been carried out.

In relation to the actions of the Turkish security forces in the context of the conflict against the PKK, it is not possible to identify the individual measures adopted in all individual cases. The difficulties in this regard derive principally from the fact that, in view

accompanying n. 680 (Turkey/PKK); Section 5.6, text accompanying n. 1163 *et seq.* (United Kingdom/Northern Ireland).

¹⁵⁹ See e.g. CoE doc. CM/Inf/DH(2006)24 rev. 2 (above n. 121).

¹⁶⁰ *Khashiyev and Akayeva v. Russia* (App. no. 57942/00 and 57945/00), ECtHR 24 February 2005; *Bazorkina v. Russia* (App. no. 69481/01), ECtHR 27 July 2006; *Imakayeva v. Russia* (App. no. 7615/02), ECtHR 2006-.... ; *Estamirov v. Russia* (above n. 128); *Luluyev and Others v. Russia* (App. no. 69480/01), ECtHR 2006-... ; *Chitayev and Chitayev v. Russia* (App. no. 59334/00), ECtHR 18 January 2007; *Isayeva, Yusupova and Bazayeva v. Russia* (above n. 59); and *Isayeva v. Russia* (App. no. 57947/00), ECtHR 24 February 2005.

¹⁶¹ *Khashiev and Akayeva v. Russia* (above n. 160). See Department for the Execution of Judgments, Pending Cases, State of Executions, Cases or groups of cases against Russia, available from <http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp> [accessed 15 May 2009].

¹⁶² The investigations in *Isayeva, Yusupova and Bazaeva v. Russia* (above n. 59) and *Isayeva v. Russia* (above n. 160) were closed; those in *Khashiev and Akayeva v. Russia* (above n. 160); *Bazorkina v. Russia* (above n. 160); *Imakayeva v. Russia* (above n. 160); *Estamirov v. Russia* (above n. 128); and *Luluyev and Others v. Russia* (above n. 160) were adjourned.

of the need for general measures to improve investigations, the consideration of the issue of re-opening of investigations in individual cases has been integrated into the consideration of the general measures adopted by Turkey by the Committee of Ministers.¹⁶³ However, information is available to the effect that re-opened criminal proceedings in a number of cases in the *Batı* group were discontinued because the limitation period had expired.¹⁶⁴

In relation to the Cypriot cases, in *Kakoulli v. Turkey*, a case arising out of the killing of a Greek Cypriot civilian by soldiers in northern Cyprus, the Court held that the authorities had failed to carry out an effective and impartial investigation.¹⁶⁵ Following the Court's decision, a fresh examination of the circumstances of Mr Kakoulli's death was carried out by the Turkish authorities. In this regard, the information provided by Turkey to the Committee of Ministers was to the effect that the Prosecutor-General had decided, after a preliminary examination in detail of each of the deficiencies identified by the Court in the original investigation, that re-opening of the investigation was not possible. The Prosecutor-General concluded that the soldier responsible had acted in accordance with relevant orders and that any prosecution was therefore precluded. Other problems identified related to the fact that the witnesses were either Greek-Cypriots or had worked for UNFICYP and had left the jurisdiction of Turkey, that the body of the deceased was buried in southern Cyprus, and, finally, that some twelve years had lapsed since the events in question. With regard to the information provided by Turkey to the Committee of Ministers, it may be noted in passing that it is striking that Turkey indicated that the preliminary examination of the circumstances of the case, with a view to re-opening the investigation, had been carried out by the security forces, in apparent disregard of the requirement of independence of investigative bodies set out in the Court's case-law.

¹⁶³ The Court's judgments concerning violations committed by the Turkish security forces in the context of the conflict with the PKK are principally included within two groups of cases currently under the supervision of the Committee of Ministers, the *Aksoy v. Turkey* group and the *Batı and Others v. Turkey* group. In the *Aksoy* group of cases, the principal issue regarding individual measures has been the possible resumption of criminal investigations. In view of the need for general measures to improve investigations, however, the issue of reopening investigations in individual cases has been largely integrated into that of general measures, and accordingly it has not been possible to identify the adoption of individual measures in each of the cases. On the other hand, in the *Batı* group, information on the individual measures adopted has been provided in relation to at least some of the individual cases. See Annex, Section 3.4.

¹⁶⁴ The cases in question are *Demir Ceyhan and Others v. Turkey* (App. no. 34491/97), ECtHR 13 January 2005 and *Sunal v. Turkey* (App. no. 43918/98), ECtHR 25 January 2005. As regards the facts at issue in *Demir Ceyhan and Others*, the Diyarbakır Assize Court decided in February 2006 to discontinue proceedings against the prison doctor who had authorized the transfer of the applicant on the basis that the limitation period had expired; that decision is subject to an appeal, as to which the Committee is awaiting information from the Turkish authorities. Similarly, in *Sunal*, the Public Prosecutor decided in September 2005 to discontinue proceedings against the accused police officers on the basis of expiry of the limitation period. The Committee has enquired what measures are envisaged (including possible disciplinary sanctions against the police officers) are envisaged in the following cases in which the limitation period expired: *Sunal v. Turkey* (cited above); *Yeşil and Sevim v. Turkey* (App. no. 34738/04), ECtHR 5 June 2007; *Tamer Fazıl Ahmet and Others v. Turkey* (App. no. 19028/02), ECtHR 24 July 2007; *Öktem v. Turkey* (App. no. 74306/01), ECtHR 19 October 2006; and *Türkmen v. Turkey* (App. no. 43124/98), ECtHR 19 December 2006. See, most recently, "Annotated Agenda and Decisions, 1078th (DH) Meeting, 2-4 March 2010", CoE doc. CM/Del/OJ/DH(2010)1078 section 4.2 publicE, 18 March 2010.

¹⁶⁵ *Kakoulli v. Turkey* (App. no. 38595/97), ECtHR 22 November 2005; on the facts of the case, the Court's judgment and discussion of the measures adopted by the Turkish authorities, see Annex, Section 4.4.1

Following the communication by Turkey of the measures taken, the Cypriot authorities proposed that the corpse of Mr Kakoulli could be made available for a further forensic investigation, a proposal of which the Committee of Ministers took note in a Decision adopted in June 2009.¹⁶⁶ Thereafter, in March 2010, the Committee adopted a further Decision; having noted that the Prosecutor General had taken the position that it was not possible to carry out a new investigation, inter alia, due to the fact that the victim's corpse was buried in southern Cyprus, noted that the other grounds put forward by the Prosecutor General did not seem to justify the absence of a new investigation and recalled the offer of the Cypriot authorities as to the possibility of a further forensic examination, the Committee observed that "in these circumstances, it is for the competent Turkish authorities to reassess the possibility of carrying out a new investigation into the death of Mr Kakoulli". The Committee accordingly invited Turkey to submit further information in that regard.¹⁶⁷

In another Cypriot case, *Adalı v. Turkey*,¹⁶⁸ an additional inquiry into the death of the victim was also carried out following the Court's judgment finding a violation of the duty to investigate.¹⁶⁹ The Turkish Government again informed the Committee of Ministers that all points identified by the Court as being deficient in the initial investigation had been considered in the new inquiry, but that, despite the additional investigative acts undertaken, it had not been possible to obtain new documents, information or testimony on the basis of which criminal charges could be brought against any person.¹⁷⁰ The Department for the Execution of Judgments expressed the view that the investigative acts carried out following the judgment of the Court corresponded to the deficiencies identified by the Court in the initial criminal investigation, although more information was still required as to whether the applicant had been informed of the new inquiry.¹⁷¹ In December 2008, the Committee of Ministers invited the Turkish Government to provide clarification as to whether the applicant had been informed of the results of the additional inquiry and noted that "no limitation period applie[d] to this type of crimes and any new element brought to the attention of the Attorney General could lead potentially to a reopening of the investigation".¹⁷² In March 2010, the Committee of Ministers, having received further information from Turkey as to communication of the results of the investigation to the applicant, decided to terminate its consideration of execution of the

¹⁶⁶ CoE doc. CM/Del/Dec(2009)1059 (above n. 39), Decision §§ 1 and 5.

¹⁶⁷ CoE doc. CM/Del/Dec(2010)1078 (above n. 111), Decision, §§ 1-4.

¹⁶⁸ *Adalı v. Turkey* (App. no. 38187/97), ECtHR 31 March 2005; on the Court's judgment, see further Annex, Section 4.4.2.

¹⁶⁹ See "Annotated Agenda and Decisions, 1035th (DH) Meeting, 17-18 September 2008", CoE doc. CM/Del/OJ/DH(2008)1035 section 4.2 PUBLIC, 8 October 2008. For discussion of the measures adopted in execution of the *Adalı* judgment, see Annex, Section 4.4.2.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² See CoE doc. CM/Del/Dec(2009)1051 (above n. 65), § § 2 and 3.

Court's judgment.¹⁷³ The assessment of the Department for the Execution of Judgments, and its endorsement by the Committee of Ministers, is somewhat disappointing, as the subsequent investigation in the *Adali* case appears to have been flawed in numerous respects. In particular, it is surprising that it was accepted, without any adverse comment, that the whereabouts of the ballistics report simply could not be established.

With regard to the United Kingdom, as regards the individual measures required by a number of judgments concerning the alleged collusion of State agents in killings carried out by sectarian paramilitary groups, the UK authorities have shown a certain reluctance to conduct new investigations or hold new inquests. The United Kingdom has taken the position that the correct legal analysis is that there is no continuing breach of the procedural obligations under Article 2 ECHR, and that, rather, any obligation to conduct further investigations arises solely under Article 46 ECHR as a consequence of the obligation to comply with judgments of the Court. In relation to those cases in which it has in fact carried out some further investigations, the UK Government has also stressed the difficulties involved in conducting the investigations in the various cases and merely stated that investigations were under way.¹⁷⁴ By contrast to the position as regards the majority of the general measures adopted by the United Kingdom, the Committee of Ministers has in general been far less satisfied with the individual measures taken by the United Kingdom. In that regard, in 2007 the Committee expressed its regret that investigations had not been completed in any of the cases, and it urged the United Kingdom "to take, without further delay, all necessary investigative steps in these cases in order to achieve concrete and visible progress."¹⁷⁵ In March 2009, the Committee of Ministers decided that, in light of the steps taken by the United Kingdom, it was able to close its consideration of individual measures in two of the cases; however, it continues to monitor compliance by the United Kingdom in relation to the investigations in the four remaining cases.¹⁷⁶

3. The impact of the Court's judgments

The present section provides an overview of the extent to which the Court's judgments have had an impact on the capability of the domestic legal systems in question to investigate and prosecute violations of fundamental rights committed by State agents. The case studies show that the degree of compliance with the Court's judgments varies greatly as between the four situations examined. As a result, there is

¹⁷³ Resolution CM/ResDH(2010)12 of 4 March 2010.

¹⁷⁴ See Annex, Section 5.5.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.* See, most recently, "Annotated Agenda and Decisions, 1078th (DH) Meeting, 2-4 March 2010", CoE doc. CM/Del/OJ/DH(2010)1078 section 4.2 publicE, 18 March 2010.

also a high degree of variance as regards the impact of the Court's judgments on the ability of the domestic legal systems under consideration to effectively address and prosecute violations of fundamental rights perpetrated by members of the security forces.

3.1 Russia

As noted in the previous section, the Russian authorities have adopted a range of measures purporting to address the defects in investigations and prosecutions identified by the Court, inter alia, in the Chechen judgments. In particular, some institutional measures have been adopted to ensure more effective and adequate investigations, and the new Code of Criminal Procedure, which came into force in 2002, has gone some way to remedying, at least formally, some of the defects which previously existed. In that regard, the Department for the Execution of Judgments has expressed the view that "the basic infrastructures lacking at the time of events are now in place" but that "numerous outstanding issues remain to be addressed to ensure effective investigations into abuses".¹⁷⁷ The Committee of Ministers has welcomed the measures taken by Russia but has underlined that the efficiency of these measures depends on the progress achieved by different investigative bodies, such as the Special Investigative Unit established by the Investigative Committee within the *Prokuratura*.¹⁷⁸

As far as the impact of the measures adopted is concerned, it is particularly difficult to obtain comprehensive and reliable data relating to investigations and prosecutions on members of the security forces and even more difficult to obtain comparative data relating to the period prior to the Court's judgments.¹⁷⁹ In particular, no significant conclusions can be drawn from the statistics concerning prosecutions of servicemen in relation to crimes committed in Chechnya provided by Russia to the Committee of Ministers, as no reference is made to the legal basis on which the prosecutions in question were brought, and no detailed information has been provided as regards convictions. However, as a matter of impression, the number of cases that have been discontinued appears high in comparison with the total number of cases transferred to the courts. That impression concords with the developments as to the re-opening of investigations in those cases where the Court has found a violation of the procedural obligations under Articles 2 or 3 ECHR.¹⁸⁰ Furthermore, the number of cases investigated

¹⁷⁷ CoE doc. CM/Inf/DH(2008)33 (above n. 64).

¹⁷⁸ See e.g. the decisions adopted by the Committee of Ministers at its 1059th DH meeting on 5 June 2009; and at its 1051st DH meeting on 19 March 2009.

¹⁷⁹ In that regard, the Russian authorities have made a statement which provides some explanation as to why it is difficult to obtain reliable statistics: "As the practice of relations with international organizations has shown, a publication of statistics [on criminal convictions for the crimes of military officers against civilians] may be used to harm the interests of the Russian Federation"; see "EHRAC and Memorial Memorandum" (above n. 43), § 8; the quote is from the Russian Government's submission to the Committee of Ministers).

¹⁸⁰ See Annex, Section 2.5.2(g).

needs be compared with the postulated real number of crimes committed by servicemen. The most recent statistics submitted by the Russian authorities to the Department for the Execution of Judgments indicate that 271 criminal cases have been investigated by the Russian investigative bodies since the first anti-terror operations in Chechnya, over ten years ago.¹⁸¹ Although there are no definitive figures as to how many crimes were actually committed in Chechnya by members of the Russian security forces during the period in question, the number of cases investigated appears to be extremely limited when one considers that, according to the most conservative estimates, between 4,000 and 5,000 civilians disappeared in Chechnya during the Second Chechen War.¹⁸² That figure only refers to those that have disappeared, and does not include all killings and instances of torture and ill-treatment. Given the lack of adequate investigations, it is difficult to be certain to what extent the Russian security forces carried out the killings and other violations, and to what extent they were committed by third parties. Nevertheless, the obligation to carry out an investigation into killings or torture applies irrespective of who actually carried out the acts in question. Seen in that light, the number of investigations is exceedingly small.

That negative assessment seems to be shared by the Department for the Execution of Judgments, which, on the basis of the limited data provided by the Russian authorities, concluded in 2008 that the number of prosecutions opened in respect of offences committed by servicemen continues to be extremely small in relation to the number of complaints forwarded to the *Prokuratura*, and suggested that the Russian authorities should intensify their efforts so as to ensure that all allegations are effectively investigated and result, where appropriate, in the prosecution of those responsible.¹⁸³ Similar observations have been made by other bodies; in particular, the Rapporteur of the Parliamentary Assembly's Committee of Legal Affairs and Human Rights, while preparing a report on "Human Rights Violations in the Chechen Republic" during 2005, addressed a number of questions concerning individual cases of human rights violations to the Prosecutor General in Chechnya.¹⁸⁴ The information he received in response to his requests contained little detail as to indictments and convictions; however, on the basis of the information available, the Rapporteur concluded that "a first analysis of the documents reveals that most investigations have not led to tangible results: few cases made it to trial; most were suspended, transferred or dismissed."¹⁸⁵

¹⁸¹ See CoE doc. CM/Inf/DH(2008)33 (above n. 64), at § 127; for discussion, see Annex, Section 2.6.2, text accompanying n. 609 et seq.

¹⁸² See Annex, Section 2.1.

¹⁸³ CoE doc. CM/Inf/DH(2008)33 (above n. 64), § 130.

¹⁸⁴ See Annex, n. 616 and accompanying text.

¹⁸⁵ PACE, Committee of Legal Affairs and Human Rights (R. Bindig, Rapporteur), "Human rights violations in the Chechen Republic: the Committee of Ministers' responsibility vis-à-vis the Assembly's concerns", PACE Doc. 10774, 21 December 2005, available at

Notwithstanding the limited data which is publicly available some further conclusions are possible. In particular, although the Criminal Code of the Russian Federation now includes a definition of torture, the statistics on criminal prosecutions show that the relevant provision (Article 117) has not been used to prosecute members of the security forces who are suspected of committing abuses amounting to torture or ill-treatment.¹⁸⁶ Instead, charges are normally brought under provisions of the Criminal Code dealing with “less grave” offences, such as “compulsion to give evidence” and “exceeding official powers”. In addition, issues have also been raised by some commentators as to whether Article 117 only deals with actions of private parties, or whether it also includes actions of officials. With regard to the effectiveness of sanctions, it appears that in the few cases where servicemen have eventually been found guilty, the sanctions imposed have generally been extremely lenient; sentences have been suspended or the guilty servicemen have merely been required to pay a fine.

The apparent lack of any meaningful impact of the judgments of the Court is confirmed by a number of studies undertaken by NGOs. For instance, one study, dating from September 2009, which assessed compliance in thirty-three of the Chechen cases, recorded that in no case had measures adopted by the Russian authorities resulted in the prosecution of those responsible, and that this was the case even where the judgment of the Court had identified particular individuals as being responsible. Indeed, in a disturbing development, the report concluded that in a number of cases, the Russian authorities had simply rejected the findings of the European Court.

In conclusion, so far, the changes made by Russia to rectify the shortcomings identified in the judgments have not had any visible impact on investigations and prosecutions of violations committed by members of the security forces. The data available indicates that the number of prosecutions opened is still extremely small compared to the number of complaints lodged with the authorities and certainly compared to the reported number of violations. Numerous domestic cases have been discontinued due to amnesties being granted. Further, ongoing proceedings may soon become time-barred due to the application of statutes of limitation. The lack of a *corpus delicti* (which may be attributable to an inadequate and ineffective investigation) is another reason for many cases being terminated. The question is thus whether this low proportion of prosecutions is connected to the authorities’ apparent lack of will to try to identify military units and servicemen allegedly involved in abuses. In that regard, it is striking, that as some NGOs have reported, the Russian authorities apparently adopt a completely different approach to the investigation of crimes depending on whether they have been committed by members of the security forces, or by rebel fighters. In

<http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc05/edoc10774.htm>,
Memorandum by Mr Bindig, at § 13a.

¹⁸⁶ See Annex, Section 2.6.2.

particular, studies involving the examination and comparison of investigations suggests a pattern of more speedy and prioritized investigations in relation to the latter. Those claims would appear to indicate both, on the one hand, that the Russian authorities are in fact capable of carrying out effective investigations and on the other, that the major problem in relation to violations by servicemen appears to arise from the lack of any will to carry out such effective investigations.

In conclusion, even from the little significant statistical information submitted by the Russian authorities to the organs of the Council of Europe, it appears that the measures relied upon by Russia have not in any meaningful fashion enhanced the capability of the domestic system to investigate and prosecute serious crimes committed by members of the security forces. Admittedly, compared to some of the other situations under consideration, the Chechen judgments are newer and concern more recent violations such that the time for compliance with the judgments, and for any concrete impact to be felt in the domestic legal system has been far shorter. Nevertheless, the Russian Federation has now had quite a relatively substantial time since the first Chechen judgments in which to take measures aimed at rectifying the shortcomings identified by the Court. Further, the fact that Russia has relied upon provisions, some of which were already in place at the time of the violations (for instance in relation to the rights of victims or relatives of victims to participate in the investigation), as constituting measures taken by way of compliance, raises questions as to the effectiveness in practice of those provisions. In that regard, if Russia takes the position that the persistent lack of accountability of members of the security forces is a question of faulty implementation of the existing legislation rather than a question of defective legislation, additional measures to ensure proper execution of those provisions are required.

3.2 Turkey / PKK

Since the first of the judgments regarding actions of the Turkish security forces in the context of the conflict with the PKK was handed down by the Court in 1996, Turkey has re-opened a number of domestic investigations and adopted a number of legislative and administrative measures aimed at ensuring effective investigations and establishing the enhanced accountability of its security forces. Although positive efforts have been made by Turkey to rectify the majority of the shortcomings identified in the Court's judgments, it appears that the changes made have still not had the desired outcome.

By providing statistics to different bodies such as the Committee of Ministers and the CPT, Turkey has attempted to show that the measures taken have had a practical impact on investigations, prosecutions and sentencing. As far as the promptness and effectiveness of investigations are concerned, in its dialogue with the Committee of

Ministers, Turkey has repeatedly emphasised the importance and relevance of the circulars issued by the Ministry of Justice in June 2005.

Comparison of the data on investigations during the period which has elapsed since the adoption of the circulars with analogous statistics relating to the period preceding their adoption could in theory provide some insight as to the impact of the measures taken by way of implementation of the Court's judgments. Although some care must clearly be taken before relying too heavily on such statistics,¹⁸⁷ by assessing the number of complaints, how many investigations have been carried out and, of those investigations, how many have resulted in prosecutions or charges being brought, it would be possible to provide some assessment of whether the legislative and administrative measures adopted following the Court's judgments have had the desired effect of ensuring more effective investigations into abuses. Unfortunately, however, insufficient reliable information is available regarding both pre-2005 investigations as well as, although to a lesser extent, investigations and prosecutions carried out after the adoption of the circulars mentioned above. Some conclusions can however be drawn from the little data available in the official statistics provided by Turkey, as well as from "anecdotal" evidence collected by NGOs.

With regard to the period preceding or immediately following the adoption of the circulars, a study by an NGO monitoring a limited number of investigations carried out during 2004 and 2005 into allegations of torture and ill-treatment reported that 59% of investigations monitored had ended with a decision by the prosecutor that there was no need for legal proceedings to be started.¹⁸⁸ With all the caveats set out above, to which must be added the fact that the study examined only a small sample of some 50 cases, it would nevertheless appear that the proportion of cases in which the investigation was discontinued was remarkably high. This is particularly so given the history of human rights violations committed by security forces in Turkey in the relevant period. From the official data provided by Turkey to the Committee of Ministers,¹⁸⁹ it would appear that the number of effective investigations into alleged violations of Articles 2 and/or 3 committed by members of the security forces / police has not increased after the amendments in the relevant legislation or the issuing of the circulars. Indeed, the data in question reveal that the number of investigations opened into allegations of torture and ill-treatment by the security forces has dropped in recent years, from 2,612 investigations opened against 5,588 members of the security forces in 2003, to 1,421 against 3,722 members of the

¹⁸⁷ In particular, the number of investigations carried out necessarily depends to a large extent on the number of complaints put forward, and accordingly reliable data as to the numbers of complaints both before and after adoption of the circulars is a necessary precondition to any meaningful evaluation. Further, the ability to evaluate whether or not the investigations carried out are in fact effective depends heavily on the availability of detailed information as to the measure in fact taken by the authorities.

¹⁸⁸ See Annex, Section 3.6.1(b).

¹⁸⁹ See Annex, Section 3.6.1(a).

security forces during the first nine months of 2007.¹⁹⁰ The decrease might be taken to reflect the impact of the Court's judgments as a result of the measures taken by the Turkish government to prevent violations of Articles 2 and 3 committed by members of the security forces; a further cause may be the reduced intensity of the conflict with the PKK and parallels the fact that fewer cases regarding abuses committed by Turkish security forces are being filed with the European Court. However, for present purposes, it would appear to be significant that, in those cases where an investigation was opened, in a comparatively high proportion of cases, a decision was taken not to prosecute, or the members of the security forces accused were acquitted. However, the statistics provided by Turkey disclose only the proportion of cases in which either a decision not to prosecute was given or members of the security forces were acquitted and there is no way of knowing whether those decisions were due to a failure of the investigations to secure evidence and/or identify the perpetrator(s), or if the investigation was in fact conducted effectively and such a high proportion of members of the security forces were simply innocent. Why over 40% were acquitted in 2005 compared to only 4% in 2006 remains unexplained, as is the fact that the proportion of decisions not to prosecute rose to 75% in 2007, whilst one might have expected the opposite.

Insofar as any conclusions can be drawn from "anedoctal" analysis of cases occurring after the adoption of the ministerial circulars, it would appear that the effect of those circulars has been relatively limited. In a 2008 report documenting twenty-eight incidents of abuses by law-enforcement officers committed since January 2008 and examining the investigations conducted in those cases, Human Rights Watch denounced that, in general, "[t]he conduct of flawed investigations into allegations of police abuse remains an entrenched problem".¹⁹¹ Amongst the shortcoming identified in the cases analysed, the absence of independent and effective investigation mechanisms into police abuses constitutes a serious obstacle to the effectiveness of the investigations. In addition, Human Rights Watch pointed out that there was a general lack of promptness and expedition in the investigations carried out by the prosecutors, that the way in which evidence was handled in the context of investigation of police abuses remained a source of great concern and, finally, that there were still numerous instances in which the prosecuting authorities failed to initiate investigations, despite ample publicly available evidence of abuses by the police.¹⁹² Again, the number of cases examined by the study is too small to be statistically very significant; however, the account of the various

¹⁹⁰ CoE doc. CM/Inf/DH(2006)24 rev. 2 (above n. 121). See also Interim Resolution CM/ResDH(2008)69 (above n. 89), Appendix I, § G.

¹⁹¹ See Human Rights Watch, "Closing Ranks" (above n. 23), pp. 6. Although the cases analyzed by Human Rights Watch do not concern abuses perpetrated in the context of action against members or alleged members of the PKK, given the general application of the circulars under consideration, they may be regarded as a fairly reliable indicator of the impact in practice of the circulars.

¹⁹² See *ibid.* For more details on the cases discussed in the report, see Annex, text accompanying n. 844.

shortcomings gives cause for real concern that the circulars appear to have had little real impact in practice.

As to the question of the excessive leniency of sanctions imposed on members of the security forces responsible for human rights violations, in 2002, the Committee of Ministers expressed concern over official statistics provided by the Turkish authorities, which revealed that light custodial sentences were imposed on servicemen who had been convicted of acts of torture or ill-treatment, and that those sentences were frequently converted into fines and, in most cases, subsequently suspended.¹⁹³ The Committee of Ministers noted that those statistics confirmed the persistence of the serious shortcomings in the criminal law protections against abuses which had been highlighted in the Court's judgments.¹⁹⁴

In response to the findings by the Court and the criticism by the Committee of Ministers, the Turkish authorities have adopted measures which have led to the gradual improvement of the domestic legal framework concerning sanctions for abuses committed by members of the security forces.¹⁹⁵ However, the data provided by Turkey indicate that those measures have so far had a limited impact on the capability of the domestic legal system to ensure the effective repression of the crimes at issue. With regard to disappearances and killings, the possibility of performing any meaningful assessment is precluded by the lack of any official statistics concerning prosecutions and conviction rates of servicemen responsible for those crimes. As far as convictions of members of the security forces for the crimes of torture and ill-treatment, the official statistics for the years 2003-2007 reveal that only a very low percentage of those charged were eventually convicted.¹⁹⁶ The greater part of judicial proceedings concerning both torture and ill-treatment did not lead to a conviction as the accused were either acquitted, the trials were suspended under the so-called "Amnesty Law",¹⁹⁷ or a decision not to prosecute was taken.¹⁹⁸ Although some of the acquittals may be the result of a more aggressive prosecution policy resulting in a greater number of prosecutions of weaker cases, in light of the overall number of allegations of torture and ill-treatment the data nevertheless gives cause for concern as to the effectiveness of the Turkish legal system in adequately punishing law-enforcement officers responsible for ill-treatment.

¹⁹³ Interim Resolution CM/ResDH(2002)98 (above n. 86).

¹⁹⁴ Interim Resolution CM/ResDH(2002)98 (above n. 86).

¹⁹⁵ See above, Section 2.1; see also Annex, Section 3.5.1(a).

¹⁹⁶ CoE doc. CM/Inf/DH(2006)24; CM/Inf/DH(2006)24 rev.; CoE doc. CM/Inf/DH(2006)24 rev. 2 (above n. 190). For a detailed breakdown of the statistics, see the annexes to the information documents and Interim Resolution CM/ResDH(2008)69 (above n. 89), Appendix I, § G. Note that the data relate only to the period January-September 2007.

¹⁹⁷ Law No. 4616 on the conditional release and the suspension of trials and sentences for offences committed up until 23 April 1999, adopted on 21 December 2000. On Law No. 4616, see Annex, n. 728 and accompanying text.

¹⁹⁸ See Annex, Section 3.6.1(b).

Further, statistics provided by Turkey to the CPT relating to prosecutions carried out in the period 1995-2004 show that most servicemen were charged with ill-treatment rather than torture. Although it is not possible to assess what proportion of the cases actually concerned instances of torture, in light of the numerous findings of torture by the Court in the same period, the figures nevertheless cast doubt on the capability of the Turkish legal system to effectively punish instances of torture. Finally, the statistics in question again reveal that those defendants who were in fact found guilty of torture or ill-treatment were given light sentences, which, in most cases, were then suspended.¹⁹⁹ These data reinforce the conclusion that sentences are still far too lenient, with the majority of those convicted receiving “other sanctions” than imprisonment or fines (i.e. disciplinary sanctions), even when they have been convicted of committing torture and/or ill-treatment. A further source of concern is represented by the fact that it appears that pecuniary fines are still imposed as a sanction for torture and ill-treatment although, as noted above, the Criminal Code was amended in 2003 so that penalties for these crimes can no longer be converted into fines.²⁰⁰ As regards sentences of imprisonment, given that detailed information concerning the length of sentences imposed has not been provided by Turkey to the Committee of Ministers, no real conclusions can be drawn as to whether, in practice, the penalties imposed on members of the security forces convicted of torture or ill-treatment have in fact been more severe, or whether the sentences imposed are so short that the sentence can be suspended in accordance with the applicable legislation.

In conclusion, from the data provided by Turkey it would appear that the measures have not solved the problems of impunity of members of the security forces: the tradition of imposing only very light penalties for acts of torture and ill-treatment continues; the majority of those convicted for torture and ill-treatment receive “other sanctions” than imprisonment; in practice, fines are still imposed as a sanction although, under the relevant legislation, penalties for these types of crimes may no longer be converted into fines; members of the security forces or police officers on trial for killings and torture are generally not suspended from active duty pending the outcome of the trial, and are not prevented from receiving promotions; and statistics presented by Turkey have only referred to the crimes of torture and ill-treatment although a number of the cases brought before the Court have dealt with killings and disappearances. The practical impact of the measures taken by Turkey is far from evident from the data provided and it is clear that further measures are needed to end impunity. In conclusion, analysis of the current trends with respect to the investigation and prosecution of abuses allegedly committed

¹⁹⁹ See *ibid.* Similarly, official statistics relating to the case-files finalized in 2003-2005 make clear that the majority of the convicted members of the security forces received “other sanctions”, i.e. punishment other than imprisonment and/or a fine: see CoE doc. CM/Inf/DH(2006)24 rev. (above n. 190). “Other sanction” may refer to earlier laws which allowed courts to impose sanctions such as temporary suspension from duty or permanent disbarring from the profession).

²⁰⁰ See above, text accompanying n. 25.

by members of the security forces in Turkey suggests that little has changed following the Court's judgments. The relatively weak character of the general measures adopted by Turkey, coupled with the clear deficiencies in the practical application of those measures suggest that they have had little real effect in practice. Taken together, those facts suggest that the Committee of Ministers may have been overly hasty in closing its examination of Turkey's compliance with the Court's judgments in relation to the effectiveness of investigations before the actual effect of the measures adopted could be fully evaluated. In far too many cases, decisions not to proceed with an investigation have been adopted; further, it appears that, if an investigation does indeed lead to a prosecution, it is likely that the prosecuted member of the security forces will be acquitted, or very lenient sentences imposed. Taken globally, the conclusion seems justified that the measures so far taken by Turkey have not been adequate in ensuring effective investigations and prosecutions. In practice, very little information regarding those investigations that have been re-opened has been made available; in some cases limitation periods have prevented criminal proceedings concerning serious human rights violations from being finally investigated and resolved; the accountability of members of the security forces in some cases has been prevented by the defence of superior orders; problems identified by the Court concerning investigations are still evident in investigations carried out today; a lack of expertise makes proper recording of medical evidence problematic; there are indications that investigations are obstructed and evidence is concealed by the police and the security forces; and finally, a number of victims and their relatives who have brought claims against servicemen have been either intimidated and threatened, or accused on counter-charges. In addition, the previously existing requirement of administrative authorization for criminal investigations into allegations of crimes committed by members of the security forces appears to have been clearly lifted only in respect of torture and ill-treatment, and in practice continues to exist with respect to other serious crimes. Turkey has had some thirteen years to comply since the first of the judgments adopted by the Court. However, judging from the outstanding issues, it still needs to take a large number of further measures in order to comply fully with the Court's judgments.

3.3 Turkey's Occupation of Northern Cyprus

In relation to Cyprus, despite the Court's finding in *Cyprus v. Turkey* that there was a continuing breach of Articles 2, 3 and 5 ECHR as a result of the lack of any investigation into the fate of individuals who had disappeared during the Turkish invasion and occupation of Northern Cyprus in 1974, no measures have yet been taken by Turkey in that regard, save for its renewed participation in the CMP, which it claims constitutes a

sufficient mechanism to fulfil its obligation to investigate.²⁰¹ Turkey's poor record of compliance with the Court's judgments as regards investigations into the fate of missing Greek-Cypriot persons is regrettable. Turkey's view that the CMP fulfils the duty to investigate has been clearly rejected by the Court and therefore, at least as a matter of its obligations under the Convention, Turkey has no other option than to comply by ensuring that mechanisms are put in place which ensure that effective investigations into the disappearances are carried out. Compliance with the judgments cannot be delayed until a global solution to the Cyprus question is found and the Court has in any case made clear that investigations are required irrespective of whatever political solution might ultimately be reached. In light of the attitude adopted by Turkey with regard to compliance with the Court's judgments in relation to disappearances, the impact of those judgments cannot be measured in the same way as in the other case studies. There have been no domestic prosecutions of members of the security forces allegedly responsible for killings in respect of events in Cyprus in 1974, nor any investigations into the fate of missing persons.²⁰²

As for the judgments which have identified serious defects in the investigations of more recent killings by the members of the Turkish / TRNC security forces in northern Cyprus, Turkey has, to a certain extent, merely gone through the motions in reopening investigations and/or re-examining cases. Although in relation to two of the cases consideration has been given to reopening investigations after the judgments, no meaningful action has in fact been taken and neither of the cases has led to any concrete results in establishing accountability of the responsible servicemen involved in the violations.²⁰³ However, it is striking that in none of the cases have the measures taken by the domestic authorities resulted in a different outcome to that prior to the judgment of the Court.²⁰⁴ Further, Turkey has to a large extent simply relied on pre-existing legislation, and asserted that the problem is a question of implementation, rather than of defects in the legislation itself.

²⁰¹ See Annex, Section 4.3.2.

²⁰² On the other hand, it is to be noted there has been compliance as regards judgments in relation to other issues which are not the subject of the present report, for instance in relation to questions relating to the right to property. See in particular the creation by the TRNC of the Immoveable Property Commission, which has been held by the Court to constitute in principle an effective remedy requiring exhaustion: see *Demopoulos v. Turkey and 7 other cases* [GC] (App. Nos. 46113/99, 3843/02, 13751/02, 13466/03, 14163/04, 10200/04, 19993/04 and 21819/04), decision on admissibility of 1 March 2010.

²⁰³ The cases in question are of *Kakoulli v. Turkey* and *Adali v. Turkey*: for discussion, see Annex, Sections 4.4.1 and 4.4.2.

²⁰⁴ See Annex, Section 4.4.

3.4 Northern Ireland

As far as compliance with the Court's judgments is concerned, the situation in the United Kingdom is essentially different from those examined in the other case studies. In some cases arising out of the Troubles, in particular as regards the use of the "Five Techniques" in interrogating terrorist suspects at issue in *Ireland v. United Kingdom*, there had been a general change of policy as to how best to deal with the terrorist threat in Northern Ireland long before the case had been heard by the Commission, let alone the Court. Similarly, in relation to the group of more recent cases concerning allegations of lack of an effective investigation into newly-emerging allegations of collusion of the security forces in killings by paramilitary groups, the shortcomings in the investigative procedures highlighted by the Court in the relevant judgments (in particular the lack of independence of investigations by the Royal Ulster Constabulary) had already been remedied by the time the Court had issued the judgments in question.²⁰⁵ Furthermore, even in those cases where the relevant legislation or practices had not been modified whilst the case was pending before the Court, the United Kingdom has shown a willingness to adopt relatively promptly domestic measures in order to remove the systemic shortcomings identified by the Court.²⁰⁶

With respect to individual measures, in the older cases the UK authorities likewise took appropriate action prior to the handing down of the Court's judgment. This was the case, for instance, as far as investigation and prosecutions of the specific instances of ill-treatment identified by the Court in *Ireland v. United Kingdom* were concerned. At the first meeting on the execution of the judgment in question, the Committee of Ministers accepted that, in light of the various measures which the UK had taken in relation to the ill-treatment condemned by the Court, including investigations and some prosecutions and the payment of compensation to the victims, no further measures of implementation were necessary.²⁰⁷

However, the UK's record of compliance with the Court's judgments in more recent cases appears to be less positive. In particular, in the group of cases where the Court found a number of flaws in the procedure for the investigation and inquests into deaths in Northern Ireland involving the security forces, the UK has been relatively reluctant to adopt measures in order to comply with the individual measures indicated by the Committee of Ministers, in particular as regards reopening of investigations.²⁰⁸ However, in this regard, it would seem that at least part of the problem results from the long-

²⁰⁵ See Annex, Section 5.5.

²⁰⁶ Ibid.

²⁰⁷ See Annex, Section 5.6.

²⁰⁸ See Annex, Section 5.5 (*McKerr, Hugh Jordan, Kelly and Shanaghan*).

periods of time which have elapsed since the events in question, rendering the carrying out of any further investigations difficult.

Despite the initial reluctance on the part of the United Kingdom to carry out further investigations into the cases in question, some progress in this regard has recently been made with the Committee of Ministers closing its consideration of individual measures in two cases.²⁰⁹ Further, it seems that the measures taken in relation to the remaining cases are likely to result in the termination of supervision of execution of those judgments by the Committee of Ministers in the relatively near future.²¹⁰

As for impact, the interaction between the Court and the United Kingdom in the context of the Northern Ireland cases has, at least in some respects, had a major impact on the United Kingdom legal system.

As compared to the other case studies, the impact of the Court's judgments as regards the ability of the United Kingdom to effectively repress violations is far less significant. In contrast to the situations at issue in the other case studies, this is to a large extent because the UK's legal system contained norms adequately criminalising conduct which violates Articles 2 and 3, and no modification of the substantive criminal law has been necessary as a consequence of the judgments of the Court under consideration. Further, in general, investigations were overall prompt and globally effective and not marred by the same problems which affect the other situations. As noted above, even before the decision of the Court in *Ireland v. United Kingdom*, a relatively large number of prosecutions had been brought against members of the security forces in relation to the ill-treatment at issue. In that regard the United Kingdom government relied upon statistics relating to prosecutions before the Court, and successfully argued when the case came before the Committee of Ministers that no further measures were necessary in order to comply with the judgment. That said, the statistics provided by the United Kingdom are of little concrete assistance, insofar as they do not distinguish between prosecutions for actions amounting to torture or other ill-treatment in violation of Article 3, and other, lesser, instances of abuse of detainees by members of the security forces.

On the other hand, the Court's more recent judgments have had a significant impact in other areas. In particular, on the one hand, as regards the systems of inquests/Coroner's courts and on the other as regards police investigations in Northern Ireland. Recent institutional improvements in domestic mechanisms applicable to investigations of allegations of violations of Articles 2 or 3 by members of the police or of the security forces are, in a number of respects, a direct consequence of the consequence of the multiple measures taken by way of compliance with the judgments of

²⁰⁹ Interim Resolution CM/ResDH(2009)44, "Action of the Security Forces in Northern Ireland (*McKerr v. United Kingdom* and five similar cases)", adopted by the Committee of Ministers at the 1051st meeting on 19 March 2009.

²¹⁰ *Ibid.*, and see Annex, Section 5.5..

the Court in the *McKerr* group of cases. Although those cases relate to killings which are more or less historically remote, and, as noted above, the progress in the investigation of the individual cases have been relatively slow, the general measures adopted by way of compliance serve to ensure that future police investigations into killings by the security services are prompt, independent and efficient. Further, the position of the families of victims in terms of involvement in the process of inquests before Coroner's Courts has been vastly improved.

As regards past violations in Northern Ireland, as noted above, the creation of the Historical Enquiries Team (HET) within the SCRT is an important development in ensuring compliance with the judgments of the Court. In particular, in order to remedy the violations identified by the Court as to the lack of involvement of the relatives of those killed, the HET was set up with a specific role of involving the families and placing them at the centre of the investigation so that their specific concerns can be addressed.²¹¹

However, it should be noted that the situation as regards the impact of the more recent cases is qualitatively different from that in the other case studies. In particular, far fewer individual cases are implicated, and the violations identified by the Court generally concern relatively minor violations of the obligation to carry out an effective investigation (i.e. issues relating to adequate participation of the families of those killed, the powers of inquests to make findings of fact, etc), and there are few concerns as to the willingness of the United Kingdom authorities to bring a prosecution if sufficient evidence is available.

In relation to at least one of the individual cases (*McShane*), the verdict of the new inquest as to the circumstances in which the death of the victim occurred resulted in the coroner referring the case to the Director of Public Prosecutions for Northern Ireland to assess whether criminal proceedings should be instituted; the Director of Public Prosecutions has recently requested further information and is still assessing whether a prosecution should be brought.²¹²

Nevertheless, whether or not the investigations in relation to the historical cases will in fact eventually result in any prosecutions is perhaps open to doubt; the events in question are now receding into the past, with all that this implies in terms of preservation of evidence and the availability of witnesses. As a consequence, there may well be slim prospects of securing convictions for historical incidents, despite the strength and innovation of the Court's rulings. Nevertheless, although in individual cases, prosecution and convictions are unlikely to be forthcoming, the future prospects for effective

²¹¹ On the HET, see Annex, Section 5.5, text accompanying n. 1110 *et seq.*

²¹² Interim Resolution CM/ResDH(2009)44,(above n. 209); see also the information provided by the United Kingdom, *ibid.*, Appendix I.

investigation and prosecutions in relation to any death at the hands of the police or security force are much brighter.

4. Global assessment and conclusions as to compliance and impact

At a very general level, the case studies show that the States concerned have in all cases at least formally endeavoured to comply with the judgments of the Court. In particular, there has been a certain amount of *formal* compliance by Russia with the judgments concerning Chechnya, as well as by Turkey in relation to the PKK judgments (at least as concerns the adoption of general measures aimed at ensuring the accountability of members of the security forces), and to some of Northern Cyprus judgments. However, despite the adoption of various pieces of legislation or other administrative measures, it appears that in both the Turkish and the Russian case *substantial* compliance in practice has been limited, insofar as the measures adopted have been far from adequate in practice to address the shortcomings identified by the Court. In fact, the mere adoption of the relevant legislation or other measures appears not to have been accompanied by any genuine desire to ensure that the measures are actually implemented. As a consequence of the scarce substantial compliance by the States in question, the impact of the judgments of the Court – measured in terms of the improvement of the effectiveness of the domestic legal system to ensure effective investigations, prosecutions and conviction of members of the security forces responsible for serious abuses – has likewise been limited.

The situation in the United Kingdom is markedly different. In general, there has been compliance with the Court's judgments in terms of the adoption of general measures, not only as a formal matter, but also in terms of the actual implementation of the various measures and the amendments to existing law which have been adopted. Indeed, in some of the earlier cases, measures remedying the circumstances giving rise to a breach later identified as resulting in a violation were adopted even before the Court or Commission had rendered a decision. Even disregarding those latter instances, which cannot formally be characterised as involving compliance *per se*, globally, the impact of the judgments of the Court has been significant. However, at least as regards cases identifying defects in investigations, the breaches identified by the Court are to a large extent qualitatively different to those at issue in the other case-studies. They did not concern the lack of any investigation at all, as is the case in relation to some of the Court's judgments examined in the other case studies; instead, they related to issues which may be characterised as involving "fine-tuning" of the investigative system (for instance, ensuring the adequate involvement of the families of the victims or the formal independence of those carrying out the investigation). Although violations of this type

have also been found in the other case studies, they have normally accompanied findings of violations arising from much more fundamental problems in the domestic legal system.

As far as compliance with the Court's judgment by way of individual measures is concerned, certain general observations may be made in relation to the specific issue of re-opening domestic investigations, which constitute the individual measure required in order to remedy the violations in relation to investigations found in many of Court's judgments. In this regard, it is noticeable how little detailed information has been provided to the Committee of Ministers by the States in question in most cases (although, again, that assessment must be qualified to a certain extent in the case of the United Kingdom). Further, and again, as previously noted, it is striking how little real progress has been made in this regard by the domestic authorities. Although some investigations have been re-opened, only in a very few cases does it seem that any real new investigative steps were actually taken. As a consequence, the re-opening of investigations in the instances discussed in the case studies has not in any case led to a different outcome or to the prosecution of those responsible. That result must be disappointing for the Court, the Committee of Ministers and in particular, the applicants, although perhaps it is not surprising given the periods of time which have often elapsed between the reopening of investigations and the events in question. Moreover, given the periods of time which have elapsed since the events in question, the operation of statutes of limitation is now creating problems in relation to further investigations in Turkey, a fact of which the Russian authorities should also be aware in order to ensure that the same problems do not arise in the cases concerning the events in Chechnya. Overall, the conclusion in relation to the re-opening of investigations must be that the judgments of the Court in the situations examined in the various case-studies have so far resulted in an unsatisfactory outcome.

In the case of the situation in northern Cyprus, there has been significant non-compliance with a number of the Court's judgments, and only formal compliance in relation to others. Given that significant lack of compliance, the impact of the Court's judgments in relation to northern Cyprus in terms of improvement in investigations and prosecutions has been minimal. This is especially so in relation to the violations resulting from the historical disappearances in 1963-4 and the Turkish military intervention in 1974, especially insofar as Turkey has continually attempted to rely on the work of CMP as constituting a measure which fulfils its obligation to ensure an effective investigation, notwithstanding clear statements by the Court that its work can not be considered in any way adequate for those purposes. Nevertheless, despite the position adopted by Turkey, its reengagement with the CMP, has meant that the work of that body, in particular the Exhumation and Identification Programme, has resulted in some limited progress in the investigation of the fate of disappeared persons. As regards the more recent judgments finding violations of the right to life, although Turkey has reported some minor

amendments to the law of the TRNC in the field of investigations, and further, at least in a handful of cases, somewhat desultory efforts have been made to reopen investigations, the overall picture is one of poor compliance. As a consequence, overall there has been little impact in the sense of improvement in the ability of the domestic legal system in northern Cyprus to investigate and prosecute violations, in particular the historic disappearances dating from 1974.

In conclusion, the case studies demonstrate that there clearly exists a large variation in the extent of compliance with the Court's judgments and the impact of those judgments within the domestic legal systems of the countries under consideration. The sections which follow attempt to identify the underlying reasons for those differences.

4.1 Irrelevance of the status of the Convention in domestic law

As a preliminary matter, it appears that the way in which the Convention has been incorporated (if at all) within the domestic legal system and its hierarchical status amongst domestic legal sources has a relatively limited practical effect on both the level of compliance and the impact of the Court's judgments. It should be emphasised that that issue is distinct from the extent to which the reception of the Convention into domestic law has an effect on compliance with the substantive obligations under the Convention itself, although obviously, to the extent to which the Convention has direct effect within the legal system, findings of violation may be avoided.²¹³

As a general matter, the modalities of the reception of the Convention into any given domestic legal system depend essentially on the monist or dualist character of the system in question as concerns the reception of international treaties. However, even in a pure monist system, where the Convention is in principle directly binding on the domestic authorities and directly invocable before the domestic courts, certain actions will often be needed to give effect to international treaties. This is particularly the case as regards compliance with the Court's judgments, which may often require the amendment of existing legislation, the enactment of new laws, or more specific individual measures, such as the reopening of investigations.

²¹³ For discussion of that latter issue, see e.g. S. Greer, *The European Convention on Human Rights; Achievements, Problems and Prospects* (Cambridge: CUP, 2006), 60-135; Polakiewicz "The Status of the Convention in National Law" in Blackburn and Polakiewicz (eds), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (OUP, 2001), 31-33. See also H. Keller and A. Stone Sweet, "Assessing the Impact of the ECHR on National Legal Systems", in H. Keller and A. Stone Sweet (eds.), *A Europe of Rights; The Impact of the ECHR on National Legal Systems* (OUP, 2008), 677, at 683, who conclude that "Other things being equal, the ECHR is most effective where Convention rights, *de jure* and *de facto*: (1) bind all national officials in the exercise of public authority; (2) possess at least supra-legislative status (they occupy a rank superior to that of statutory law in the hierarchy of legal norms), and (3) can be pleaded directly by individuals before judges who may directly enforce, while disapplying conflicting norms".

As far as the mechanisms for giving effect to the Convention within the domestic system are concerned, two of the countries under consideration, the Russian Federation and Turkey, both have an essentially monist system, whilst the United Kingdom has a dualist system.²¹⁴ In particular, within the Russian legal system, the Convention has *de jure* been directly applicable since its entry into force for the Russian Federation in 1996; as a consequence, it was thus in theory applicable at the time of the events of the Second Chechen War. With regard to Turkey, the direct applicability of international treaties under the 1982 Constitution has been consistently recognized by the Council of State; therefore, the Convention was, at least formally, directly applicable at the time the events at issue in the PKK cases took place. As regards specifically the situation in northern Cyprus, under the laws of the Republic of Cyprus, the Convention has constitutional force.²¹⁵ However, although formally the Republic of Cyprus is regarded as the sole legitimate government of the entirety of the island, it does not exercise effective control over northern Cyprus, and its domestic laws do not apply there.²¹⁶ With regard to northern Cyprus, the TRNC Constitutional Court has held that the TRNC Constitution, adopted on 7 May 1985, is to be interpreted in conformity with international law and the European Convention.²¹⁷ By contrast, the United Kingdom legal system is strongly dualist. Given that the incorporation of the substantive rights under the Convention within the UK legal system only took place following the adoption of the Human Rights Act 1998, which entered into force on 2 October 2000, at the time of the Troubles in Northern Ireland the Convention could not be directly relied upon by individuals before the English or Northern Irish courts, although at the time of some of the later cases, the Human Rights Act was in force. That said, indirect effect was nevertheless given to it in a number of ways even prior to incorporation.²¹⁸

With regard to the status of the Convention in the domestic system, in the two monist systems, namely the Russian Federation and Cyprus (as well as in the TRNC), the Convention has constitutional status and in theory prevails over inconsistent domestic legislation. However, at the time of the conflict with the PKK, the hierarchical status of the Convention in Turkey was unclear and it is only subsequently, as the result of a constitutional amendment, that the Convention has been given clear constitutional

²¹⁴ The situation in both the Republic of Cyprus and the TRNC is briefly discussed in the Annex, Section 4.2; the TRNC also has an essentially monist system. The modalities of incorporation and the status of the Convention within the Russian and Turkish legal systems are briefly discussed in the Annex, Section 2.2 and Section 3.2, respectively. For the situation in the United Kingdom, see Annex, Section 5.2

²¹⁵ For further discussion, see Annex, Section 4.2

²¹⁶ For example, when Cyprus entered the European Union in May 2004, the application of the *acquis communautaire* was suspended in those areas in which the government of the Republic of Cyprus does not exercise effective control: see Article 1(1) Protocol No 10 on Cyprus to the Act concerning the conditions of accession [to the European Union] of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 955).

²¹⁷ Judgment of the TRNC Constitutional Court in case no. 3/2006.

²¹⁸ On the implementation of the Convention in the British legal system, see Annex, Section 5.2.

status.²¹⁹ In the UK, as already noted, the Convention had no direct effect at the relevant time, and accordingly no question of its hierarchical position arose. Following the entry into force of the Human Rights Act, the courts are required to interpret all legislation, to the extent possible, consistently with the United Kingdom's obligations under the Convention. However, the courts have no power to strike down primary legislation and, if they find that a law passed by Parliament can not be interpreted consistently with the Convention, the most they can do is make a declaration of incompatibility, following which it is for the executive to take steps to ensure amendment of the relevant law. By contrast, secondary legislation will be invalid to the extent that it is incompatible with the Convention and all public authorities (including the courts) are required to act consistently with it.

Despite these differences in the position of the Convention under the domestic law of the States concerned, the case studies show that the different degrees of compliance with the Court's judgments is in practice independent of both the extent to which the Convention had been received into domestic law, and any hierarchical status it may have in the domestic system. In the four situations examined, the highest degree of compliance with the judgments of the Court would appear to be that of the United Kingdom in relation to the Troubles in Northern Ireland; this is so, despite the lack of any direct applicability as a matter of domestic law at the time of many of the relevant judgments, and the lack of any super-legislative status of the Convention even following its reception into domestic law. The principal reason behind the relatively positive record of compliance by the United Kingdom would appear to be an ingrained culture of compliance with the rule of law and a consequent desire to comply with the judgments of the Court. By contrast, in the case of the Russian Federation, despite the direct applicability and the constitutional status which the Convention enjoys under Russian law, the record of compliance with the Court's judgments pertaining to Chechnya has been relatively poor. Although the Russian Federation has on the whole complied with its obligation to pay the monetary compensation awarded by the Court by way of just satisfaction, other specific measures required for compliance, including in particular the carrying out of effective investigations into violations of Articles 2 and 3 identified by the Court, have in general not been adopted. A similar situation obtains in relation to Turkey in respect of cases arising out of the conflict with the PKK. Despite the direct applicability of the Convention under domestic law, and its clear hierarchical status since 2004, Turkey has in general failed to comply with the judgments of the Court insofar as they require adequate and effective investigations of alleged violations of Articles 2 and 3 ECHR committed by members of its security forces. Finally, the situation in northern Cyprus is rendered more complex by the existence of the TRNC, which Turkey continues to insist is an independent sovereign State. Nevertheless, Turkey has in general failed to

²¹⁹ See Annex, Section 2.2 (Russian Federation); Section 3.2 (Turkey); Section 4.2 (Cyprus).

ensure compliance with the Court's judgments insofar as they require effective investigations into violations of Articles 2 and 3 ECHR. In sum, rather than depending upon the extent of reception of the Convention into domestic law, or the fact that the Convention has any higher status under domestic law, the level of compliance with the judgments of the Court thus seems to depend on other factors.

4.2 The political nature of the reasons underlying non-compliance

If the formal status of the Convention within the domestic legal system in practice makes little difference to the extent to which a particular State in fact complies with the Court's judgments, what then is the underlying reason for the varied record of compliance in the four case studies under consideration?

In a 2000 study on the issue of compliance, the PACE identified a range of reasons which may underlie problems of execution and implementation of the Court's judgments. According to the PACE, the most common obstacles to full compliance with the judgments of the Court, are:

- (a) political reasons;
- (b) reasons to do with the reforms required;
- (c) practical reasons relating to national legislative procedures;
- (d) budgetary reasons;
- (e) reasons related to public opinion;
- (f) judgments drafted in a casuistic or unclear manner; and
- (g) reasons relating to interference with obligations deriving from other institutions.²²⁰

Of course, these various possible causes of a lack of compliance are by no means mutually exclusive and more than one reason may be present in a given case. For instance, political causes for non-compliance will often by their nature be closely related to public opinion, especially if a particular reform is unpopular. With respect to the lack of compliance identified in all of the case studies with regard to some aspects of the Court's judgments, it appears that the obstacles to compliance listed under (c), (d), (f) and (g) can be discounted. Perhaps unsurprisingly, the principal underlying essential causes of non-compliance in the situations studied would appear to be a combination of different causes, in particular a lack of political will to adopt or effectively implement particular

²²⁰ Parliamentary Assembly Resolution 1226 (2000), "Execution of judgments of the European Court of Human Rights".

reforms.²²¹ At least in some of the case studies, that lack of political will is accompanied by or results from strong underlying public opinion opposed to the adoption of the measures.

In the case of Turkey and the Russian Federation, the major reason for the scarce degree of compliance with the Court's judgments finding violations of the duty to investigate violations of Articles 2 and 3 committed by members of the security forces is clearly the persistent political unwillingness on the part of the authorities to prosecute members of the military. At least to some extent, both Russia and Turkey have taken important preventive measures aimed at preventing future similar violations, by strengthening safeguards in custody and increasing training and education of security forces, prosecutors and judges. However, neither State seems yet to have been able to establish adequate accountability of their respective security forces, either for violations occurring prior to the Court's judgments or for those taking place after the judgments in question. The multiple violations committed by the security forces in Turkey in the conflict with the PKK and Russia in the Chechen conflict occurred in the context of situations perceived by the government and military as threatening the fundamental interests of the State and thus requiring drastic measures. Further, it would appear that many of the violations result from systematic practices which, if not explicitly directed or condoned by the highest political/military circles, were at the least tacitly tolerated or adequately condemned. In such circumstances, it would appear that the States in question are trying to satisfy the expectations of the military as well as internal political pressures by so far as possible avoiding punishment of members of the security forces for actions carried out in furtherance of State interests. On the other hand, those States are also purporting to comply with the demands of the Committee of Ministers by carrying out at least some investigations. However, the the majority of those investigations are then either closed with no prosecution or conviction, or result in punishments which are often more symbolic than proportionate.

Of course, the situation in Turkey and in the Russian Federation is by no means unique. There is a general reluctance in many States, especially those which have to deal with continuous threats to the safety of their citizens coming from separatist movements or "terrorist" organizations, subsequently to subject the actions of the security forces to strict review and to ensure accountability. However, it is clear that this reluctance is higher in some countries than in others. Although internal political considerations certainly play a role, issues of the internalization of norms, reputational

²²¹ Y. Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary", *European Journal of International Law*, vol. 20 (2009), 73, at 77. This thesis, in its general formulation has been developed by Martii Koskenniemi: see M. Koskenniemi and P. Leino, "Fragmentation of International Law? Postmodern Anxieties", *Leiden Journal of International Law*, vol. 15 (2000), 553, at 569; see also M. Koskenniemi, "The Politics of International Law – 20 Years Later" (2009) *European Journal of International Law*, vol. 20 (2009), 7, at 9-10.

issues, and ultimately the commitment of the political and legal system of the State to the rule of law are also of relevance.

In this regard, a comparison between the attitude of the Russian and Turkish authorities and those of the United Kingdom is illuminating. Although reasons relating to a lack of political will appear, at least to a certain extent, to underlie the reluctance of the United Kingdom to comply with the Court's judgments as regards the reopening of investigations in specific historical cases where the Court has found violations in the original investigation, that reluctance does not seem to be the main reason for the lack of compliance in this regard. Rather, the particular circumstances of the cases in question present significant practical problems resulting from the period of time which has passed since the events in question. In any event, although initially somewhat reluctant to take some individual measures in relation to particular cases, some action is finally being taken in order to attempt to ensure full compliance with all aspects of the judgments of the Court, although the measures taken would appear to be far from perfect.

The difference between Turkey and Russia, on the one hand, and the UK, on the other, would appear, in the final analysis, to be attributable to norm-internalization and, to a certain extent, question of self-image. A further connected factor to be taken into account is the extent to which there is a culture of compliance with the rule of law in the State in question, both domestically, and as regards the State's international obligations. The level of commitment to the rule of law clearly has a significant impact both on the existence of the political will to ensure accountability and on the acceptability of such measures from the standpoint of majority public opinion.

With regard to the multi-faceted and complex issues that the Cyprus problem presents, in addition to those outlined above, other more far-reaching political considerations are relevant and explain in part the non-compliance by Turkey with the Court's judgments concerning missed persons. In the *Loizidou* case, concerning the violations of the right to property of Greek Cypriots in northern Cyprus, one of the dissenting Judges noted:

The "political nature" of the present case is [...] rather related to the place of the courts in general, and of the Strasbourg mechanism in particular, in the scheme of the division and separation of powers. There, the courts have a different role to play, than, e.g., the legislative and executive bodies. Courts are adjudicating in individual and in concrete cases according to prescribed legal standards. They are ill-equipped to deal with large-scale and complex issues which as a rule call for normative action and legal reform.

I have great respect for the principled view that the Court's only task is to see to it that fundamental rights of individuals are respected, irrespective of their numbers. On the other hand, I see much reason to consider seriously an equally legitimate issue of this Court's effectiveness in resolving human rights problems. This problem is even more difficult in respect of individual cases, such as the present one, which are

inextricably linked to, and also depend upon the solution of a large-scale inter-communal ethnic and/or political conflict.²²²

Nevertheless, the Court has continued to insist on the irrelevance of the wider political context in determining the obligations of State Parties under the Convention. In *Varnava*, the Grand Chamber adverted to this problem, observing, in the context of its discussion of the obligation to investigate under Article 2:

It may be that both sides in this conflict prefer not to attempt to bring out to the light of day the reprisals, extra-judicial killings and massacres that took place or to identify those amongst their own forces and citizens who were implicated. It may be that they prefer a “politically-sensitive” approach to the missing persons problem and that the CMP with its limited remit was the only solution which could be agreed under the brokerage of the UN. That can have no bearing on the application of the provisions of the Convention.²²³

As noted by one commentator, in the Cyprus cases, the European Court has been faced with the dilemma between “the effectiveness of the remedies the Convention offers over judicial restraint in the face of issues which might be better addressed in a political forum”.²²⁴ Compliance in the cases dealing with human rights violations resulting from the armed conflict and the de facto division of Cyprus seems to a large extent to be contingent on the overall settlement of the Cyprus problem, a question goes beyond the control of the Court, and is probably better left to other international organizations, such as the United Nations or the European Union.²²⁵ For example, the recent measures taken by Turkey by way of compliance with certain judgments of the Court as regards issues relating to property rights can be seen to have occurred principally as a result of the desire of Turkey to become a member of the European Union, since the execution of such judgments is now monitored not only by the Committee of Ministers of the Council of Europe, but also by the Commission of the European Communities and the European Parliament.²²⁶ However, the violations with which the present report is concerned are of a very different character. Given that Turkish membership of the EU would still appear to be a relatively distant prospect, and will in any case necessitate a global solution to the Cyprus problem, it is clear that the political interests of Turkey have not yet reached a point where it can no longer avoid carrying out investigations in relation to the

²²² *Loizidou v. Turkey* [GC] (App. no. 15318/89) (Merits), Reports 1996-VI, Dissenting Opinion of Judge Jambrek, §§ 7-8.

²²³ *Varnava v. Turkey* [GC] (above n. 935), §193.

²²⁴ R. White, “Tackling Political Disputes Through Individual Applications”, *European Human Rights Law Review*, vol. 1 (1998), p. 72

²²⁵ A. Moravcsik, “Explaining International Human Rights Regimes. Liberal Theory and Western Europe”, *European Journal of International Relations*, vol. 1 (1995), 157-189.

²²⁶ Regular Reports from the Commission on Turkey’s Progress Towards Accession 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, available at < http://ec.europa.eu/enlargement/candidate-countries/turkey/key_documents_en.htm>.

disappearances in northern Cyprus, or resolving the various other, wider issues. Similarly, insufficient political pressure has been brought to bear on Russia to force it to ensure accountability in relation to the atrocities in Chechnya.

5. Improving compliance and maximizing impact: the way forward

Despite the essentially political nature of the reasons underlying non-compliance with certain aspects of the Court's judgments, a number of measures could improve the level of compliance with the findings of the Court in relation to investigations and prosecutions and, as a consequence, the impact of the Court's judgments on the capability of the domestic legal system to address serious abuses committed by members of the security forces and law-enforcement officers in the future. These measures may be divided according to whether they involve measures to be taken by the Court, by the Committee of Ministers, or by the Member States of the Council of Europe. Each will be considered in turn.

5.1 A more robust approach under Article 41

Under Article 41 of the Convention, the Court has the power to award "just satisfaction" when it has found a violation of the Convention and full reparation for the violation cannot be made under the internal law of the State concerned. On this basis, the Court normally either concludes that the mere finding of a violation of the Convention is to be taken as sufficient just satisfaction, or awards the applicants sums by way of compensation in relation to pecuniary or non-pecuniary damage suffered.²²⁷ The two sections which follow discuss the merits of two potential modifications to the Court's traditional approach to the issue of just satisfaction might be adopted in order to improve compliance with the Court's judgments.

5.1.1 Ordering non-monetary measures

Traditionally, when dealing with issues of just satisfaction under Article 41 ECHR, the Court has refrained from making specific recommendations or orders which went beyond a declaration that there has been a breach and/or the award of monetary

²²⁷ See e.g. the example cited in Annex, Section 1.2.1; for instance, in *McCann and Others v. the United Kingdom* (App. no. 18984/91), Series A no. 324, the Court held that the finding of a violation in respect of a number of aspects of the killing of the applicants' relatives in an anti-terrorism operation constituted sufficient just satisfaction.

compensation for pecuniary or non-pecuniary damage. The refusal to accede to requests by applicants to indicate specific measures by way of just satisfaction was normally justified by the Court by reference to the principle of subsidiarity, by virtue of which respondent states have freedom of choice as regards the means to be employed in order to meet their obligations under the Convention to abide by a judgment of the Court against them.²²⁸

More recent practice seems, however, to indicate that the Court may in some exceptional cases be prepared to go beyond monetary awards and order other, non-monetary, measures by way of just satisfaction under Article 41, including for example ordering the release of detainees or ordering the return of property.²²⁹ However, the Court has so far refused to order the opening or re-opening of investigations as a measure to provide the applicants with “just satisfaction” under Article 41 in cases where a violation due to a lack of effective domestic investigation of crimes committed by State agents had been found.

In a number of cases of this type, and in particular where there had been either no or limited compliance by the respondent State with previous judgments identifying similar violations, applicants have unsuccessfully sought to convince the Court to order the State to undertake investigations and prosecutions. The earliest example in this regard is *Ireland v. United Kingdom*, in which the Republic of Ireland requested that the Court make a consequential order requiring the United Kingdom to “proceed as appropriate, under the criminal law of the United Kingdom and the relevant disciplinary code, against those members of the security forces who have committed acts in breach of Article 3 [...] and against those who condoned or tolerated them”.²³⁰ In that regard, the Court concluded very briefly that it had no power to direct the United Kingdom to institute criminal or disciplinary proceedings, although it expressed no view on the wider question of whether its functions might extend, in certain circumstances, to addressing consequential orders to States parties.²³¹

In more recent times, the applicants in a number of cases concerning abuses perpetrated in Chechnya by members of the Russian security forces have requested, under Article 41 of the Convention, that the Court order that an independent investigation

²²⁸ See, e.g., *Mezhidov v. Russia* (App. no. 67326/01), ECtHR 25 September 2008, § 99. For discussion of the traditional approach of the Court to the issue of just satisfaction, see P. Leach, “Beyond the Bug River: A New Dawn for Redress Before the European Court of Human Rights”, *European Human Rights Law Review* (2005), 147; L.R. Helfer, “Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime”, *European Journal of International Law*, vol. 19 (2008), 125, at 146; V. Colandrea, “On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the *Assandize*, *Broniowski* and *Sejdovic* Cases”, *Human Rights Law Review*, vol. 7 (2007), 396.

²²⁹ For examples of cases in which the Court has ordered non-monetary measures under Art. 41, see Annex, text accompanying n. 314 *et seq.*

²³⁰ *Ireland v. United Kingdom* (App. no. 5310/71), *Series A*, No. 25 (1978), § 186.

²³¹ *Ibid.*, § 187. For discussion, see Annex, Section 5.6.

be conducted into the death of their relatives.²³² The Court, although not expressly denying that it had power to order the reopening of investigations, has rejected the applicants' requests, noting that since the effectiveness of the investigations had already been undermined at their early stages by the domestic authorities' failure to take meaningful investigative measures, it was very doubtful that the situation that existed before the breaches could be restored. Accordingly, the Court concluded that it was most appropriate to leave it to the respondent State to choose, under the supervision of the Committee of Ministers, the means to be adopted in order to comply with the judgment.²³³ A similar conclusion was reached by the Third Section of the Court and affirmed by the Grand Chamber in the case of *Varnava v. Turkey*. In that case the applicants had requested consequential orders requiring the opening of investigations, in support of which, as discussed further in the following section, they also requested an order that in default of adoption of those measures, Turkey was to pay damages on a steadily increasing scale until such time as it had complied. Both the Third Section and the Grand Chamber saw no reason to make the specific non-monetary orders requested. The Chamber noted, that given the ongoing supervision by the Committee of Ministers of Turkey's compliance with the judgment in *Cyprus v. Turkey*, it would be neither "appropriate or constructive, or even just, to make additional specific awards or recommendations in regard to individual applicants".²³⁴ The Grand Chamber took a slightly different approach: having reaffirmed its previous jurisprudence to the effect that, in principle, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention to abide by a judgment of the Court, it concluded that consequently it fell to the Committee of Ministers "to address the issues as to what may be required in practical terms by way of compliance".²³⁵

The reluctance of the Court in these cases to order the opening/reopening of investigations as consequential, non-monetary measures by way of just satisfaction under Article 41 is questionable for a number of reasons. First, in light of both the letter of the Convention and the Court's practice, it is clearly arguable that the notion of "just satisfaction" under Article 41 is broader than that of pecuniary compensation. It cannot be denied that the Court has regarded it as legitimate, at least in certain circumstances, to make specific orders relating to the adoption of non-monetary measures.²³⁶ Second, at least in some circumstances, the ordering of investigations would appear to be justified

²³² See *Mezhidov v. Russia* (App. no. 67326/01), ECtHR 25 September 2008; *Lyanova and Aliyeva v. Russia* (App. no. 12713/02 and 28440/03), ECtHR 2 October 2008; *Musayeva v. Russia* (App. no. 12703/02), ECtHR 3 July 2008; discussed in Annex, text accompanying n. 415 *et seq.*

²³³ See, e.g., *Musayeva v. Russia* (above n. 232), §§ 164-166; see further Annex, text accompanying n. 417.

²³⁴ *Varnava and Others v. Turkey* (Chamber Judgment) (above n. 97), § 158.

²³⁵ *Varnava and Others v. Turkey* [GC] (above n. 97), § 222.

²³⁶ On recent practice of the Court to order non-monetary measures under Art. 41, see Annex, Section 1.2.1.

on the basis of the principle of *restitutio in integrum*. That principle requires that, where a violation of an international obligation has been found, the injured party should be put, as far as possible, in the position he would have been in had the violation not taken place. The principle of *restitution in integrum* is a cardinal principle of the international law of State responsibility and has been affirmed on a number of occasions by the European Court.²³⁷ Further, it is clear that, as a matter of the substantive obligations under the Convention, a failure to carry out an effective investigation into death or ill-treatment will normally constitute a continuing breach of the Convention; as a result, the only way in which to put an end to such a breach is through performing an adequate investigation or re-opening an investigation.

The further step to accepting the possibility that the Court may make orders requiring the starting or reopening of investigations by the Court, which would only make explicit what is already abundantly implicit, is a relatively small one. In that regard, certain observations made by the Grand Chamber in *Varnava v. Turkey* are particularly striking. In particular, the Grand Chamber made clear that even the passage of a period of over thirty years since the events in issue could not absolve Turkey of the obligation to carry out an effective investigation; in that regard, although it did recognize that the investigations might prove inconclusive, or that insufficient evidence might be available, it emphasised, referring to the experience in Northern Ireland with the SCRT and HET, that such an outcome “is not inevitable even at this late stage” and that, as a result, “[i]t cannot therefore be said that there is nothing further that could be done”.²³⁸ Those conclusions are obviously in some tension with the Grand Chamber’s later conclusion that it was, in principle, for the State to choose the means by which to comply with the judgment.

It may also be noted that other human rights monitoring bodies, in particular the Inter-American Court of Human Rights, have taken a more robust approach under their respective constitutive instruments to the issue of non-monetary measures and have been more willing to order such measures. The Inter-American Court provides a good comparison as it has dealt with cases similar to those considered in the present report, albeit that the relevant provision relating to reparation, Article 63(1) of the American Convention on Human Rights, is framed in far wider terms than Article 41 of the European Convention insofar as it provides that if the Inter-American Court finds a

²³⁷ See e.g. *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 29 at p. 48; see also Art. 35, Articles on the Responsibility of States for Internationally Wrongful Acts, and the Commentary thereto, reprinted in J.R. Crawford, *The ILC’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge, 2002). For an example of the endorsement of the principle by the European Court, see e.g. *Papamichalopoulos and Others v. Greece (Article 50)* (App. no. 14556/89), Series A no. 330-B, §34, where the Court reiterated that “[...] a judgement in which it finds a breach imposes on the respondent State a legal obligation to put an end to such breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*)”.

²³⁸ *Varnava v. Turkey* [GC] (above n. 97), §192.

violation it shall “rule that the injured party be ensured the enjoyment of his right or freedom that was violated” and that, if appropriate, the Inter-American Court can order that “the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party”.²³⁹ Where the Inter-American Court has found that restoration of the situation existing prior to the breach is no longer possible (e.g. in cases regarding disappearances, in which the death of the disappeared individual has to be assumed after the passage of a certain period of time), it has held that it possesses the power to order an investigation into the facts related to the arrest or disappearance and the punishment of the agents responsible for the violation.²⁴⁰

Further, most of the objections to the European Court ordering the adoption of specific measures are relatively easily dismissed. For instance, the ordering of specific measures, including reopening of investigations, poses no problems from the viewpoint of the subsidiary role of the Convention mechanisms. This is particularly so in light of the fact that, as noted above, it is well-established in the jurisprudence of the Court, as well as in the practice of the Committee of Ministers, that a violation of an obligation to investigate constitutes a continuing violation. As such, a violation of this type can normally only be remedied by the reopening of an investigation, or the institution of a new investigation where none has taken place previously.

With regard to specific remedial measures consisting in the opening or re-opening of investigations, it is also to be noted that ordering further investigations is somewhat less invasive, when compared, for instance, to ordering the release of a detainee. The outcome of an investigation is naturally not known beforehand, and the most the Court may do is order the authorities to carry out an effective investigation. In this regard, it is clear that the Court cannot dictate the outcome of the investigation, and in particular whether, following a fresh investigation, a prosecution should be instituted, although a decision not to prosecute which was not justified on the facts would itself raise issues under the Convention.

Although the Court’s constant jurisprudence has been to the effect that implementation of the obligation of *restitutio in integrum* falls to be given effect at the stage of execution of a judgment under the supervision of the Committee of Ministers under Article 46 of the Convention, rather than by the Court,²⁴¹ in light of the recent developments in the Court’s approach to the adoption of non-monetary measures, it

²³⁹ Article 63(1), American Convention on Human Rights (San Jose´, 22 November 1969), 1144 UNTS 123.

²⁴⁰ See, e.g., the enforced disappearance case of *Garrido and Baigorria v. Argentina, Reparations and Costs, I/A Court H.R., Series C No. 39* (1998), at § 74 and the *dispositif*, § 91(4); see also *Suárez-Rosero v. Ecuador, Merits, I/A Court H.R., Series C No. 35* (1997), at §§ 106-107 and the *dispositif*, §110(6); *Suárez-Rosero v. Ecuador, Reparations and Costs, I/A Court H.R., Series C No. 44* (1999), at §§ 79-80.

²⁴¹ See e.g. the recent reaffirmation of this principle in *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, (App. No. 32772/02), ECHR [GC], 30 June 2009, §§ 84-89.

would appear that some cracks are increasingly appearing in the Court's strict application of the principle.

Quite apart from the Court's consolidated jurisprudence in this regard, a number of other objections may be made to such an approach. For instance, it is true that some States, including Russia, have in a number of cases failed to comply with specific individual measures recommended by the Committee of Ministers calling for the reopening of investigations as part of compliance with judgments of the Court. There is no reason to think that they would adopt a different attitude merely because the measure in question had been ordered by the Court. However, such considerations cannot justify the exclusion of the possibility for the Court to order specific measures *per se*. That logic likewise undermines and negates the binding character of the obligation to comply with any judgment of the Court, and the system of execution foreseen by the Convention as a whole.

A further objection, of a more practical nature, to the ordering of investigations by the Court is that, due to the substantial delays before cases are heard by the Court, by the time a judgment has been given the prospect of any investigation producing new useful evidence may well be very slim. In this regard, the Court's decision to reject requests made by the applicants in some of the Chechen cases for an order for investigations to be carried out seems to show an awareness on the part of the Court of the limits of a *restitutio* based approach. In rejecting the applicants' request, the Court did not state that it lacked competence to make orders such as those requested by the applicants, but merely that, in the circumstances of the cases, it was doubtful that *restitutio in integrum* could be achieved, and it was on that basis that it refused to make the orders.²⁴² Although this might be the case, it is important to note that the damage done to the prospects of an effective investigation due to the passage of time is further compounded by the period which it normally takes for the Committee of Ministers actually to consider what measures should be taken by way of execution of the judgment. From this perspective, the fact that the Court ordered an investigation in the judgment itself would in practice render execution by the Committee a great deal simpler in many cases.

In conclusion, the language of Article 41 of the European Convention is relatively broad and open-textured, and the Court is fully empowered to make more wide-ranging awards of just satisfaction. In that regard, it should adopt a more far-reaching approach to non-monetary measures and be prepared to order the reopening or instigation of investigations in appropriate cases. As noted by one commentator, it would appear that so far the Court has indicated which specific measures should be adopted by the

²⁴² See *Mezhidov v. Russia* (above n. 232) at §§ 159-160; *Lyanova and Aliyeva v. Russia* (above n. 232), §§ 96-99; *Musayeva v. Russia* (above n. 232), at §§ 164-166. See further, Annex, text accompanying n. 415 *et seq.*

respondent State “[o]nly when the violation is such that it excludes any choice as to the means of reparation open to the State.”²⁴³ However, in circumstances involving a failure to carry out an effective investigation or any investigation at all in violation of the procedural obligations under Articles 2 and 3 ECHR, the only conceivable measure to comply with the judgment is that of starting or reopening the investigation. In this regard, the criticism expressed by the Venice Commission of the cautious approach of the Court to the issue of non-monetary remedies may be endorsed:

[...] in application of Article 41 of the Convention the question of the possible award of just satisfaction is subsidiary to that of *restitutio in integrum*. The Court should thus address the question of whether and to what extent concrete reparation is possible, prior to examining whether and to what extent it is appropriate to award, instead or in addition, just satisfaction. The Court would need to give indications as to what would constitute adequate reparation in the type of case under consideration, in order to express its view as to whether such reparation would be possible, wholly or in part, under the applicable national legislation. [...] In such scenario, the Court would play an active role in the matter of ensuring implementation of its own judgments [...]: in general terms, it would give directions as to the individual and general measures whose realisation is necessary in given cases of Convention breaches. Further, in relation to individual cases, once it would find that it is possible to put the applicant, insofar as possible, in the same situation as he or she enjoyed prior to the violation of the Convention, i.e. to achieve *restitutio in integrum*, it would monitor its achievement and subsequently, if necessary, would grant monetary compensation should this restriction not be possible or sufficient (it may grant moral damages, for instance).²⁴⁴

The advantages identified by the Venice Commission are clearly relevant in the kind of cases under consideration. First, an order by the Court requiring the respondent State to carry out *ex novo* or to reopen an investigation is undoubtedly comparatively stronger and more authoritative than any recommendation to the same effect by the Committee of Ministers in its supervisory role. Second, the judgments would also be clearer and more specific as to what measures the respondent State is required to undertake in order to fulfil its obligations under Article 46 of the Convention and supervision of compliance by the Committee of Ministers would therefore be simpler.

5.1.2 Increasing damages for non-compliance?

In one recent case against Turkey, the applicants tried to pursue a different avenue to make sure that the respondent State would comply with the judgment of the Court. In *Varnava and Others v. Turkey*, the applicants requested not only that the Court order the

²⁴³ Colandrea, “On the Power of the European Court” (above n. 228), at 411.

²⁴⁴ European Commission for Democracy Through Law (Venice Commission), *Opinion on the Implementation of the Judgments of the European Court of Human Rights*, Opinion No. 209/2002 (18 December 2002), available at <http://www.venice.coe.int/docs/2002/CDL-AD%282002%29034-e.asp>, paras 64-65.

respondent Government to take specific remedial measures, but also that the Turkish Government be required to pay a sum of money as “increased damages” for every day between the date on which the judgment became final and the implementation of the remedial measures in question.²⁴⁵

The Chamber, whilst noting “the applicants’ concern to induce the respondent Government to take action as promptly as possible under pain of increased damages”, found “no precedent for such an ongoing, indefinite and prospective award in its case-law and perceived no basis of principle on which to embark on such a course in the present case”.²⁴⁶ The Grand Chamber likewise rejected the applicants’ request for daily fines for such period as Turkey was in continued non-compliance, noting that it had consistently rejected claims for punitive damages, and that there was “little, if any, scope under the Convention for directing Governments to pay penalties to applicants which are unconnected with damage shown to be actually incurred in respect of past violations of the Convention; in so far as such sums would purport to compensate for future suffering of the applicants, this would be speculative in the extreme.”²⁴⁷

The rejection of such an innovative approach by the Court may be seen as a major missed opportunity to ensure greater compliance with its judgments. The power to make orders for progressively larger sums to be paid in the case of non-compliance with a judgment is not unknown among international courts and tribunals; for instance, the European Court of Justice has a power to order the payment of daily penalties in the event that the respondent State fails to comply with a previous judgment, although admittedly that power is expressly foreseen by a treaty provision.²⁴⁸ On the other hand, the appropriateness of such an approach under the European Convention can be doubted. In the structure of the European Convention, the role of the European Court is to identify violations of the Convention; in principle, as the Court has repeatedly noted, questions of compliance with the judgments and what measures are to be taken in that regard fall within the competence of the Committee of Ministers. On that basis, an appropriate division of labour between the Court and the Committee of Ministers therefore requires that the Court abstains from awarding progressively increasing damages in case of non-compliance. Further, the example of the power of the European Court of Justice is not entirely apposite; under European Union law, daily penalties may only be imposed as the result of proceedings brought by the Commission following a failure to comply with a previous judgment. The penalties are fines paid to the Commission itself as the guardian of compliance with European law, rather than being

²⁴⁵ *Varnava v. Turkey* [GC] (above n. 97), §215; *Varnava v. Turkey* (Chamber Judgment) (above n. 97), § 151. For discussion, see Annex, Section 4.3.3, text accompanying n. 970 et seq.

²⁴⁶ *Varnava v. Turkey* (Chamber Judgment) (above n. 97), §156.

²⁴⁷ *Varnava v. Turkey* [GC] (above n. 97), § 223.

²⁴⁸ See Article 228, Treaty establishing the European Community and see, e.g., Case C-387/97 *Commission v Greece* [2000] ECR I-5047.

paid to the applicants as increased damages, as was envisaged by the applicants in *Varnava*.

In any case, the adoption of “fines” proposed by the applicants in *Varnava* would have been a major departure from both the text of the Convention and the Court’s interpretation of it to date. It would have been certain to have provoked protest from a large number of Member States and could even conceivably have caused a crisis resulting in the withdrawal of some States from the Convention and the Council of Europe. Although it is possible to envisage an amendment to the Convention expressly conferring on the Court the power to order graduated damages for such period that a judgment is not complied with, realistically such a prospect is remote and could only take place as part of a comprehensive overall of the system of enforcement of judgments, involving a substantial revision of the role of the Committee of Ministers.

5.2 Pilot judgments

Starting in 2004, with the encouragement and at the instigation of the Committee of Ministers,²⁴⁹ the European Court has on occasion adopted a different approach to consideration of cases where closely similar or identical violations all arise from the same underlying systemic or structural problem. Under the so-called “pilot judgment” procedure, in carefully selected groups of cases involving allegation of similar violations as a result of a systemic problem in the respondent State, the Court will choose one case as representative of the group, staying all other similar pending cases, and proceed to analyse the underlying structural or systemic problem giving rise to the violations. In such cases, the Court will, exceptionally, make suggestions/recommendations to the respondent State as to what measures may be appropriate in order to resolve the underlying problem.²⁵⁰

Although the indications given by the Court in the “pilot judgments” as to how the respondent State might solve the underlying systemic or structural problem are not binding and constitute no more than recommendations by the Court in that regard, there is a strong incentive for the State to follow those indications, or to adopt some other suitable solution in that regard. Such an incentive is represented by the fact that, if the respondent State fails to address the systemic problems identified by the Court in a satisfactory manner, the Court will proceed to lift the stays on all other similar cases and then to deal with them individually, potentially in a relatively summary fashion, awarding sums by way of just satisfaction in each case.

²⁴⁹ See Resolution CM/ResDH(2004)3 on judgments revealing an underlying systemic problem, adopted by the Committee of Ministers at its 114th Session on 12 May 2004.

²⁵⁰ The first “pilot judgment” was adopted by the Court in the case of *Broniowski v. Poland* [GC] (App. no. 31443/96), Reports 2004-V. On the “pilote judgment” procedure, see Annex, Section 1.2.3.

Notwithstanding the systematic and widespread nature of at least some of the violations identified by the Court in relation to investigation and prosecution of serious violations of Articles 2 and 3 at issue in the case studies, the Court has so far not adopted pilot judgments in relation to any of the situations examined in the case studies. One simple explanation for this is that in relation to all of the situations at issue in the case studies (in particular, in relation to Northern Ireland and PKK/Turkey, and to a lesser extent, in relation to Cyprus and Chechnya), the violations and principal waves of cases occurred well-before the Court started to adopt its first pilot judgments in 2004. However, even in relation to the Chechen situation, in which large numbers of broadly similar cases are still coming before the Court, the Court has not resorted to the “pilot judgment” procedure.

It is suggested that a further measure which might be adopted by the Court in order to increase compliance by State with judgments finding violations of the procedural obligations under Articles 2 and 3 is the expansion of the “pilot judgment” procedure, so as to encompass situations involving multiple, widespread and similar violations of the obligation to investigate allegations of violations of the right to life and the prohibition of torture and ill-treatment. Such an approach would have the advantage both of reducing the burden on the Court in having to deal with numerous essentially similar cases, as well as reducing the time taken to deal with individual cases. Further, to the extent that the Court in pilot judgment cases goes beyond its normal role by actually recommending the measures which should be considered by the State in order to put an end to the violations, thereby clearly identifying what is required, compliance (and its monitoring by the Committee of Ministers) would be improved. The pilot judgment procedure would be particularly suitable where deficiencies in investigations are widespread and therefore raise issues in a large number of similar cases. Such widespread deficiencies have a tendency to result from systemic problems in domestic legislation or practice, for instance problems arising from a lack of independence of the investigating authorities, or due to inadequate rules or discipline in practice in the taking of evidence. Such problems are particularly apt to be addressed by the pilot judgment procedure.

Admittedly, such an approach would not be without problems. So far, the situations in relation to which pilot judgments have been adopted by the Court have concerned groups of very similar cases resulting in large numbers of applications, for instance in relation to claims of violations of the right to peaceful enjoyment of property, situations where there was a lack of an effective remedy in the domestic legal system, including in cases in which there were widespread and persistent failures to enforce final domestic judgments or re-trial of those convicted *in absentia*, and finally in relation to the mass of cases arising from systemic problems leading to multiple violations of the right to a trial

within a reasonable time.²⁵¹ The violations in such cases may be seen as being essentially “administrative”, resulting from the functioning of particular institutions or particular legislative provisions.

Obviously, violations of those types are far removed from cases concerning violations of the right to life or the prohibition of torture and ill-treatment by members of the security forces, where the underlying factual situation may be markedly different in each case. In addition, the latter type of cases will almost always involve substantial disputes of fact between the applicants and the respondent Government, including disputes as to precisely what happened to the victims and/or who is responsible for the alleged violations. It may be hypothesized that the particularly serious nature of the violations in issue, coupled with the variety of substantive violations alleged and the presence of disputed questions of fact in many of the Chechen cases represents the reason why the Court has so far apparently considered that the “pilot judgments” procedure is inappropriate for the remaining Chechen cases. It may well be that, as noted by Judge Wildhaber “not every situation giving rise to what we call repetitive cases is suitable for the pilot-judgment approach adopted in *Broniowski*”.²⁵² However, quite apart from the disputed factual background of each case, at least some aspects of the Chechen cases would appear to be suitable for the pilot judgment procedure insofar as they disclose recurring themes relating to the inadequacy of the investigation or a failure to comply with other positive obligations of a procedural nature. In this regard, in light both of the findings of the Court and of the assessment of the situation to date carried out by the Committee of Ministers, there is little doubt that the reasons underlying those violations are “systemic”.

Nevertheless, the pilot judgment procedure would need a certain amount of modification and tailoring if it were to be applied efficiently to such cases. It is obviously undesirable that the substantive claims of violation in the “following” cases, which, if anything, are more important than the procedural claims, should be stayed pending the outcome of the pilot judgment procedure, as would normally be the case under the pilot judgment procedure. Further, even if there were compliance as regards the defective investigations, this would not dispose of the substantive claims. One solution might be to hive off the particular claims of violation relating to the inefficiency of investigations to one pilot judgment case, while allowing the substantive claims to proceed separately as normal, although this would largely defeat one of the principal underlying purposes of the ‘pilot judgment’ procedure of shielding the Court from having to examine large numbers of essentially similar cases. That said, the willingness of the Court to apply the pilot

²⁵¹ See the discussion in Annex, Section 1.2.3 and the cases cited therein.

²⁵² L. Wildhaber, “Consequences for the European Court of Human Rights of Protocol No. 14 and the Resolution on judgments revealing an underlying systemic problem – Practical steps of implementation and challenges”, in *Reform of the European human rights system. Proceedings of the high-level seminar, Oslo, 18 October 2004* (Council of Europe, 2004), available at <http://www.coe.int/t/e/human_rights/reformeurhrsystem_e.pdf>, 23, at 28.

judgment procedure relatively flexibly to a range of systemic problems is evident from the decision in *Burdov v. Russia (No. 2)*, a pilot judgment relating to the widespread failure in the Russian legal system of ensuring the enforcement of final domestic judgments. As noted by Leach *et al*:

There were two distinct differences between *Burdov (No. 2)* and the earlier Polish pilot judgments (*Broniowski* and *Hutten-Czapska*). First, Mr Burdov did not belong to an 'identifiable class of citizens'; the problem of the non-implementation of domestic court judgments affected many thousands of people in very different situations. In that sense, the category of people affected was 'open-ended'. Second, as noted above, his case was far from being the first case against Russia relating to the problem of non-enforcement of domestic judgments, unlike the Polish cases, which were the first cases of their kind. [...]²⁵³

Resort to pilot judgments might be effective insofar as the violations at issue derive from deficiencies in the relevant domestic legislation and to the extent to which the Court is able to indicate possible modifications to the law which are likely to prevent similar violations. However, it should be noted that the procedure in question is not a panacea and offers no particular advantages over normal judgments in terms of ensuring that investigations in the particular individual cases are in fact reopened and conducted effectively. That problem is to some extent attenuated at the stage of enforcement to the extent that such judgments are subject to enhanced and speedy supervision of execution by the Committee of Ministers; in that regard, Rule 4(1) of the Rules of Procedure of the Committee of Ministers in relation to execution of judgments of the Court, expressly foresees that the Committee "shall give priority to supervision of the execution of judgments in which the Court has identified what it considers a systemic problem in accordance with Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem."²⁵⁴ Such enhanced supervision, if applied with diligence by the Committee, could result in not only adoption of reforms aimed at removing the systemic problem identified by the Court, but also individual measures aimed at wiping out the violation in the individuals cases in which the systemic violation is identified.

Finally, whether or not the pilot judgment procedure can (or should) be adapted so as to deal with systemic deficiencies relating to investigations in situations of mass

²⁵³ P. Leach, H. Hardman and S. Stephenson, "Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? *Burdov* and the Failure to Implement Domestic Court Decisions in Russia", *Human Rights Law Review*, vol. 10 (2010), p. 346; the Russian judge on the European Court has suggested that *Burdov* was chosen as a pilot judgment in order to remind the Russian Government of the repeated nature of the violation "like Pavlov's dog" (*ibid.*).

²⁵⁴ Rule 4(1), *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*, adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies (hereinafter "CoM Rules 2006"). Rule 4(2) makes clear that the priority given to such cases "shall not be to the detriment of the priority to be given to other important cases, notably cases where the violation established has caused grave consequences for the injured party".

atrocities committed by State agents, at least some additional pressure might be put on respondent States if the Court were to indicate more often in its judgments that similar issues had arisen in a previous judgment and had not resulted in the adoption of appropriate measures. That approach has been endorsed by both the Venice Commission and the Parliamentary Assembly of the Council Europe.²⁵⁵

5.3 Proper evaluation of the impact of measures taken before closure of examination of a case

According to the Rules of the Committee of Ministers for the supervision of the execution of judgments, the Committee adopts a final resolution when it has established that the respondent State has taken all the necessary measures to abide by the judgment.²⁵⁶

As regards the situations examined in the case studies, the Committee of Ministers has adopted such final resolutions in relation to either individual cases or groups of cases in respect of Northern Ireland and some of the cases arising out of the situation in Cyprus. However, even though final resolutions have not been adopted as regards the groups of Chechen cases, the cases arising out of the Turkey/PKK conflict and most of the Cypriot cases, the Committee has decided to close parts of its examination of certain issues concerning compliance with the Court's judgments in those cases. For instance, in relation to the PKK cases, the Committee of Ministers concluded in an Interim Resolution adopted in 2008 its examination of the general measures concerning procedural safeguards in police custody, improvement of professional training of members of the security forces, the question of giving direct effect to the requirements of the Convention, the provision of prompt compensation, and training of judges and prosecutors.²⁵⁷ In this regard, there are clear indications that, although Turkey has undoubtedly made significant progress, insofar as it has adopted wide-ranging institutional reforms by way of general measures in compliance with the various judgments, the actual impact of the measures in question has yet to be felt and the measures in question are not sufficient to address the defects identified in the relevant Court's judgments.²⁵⁸ It is notable that, according to the Committee of Ministers, the outstanding compliance issues in relation to the PKK cases relate to ensuring enhanced

²⁵⁵ On this point, see E. Lambert Abdelgawad, "The Execution of Judgments of the European Court of Human Rights", Council of Europe, *Human Rights Files No. 19* (2nd ed., 2008), p. 59.

²⁵⁶ Rule 17, CoM Rules 2006 (above n. 254).

²⁵⁷ See, e.g., Interim Resolution CM/ResDH(2008)69 (above n. 89), at §§ A-D and F.

²⁵⁸ For discussion of this specific obstacle to effective implementation of the Court's judgments, see Annex, Section 3.7.

accountability of members of the security forces in practice and ensuring the overall practical impact of the general measures adopted under the other headings.²⁵⁹

One may question the wisdom of the Committee of Ministers' decision to close its examination of the particular general measures required, while maintaining examination of a broad and somewhat ill-defined category relating to the "practical impact" of those same general measures. There is undoubtedly a risk that closing the examination of the particular general measures may result in a reduction of the pressure felt by Turkey to ensure that the general measures adopted have the required practical effects. On the other hand, the closing of the examination of those specific issues may be seen as a reward for and recognition of the extensive reforms which Turkey has undertaken, and the fact that it has formally fulfilled the demands of the Committee of Ministers in relation to the enactment of specific reforms, even if those reforms are in fact having little impact in practice. From this perspective, the approach of the Committee of Ministers may be seen as a balanced one which recognizes the progress achieved by Turkey, while underlining that the problem is now not so much the content of the substantive law, but a question of changing attitudes. In that regard, the approach adopted would seem to be aimed at ensuring that Turkey remains engaged in complying with the judgments in question. Nevertheless, it may be asked whether a better approach would not have been to maintain examination of each of the specific measures demanded by the Committee of Ministers by way of compliance until such time as the measures in fact have had the necessary practical effects.

Further, some criticism may be made of the way in which the Committee of Ministers has agglomerated the cases arising out of the actions of the Turkish security forces in the conflict with the PKK into a single group for the purposes of supervision of execution. The cases included in the group identified a large variety of different violations; although undoubtedly there are some common structural features which underlie many of those violations, the aggregation of the cases has meant that monitoring compliance of the individual measures in relation to each of the specific cases is extremely difficult and has to some extent fallen by the wayside as a result of the focus on the general measures in relation to the more far-reaching structural problems. In this regard, it is notable that the Committee of Ministers has to a large extent done little in the way of ensuring that individual measures involving, for instance, effective investigations into particular violations identified by the Court in individual cases are in fact carried out, those measures having been largely subordinated to the issue of the adoption of general measures.²⁶⁰

²⁵⁹ See Interim Resolution CM/ResDH(2008)69 (above n. 89), at §§ E and G.

²⁶⁰ See, e.g., Department for the Execution of Judgments, Pending Cases, State of Executions, Cases or groups of cases against Turkey, available from <http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp>, under *Aksoy v. Turkey* [accessed 27 June 2009]. On the other hand, some cases in which criminal proceedings

In conclusion, rigorous examination by the Committee of Ministers of both the individual and general measures taken by States in order to comply with judgments of the Court, as well as ensuring that the measures adopted in fact are effective in practice, is vital. Although it is of course true that, just as the number of applications to the Court has swelled, so has the number of judgments execution of which the Committee of Ministers is required to supervise, the fact that the Committee is heavily burdened cannot justify a more relaxed attitude to compliance by States with judgments of the Court. If the European Convention is to play its role in effectively protecting the fundamental rights of individuals, States which have been found to have violated the Convention cannot then be allowed to get away with adopting more or less cosmetic legislation which does not in fact function in practice.

5.4 A more robust approach to supervision of execution of judgments

Under Article 46(2) of the Convention, the Committee of Ministers is entrusted with the primary responsibility for supervising the execution of Court's judgments. The modalities in which the Committee carries out its responsibilities in this regard are set out in the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted in 2001 and amended most recently in 2006.²⁶¹ These Rules provide that, when supervising the execution of a judgment, the Committee is to examine whether the following questions:

- (a) whether any just satisfaction awarded by the Court has been paid [...];
- (b) if required, and taking into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment, whether:
 - i. individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention;
 - ii. general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations.²⁶²

In the exercise of its supervisory functions, the primary means available to the Committee of Ministers in order to exert pressure on a Contracting State which fails to comply with a judgment of the Court, or even simply delays adopting the necessary

in relation to the violations identified are presently pending are followed separately: see e.g. the *Bati* group of cases, as to which see "Annotated Agenda and Decisions, 1078th (DH) Meeting, 2-4 March 2010", CoE doc. CM/Del/OJ/DH(2010)1078 section 4.2 publicE, 18 March 2010.

²⁶¹ See CoM Rules 2006 (above n. 254).

²⁶² *Ibid.*, Rule 6(2).

measures, is the adoption of interim resolutions or decisions.²⁶³ The content of those interim resolutions may be essentially of three types:

- (1) the Committee may take note that no measures have been adopted by the State, and invite it to comply with the judgment;
- (2) the Committee may take note of progress made, and call upon the State to take further specific measures in order to ensure compliance. In areas where multiple measures are required in order to address different shortcomings identified by the Court, interim resolution may also be used in order to terminate consideration of specific issues following the achievement of progress in relation to a specific issue (although this function is also on occasion taken by decision);
- (3) in exceptional cases, the Committee may threaten a non-compliant State with the adoption of sanctions, including in particular the invocation of Article 8 of the Statute of the Council of Europe and possible suspension of the voting rights or exclusion of the State in question from the Council of Europe.²⁶⁴

With regard to the situations considered in the present report, the Committee of Ministers has adopted interim resolutions in relation to the situation in Cyprus (with regard to the execution of the Court's judgment in *Cyprus v. Turkey*), in relation to several of the groups of cases arising out of the actions of the security forces in Northern Ireland, as well as with regard to cases arising out of actions of the security forces in the context of the conflict with the PKK in Turkey. As noted above, final resolutions terminating the Committee's supervision of execution have also been adopted in a number of the cases examined arising out of the PKK-Turkey conflict and some of those relating to the Troubles in Northern Ireland. By contrast, no interim resolution has yet been adopted in relation to the *Khashiyev* group of cases, which gathers together the majority of the cases against Russia arising out of the Chechen conflict.

All of the interim resolutions adopted to date in the situations under consideration fall within the second category outlined above, insofar as they take note of certain

²⁶³ Ibid., Rule 16.

²⁶⁴ This classification of the Committee's interim measures is proposed by Lambert Abdelgawad (above n. 255), at pp. 40-41. Article 8 of the Statute of the Council of Europe (London, 5 May 1949, CETS no. 1) provides that "[a]ny member of the Council of Europe which has seriously violated Article 3 may be suspended from its right of representation and requested by the Committee of Ministers to withdraw under Article 7. If such a member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine". Article 3 of the Statute provides that members of the Council must "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms", and "collaborate sincerely and effectively" in achieving the aims of the Council of Europe.

progress and encourage the State to adopt further measures in the future. To date there has been no express discussion by the Committee of Ministers of resorting to invocation of Article 8 of the Statute of the Council of Europe so as to threaten any of the States under consideration with suspension of voting rights or exclusion from the Council of Europe.²⁶⁵

This is so even where there has been persistent non-compliance with judgments of the Court, as is for instance the case with regard to Turkey's continued reference to the work of the CMP and its refusal to adopt any other measures in relation to disappearances in Cyprus by way of compliance with the Court's judgment in *Cyprus v. Turkey*.²⁶⁶ Similarly, the Committee of Ministers does not appear to have made full use of what is probably the only tool at its disposal to ensure compliance with the Court's judgment, i.e. political pressure, with regard to the execution of the judgments concerning failure to investigate abuses committed in the contest of the PKK conflict. For example, as noted above, given the conclusion by the Committee of Ministers of its examination of the general measures of compliance with the judgments in some cases, Turkey appears to have escaped relatively lightly, even though the measures adopted do not appear to have been effective in practice.

In respect of actions taken by the security forces in Chechnya, although the Committee of Ministers has issued a number of decisions, no interim resolution has yet been adopted, despite the fact that the Court issued judgments in the first Chechen cases in 2005. The slow progress of the Committee in this context has been noted by the PACE, which criticized the Committee for being too lenient in its monitoring of execution of the Chechen judgments. In a Recommendation adopted in January 2006, the PACE "urged the Committee of Ministers to confront its responsibilities in the face of one of the most serious human rights issues in any of the Council of Europe's member states, as the lack of effective reaction by the Council's decision-making body has the capacity to seriously threaten the credibility of the whole Organisation" and, accordingly, "urged the Committee of Ministers to discuss ways and means to prevent new human rights violations and to overcome the climate of impunity in the Chechen Republic, and to address appropriate recommendations to the Government of the Russian Federation".²⁶⁷ In response to that Recommendation, the Committee of Ministers recalled that its standpoint as regards the situation in the Chechen Republic was based on the following principles:

²⁶⁵ Or at least, not as a reaction to failure to comply with judgments in the cases under examination. Turkey's non-compliance with the decision of the Court awarding sums by way of just satisfaction in *Loizidou v. Turkey* led the Committee of Ministers to implicitly brandish the threat of exclusion for the first time, although that threat was implausible; for discussion, see Lambert Abdelgawad (above n. 255), p. 45 and see n. 272 below.

²⁶⁶ See Annex, Section 4.3.2.

²⁶⁷ PACE Recommendation 1733 (2006), "Human rights violations in the Chechen Republic: the Committee of Ministers' responsibility vis-à-vis the Assembly's concerns", 25 January 2006, available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/erec1733.htm>, §§ 2 and 3.

- (a) full support of the territorial integrity of the Russian Federation;
- (b) absolute denouncement of all forms of terrorism;
- (c) only political means can lead to a long-lasting solution to the situation in the Chechen Republic;
- (d) democracy, human rights and the rule of law must be fully respected in accordance with Council of Europe standards; and
- (e) human rights violations must be effectively and thoroughly investigated and adequately remedied and the perpetrators of crimes must be brought to justice.²⁶⁸

As regards implementation of the Court's judgments in the Chechen cases, the Committee of Ministers observed at the outset of its supervision that those judgments required significant individual and general measures. In 2006, the Department for the Execution of Judgments noted that, in particular, "the existence of procedures allowing a thorough and effective investigation into alleged abuses [was] one of the core requirements highlighted by the judgments".²⁶⁹

Although certain shortcomings have been identified with the practice of adoption of interim resolutions and, accordingly, it has been recommended that "faster and more instructive decisions should replace interim resolutions in certain circumstances",²⁷⁰ the censure and political impact of a reasoned, fully motivated interim resolution will generally be substantially greater than that of relatively terse decisions. The recent practice of the Committee to frequently endorse the assessments and recommendations contained in information documents prepared by the Department for the Execution of Judgments in decisions²⁷¹ is no substitute for the adoption of resolutions where appropriate.

In conclusion, a more robust approach to supervision of the execution of judgments by the Committee of Ministers is required, involving at a minimum, the more frequent adoption of strongly-worded interim resolutions clearly condemning the lack of compliance by the respondent State. As for the possibility of adopting interim resolutions falling within the third category outlined above, i.e. containing a threat of a "sanction", it is to be noted that in over 60 years of existence the Committee has only very infrequently

²⁶⁸ "Human rights violations in the Chechen Republic: the Committee of Ministers' responsibility vis-à-vis the Assembly's concerns", PACE Recommendation 1733 (2006), Reply adopted by the Committee of Ministers on 10 May 2006 at the 946th meeting of the Ministers' Deputies", CoE doc. CM/AS(2006)Rec1733 final, § 1.

²⁶⁹ CoE doc. CM/Inf/DH(2006)32 (above n. 419), § 44.

²⁷⁰ Lambert Abdelgawad (above n. 255), p. 43.

²⁷¹ *Ibid.* Such document has been produced in respect of actions of security forces in Chechnya, the most recent publicly available document dating from late 2008 (CoE doc. CM/Inf/DH(2008)33, Addendum, 28 November 2008). A more detailed report regarding Chechnya is currently being prepared as a result of the outcome of the first and the second rounds of bilateral consultations with the competent Russian authorities (see CoE doc. CM/Del/Dec(2009)1051 (above n. 65), Decision, § 5).

resorted to such measures.²⁷² The main concern in this regard is of course that the exclusion of a State from the Council of Europe would almost invariably be counterproductive. In this regard, the drafters of the Explanatory Report to Protocol No. 14 have noted that:

Currently the ultimate measure available to the Committee of Ministers is recourse to Article 8 of the Council of Europe's Statute (suspension of voting rights in the Committee of Ministers, or even expulsion from the Organisation). This is an extreme measure, which would prove counter-productive in most cases; indeed the High Contracting Party which finds itself in the situation foreseen in paragraph 4 of Article 46 continues to need, far more than others, the discipline of the Council of Europe.²⁷³

Nevertheless, the threat of exclusion may constitute an effective tool at least as regards some States, in particular Turkey, given that continued membership of the Council of Europe is essential from a political point of view in the context of negotiations for EU accession. In any event, even without resorting to the extreme measure of expulsion of a State from the organization, lesser sanctions could be adopted. The Committee of Ministers has, to date, apparently regarded the suspension of voting rights as an extreme measure, perhaps because it constitutes the first step on the road towards expulsion in the case of continued non-compliance. However, it may constitute an adequate means of exerting pressure on persistently non-compliant States for precisely that reason. Other possible sanctions for non-compliance could include the "exclusion of the member State concerned State from assuming leading positions or certain functions" within the Council of Europe.²⁷⁴

²⁷² Lambert Abdelgawad (above n. 255), at pp. 40-41; for a rare example, see e.g. Interim Resolution ResDH(2003)174, of 12 November 2003 concerning the just satisfaction award of the Court in the *Loizidou* case, in which the Committee urged Turkey to pay the just satisfaction ordered by the Court within one week and declared its "resolve to take all adequate measures against Turkey if Turkey fails once more to pay the just satisfaction awarded by the Court to the applicant". Turkey subsequently paid the sums due on 2 December 2003: see Resolution ResDH(2003)190, 2 December 2003.

²⁷³ "Explanatory Report, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS No. 194)", available at <<http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>>, § 100. Similar concerns have been voiced by academic commentators; for instance, Stephen Greer notes that "[t]here is very little the Council of Europe can do with a state persistently in violation, short of suspending its voting rights on the Committee of Ministers or expelling it from the Council altogether, each of which is likely in all but the most extreme circumstances to prove counterproductive" (S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP, 2006), pp. 155-156); see also P. Leach, "The Effectiveness of the Committee of Ministers in Supervising the Enforcement of Judgments of the European Court of Human Rights", *Public Law* [2005], p. 443; S. Greer, "Protocol 14 and the Future of the European Court of Human Rights" *Public Law* [2005], p. 83, at 92.

²⁷⁴ This suggestion was advanced by the participants at a high-level seminar convened in 2004 to discuss possible reforms of the Court: see *Reform of the European human rights system. Proceedings of the high-level seminar, Oslo, 18 October 2004* (Council of Europe, 2004), available at http://www.coe.int/t/e/human_rights/reformeurhrsystem_e.pdf, "Conclusions of the Seminar", p. 12, § 28: "In a case of a consistent failure of a respondent State to execute a judgment, the Committee of Ministers should consider, in addition to the possible institution of infringement proceedings as provided for in Protocol No. 14 [...], the possibility of excluding the member State concerned from assuming leading positions or certain functions in the Organisation, or, even, suspending the member State's voting rights in the Committee of Ministers. Reference was furthermore made to Article 8 of the Statute on expulsion of the State from the Council of Europe, as a last resort."

5.5 Improved enforcement mechanisms under Protocol No. 14

The need for more effective enforcement mechanisms was one of the reasons which led to the adoption of Protocol No. 14 in 2004.²⁷⁵ According to the Explanatory Report to Protocol 14 “it appeared necessary to give the Committee of Ministers, as the competent organ for supervising execution of the Court’s judgments, a wider range of means of pressure to secure execution of judgments”.²⁷⁶ Accordingly, Protocol No. 14 modifies the procedures for the execution of judgments, enhancing the role of the Committee of Ministers in that regard by giving it the power to initiate “enforcement or infringement proceedings” before the Court in case of non-compliance by a State Party with a final judgment.²⁷⁷ Infringement proceedings will result in a judgment rendered by the Grand Chamber.²⁷⁸ In addition, Article 46(3) of the Convention as amended by Protocol No. 14 provides that the Committee can refer judgments to the Court where it considers that there is a “problem of interpretation” in relation to the implementation of a judgment.²⁷⁹

Following the entry into force of Protocol No. 14 on 1 June 2010, the Committee of Ministers is therefore equipped with two new remedies involving the referral of problematic cases back to the Court. In that regard, the Explanatory Report on Protocol No. 14 underlines that the fact that the Committee of Ministers would be able to bring infringement proceedings under Article 46 as amended “[...] adds further possibilities of bringing pressure to bear to the existing ones. The procedure’s mere existence, and the threat of using it, should act as an effective new incentive to execute the Court’s judgments.”²⁸⁰ The institution of infringement proceedings could no doubt be chosen as an avenue to attempt to ensure compliance by those States which, as is the case with Russia and Turkey, have consistently refrained from fully complying with some aspects of the Court’s judgments finding violations committed by members of their security forces. Although the effectiveness of the new infringement proceedings has of course still

²⁷⁵ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (adopted 13 May 2004, in force 1 June 2010), CETS No. 194; see also “Explanatory Report, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS No. 194)”, available at <<http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>>.

²⁷⁶ Ibid. § 100.

²⁷⁷ Art. 46(4) of the Convention as amended by Protocol No. 14 provides: “If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation [to abide by a judgment]”.

²⁷⁸ Art. 31 of the Convention as amended by Protocol No. 14.

²⁷⁹ Art. 46(3) of the Convention as amended by Protocol No. 14.

²⁸⁰ Art. 46(4) of the Convention as amended by Protocol No. 14.

to be tested in practice, it is to be expected that, in the context of those proceedings, the Court will have to be more specific as to the measures that the State is required to adopt in order to give effect to the original judgment. In particular, the Court will, as a minimum, have to rule on whether the measures recommended by the Committee of Ministers must be implemented by the respondent State. In cases concerning failure to conduct adequate investigations, this should mean that the Court will be able to directly assess the conduct of the State authorities in the context of the new or re-opened investigation, or their failure to initiate a new investigation. As such, the Court will be able to scrutinize whether the new investigations constitute a genuine attempt on the part of the respondent State to remedy the shortcomings identified by in its original judgment, or, as is more often the case in relation to situations where violations committed by the security forces have been condoned or even encouraged by the State, whether the new investigation has simply been a sham or façade in an attempt to show some degree of compliance with the judgment. In this regard, it obviously remains to be seen if the Court will go so far as to assess the compatibility with the original judgments of any subsequent decisions not to prosecute.

The possibility for the Committee of Ministers to refer issues of compliance with judgments to the Court for a further ruling is likely to have some value in “naming and shaming” the respondent State as regards particularly obvious instances of non-compliance. It is of course true that the value in practice of resorting to that procedure in cases where the State in question has persistently refused to comply for political reasons may be open to question. For instance, it is perhaps doubtful that, as regards the obligation to investigate identified in *Cyprus v. Turkey*, a further ruling by the Court would make much difference. Turkey’s non-compliance is extremely clear and the Grand Chamber has in *Varnava* again reiterated its position as to the inadequacy of the work of the CMP to fulfill Turkey’s obligations to no avail. The utility of a further ruling by the Court in such circumstances may well be minimal. On the other hand, the issue of disappeared persons in northern Cyprus is an extreme case, and it may well be that the prospect of condemnation by the Court may well be effective in other, less politically-sensitive cases.

5.6 Increased use of the inter-State procedure

The importance of collective enforcement of human rights is underlined in the Convention’s preamble.²⁸¹ One aspect of this collective enforcement, although only

²⁸¹ The fifth paragraph of the Preamble to the Convention provides: “Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the *collective enforcement* of certain of the rights stated in the Universal Declaration” [emphasis added].

relatively infrequently used, is the possibility of inter-State applications brought by one State against another under Article 33 of the Convention.²⁸² Inter-State applications are particularly effective as regards wide-spread or systemic violations. It bears noting that, where it is alleged in an inter-State application that there is a “practice” of violation of the Convention, rather than reference being made to alleged violations concerning particular individuals, the Court has held that the requirement of exhaustion of domestic remedies is not applicable.²⁸³ Nevertheless, inter-State cases before the European Court remain relatively rare, although a number of such cases have been brought in relation to the situations covered by the case studies. Famously, Ireland brought an inter-State case against the United Kingdom in relation to, inter alia, the use of the “Five Techniques”, at the height of the Troubles.²⁸⁴ Similarly, Cyprus has brought a number of inter-State cases against Turkey, in relation to, inter alia, the violations arising out of disappearances of individuals in the context of inter-communal violence in Cyprus.²⁸⁵ As for the conflict with the PKK, to date the only inter-State case which has been brought against Turkey in relation to the actions of the security forces was effectively an action by way of diplomatic protection, insofar as it concerned a single instance of alleged ill-treatment of an individual Danish national; the case was the subject of a friendly settlement.²⁸⁶ Finally, none of the Member States of the Council of Europe has had resort to the possibility of bringing an inter-State complaint against Russia before the Court under Article 33 of the Convention in relation to violations committed in Chechnya. The reasons underlying the lack of any such inter-State case are relatively obvious: the bringing of an inter-State application depends upon the presence of sufficient motivation of the individual Contracting States, which may not wish to endanger their relations with the State in question by initiating legal proceedings.²⁸⁷

Situations such as those of Chechnya and South East Turkey would appear to be prime candidates for the bringing of inter-State cases, insofar as the violations in question are particularly serious and wide-spread. Further, experience of the reaction of Russia and Turkey to the judgments in the individual applications against them would appear to suggest that insufficient pressure is felt by them in ensuring compliance with their obligations under the Convention. However, the inter-State cases brought to date in the situations under examination have all been in cases in which the applicant State has

²⁸² On inter-State applications before the Court, see Annex, Section 1.1.1.

²⁸³ See *Ireland v. the United Kingdom* (App. no. 5310/71), Series A no. 25, § 159; *Cyprus v. Turkey* (above n. 96), §§ 99 and 296.

²⁸⁴ *Ireland v. United Kingdom* (above n. 230).

²⁸⁵ *Cyprus v. Turkey* (above n. 96).

²⁸⁶ *Denmark v. Turkey (Friendly Settlement)* (App. no 34382/97); Reports 2000-IV.

²⁸⁷ S. Leckie, “The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?”, *Human Rights Quarterly*, vol. 10 (1998), 249, at 250 and 254; T. Buergenthal, “The American and European Conventions on Human Rights: Similarities and Differences”, *American University Law Review*, vol. 30 (1980), 155, at 160. See generally P. Jessup, “International Litigation as a Friendly Act”, *Columbia Law Review*, vol. 60 (1960), 24.

had some more or less close interest in the violations alleged. The prospect of an inter-State case against Russia is considerably lessened by the considerable political fall-out which would undoubtedly ensue if any single State were to bring such a case. That said, in the past inter-State applications brought by States having no immediate, direct interest in the violations in question are not entirely unheard of, although such cases have typically been brought by groups of concerned States, rather than individual States.²⁸⁸ It is suggested that this would be an appropriate way to proceed in the future in relation to any further situations involving mass atrocities; the fact that an inter-State application is brought by a group of States not only reduces the risk of political fall-out for the States involved but would also to some extent preclude any complaints by the respondent State that it was being unfairly targetted or singled out. It is suggested that the bringing of inter-State applications is likely to exert substantial pressure on respondent States.²⁸⁹

5.7 Conclusions

The four case studies reveal that, although the system of the European Convention is potentially capable of producing significant impacts on the domestic legal systems of Contracting States in terms of their ability of the domestic legal system to investigate and prosecute serious violations of human rights, such impact is relatively limited. This lack of impact is clearly due to the fact that, particularly in certain politically sensitive situations, there is little or no compliance with the judgments of the Court, and consequently minimal impact. This is particularly the case in relation to wide-spread violations committed by State agents in the context of armed conflicts or other comparable situations, especially where the situation in question is tied up with wider internal or international political issues. Violations of this kind are among the most serious it is possible to envisage, and therefore it is crucial that full compliance with the Court's judgments is obtained in these cases, regardless of any political consideration.

None of the various suggestions for improving compliance canvassed in the previous sections are capable, in and of themselves, of ensuring complete compliance in all cases. However, the issue is not to find a general solution to compliance (which does not exist in the present configuration of the international legal system), but rather to identify mechanisms and procedures by which some modicum pressure can be brought

²⁸⁸ See e.g. "The Greek Case" (*Denmark v. Greece*; *Sweden v. Greece*; *Norway v. Greece and Netherlands v. Greece*) (Apps nos. 3321/67; 3322/67; 3323/67 and 3344/67); European Commission of Human Rights, Report of 5 November 1969; *Yearbook of the ECHR*, vol. 12 (1969), p. 1, and see Committee of Ministers, Resolution DH (70) 1 of 15 April 1970. See also *France v. Turkey*; *Norway v. Turkey*; *Denmark v. Turkey*; *Sweden v. Turkey*; *Netherlands v. Turkey* (Apps nos 9940-44/82), decision on admissibility of 6 December 1983, D.R., vol. 35, p. 143.

²⁸⁹ C. Tomuschat, "Quo Vadis, Argentoratum? The Success Story of the European Convention on Human Rights – and a Few Dark Stains", *Human Rights Law Journal*, vol. 13 (1992), 402. Cf. R. White, "Tackling Political Disputes through Individual Applications", *European Human Rights Law Review*, vol. 1 (1998), 72.

to bear on respondent States in order make it in their interests to genuinely comply with judgments. In this regard, as the example of EU influence on Turkey's compliance makes clear, those tools may to some extent lie outside the narrow realm of the Council of Europe system and the quest for ensuring compliance with judgments of the Court is thus to a certain extent dependent on wider aspects of international relations. Nevertheless, it may be going too far to suggest, as some commentators have done, that when it comes to compliance with findings of large-scale human rights violations the Convention system is "powerless".²⁹⁰ Although compliance is imperfect, the Convention system has a vital role to play, in particular in enunciating standards of conduct for States which are applicable even in the most extreme circumstances.

²⁹⁰ V. Dimitrijevic, "Prevention of and responses to structural or large-scale human rights violations", in *In Our Hands: The Effectiveness of Human Rights Protection 50 Years after the Universal Declaration* (Council of Europe, 1998), p. 68. See also S. Greer, "Protocol 14 and the Future of the European Court of Human Rights" *Public Law* [2005], p. 83, at 92.

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1. Overview of the Convention system

The present section provides a general background to the case studies which follow. In that regard, the first section contains a brief description of the historic and present monitoring mechanisms under the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention” or “the European Convention”), including the conditions for admissibility, the system of remedies and the role of the Council of Ministers in monitoring execution of judgments.

The second part provides a brief summary of the substantive standards which have been elaborated by the European Court of Human Rights (“the European Court” or “the Court”) in relation to the right to life under Article 2 of the Convention and the prohibition of torture and other form of ill-treatment under Article 3. In this regard, particular consideration will be paid to the procedural obligations relating to investigation and prosecution which have been developed by the European Court in its jurisprudence.

1.1 Enforcement mechanisms

1.1.1 Inter-State applications and the right of individual petition

The enforcement mechanisms of the European Convention have been substantially amended in the years since its adoption. The most important of these revisions was that effected by Protocol No. 11, which entered into force in 1998. However, a number of the cases dealt with in the present report were brought under the mechanisms of the Convention as configured prior to their fundamental reform by Protocol No. 11; it is accordingly useful also to provide a brief account of the previously applicable mechanisms.

As originally adopted, the European Convention provided for a two-tier system in relation to both individual and inter-State complaints. As regards those States which had accepted the right of individual petition under original Article 25 of the Convention, the European Commission of Human Rights was granted jurisdiction to hear applications alleging violations of the Convention. Under original Article 31, the Commission was empowered to draw up a report setting out its view as to whether there had been a violation of the Convention, which was then transmitted to the Committee of Ministers. In addition, complaints of violation of the Convention could be brought before the Commission by other States parties pursuant to original Article 24, with no specific declaration of acceptance of the jurisdiction of the Commission being necessary in that regard.

Cases which had been the subject of a Report by the Commission could be referred to the Court. However, in contrast to the Commission, under the original scheme of the Convention, the jurisdiction of the Court to hear cases was entirely consensual, requiring a specific declaration of acceptance of jurisdiction by each of the States parties under original Article 45. Further, individuals could not refer cases upon which a Report had been delivered by the Commission to the Court; only the Commission and States parties were able to do so (original Article 44). If the respondent State party had made the requisite declaration accepting jurisdiction, the case could be referred to the Court by either the Commission, the respondent State party, a State party which had brought the case before the Commission or the State party whose national was alleged to be a victim (original Article 48).²⁹¹ If the case was not so referred within 3 months of the adoption of a Report by the Commission, the Committee of Ministers would proceed under original Article 32 to decide whether there had been a violation of the Convention. A conclusion that there had been a violation required a two-thirds majority of the Committee.

As noted above, the enforcement mechanisms of the Convention were fundamentally modified in 1998 following the entry into force of Protocol No. 11. The Commission was abolished, and the European Court was made permanent and established on a full-time basis. Although the right of individual petition and the jurisdiction of the Court had *de facto* been accepted by all States parties prior to the adoption of Protocol No. 11, the modifications allowed individuals, NGOs or groups to bring cases directly before the Court as well as rendering the jurisdiction of the Court compulsory in all cases, whether the case was brought under the right of individual petition contained in Article 34 of the Convention (as renumbered), or by another State under Article 33.

1.1.2 Issues of admissibility

Following the entry into force of Protocol No. 11, the conditions for the admissibility of individual complaints before the European Court are contained in Article 35 of the Convention; previously, similar provisions regulating questions of admissibility before the European Commission were contained in original Articles 26 and 27 of the Convention.

Following the further amendments introduced by Protocol No. 14, Article 35 provides:

²⁹¹ In accordance with original Article 47, the Court could only deal with a case where the Commission had acknowledged “the failure of efforts for a friendly settlement”.

“1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2. The Court shall not deal with any application submitted under Article 34 that

(a) is anonymous; or

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

It is to be noted that the requirements of exhaustion of domestic remedies and compliance with the six month rule contained in Article 35(1) on their terms apply to both inter-State claims under Article 33 and individual applications under Article 34. However, by contrast, on their express terms, the grounds of inadmissibility contained in Article 35(2) and (3) are applicable only to individual complaints.

(a) *Exhaustion of domestic remedies*

Under Article 35(1) of the Convention, an initial condition of the admissibility of a complaint is that “all domestic remedies have been exhausted, according to the generally recognised rules of international law”. In this regard, the Court has observed that the rule of exhaustion of domestic remedies:

[...] obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption, reflected in Article 13 of the Convention - with which it has close affinity -, that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law. In this way, it is an important aspect of the

principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.²⁹²

The reference in Article 35 to “the generally recognised rules of international law” has as a consequence that only those domestic remedies which are in fact accessible, adequate and effective are required to be exhausted. Further, the Court has emphasized that the requirement of exhaustion of domestic remedies has to be “applied with some degree of flexibility and without excessive formalism”, that the requirement of exhaustion is neither absolute nor capable of automatic application, and that regard is to be had to the circumstances of the particular case, the overall context, and the situation of the applicant.²⁹³

The requirement of exhaustion of domestic remedies is equally applicable to inter-State cases in which one State brings a claim against another in relation to the latter’s treatment of specific individuals.²⁹⁴ However, in *Ireland v. United Kingdom*, the Court affirmed that, by contrast, the rule does not apply to inter-State cases in which complaint is made of the existence of a generalized practice of violation of the Convention. As to the notion of “practice incompatible with the Convention”, the Court explained that such a practice:

[...] consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches. [...]

The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, [...] applies to State applications [...] in the same way as it does to “individual” applications [...], when the applicant State does no more than denounce a violation or violations allegedly suffered by “individuals” whose place, as it were, is taken by the State. On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask [...] the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.²⁹⁵

²⁹² *Akdivar and Others v. Turkey* [GC] (App. no. 21893/93), Reports 1996-IV, § 65.

²⁹³ See, e.g., *Isayeva, Yusupova, Bazayava v. Russia* (App. no. 57947/00, 57948/00 and 57949/00), ECtHR 24 February 2005, §§ 144-145.

²⁹⁴ See, e.g., *Denmark v. Turkey* in which Denmark brought a claim against Turkey in relation to the latter’s ill-treatment of a Danish national; the case was the subject of a friendly settlement and was struck out of the list: *Denmark v. Turkey* (Friendly Settlement) (App. no. 34382/97), Reports 2000-IV.

²⁹⁵ *Ireland v. the United Kingdom* (App. no. 5310/71), Series A no. 25, § 159; for an application of those rules in a later case, see, e.g., *Cyprus v. Turkey* [GC] (App. no. 25781/94), Reports 2001-IV, §§ 99 and 296.

(b) Six-month rule

Under Article 35(1), a case may also be declared inadmissible by the Court if it is submitted more than six months after the final decision relied upon by way of exhaustion of domestic remedies. In that regard, the Court has observed that the purpose of the six-month rule:

[...] is to maintain reasonable legal certainty and to ensure that cases raising problems under the Convention are examined within a reasonable time. It ought also to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time. Lastly, the rule is designed to facilitate establishment of the facts of the case; otherwise, with the passage of time, this would become more and more difficult, and a fair examination of the issue raised under the Convention would thus become problematic.²⁹⁶

(c) Duplication of procedures

Pursuant to Article 35(2)(b) of the Convention, the Court may not deal with an individual application that “is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.”

The Court has held that, in order for an application to be inadmissible on the basis that the matter is “substantially the same” as that submitted to another international procedure, it is necessary that the identity of the applicants in the proceedings before the Court must be the same as the persons the subject of proceedings submitted to the other “procedure of international investigation or settlement”.²⁹⁷ Further, as to the subject matter of the complaints involved, the Court has interpreted the term “substantially the same” restrictively; in order to avoid being declared inadmissible on this basis, it is sufficient that the proceedings before the other international forum be of a general nature, while those before the Court relate to a particular specific incident of which complaint is made.²⁹⁸

(d) Incompatible with the provisions of the Convention, manifestly ill-founded or an abuse of the right of application (including “victim” status)

Article 35(3)(a) of the Convention gives the Court wide-ranging powers to find individual applications inadmissible on a variety of other grounds. Applications will

²⁹⁶ *Alzery v. Sweden* (dec) (App. no. 10786/04), ECtHR 26 October 2004.

²⁹⁷ See, e.g., *Folgerø and others v. Norway* (dec) (App. no. 15472/02), ECtHR 14 February 2006.

²⁹⁸ See, e.g., *Evaldsson and others v. Sweden* (dec) (App. no. 75252/01), ECtHR 28 March 2006 (general proceedings before the European Committee of Social Rights).

typically be found to be manifestly ill-founded where the complaint discloses no arguable allegation of violation of the Convention. An application may be found to be an abuse of the right of application, *inter alia*, if it is knowingly based on untrue facts,²⁹⁹ on incomplete and therefore misleading information,³⁰⁰ or if the applicant has violated the confidentiality of friendly settlement proposals.³⁰¹

A finding of inadmissibility on the basis that the application is incompatible with the provisions of the Convention may be made in a variety of circumstances. For instance, in a case in which the Court held that the alleged violations occurred outside the jurisdiction of the Member States, with the result that the Court concluded that the substantive obligations contained in the Convention were not applicable to the actions in question, the application was held to be inadmissible on the basis that it was incompatible with the provisions of the Convention.³⁰² An application which alleges a violation of an international instrument other than the European Convention and its Protocols will be declared incompatible with the Convention *ratione materiae*.³⁰³

Similarly, where an applicant cannot claim to be a victim, or is held to have lost the status of victim, the application will be declared inadmissible on the basis that it is incompatible with the provisions of the Convention *ratione personae* by reference to Article 34 of the Convention.³⁰⁴ In this regard, a little more needs to be said about the requirement under Article 34 that the applicant should be a victim of a violation of the Convention, in the sense that they are actually affected by the violation that he or she alleges. In this regard, the Court has observed that the Convention

[...] does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment.³⁰⁵

Nevertheless, the Court has held that an individual may complain of the potential application of a law if its operation is secret, so that the individual has no way of knowing

²⁹⁹ See, e.g., *Bagheri and Maliki v. Netherlands* (dec) (App. no. 30164/06), ECtHR 15 May 2007.

³⁰⁰ See, e.g., *Hadrabová and Others v. Czech Republic* (dec) (App. no. 42165/02 and 466/03), ECtHR 25 September 2007.

³⁰¹ *Ibid.*

³⁰² See e.g., *Bankovic and Others v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and United Kingdom* (dec) [GC] (App. no. 52207/99), Reports 2001-XII.

³⁰³ See e.g. *Zehnalová and Zehnal v. the Czech Republic* (dec) (App. no. 38621/97), Reports 2002-V (complaint of violation of the European Social Charter inadmissible).

³⁰⁴ See e.g. *Ada Rossi and others v. Italy* (dec) (App. no. 55185/08, 55483/08, 55516/08, 55519/08, 56010/08, 56278/08, 58420/08, 58424/08), Reports 2008–..

³⁰⁵ *Klass and Others v. Germany* (App. no. 5029/71), Series A no. 28, § 33.

whether or not it is in fact being applied to him or her.³⁰⁶ Further, in exceptional cases, the Court has held that the mere existence and possibility of application of a law to a particular category of persons may nevertheless violate protected rights such that they can claim to be a victim,³⁰⁷ and that an individual can exceptionally claim to be a victim where there is a very real risk that, in the not too distant future, action will be taken on the basis of existing legislation which is alleged to violate his or her protected rights.³⁰⁸

Further, an applicant who has been the subject of a violation of the Convention may lose the status of victim if the respondent State has expressly or in substance acknowledged the violation of the Convention and has provided adequate redress for the breach of the Convention.³⁰⁹

(e) Article 34(3(b))

Finally, following the entry into force of Protocol No. 14, the Court has the power to declare inadmissible individual applications where the applicant has not suffered a significant disadvantage, provided that respect for human rights does not require examination of the application of the merits, and the case has been considered by a domestic tribunal. The aim of the new Article 34(3)(b) is to allow the Court to filter out, at an early stage, allegations of comparatively minor breaches of the Convention. It is inconceivable that this provision will be held to have any application to applications of the type studied in the present report.

1.2 Remedies for breach of the Convention

The system of remedies under the Convention operates on the basis of a division between the award of “just satisfaction” for violations by the Court, and supervision of compliance with the judgment of the Court more generally by the Committee of Ministers.

³⁰⁶ Ibid.

³⁰⁷ See, e.g., *Dudgeon v. the United Kingdom* (App. no. 7525/76), Series A no. 45, in which it was held that the existence of laws criminalizing homosexual acts between consenting adults constituted an interference with the applicant’s right to a private life under Article 8 of the Convention. See also *Norris v. Ireland* (App. no. 10581/83), Series A no. 142.

³⁰⁸ *Burden v. the United Kingdom* [GC] (App. no. 13378/05), ECtHR 29 April 2008.

³⁰⁹ See, e.g., *Amuur v. France* (App. no. 19776/92), Reports 1996-III, § 36; and *Scordino v. Italy (no. 1)* [GC] (App. no. 36813/97), Reports 2006-... § 180. It should be noted that the Court has gradually tightened the requirements for loss of the status of victim; at least in the early years of application of the Convention, the Commission was much more willing to declare applications inadmissible on the basis that the applicants had lost the status of victim merely because they had been paid compensation: see e.g. *Donnelly and Others v. United Kingdom* (dec) (App 5577-5583/72), EComHR (1975) 4 DR 4.

1.2.1 Just satisfaction

Article 41 of the Convention provides:

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

In this regard, the Court has emphasized that the purpose of an award of monetary compensation by way of just satisfaction “is to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied.”³¹⁰ On this basis, the Court in appropriate cases may award sums by way of compensation in relation to pecuniary or non-pecuniary damage suffered by an applicant; however, the Court on occasion holds that the mere finding of a violation of the Convention is to be taken as sufficient just satisfaction.³¹¹

Given the function of awards of just satisfaction, the Court has normally refused requests by applicants that the respondent State should be ordered to take particular measures, emphasising that questions of compliance and the choice of the remedy for violations identified in a judgment lie with the domestic authorities, subject to the supervision of the Committee of Ministers. The reasons given by the Court when rejecting the applicants’ requests for non-monetary measures have been different. For instance, in *Ireland v. United Kingdom*, the Court, whilst expressly avoiding to address the question “whether its functions extend[ed], in certain circumstances, to addressing consequential orders to Contracting States”, held that in the case in question “the sanctions available to it do not include the power to direct one of those States to institute criminal or disciplinary proceedings in accordance with its domestic law”.³¹² More recently, in three Chechen cases, the Court held that since the effectiveness of the investigations had already been undermined at their early stages by the domestic authorities’ failure to take meaningful investigative measures, it was very doubtful whether the situation that existed before the breaches could be restored and,

³¹⁰ See, e.g., *Scozzari and Giunta v. Italy* [GC] (App. no. 39221/98 and 41963/98), Reports 2000-VIII, § 250.

³¹¹ See, e.g., *McCann and Others v. the United Kingdom* (App. no. 18984/91), Series A no. 324, in which the Court so held in relation to the killing of the applicant’s relatives in light of the fact that they had been intending to plant a bomb in Gibraltar (*ibid.*, at § 219). See also *Practice Direction: Just Satisfaction Claims*, 28 March 2007.

³¹² *Ireland v. United Kingdom* (above n. 295), § 187.

accordingly, it was most appropriate to leave it to the respondent State to choose the means to be used.³¹³

However, in a number of cases the Court has exceptionally resorted to ordering specific measures against respondent States other than the payment of sums by way of “just satisfaction”.³¹⁴ Such measures have included orders to release an applicant from custody in circumstances in which he had been subjected to prolonged detention which was unlawful under domestic law and in breach of Article 5,³¹⁵ and orders requiring the restitution of property of which the applicant had been deprived in breach of Article 1 of Protocol No. 1.³¹⁶ Further, although continuing to deny that a finding of a breach of Article 6 in criminal proceedings automatically involves the invalidity of any conviction produced in the proceedings, in a number of cases the Court has nevertheless on occasion expressed the view that the reopening of the proceedings would be “the most appropriate form of redress”.³¹⁷

1.2.2 Binding force of judgments

Under Article 46(1) of the European Convention, by becoming a party to the Convention a State agrees to abide by the final judgments of the Court; execution in that regard is subject to the supervision of the Committee of Ministers. Although the Court has emphasized that its judgments are essentially declaratory in nature, it has also stated that:

[...] a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects [...]. Furthermore, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment.³¹⁸

³¹³ See *Mezhidov v. Russia* (App. no. 67326/01), ECtHR 25 September 2008, §§ 159-160; *Lyanova and Aliyeva v. Russia* (App. no. 12713/02 and 28440/03), ECtHR 2 October 2008, §§ 96-00; and *Musayeva v. Russia* (App. no. 12703/02), ECtHR 3 July 2008, §§ 164-166. For discussion of the cases, see below, Section 2.3.

³¹⁴ See, e.g., V. Colandrea, “On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the *Assanidze*, *Broniowski* and *Sejdovic* Cases”, *Human Rights Law Review*, vol. 7 (2007) p. 396.

³¹⁵ *Assanidze v. Georgia* [GC] (App. no. 71503/01), Reports 2004-II, §§ 202-203; and *Ilaşcu and Others v. Moldova and Russia* [GC] (App. no. 48787/99), Reports 2004-VII, § 490.

³¹⁶ *Papamichalopoulos and Others v. Greece* (Article 50) (App. no. 14556/89), Series A no. 330-B, §§ 34-39.

³¹⁷ *Sejdovic v. Italy* [GC] (App. no. 56581/00), Reports 2006-II.

³¹⁸ See e.g. *Scozzari and Giunta v. Italy* (above n. 310), § 249; see also, for a recent discussion of the principles governing execution of the Court's judgments *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (No. 2) [GC] (App. No. 32772/02), ECHR 30 June 2009, §§ 84-89.

The Court has furthermore stated that this discretion to “choose” the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under Article 1 to secure the rights and freedoms guaranteed by the Convention.³¹⁹

1.2.3 The “pilot judgment” procedure

An important recent development in the practice of the Court has been the emergence of the possibility of giving “pilot judgments” in situations where a systemic problem in the legal system of a particular Member State, which affects a large number of individuals has produced, or risks producing, a large number of similar applications before the Court.³²⁰

The new approach originates in Resolution DH(2004)3 of the Committee of Ministers, by which the Committee invited the Court to:

[...] identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.³²¹

As a consequence, the Court has developed a practice of selecting “test” or “pilot” cases, in the meantime staying all other pending similar applications against the same State. In the “pilot judgment”, the Court indicates the type of general measures which the respondent State might consider adopting in order to remedy the systemic problem. In this context, the Court examines in greater detail the causes of certain systemic problems likely to lead to, or having already led to, a massive influx of new applications and is able to provide non-binding recommendations as to general measures which should be taken in order to deal with the systemic problems and thus prevent further applications, most importantly as regards the necessity of setting up efficient domestic remedies.

It should be emphasized that the indications given by the Court in relation to the types of measures which should be adopted in order to remedy systemic problems are not binding as such. In this regard, the Court has emphasized that the procedure is:

³¹⁹ See, *mutatis mutandis*, *Papamichalopoulos and Others v. Greece* (Article 50) (above n. 316), § 34.

³²⁰ See also Colandrea, “On the Power of the European Court” (above n. 314).

³²¹ Resolution CM/ResDH(2004)3 on judgments revealing an underlying systemic problem, adopted by the Committee of Ministers on 12 May 2004, at its 114th Session.

[...] primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level, thereby securing to the persons concerned the Convention rights and freedoms as required by Article 1 of the Convention, offering them more rapid redress and, at the same time, easing the burden on the Court, which would otherwise have to take to judgment large numbers of applications similar in substance.³²²

However, although the recommendations are formally non-binding, the Court has a relatively potent weapon at its disposal in order to induce compliance with its recommendations, insofar as it extends the stay of the other pending cases for a relatively short period in which the respondent State is to arrive a solution, failing which it will proceed to consider all of the similar cases. For instance, in *Xenides-Arestis v. Turkey*, a case relating to mass property rights violations in Cyprus, the Court recommended that Turkey should introduce a compensation mechanism and that that mechanism should be made available within three months from the date of the judgment, failing which it would proceed to lift the stays and render judgment on the numerous individual cases.³²³

Pilot judgments in relation to recurrent violations of Article 6 have related to systemic problems in failing to ensure trial within a reasonable time or compensation in that regard,³²⁴ failure to ensure a retrial after a criminal conviction *in absentia*,³²⁵ or failure to ensure compliance with final and binding judgments in civil proceedings.³²⁶ Similarly, cases concerning violations of the right to peaceful enjoyment of property under Article 1 of Protocol No. 1 have been dealt with under the “pilot judgment” procedure, in particular in relation to measures adopted by States attempting to change from a managed to a free-market economy after the fall of Communism.³²⁷

1.2.4 Execution of judgments and the role of the Committee of Ministers

Once the Court has issued a final judgment, it is transmitted to the Committee of Ministers, which supervises the execution of judgments in accordance with Article 46(2) of the European Convention. Formally, the Committee of Ministers is composed of the Ministers for Foreign Affairs of each State Party and is the executive organ of the

³²² *Broniowski v. Poland* (friendly settlement) [GC] (App. no. 31443/96), Reports 2005-IX, § 35.

³²³ *Xenides-Arestis v. Turkey* (App. no. 4634/99) (Merits), ECtHR 22 December 2005, § 40.

³²⁴ See, e.g., *Scordino v. Italy* (above n. 309); *Riccardi Pizzati v. Italy* [GC] (App. no. 62361/00), ECtHR 29 March 2006.

³²⁵ *Sejdovic v. Italy* (above n. 317).

³²⁶ *Burdov v. Russia* (no. 2) (App. no. 33509/04), ECtHR 15 January 2009.

³²⁷ See, e.g., *Broniowski v. Poland* [GC] (App. no. 31443/96), Reports 2004-V.

Council of Europe; however, in practice, the Committee of Ministers usually meets (including in relation to the supervision of the execution of judgments of the European Court pursuant to Article 46 of the Convention), in a formation composed of the Ministers' Deputies.³²⁸

Following transmission of a final judgment to the Committee of Ministers, the Committee invites the respondent State to inform it of the steps taken to pay any just satisfaction ordered by the Court (pecuniary and/or non-pecuniary compensation as well as compensation for legal costs and expenses). At the same time, the Committee requests the State to provide information as to the individual or general measures proposed or which have already been taken in order to comply with the judgment in compliance with the State's obligation under Article 46(1) of the Convention to abide by the judgment.³²⁹ The injured party, as well as NGOs, may submit information and observations to the Committee in relation to its supervision of compliance with any particular judgment by a Member State.³³⁰ In the performance of this task, the Committee of Ministers is assisted by a special department of the Secretariat of the Council of Europe, the Department for the Execution of Judgments of the European Court of Human Rights (hereinafter "Department for the Execution of Judgments"). Although the Department for the Execution of Judgments has a merely advisory role, it fulfils a particularly important practical function in the process of supervision of implementation of judgments of the Court, in that it considers, in cooperation with the respondent State, what measures should be taken in order to comply with the judgments. Furthermore, on the request of the Committee, the Department for the Execution of Judgments prepares memoranda regarding the execution of judgments, and offers its opinion and advice, to the Committee of Ministers in preparation of its examination of different aspects of the cases. In these memoranda, the Department provides an assessment of the progress made by the respondent State and the issues which it regards as still outstanding. It is naturally for the Committee of Ministers to take the final decision in all cases but, given the sheer volume of cases with which the Committee is required to deal, it often follows the Department for the Execution of Judgments opinion.³³¹ The Committee also decides if the memoranda prepared by the Department are to be made public.

When the Committee of Ministers is satisfied that any just satisfaction ordered by the Court has been paid and that other adequate individual and general measures have been taken by the respondent State by way of compliance with a judgment of the Court,

³²⁸ See Rule 14 of the *Rules of Procedure of the Committee of Ministers* (5th rev. edition: 2005) and the *Rules of Procedure for the Meetings of Ministers' Deputies* (4th rev. edition: 2005).

³²⁹ As to individual and general measures, see below, Annex, Section 1.2.5.

³³⁰ See Rules 9.1 and 9.2, *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*, adopted on 10 May 2006 at the 964th meeting of the Ministers' Deputies (hereinafter "CoM Rules 2006").

³³¹ Statement by Elena Malagoni, DG Human Rights & Legal Affairs - Directorate of Monitoring - Department for the Execution of ECHR Judgments, Council of Europe (email correspondence 31 August 2009).

it adopts a final resolution in which it concludes that its functions under Article 46(2) in relation to supervision of the judgment have been exercised.³³² In addition, the Committee may adopt Interim Resolutions “notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution”.³³³

The enforcement mechanisms will be strengthened once Protocol No. 14 enters into force on 1 June 2010. Protocol No. 14 will amend Article 46 of the Convention so as to empower the Committee of Ministers to seek a further judgment from the court in relation to enforcement in two specific situations: first, under new Article 46(3), if the Committee is of the view that supervision of execution of a final judgment is hindered by a problem of interpretation of the judgment, it will be able, acting by a two-thirds majority, to refer the question of interpretation to the European Court for a ruling. More significantly, new Article 46(4) makes provision for further enforcement proceedings before the European Court in case of non-compliance by a State Party with a final judgment; if the Committee considers that a State Party refuses to abide by a final judgment against it, the Committee is empowered, acting by a two-thirds majority and having served formal notice in that regard on the State in question, to refer to the European Court the question of whether the State Party in question has complied with its obligation to abide by the judgment under Article 46(1) of the Convention. Any such referral under Article 46(4) will be heard by the Grand Chamber.³³⁴ Pursuant to new Article 46(5), if the Grand Chamber finds a violation of Article 46(1), then the matter is referred back to the Committee of Ministers for it to consider what measures should be taken. In the case that no violation of Article 46(1) is found by the Court, the matter returns to the Committee of Ministers which is then required to close its examination of compliance by the State in question with the original judgment.

1.2.5 Individual and general measures

The measures which States are required to adopt in compliance with their obligations under Article 46(2) to abide by the judgments of the Court are generally analysed by the Committee of Ministers in terms of “individual” and “general” measures.

The purpose of individual measures is to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as prior to the violation of the Convention (*restitutio in integrum*). By way of example of individual measures, a note to Rule 6(2)(b)(i) of the Rules of the Committee of Ministers for the

³³² Ibid., Rule 17.

³³³ Ibid., Rule 16.

³³⁴ See Article 31, European Convention, as amended by Article 10(2), Protocol No. 14.

supervision of the execution of judgments and of the terms of friendly settlements lists the striking out of an unjustified criminal conviction from the criminal records, the granting of a residence permit or the re-opening of impugned domestic proceedings.³³⁵ In relation to many of the grave human rights violations discussed in the case studies, in particular in circumstances in which the Court has concluded that there has been inadequate investigation of an allegation of violation of the right to life or the prohibition of torture, the individual measures required by the Committee of Ministers often consists of the re-opening of investigations into the alleged violation.³³⁶

By contrast, the aim of general measures is to prevent new and further violations similar to those found in the judgment in question, or the putting an end to continuing violations where they result from wider problems.³³⁷ Examples of general measures that the Rules of the Committee of Ministers mention are legislative or regulatory amendments, changes of case law or administrative practice, or publication of the Court's judgment in the language of the respondent state and its dissemination to the authorities concerned.³³⁸ Over half of the general measures taken by respondent States involve changes to legislation.³³⁹

As noted above, both the injured party as well as NGOs may submit information and comments to the Committee concerning the actual or proposed measures taken by a State Party by way of compliance with a judgment against it.³⁴⁰

1.2.6 Other enforcement mechanisms within the Council of Europe

A number of other mechanisms for enforcement of the European Convention exist within the framework of the Council of Europe, although resort to some of these mechanisms is relatively rare.

³³⁵ Rule 6(2)(b)(i), CoM Rules 2006 (above n. 330), note 1; as to the latter type of measures, see *Recommendation Rec(2000)2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights*, adopted on 19 January 2000 at the 694th meeting of the Ministers' Deputies. In the Recommendation, the Committee asks States to provide for means of reopening proceedings within their national legal system following a finding of a violation by the Court, particularly where: (I) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (II) the judgment of the Court leads to the conclusion that (i) the impugned domestic decision is on the merits contrary to the Convention, or (ii) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

³³⁶ Issues relating to the reopening of investigations which have been found by the Court to be inadequate are relevant in relation to each of the case studies below; for discussion, see Section 2.5.2(g) (Russia/Chechnya), Section 3.5.3(b) (Turkey/PKK), Sections 4.4.1 and 4.4.2 (Cyprus) and 5.5-5.6 (Northern Ireland).

³³⁷ Rule 6(2)(b)(ii), CoM Rules 2006 (above n. 330).

³³⁸ *Ibid.*, Rule 6(2)(b)(ii) note (2).

³³⁹ C. Ovey and R. White, *Jacobs and White: the European Convention on Human Rights* (4th ed., OUP, 2006), p. 499.

³⁴⁰ Rule 15, CoM Rules 2006 (above n. 330).

Under Article 52 of the European Convention, the Secretary General of the Council of Europe may require any State Party to the Convention to provide an explanation of the manner in which its domestic law ensures the effective implementation of any of the provisions of the Convention.

In the case of persistent refusal to adopt the requisite measures in order to comply with a judgment, the ultimate sanction is expulsion from the Council of Europe. Article 3 of the Statute of the Council of Europe lays down that members of the Council must “accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms”, and “collaborate sincerely and effectively” in achieving the aims of the Council of Europe contained in Article 1 of the Statute. Pursuant to Article 8 of the Statute, any Member State which seriously violates Article 3 of the Statute may be suspended from its right to be represented and asked by the Committee of Ministers to withdraw from the Council of Europe. If the Member State fails to comply with that request, the Committee of Ministers may expel the Member State. In taking such decisions, the Committee of Ministers acts by a two-thirds majority;³⁴¹ as a matter of practice, the Committee of Ministers would normally consult the Parliamentary Assembly prior to requesting a Member State to withdraw.³⁴²

In relation specifically to the prohibition of torture, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“the CPT”), constituted under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,³⁴³ plays an important role in monitoring compliance with Article 3 of the Convention. Those States which are party to the European Convention for the Prevention of Torture accept a system of regular periodic visits and monitoring of any place within their jurisdiction where persons are deprived of their liberty by a public authority.³⁴⁴ The CPT in carrying out visits is entitled, without restriction, to visit any facility under the jurisdiction of the State Party where persons are deprived of their liberty;³⁴⁵ to have full access to information on the places where persons deprived of their liberty are being held;³⁴⁶ and to interview in private persons deprived of their liberty.³⁴⁷ Following a visit, the CPT draws up a report, which may contain any recommendations to the State Party thought necessary, which is communicated to the State Party in question.³⁴⁸ However, the information obtained by the CPT and the report

³⁴¹ See Article 20(d), Statute of the Council of Europe Statute of the Council of Europe (London, 5 May 1949, CETS no. 1).

³⁴² See Resolution (51)30A (3 May 1951), adopted by the Committee of Ministers at its 8th Session.

³⁴³ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, entered into force 1 February 1989) CETS no. 126.

³⁴⁴ *Ibid.*, Article 2.

³⁴⁵ *Ibid.*, Article 8(2)(a).

³⁴⁶ *Ibid.*, Article 8(2)(b).

³⁴⁷ *Ibid.*, Article 8(3).

³⁴⁸ *Ibid.*, Article 10(1).

itself is confidential; it may normally only be published at the request of the State Party, together with any comments of the State Party.³⁴⁹ The strongest weapon for ensuring compliance at the disposal of the CPT is the possibility of “naming and shaming” recalcitrant States; exceptionally, where a State Party refuses to cooperate with the CPT or refuses to improve the situation in accordance with the recommendations of the CPT, the CPT is empowered to make a public statement on the matter.³⁵⁰ Such a decision must be adopted by a two-thirds majority of the members of the CPT, having given the State Party in question an opportunity to make known its views.³⁵¹

1.3 The applicable substantive law: obligations under Articles 2 and 3 ECHR

As has been consistently emphasized by the European Court, Articles 2 and 3 rank among the most fundamental provisions of the Convention.³⁵² Quite apart from the “negative” aspects of the provisions under consideration, which of course entail an obligation upon the State, acting through its agents, to refrain from arbitrarily depriving individuals under its jurisdiction of their life, and to refrain from subjecting them to torture or other forms of ill-treatment, a number of “positive obligations” have been recognized by the Convention bodies.³⁵³ The positive obligations deriving from Articles 2 and 3 are numerous and vary greatly in their scope and stringency.³⁵⁴ For present purposes, particularly relevant are the positive obligations in relation to the criminalization, investigation and prosecution of alleged violations of the right to life or the absolute prohibition of torture and other ill-treatment.

1.3.1 Obligation to criminalise

The duty to criminalize conduct in violation of Articles 2 and 3 ECHR constitutes one of the most important positive obligations stemming from those provisions. In particular, the

³⁴⁹ Ibid., Article 11.

³⁵⁰ Ibid., Article 10(2).

³⁵¹ Ibid.

³⁵² See, e.g., *Streletz, Kessler and Krenz v. Germany* [GC] (App. no. 34044/96, 35532/97 and 44801/98), Reports 2001-II, §§ 92-94 (right to life); and *Saadi v. Italy* [GC] (App. no. 37201/06), Reports 2008-... § 127 (prohibition of torture and other ill-treatment).

³⁵³ See, e.g., *Osman v. the United Kingdom* (App. no. 23452/94), Reports 1998-VIII, § 115; *Vo v. France* [GC] (App. no. 53924/00), Reports 2004-VIII, § 88: Article 2 “requires the State not only to refrain from the “intentional” taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.”

³⁵⁴ For instance, the Court has recognized a positive obligation on the State authorities under Article 2 to take reasonable steps in all the circumstances to prevent and protect against risks to life deriving by private parties (see, e.g., *Osman v. the United Kingdom* (above n. 353) § 116; obligations in relation to planning of law enforcement operations so as to minimize recourse to lethal force (*McCann and Others v. United Kingdom* (above n. 311) §§ 150 and 194; and positive obligations attaching to the exercise of potentially dangerous activities (see, e.g., *Öneriyıldız v. Turkey* [GC] (App. no. 48939/99), Reports 2004-XII, §§ 71 and 89-90.

positive obligation to protect life in Article 2 of the Convention requires State parties to ensure that it is possible under their criminal law to bring a prosecution in circumstances in which there has been a breach of the right to life as a result of the action of public officials or private actors. A similar obligation has been recognized as far as ill-treatment is concerned.³⁵⁵ In this context, the European Court has consistently recognized that the effective protection of the individual in his or her relations with other private persons requires the State to put in place domestic legislation which imposes penal sanctions for conduct which affects the rights protected under the Convention.³⁵⁶ It is worth noting, however, that the positive obligation under Article 2 does not invariably require the State to adopt legislation criminalizing all conduct which results in a deprivation of life. The European Court has recognized that in some specific circumstances “[...] if the infringement of the right to life or personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case.”³⁵⁷ The number of cases in which the Court has found the provision of a civil law remedy to be sufficient for the purposes of Article 2 is, however, extremely limited and to date has been exclusively concerned with cases where the deprivation of life has resulted from medical negligence.³⁵⁸ In all other cases to date, the Court has found that the duty to protect life under Article 2 and the prohibition of ill-treatment under Article 3 require the provision of a criminal law remedy for intentional violations of those rights.

1.3.2 Investigations

(a) *The duty to investigate*

The duty to protect the right to life under Article 2 and the prohibition of torture and other ill-treatment enshrined in Article 3 require by implication that the authorities have to carry out a prompt and effective investigation into incidents resulting in violent deaths or credible allegations of violations of the prohibition of ill-treatment. With respect to alleged violations of the right to life, the consistent jurisprudence of the European Court indicates that:

³⁵⁵ See also Art. 16, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984), 1468 *UNTS* 85; Committee against Torture, General Comment No. 2: Implementation of article 2 by States parties, 24 January 2008, UN doc. CAT/C/GC/2, at § 3.

³⁵⁶ This is true not only in relation to action of private individuals infringing values protected by core provisions of the Convention, such as the right to life or to physical integrity (see, e.g., in relation to Art. 3, *A v. United Kingdom* (App. no. 35373/97), Reports 2002-X), but also as far as very serious violations of other Convention rights are concerned (see, e.g., in relation to Art. 8, *X and Y v. the Netherlands* (App. no. 8978/80), Series A no. 91, §§ 23-27).

³⁵⁷ *Calvelli and Ciglio v. Italy* [GC] (App. no. 32967/96), Reports 2002-I.

³⁵⁸ See, e.g., *Calvelli and Ciglio v. Italy* (above n. 357); *Vo v. France* (above n. 353), §§ 90-95.

The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force [...]. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility [...].³⁵⁹

The obligation to carry out an effective investigation into the circumstances surrounding the violent death of an individual is of particular relevance in cases concerning alleged unlawful deprivation of life by the State. In these circumstances, as noted by the European Court, "a general legal prohibition of arbitrary killing by the agent of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities".³⁶⁰ However, the obligation to carry out an effective investigation into violent deaths is by no means limited to those cases where it has been established that the killings were committed by State agents, but also extends to killings by third parties.³⁶¹ Further, the obligation in question arises not only in circumstances where it has been conclusively established that the person in question has been killed, but also "[...] upon proof of an arguable claim that an individual who was last seen in the custody of the State, subsequently disappears in a context which might be considered life-threatening."³⁶²

Similarly, the jurisprudence of the Convention bodies makes clear that where an individual makes a credible assertion that he has suffered treatment infringing the prohibition of torture and inhuman or degrading treatment under Article 3 of the Convention at the hands of the police or other agents of the State, that provision, again read in conjunction with the State's general duty under Article 1 of the Convention, likewise requires by implication that there should be an effective official investigation into the allegation by the relevant public authorities.³⁶³ Again the Court has noted that, "if this were not the case, the general legal prohibition of torture and inhuman and degrading treatment or punishment, despite its fundamental importance [...] would be ineffective in

³⁵⁹ For a recent restatement of the principle, see, e.g., *Nachova and Others v. Bulgaria* [GC] (App. nos 43577/98 and 43579/98), Reports 2005-VII, §§ 110-113 (internal references to previous jurisprudence omitted). See also, e.g., *McCann and Others v. United Kingdom* (above n. 311) § 161; and *Kaya v. Turkey* (App. no. 22729/93), Reports 1998-I, § 86.

³⁶⁰ See *McCann and Others v. United Kingdom* (above n. 311), § 161. See also *Güleç v. Turkey* (App. no. 21593/93), Reports 1998-IV, § 78: "The procedural protection for the right to life inherent in Article 2 of the Convention means that agents of the State must be accountable for their use of lethal force; their actions must be subjected to some form of independent and public scrutiny capable of determining whether the force used was or was not justified in a particular set of circumstances".

³⁶¹ *Yaşa v. Turkey* (App. no. 22495/93), Reports 1998-IV, § 100.

³⁶² *Cyprus v. Turkey* (above n. 295), § 132.

³⁶³ See, e.g., *Assenov and Others v. Bulgaria* (App. no. 24760/94), Reports 1998-VIII, § 102.

practice and it would be possible in certain cases for agents of the State to abuse the rights of those under their control with virtual impunity”.³⁶⁴

(b) Promptness of the investigation

Whenever the national authorities are informed or become aware of facts potentially involving a violation of Article 2 or of Article 3, they are not permitted to await a specific and/or formal request from the victim or relatives of the victim to open an investigation; they are required to act promptly and of their own initiative to open an investigation upon receiving the information giving rise to credible suspicion of death or of ill-treatment.³⁶⁵ Further, as far as alleged violations of Article 2 are concerned, the obligation under consideration arises not only when the authorities are informed of a violent death, but also when they are informed of an unexplained disappearance in suspicious circumstances. The knowledge on the part of the authorities of situations of that type gives rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death or the disappearance.³⁶⁶

Quite apart from being vital in ensuring the effectiveness of the investigation, the European Court has stressed that a prompt response by the authorities in investigating a use of lethal force or allegations of mistreatment by state agents serves the equally fundamental aim of maintaining public confidence in the criminal justice system,³⁶⁷ as it demonstrates the investigative authorities’ “adherence to the rule of law and [prevents] any appearance of collusion in or tolerance of unlawful acts”.³⁶⁸

(c) Effectiveness of the investigation

In order to be regarded as “effective” for the purpose of Article 2, the investigation into cases of violent death or disappearances must be “adequate”, i.e. capable of establishing the cause of death and of identifying the individual or individuals responsible.³⁶⁹ Further, in cases concerning alleged violations of Article 2 as the result of the force used not being “absolutely necessary under Article 2(2), the requirement that

³⁶⁴ Ibid.

³⁶⁵ *Yasa v. Turkey* (above n. 361) § 100: “Nor is the issue of whether members of the deceased’s family or others have lodged a formal complaint about the killing with the competent investigatory authorities decisive. [...] the mere fact that the authorities were informed of the murder [...] gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation”.

³⁶⁶ Ibid.

³⁶⁷ See *Yasa v. Turkey* (above n. 361) §§ 102-104; *Çakıcı v. Turkey* [GC] (App. no. 23657/94), Reports 1999-IV, §§ 80, 87 and 106; *Tanrikulu v. Turkey* [GC] (App. no. 23763/94), Reports 1999-IV, § 109; and *Mahmut Kaya v. Turkey* (App. no. 22535/93), Reports 2000-III, §§ 106-107.

³⁶⁸ See, e.g., *Hugh Jordan v. the United Kingdom* (App. no. 24746/94), Reports 2001-III, §§ 108, 136-140.

³⁶⁹ See, e.g., *Ramsahai and Others v. the Netherlands* [GC] (App. no. 52391/99), Reports 2007-... § 324.

the investigation be “effective” implies that it must be capable of leading to a determination of whether the force used in the particular case was or was not justified in all the circumstances.³⁷⁰ A similar requirement of effectiveness has been identified by the Court in relation to alleged violations of the prohibition of ill-treatment under Article 3.³⁷¹

As consistently underlined by the Court, the obligation to identify the individuals responsible for an alleged violation of Articles 2 or 3 is an obligation of means and not of result, in the sense that the investigating authorities have to take all available measures which are potentially capable of leading to the identification of those responsible.³⁷² The fact that, in the specific circumstances of a given case, the investigation does not in fact result in the identification and punishment of the individual responsible does not *per se* amount to a violation of the positive obligation on the State; however, any deficiency in the investigation which diminishes its ability to establish the cause of death or to identify the individual responsible will risk falling foul of the requisite standard of effectiveness.³⁷³ In this context, the requirement that the investigation be effective implies that the authorities are under an obligation to take the reasonable steps available to them in order to secure all available evidence concerning the incident.³⁷⁴ Of course, as regards the potential ability of the investigation to produce the required result, the requirements of promptness in the initiation of the investigation and reasonable expedition in its execution are also crucial.³⁷⁵

(d) Independence of the investigation

A further essential requirement of an investigation which is compliant with the requirements of Articles 2 and 3 as defined by the Court is the independence of the investigation. The requisite of independence is of course crucial in those cases where the alleged violation of Article 2 or 3 derives from actions or omissions of State authorities. In that context, the Court has emphasized that in order for an investigation to

³⁷⁰ See, e.g., *Kaya v. Turkey* (above n. 359), § 87; and *Oğur v. Turkey* [GC] (App. no. 21594/93), Reports 1999-III, § 88.

³⁷¹ See e.g., *Assenov and Others v. Bulgaria* (above n. 363), § 102.

³⁷² See, e.g., *Isayeva, Yusupova and Bazayeva v. Russia* (above n. 293), § 211.

³⁷³ See e.g. the Northern Irish cases concerning the inability of inquests to compel members of the security forces directly involved in the use of lethal force to give evidence: *McKerr and Others v. United Kingdom* (App. no. 28883/95), Reports 2001-III, § 144; and *Hugh Jordan v. the United Kingdom* (above n. 368), § 127.

³⁷⁴ According to the Court, such evidence might include, inter alia, “eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death”; see, e.g., *Salman v. Turkey* [GC] (App. no. 21986/93), Reports 2000-VII, § 106; *Tanrikulu v. Turkey* (above n. 367); *Gül v. Turkey* (App. no. 22676/93), ECtHR 14 December 2000, § 89; and *Kelly and Others v. the United Kingdom* (App. no. 30054/96), ECtHR 4 May 2001, § 96.

³⁷⁵ See, e.g., *Kelly and Others v. United Kingdom* (above n. 374), § 97. See also *Yaşa v. Turkey* (above n. 361) §§ 102-104; *Çakıcı v. Turkey* (above n. 367); *Tanrikulu v. Turkey* (above n. 367); *Mahmut Kaya v. Turkey* (above n. 367).

be effective, it will generally be regarded as necessary for the officials responsible for and carrying out the investigation to be independent from those implicated in the events.³⁷⁶ The Court has elaborated upon the notion of “independence” in this context, noting that it cannot be equated with the absence of any hierarchical or institutional connection between the investigator and the officers involved in the incident; what is required is “practical independence”.³⁷⁷ The most obvious example of a violation of Article 2 in its procedural aspect due to a lack of independence would be where an investigation into a death in circumstances engaging the responsibility of a public authority had been carried out by direct colleagues of the persons allegedly involved.³⁷⁸ However, the case law of the Court demonstrates that supervision by another authority, however independent, may not necessarily offer a sufficient safeguard as to the independence of the investigation.³⁷⁹

(e) Public scrutiny and participation of the victim or his or her relatives

The investigation process must guarantee a certain degree of transparency, openness and access for the victim and/or his or her relatives, as well as for the wider public. In particular, the European Court has recognized that, in order for an investigation to secure accountability in practice as well as in theory, there must be a sufficient element of public scrutiny of the investigation process or at least of its results.³⁸⁰ Again, this requirement is particularly essential where involvement of public officials in the incident in question is alleged, as it serves the fundamental objective of maintaining public confidence in the authorities' adherence to the rule of law and preventing suspicions of collusion by the authorities or of tolerance of unlawful acts.³⁸¹

In practice, the degree of public scrutiny required may well vary from case to case, depending on the circumstances of the case and/or the personal characteristics of those involved.³⁸² The Court has made clear that, since the disclosure or publication of investigative materials can involve sensitive issues and may therefore have potentially prejudicial effects for private individuals or on other, separate investigations, Article 2 does not entitle the next of kin of a deceased victim to be granted access to the

³⁷⁶ See, e.g., *Kelly and Others v. the United Kingdom* (above n. 374), § 95.

³⁷⁷ *Isayeva, Yusupova and Bazayeva v. Russia* (above n. 293), § 210. For instance, the Court found that such practical independence was lacking where the public prosecutor investigating the death of a girl during an alleged clash relied almost exclusively on the evidence provided by the police officers involved in the incident: see *Ergi v. Turkey* (App. no. 23818/94), Reports 1998-IV, §§ 83-85.

³⁷⁸ *Aktaş v. Turkey* (App. no. 24351/94), Reports 2003-V, § 301.

³⁷⁹ See, e.g., *Hugh Jordan* (above n. 368) § 120; *McKerr* (above n. 373) § 128.

³⁸⁰ *Güleç v Turkey* (above n. 360), §§ 77-78.

³⁸¹ See, among many other authorities, *Anguelova v. Bulgaria* (App. no. 38361/97), Reports 2002-IV, § 140.

³⁸² See, e.g., *Kelly and Others v. United Kingdom* (above n. 374), § 98.

investigation whilst it is ongoing, nor does it impose a duty on the investigating authorities “to satisfy every request for a particular investigative measure made by a relative in the course of the investigation”.³⁸³ Nevertheless, the Court has clearly recognized that in all cases the victim or his or her family should have a role in the investigation and must be involved in the procedure to the extent necessary to safeguard their legitimate interests.³⁸⁴ The requisite access of the public, the victim or the victim's relatives must be provided for at some stage of the available procedures. In any case, the victim (or his or her next of kin) should, as a minimum, be allowed to access the case file.³⁸⁵ Access to case documents is obviously of crucial importance in order for the victim and other interested parties to be able to determine whether, for example, a decision not to prosecute was arrived at properly.³⁸⁶

1.3.3 Prosecutions

(a) *Duty v. discretion to prosecute. Possibility of challenging a refusal to open criminal proceedings or the progress of the investigation*

As noted above, Articles 2 and 3 ECHR impose an obligation to permit adequate public scrutiny of an investigation and its results and to adequately involve the next of a kin of a victim in the process.³⁸⁷ As a specific element of that obligation, the European Court has held that where the prosecutor has a discretion whether or not to bring a prosecution, the lack of any requirement to give reasons for a decision not to prosecute and the non-availability of judicial proceedings by which to challenge such a decision, may give rise to issues under Article 2. In *Hugh Jordan v. United Kingdom* the applicant's son had been shot by police officers; at the close of the investigation, the prosecutor decided not to bring a prosecution. Under the law of Northern Ireland at the time, the prosecutor was under no obligation to provide any reasons and no proceedings could be brought for judicial review of the decision. In those circumstances, the Court observed that:

where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a

³⁸³ *Ramsahai v. The Netherlands* (above n. 369), §§ 347-348.

³⁸⁴ See *Güleç v. Turkey* (above n. 360), § 82; *Oğur v. Turkey* (above n. 370), § 92; *Gül v. Turkey* (above n. 374), § 93; *McKerr v. the United Kingdom* (above n. 373), § 148.

³⁸⁵ See, e.g., *Oğur v Turkey* (above n. 370), § 92.

³⁸⁶ See *infra*, Section 1.3.3(a).

³⁸⁷ See e.g. *Hugh Jordan v. United Kingdom* (above n. 368), § 109.

matter of crucial importance to them and prevents any legal challenge of the decision.

[...] the applicant was [...] not informed of why the shooting was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way. This however is not the case.³⁸⁸

The Committee of Ministers, in supervising compliance with the decision in *Hugh Jordan* and other similar cases relating to Northern Ireland, has expressed the view that the availability of judicial review of a prosecutors' decision whether or not to prosecute constitutes an important safeguard in order to ensure adequate information and public scrutiny.³⁸⁹

(b) Conviction and sentencing

As noted above, the European Court has held that there is an obligation upon States Parties to the Convention to have in place substantive criminal laws and a criminal justice system which is capable of investigating the cause of death and, if appropriate, of identifying and punishing those responsible.³⁹⁰ In addition, the European Court has made clear that under Article 2 there is an obligation upon the Contracting States to make sure that the punishment is sufficient to act as a deterrent and accordingly thereby to effectively protect the right to life and physical integrity. In *Öneriyildiz v. Turkey*, the Grand Chamber made clear that not only must an investigation be effective, but that, where the investigation has led to a prosecution, Article 2 requires that "the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law."³⁹¹ However, the Court was anxious to stress that the positive obligations under Article 2 do not in any way "entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence [...] or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence [...]"³⁹²

Nevertheless, as the Court emphasized, the domestic authorities and courts can not be prepared to allow life-endangering offences to go unpunished: effective

³⁸⁸ *Hugh Jordan v. United Kingdom* (above n. 368), §§ 123-124.

³⁸⁹ Interim Resolution CM/ResDH(2007)73, Action of the Security Forces in Northern Ireland (Case of McKerr against the United Kingdom and five similar cases). Measures taken or envisaged to ensure compliance with the judgments of the European Court of Human Rights in the cases against the United Kingdom listed in Appendix III. Adopted by the Committee of Ministers on 6 June 2007 at the 997th meeting of the Ministers' Deputies.

³⁹⁰ See above 1.3.2.

³⁹¹ *Öneriyildiz and Others v. Turkey* (above n. 354), § 95.

³⁹² *Ibid.*, § 96.

enforcement, including sentencing, is essential “for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts [...]”.³⁹³ As a result, the domestic courts must give adequate scrutiny to cases involving a loss of life, “so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined.”³⁹⁴ That scrutiny extends to making sure that those responsible for the loss of life or for endangering life must be given an appropriate sentence if convicted.

In the later case of *Ali and Ayşe Duran v. Turkey*, the Court extended that interpretation to Article 3, noting that:

[t]he requirements of Articles 2 and 3 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law and the prohibition of ill-treatment. While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow life-endangering offences and grave attacks on physical and moral integrity to go unpunished.³⁹⁵

The logic of the Court’s reasoning in this regard also implies that the obligation to ensure effective punishment of conduct violating Articles 2 and 3 means that the application of statutes of limitation, or a fortiori, the granting of an amnesty cannot be relied upon as valid reasons for not prosecuting perpetrators of serious violations of human rights.

³⁹³ Ibid.

³⁹⁴ Ibid.

³⁹⁵ *Ali and Ayşe Duran v. Turkey* (App. no. 42942/02), ECtHR 8 April 2008, § 61.

2. Case Study: Russian actions in Chechnya

2.1 Introduction

Chechnya is today an autonomous republic of the Russian Federation. When the Soviet Union collapsed in 1991, the Chechen-Ingush Autonomous Soviet Socialist Republic was split into two republics: the Republic of Ingushetia and the Chechen Republic. The Chechen Republic sought independence and after the First Chechen War against Russia (1994-1996), Chechnya gained *de facto* independence as the Chechen Republic of Ichkeria. The newly won independence only lasted until the Second Chechen War with Russia which started in 1999 and lasted until 2001. After the war, Russia managed to reinstate control over the republic and Chechnya became an autonomous republic within the Russian Federation.³⁹⁶ Although figures as to the total deaths are disputed and extremely far from clear, some human rights groups have conservatively estimated that the total of civilian victims of the Second Chechen War, excluding those who have “disappeared” is between 10,000 and 20,000.³⁹⁷ Similarly, the number of “disappeared” individuals is estimated to be between 4,000 and 5,000 people during the Second Chechen War.³⁹⁸

The present case deals exclusively with cases arising out of events during and after the Second Chechen War, as the European Convention was not in force for the Russian Federation at the time of the First Chechen War, and as a consequence, the events of that conflict fall outside the jurisdiction *ratione temporis* of the European Court.³⁹⁹ The cases decided by the Court have been brought by victims and their relatives, all Russian nationals from Chechnya. The majority of cases concerns deaths resulting from attacks by State agents, unlawful apprehensions, disappearances after being detained by Russian servicemen, torture and inhuman and degrading treatment of detainees and the mental suffering that some of the applicants have endured on account

³⁹⁶ On the Chechen conflict, see, e.g., A. Politkovskaya, *A Small Corner of Hell; Dispatches from Chechnya* (University of Chicago Press, 2007); O. Olikier, *Russia's Chechen Wars 1994 – 2000: Lessons from the Urban Combat* (RAND Corporation, 2001); C. Gall and T. De Waal, *Chechnya: Calamity in the Caucasus* (New York University, 1999); V. Tishkov and M.S. Gorbachev, *Chechnya: Life in a War-Torn Society* (University of California Press, 2004); A. Meier, *Chechnya: To the Heart of a Conflict* (W. W. Norton & Company, 2004); T. Wood, *Chechnya: The Case for Independence* (Verso, 2007); A. Glucksmann and S. Greene, *Open Wound: Chechnya 1994 – 2003* (Trolley, 2004); A. Lieve, *Chechnya: Tombstone of Russian Power* (Yale University Press, 2nd ed. 1999); and A. Politkovskaya and T. de Waal, *The Dirty War* (Harvill Press, 2004).

³⁹⁷ A. Cherkasov and D. Grushkin, “The Chechen Wars and the Struggle for Human Rights”, in R. Sakwa (ed.), *Chechnya: From Past to Future* (Anthem Press, London, 2005), p. 139-140.

³⁹⁸ *Ibid.*, and see also Amnesty International, “Russian Federation; Normalization in Chechnya Must Bring Accountability”, 16 April 2009, available at <<http://www.amnesty.org/en/for-media/press-releases/russian-federation-normalization-chechnya-must-bring-accountability-2009>>.

³⁹⁹ For details of Russia's ratification of the Convention, see below, Section 2.2.

of these events. Most cases have also dealt with the absence of an adequate investigation, denial of access to a court and lack of effective remedies in respect of the violation. The majority of applicants have relied on Article 2 of the Convention, protecting the right to life, Article 3, prohibiting torture and inhuman or degrading treatment, as well as other provisions of the Convention.⁴⁰⁰

The present case study examines the extent to which the Russian Federation has so far complied with the Court's judgments relating to violations committed by the Russian security forces in Chechnya. In particular, the case studies focuses on the individual and general measures adopted by the Russian Federation to address the problems identified by the Court with respect to the obligation to carry out effective investigations into allegations of violations of Articles 2 and 3 of the Convention. The present study will also address the question whether the Court's judgment have had any impact on the capability of the domestic legal system to carry out effective investigations and prosecutions in relation to alleged serious violations of the right to life or acts of torture and ill-treatment committed by servicemen.

2.2 The Russian Federation and the Convention

As one of the conditions of joining the Council of Europe in 1996, the Russian Federation undertook to ratify the Convention within one year of its accession to the Statute of the Council.⁴⁰¹ Russia eventually ratified the Convention on 5 May 1998. Russia has at no point purported to make any derogation under Article 15 of the Convention in relation to the conflict in Chechnya.

The Russian Federation has a monist legal system. International law is proclaimed to be part of the law of the land and the Constitution accords a higher hierarchical status to international rules. In this regard, Article 15(4) of the 1993 Constitution of the Russian Federation provides that "the universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied".⁴⁰² Accordingly, at least in principle, the adoption of domestic legislation incorporating the Convention is not needed for the

⁴⁰⁰ In particular, Articles 5 (right to liberty and security), 6 (right to fair trial), 8 (right to respect for private and family life), 13 (right to effective remedy) and Article 1 of Protocol No. 1 (protection of property).

⁴⁰¹ M. Janis, "Russia and the 'Legality' of Strasbourg Law", EJIL, vol. 8 (1997), p. 93, referring to R. Bernhardt, S. Trechsel, A. Weitzel and F. Ermacora, "Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards", *Human Rights Law Journal*, vol. 15 (1994), p. 287.

⁴⁰² See Art. 15(4) Constitution of the Russian Federation, 12 December 1993, *Rossiiskaya Gazeta*, 25 December 1993; available at <<http://www.constitution.ru/en/10003000-02.htm>>. See also G.M. Danilenko, "Implementation of International Law in CIS States: Theory and Practice", EJIL, vol. 10 (1999), p. 51, at p. 52.

Convention to have effect within the domestic legal system and be applied by the courts and other domestic authorities.

Further, decisions of the European Court interpreting the Convention must be taken directly into account by, and are binding upon, the domestic authorities.⁴⁰³ This has been expressly recognized by the Plenum of the Supreme Court of the Russian Federation in a resolution adopted in 2003, which states that:

The Convention on Human Rights and Basic Freedoms has a mechanism of its own which includes a compulsory jurisdiction of the European Court on Human Rights and a systematic monitoring over the execution of the decisions of the Court by the Committee of Ministers of the Council of Europe. In accordance with Item 1 of Article 46 of the Convention these decisions with regard to the Russian Federation [...] shall be mandatory for all State bodies of the Russian Federation including for the courts. The implementation of the decisions related to the Russian Federation presumes, if necessary, the obligation on the part of the State to take measures of a private nature aimed at eliminating violation of human rights stipulated by the Convention and the impact of these violations on the applicant as well as measures of a general nature to prevent repetition of such violations. The courts within their scope of competence should act so as to ensure the implementation of obligations of the State stemming from the participation of the Russian Federation in the Convention [...].⁴⁰⁴

As far as the jurisdiction of the Court is concerned, pursuant to Article 34 of the Convention, the Russian Federation *ipso facto* recognizes the jurisdiction of the European Court to hear individual complaints; that position is expressly recognised as a matter of domestic law.⁴⁰⁵

In the absence of any meaningful domestic remedies for some violations of the Convention, despite its supposed applicability as a matter of domestic Russian law, the European Court is increasingly seen as playing an important role by Russian citizens. According to one commentator, the obligation “to secure to everyone the rights and freedoms defined in the Convention” is generally understood in Russia “as the Russian Government’s recognition of the authority of the European Court of Human Rights to adjudicate petitions alleging violations of the Convention provisions occurring under Russian jurisdiction. In other words, the ratification of the Convention is perceived by Russian citizens as the right “to write to Strasbourg”, as the right to complain to an international body, as a “panacea” for all human rights violations.”⁴⁰⁶ This view of the

⁴⁰³ On this point, see Danilenko (above n. 402), p. 68

⁴⁰⁴ Resolution No. 5 adopted by the Plenum of the Supreme Court of the Russian Federation, “On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation”, Moscow, 10 October 2003 available at <<http://www.supcourt.ru/EN/resolution.htm>> [last accessed 12 September 2009].

⁴⁰⁵ See A.L. Burkov, “The Domestic Status of the European Convention on Human Rights in Russian Law”, *EHRAC Bulletin*, vol. 8 (2007), p. 12.

⁴⁰⁶ A.L. Burkov, “Implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts”, *Russian Law: Theory and Practice*, vol. 1 (2006), p. 69.

Court is to a large extent confirmed by the number of complaints lodged with the Court originating in Russia. At the time of writing, Russia ranked first in the list of countries with the largest number of cases pending at the European Court. As of the end of May 2010, 35,400 cases were pending before a judicial formation of the Court, which accounted for 28.1% of the total number of pending applications.⁴⁰⁷

2.3 The European Court and the conflict in Chechnya

Russia has at no point purported to make any derogation under Article 15 of the Convention in relation to the conflict in Chechnya. In February 2005, the European Court issued its first three judgments on claims arising out of the armed conflict in Chechnya.⁴⁰⁸ Since then, the Court has issued over one hundred other judgments on atrocities which have take place since the start of the Second Chechen War, providing Chechens with an alternative source of justice,⁴⁰⁹ and many more are pending, including in relation to disappearances following the end of full-scale hostilities. The violations identified by the Court in the Chechen judgments to date relate, inter alia, to:

- failure to present any justification for the use of lethal force by state agents (violations of Article 2);⁴¹⁰
- failure to prepare and execute counter-terrorist operations involving the use of heavy combat weapons with the requisite care for the lives of civilians (violations of Article 2);⁴¹¹
- failure to carry out effective investigations into the circumstances surrounding the deaths or alleged deaths of the applicants' relatives or

⁴⁰⁷ European Court of Human Rights, "Pending applications allocated to a judicial formation – 31/05/2010), available at http://www.echr.coe.int/NR/rdonlyres/99F89D38-902E-4725-9D3D-4A8BB74A7401/0/Pending_applications_chart.pdf. This large amount of cases was foreseen by some commentators who argued that the Russian Federation, at the time of accession to the Council, fell short of the usual European standard of the rule of law and the protection of human rights. Given Russia's lack of experience of protecting human rights at the level of municipal law, commentators thought it likely that a great many violations of European human rights law would be committed there, which would not be remedied domestically; for discussion, see Janis (above n. 401).

⁴⁰⁸ *Khashiyev and Akayeva v. Russia* (App. no. 57942/00 and 57945/00), ECtHR 24 February 2005; *Isayeva v. Russia* (App. no. 57950/00), ECtHR 24 February 2005; *Isayeva, Yusupova and Bazayeva v. Russia* (App. no. 57947/00, 57948/00 and 57949/00), ECtHR 24 February 2005.

⁴⁰⁹ See e.g. K. Koroteyev, "Chechnya's Strasbourg 'anniversary'", 25 April 2009, available at <<http://www.watchdog.cz/?show=000000-000008-000001-000502&lang=1>>; and Memorial, "European Court announced the 100th judgment in case from Chechnya", 23 April 2009, available at <<http://www.memo.ru/2009/04/28/2804095.htm>>

⁴¹⁰ See, e.g., *Khatsiyeva and Others v. Russia* (App. no. 5108/02), ECtHR 17 January 2008.

⁴¹¹ See, e.g., *Isayeva, Yusupova and Bazayeva v. Russia* (above n. 408).

allegations of torture, as well as failure to provide effective remedies in that regard (violations of Articles 2, 3 and 13);⁴¹²

- unacknowledged detention and subsequent disappearances of individuals by State agents, as well as the authorities' failure to provide the applicants with any plausible explanation in this respect (violations of Articles 2, 3 and 5);⁴¹³ and
- unjustified destruction of property by the security forces in the course of anti-terrorist operations (violations of Article 1 of Protocol No. 1).⁴¹⁴

Despite the variety of violations which have occurred, for the purposes of the present study, the violations which are principally of concern are those relating to the failure to conduct effective investigations into all credible allegations of breaches of the right to life and the prohibition of torture and other forms of ill-treatment.

In some of the Chechen cases, the applicants have made requests under Article 41 that the Court order that “an independent investigation which would comply with the Convention standards” be conducted into the death of their relatives by way of just satisfaction.⁴¹⁵ In these cases, the Court has taken the position that the situation in each case was distinguishable from that in the authorities relied upon by the applicants as justifying such an approach and declined to make the order sought.⁴¹⁶ In particular, it reasoned that, since the effectiveness of the investigations had already been undermined in their early stages by the failure of the domestic authorities to adopt meaningful investigative measures, it was very doubtful that the situation that existed before the breaches could be restored. Therefore, the Court found it most appropriate to leave it to the respondent State to choose the means to be used to remedy the violation.⁴¹⁷

⁴¹² See, e.g., *Kukayev v. Russia* (App. no. 29361/02), ECtHR 15 November 2007; *Bazorkina v. Russia* (App. no. 69481/01), ECtHR 27 July 2006; *Musayeva v. Russia* (App. no. 12703/02), ECtHR 3 July 2008; and *Magomadov v. Russia* (App. no. 68004/01), ECtHR 12 July 2007.

⁴¹³ See, e.g., *Magomadov v. Russia* (above n. 412); *Musayeva and Others v. Russia* (App. no. 74239/01), ECtHR 26 July 2007; *Bitiyeva and X v. Russia* (App. no. 57953/00 and 37392/03), ECtHR 21 June 2007; and *Luluyev and Others v. Russia* (App. no. 69480/01), Reports 2006-... .

⁴¹⁴ See, e.g., *Khamidov v. Russia* (App. no. 72118/01), Reports 2007-... .

⁴¹⁵ See, e.g., *Mezhidov v. Russia* (App. no. 67326/01), ECtHR 25 September 2008; *Lyanova and Aliyeva v. Russia* (App. no. 12713/02 and 28440/03), ECtHR 2 October 2008; *Musayeva v. Russia* (above n. 413).

⁴¹⁶ In this regard the applicants had relied upon *Assanidze v. Georgia* [GC] (App. no. 71503/01), Reports 2004-II, §§ 202-203, where the Court ordered the release of individuals detained; for discussion, see above n. 315 and accompanying text and *Tahsin Acar v. Turkey* (preliminary objection) [GC] (App. no. 26307/95), Reports 2003-VI, § 84; for discussion of the latter case, see below, text accompanying n. 668 *et seq.*

⁴¹⁷ See *Mezhidov v. Russia* (above n. 415) at §§ 159-160; *Lyanova and Aliyeva v. Russia* (above n. 415), §§ 96-99; *Musayeva v. Russia* (above n. 413), at §§ 164-166.

2.4 Execution of judgments

The Chechen judgments have been transmitted to the Committee of Ministers for supervision of execution in accordance with Article 46 of the Convention. After reviewing the information provided by Russia regarding measures taken and planned, the Department for the Execution of Judgments of the Court observed that all of the Chechen judgments “require significant individual measures in order to remedy the consequences of the violations found as well as general measures to prevent new similar violations”.⁴¹⁸ As the Court has in the majority of the Chechen cases found violations due to the lack of an effective investigation, the individual measure that has been most frequently examined by the Committee in the context of the Chechen judgments is the re-opening of investigations in Chechnya and the existence of measures taken in that regard (or the lack thereof) will be the principal topic for study in relation to compliance as regards adoption of individual measures.

As far as general measures are concerned, the Department for the Execution of Judgments recommended three main heads of action to be pursued so as to prevent similar violations in the future:

- (1) improvement of the legal and regulatory framework governing the counter-terrorist activities of security forces;
- (2) measures aimed at raising awareness and training members of the security forces; and
- (3) improvement of domestic remedies.⁴¹⁹

Those recommendations have been generally endorsed by the Committee of Ministers, which has likewise drawn attention to the fact that “one of the general problems relates to the effectiveness of domestic investigations” and “stressed that this issue should be addressed as a matter of priority in order to ensure rapid adoption of the individual and general measures required by the European Court’s judgments”.⁴²⁰ As to the first and second category of measures, it has been recommended by the Department for the Execution of Judgments that measures be taken regarding procedural safeguards in custody, training of judges and prosecutors and education of members of the security forces, i.e. measures which are aimed at prevention of crimes.⁴²¹ However, for present

⁴¹⁸ CoE doc. CM/Inf/DH(2006)32 rev. 2 (above n. 396).

⁴¹⁹ CoE doc. CM/Inf/DH(2006)32 of 29 June 2006; see also CoE doc. CM/Inf/DH(2008)33 of 11 September 2008 and CoE doc. CM/Inf/DH(2010)26 of 27 May 2010.

⁴²⁰ See e.g. “Decisions adopted at the 1035th (DH) meeting, 17-18 September 2008”, CoE doc. CM/Del/Dec(2008)1035 of 22 September 2008, § 3.

⁴²¹ Russia has adopted new legislation and made changes to existing legislation in these areas to ensure compliance with the judgments. For example, the procedural safeguards in custody have been strengthened, the legal and regulatory framework governing the activities of the security forces has been somewhat reinforced and work has been done on awareness raising and training of members of the security forces as well as further

purposes, it is the measures falling in the third category listed above, in particular those relating to improving the efficiency of investigations, which are of most interest. Accordingly, the focus of the assessment of compliance will be on those general measures which particularly affect domestic investigations and prosecutions, e.g., changes to rules and procedures so as to ensure effective and independent investigations; changes to the structure of the Prokuratura (the Prosecutor's Office); and changes in the law relating to ensuring that there are meaningful sanctions available against servicemen responsible for abuses. As regards the question of the impact of the general measures in fact adopted on the capability of the domestic legal system to effectively prosecute and punish serious violations committed by state agents, given the wide variety of general measures adopted by Russia, consideration of impact will focus on those topics which have been the subject of study in relation to compliance

2.5 Compliance with judgments

2.5.1 Measures concerning the obligation to criminalize conduct in violation of Articles 2 and 3

There is a positive obligation stemming from Articles 2 and 3 of the Convention to make criminal law remedies available. In that regard, the Court has consistently recognized that the effective protection of the individual in his or her relations with other persons requires the State to put in place domestic legislation which criminalizes conduct constituting a violation of the fundamental rights protected under Articles 2 and 3 of the Convention. In addition, the Court has made clear that under those provisions there is an obligation upon the Contracting State to make sure that the punishments imposed under the relevant domestic legislation are sufficient to act as a deterrent and accordingly thereby to effectively protect the right to life and physical integrity.⁴²²

(a) Domestic provisions criminalizing conduct in violation of Articles 2 and 3

Although torture was explicitly prohibited by the Russian Constitution at the relevant times,⁴²³ as well as reference being made to the notion in a number of other

educating judges and prosecutors. For more information on these measures, see CoE doc. CM/Inf/DH(2006)32 rev. 2 (above n. 396); and CoE doc. CM/Inf/DH(2008)33 (above n. 419).

⁴²² For an overview, see above, Section 1.3.1.

⁴²³ See Art. 21, Constitution of the Russian Federation (above n. 402).

provisions,⁴²⁴ until relatively recently Russian criminal law lacked a definition of “torture”. It this regard, it was argued by some human rights groups that “the absence of the definition of torture in the national legislation contributed to the misunderstanding on the side of the law enforcement bodies of the obligations, taken by the Russian Federation under the Convention Against Torture, the European Convention on Human Rights and the International Covenant on Civil and Political Rights”.⁴²⁵ However, the European Court has not commented upon the question of the adequacy of the criminalization of torture under Russian law, whether in the context of Chechnya, or otherwise; rather it has been concerned with problems in relation to investigations of acts amounting to a violation of Article 3 of the Convention and not with the underlying question of what was the basis for criminalization of that conduct and therefore the basis for the investigation.⁴²⁶

The Russian Criminal Code was amended in December 2003 to introduce a definition of “torture”; Article 117 of the Code as amended now defines “torture” as “[...] infliction of physical or mental suffering for the purpose of compelling to give evidence or to commit other actions against a person’s will, as well as for the purpose of punishing, or for other purposes.”⁴²⁷ Torture under Article 117(2) is punishable by an imprisonment term of three to seven years. Notwithstanding that development, some commentators have disputed whether Article 117 in fact encompasses the involvement of officials in acts of torture.⁴²⁸ The criticism is based on the observation that the definition now contained in Article 117 of the Criminal Code differs from that contained in CAT, to which the Russian Federation is a party.⁴²⁹ Article 1 of CAT defines torture as involving serious

⁴²⁴ See, e.g., Art. 9(2), Criminal Procedure Code of the Russian Federation, Federal Law No. 174-FZ of 10 December 2001, entered into force 1 July 2002 (hereinafter “2002 RF Criminal Procedure Code”); unofficial English translation available at <http://www.legislationline.org/download/action/download/id/1698/file/3a4a5e98a67c25d4fe5eb5170513.htm/previ-ew>; Art. 5 of the Law “On Police” and Art. 4 of the Law “On the Confinement of Suspects and Defendants”. Note also that the 2002 Criminal Procedure Code contains further safeguards in relation to confessions obtained through torture. According to Art. 75(2)(1) of the 2002 RF Criminal Procedure Code, the trial court should consider as inadmissible a confession by a suspect or an accused person at the pre-trial stage of criminal proceedings which he/she did not support in court. Exceptions are made where the confession was made in the presence of a lawyer..Further, according to Art. 72(2) of the 2002 RF Criminal Procedure Code, no conviction may be based solely on an accused person’s confession of guilt, unless the confession is corroborated by all the evidence available in the case. Otherwise such conviction may be overturned by the appeal court on the ground of violating the Criminal Procedure Code (see Art. 379(1) (2), 2002 RF Criminal Procedure Code (above n. 424)). For further discussion, see CoE doc. CM/Inf/DH(2008)33 (above n. 419), at §§ 74 et seq.

⁴²⁵ See, e.g., O. Shepeleva, “Russian Legislation Now Features the Definition of ‘Torture’”, Moscow Helsinki Group, available at <http://www.mhg.ru/english/2F7698B>.

⁴²⁶ See below, Section 2.5.2.

⁴²⁷ Art. 117, Criminal Code of the Russian Federation, Law No. 63-FZ of 13 June 1996 (hereinafter “RF Criminal Code”); unofficial English translation available at <http://www.legislationline.org/download/action/download/id/1697/file/0cc1acff8241216090943e97d5b4.htm/previ-ew>, as amended in 2003 by the “Federal Law on the Introduction of Changes and Amendments to the Criminal Code of the Russian Federation” of 8 December 2003

⁴²⁸ See, e.g., “Russian NGO Shadow Report on the Observance of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the Russian Federation for the period from 2001 to 2005”, (May 2006), available from <http://www2.ohchr.org/english/bodies/cat/docs/ngos/joint-russian-report-new.pdf>; see also Shepeleva (above n. 425).

⁴²⁹ UN Convention Against Torture (above n. 355).

harm “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. In this regard, it is argued that, under CAT, “it is the involvement of an official in the torture [...] that is the key characteristic distinguishing this gross violation of human rights from other kinds of physical abuse against an individual”.⁴³⁰ NGOs having examined the situation have found Article 117 to be inadequate due to, inter alia, the fact that “the definition fails to include one of the key elements of torture, namely direct or indirect involvement of a public official” and “neither the Criminal Code nor any other domestic act gives a definition of cruel, inhuman or degrading treatment”.⁴³¹

The Russian Federation has maintained that the definition contained in Article 117 is indeed intended to cover abuses committed by public officials, and the fact that it is wider is irrelevant. For instance, before the Committee against Torture, Russia argued that:

[...] the definition of torture in the Criminal Code of the Russian Federation is in certain respects somewhat broader than that in the Convention. While the Convention relates to torture “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”, the perpetrator of the offence covered by article 117 (Torture) of the Russian Criminal Code may be any person who has attained the age of 16, including officials.⁴³²

The Committee Against Torture avoided openly criticising the wider formulation as such, only stating that “the definition of the term ‘torture’ as contained in the annotation to article 117 of the Criminal Code does not fully reflect all elements of the definition in Article 1 of the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] which includes the involvement of a public official or other person acting in an official capacity in inflicting, instigating, consenting to or acquiescing to torture. The definition, moreover, does not address acts aimed at coercing a third person as torture.”⁴³³

⁴³⁰ Shepeleva (above n. 425).

⁴³¹ “Submissions of NGOs on legal remedies for grave human right violations to be created in the northern caucasus region”, Rapporteur Mr. Dick Marty (PACE Committee of Legal Affairs and Human Rights), “Legal remedies for human rights violations in the Northern Caucasus” (8 February 2008), §§ 19 and 22, available at http://www.londonmet.ac.uk/londonmet/library/b62279_3.pdf

⁴³² “Information from the Russian Federation concerning the list of issues prepared by experts of the Committee against Torture scheduled for consideration at the Committee’s thirty-seventh session during the submission by the Russian Federation of its fourth periodic report on implementation of the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, UN doc. CAT/C/RUS/Q/4/Add.1 (2006).

⁴³³ Committee against Torture, *Conclusions and recommendations of the Committee against Torture: Russian Federation*, 23 November 2006, UN doc. CAT/C/RUS/Q/4 (2006), available at <http://www.unhcr.org/refworld/docid/465edff52.html>, § 7.

In any case, it is to be observed that neither the text of Article 3 ECHR, nor the relevant case-law of the European Court necessarily limit the notion of torture to acts committed by public officials. It is at least in part for this reason that the Court has never had occasion to comment on this characteristic of the Russian legislation criminalizing torture. Under the Convention, the problem appears to be not so much the scope of Article 117 of the Criminal Code, but rather the fact that in practice officials are prosecuted under other provisions, which are regarded as constituting *lex specialis* in relation to Article 117.⁴³⁴ In particular, officers accused of torture or ill-treatment can be prosecuted under Article 302 of the Criminal Code, which criminalizes “compulsion to give evidence used with regard to a subject, defendant, victim, or witness, or coercion of an expert, a specialist to make a report or to give evidence through the application of threats, blackmail, or other illegal actions, by an investigator or a person conducting inquests, as well as by other person with the knowledge or a tacit consent of the investigator or the person conducting inquests”.⁴³⁵ Under the provision in question, which was also amended in 2003, the same criminal act “joined with the use of violence, mockery, or torture” is punishable by deprivation of liberty for term of two to eight years.⁴³⁶

With regard to the criminal responsibility of the superior officers who order the use of torture, the Russian Federation stated that they may be prosecuted under Article 286(2) and (3) of the Criminal Code for “exceeding official powers”,⁴³⁷ defined as the “commission by an official of actions which transcend the limits of his powers and which involve a substantial violation of the rights and lawful interests of individuals or organizations, or the legally-protected interests of society and the State.”⁴³⁸ As far as sanctions are concerned, the provision in question provides that, whenever the offence involves the use of torture or ill-treatment, it shall be punishable by deprivation of liberty for three to ten years, with disqualification from holding specified offices or from

⁴³⁴ “Legal remedies for human rights violations in the Northern Caucasus” (above n. 431), § 19.

⁴³⁵ Art. 302(1), RF Criminal Code (above n. 427).

⁴³⁶ Ibid., Art. 302(2), as amended by the Federal Law “On the Introduction of Changes and Amendments to the Criminal Code of the Russian Federation”. The version of Art. 302 prior to the amendment had been strongly criticized by some human rights groups on a variety of grounds: see, e.g., Shepeleva (above n. 425): “in its previous wording was very close to the definition of torture and cruel and degrading treatment given in the corresponding international agreements of the RF, but nevertheless contained a number of serious limitations. Firstly, Article 302 was of limited use since it viewed as an actor only officials ranking as investigators, while in practice torture including that for the purpose of obtaining evidence has been widely used by operatives of the law enforcement agencies. Secondly, Article 302 established a punishment for the employment of torture against a particular kind of individual and for a particular purpose, namely for the purpose of coercing a suspect, defendant, victim or witness into giving evidence or an expert into delivering an opinion. Employment of torture and cruel treatment against people who do not have a procedural status for the purposes of getting information about a crime or its details, as well as the employment of torture for the purposes other than those given in Article 302 did not fall under its regulation. In its new wording Article 302 expanded the category of subjects prosecutable under Article 302 by adding to the previous definition the following clause: “as well as other individuals with the knowledge or acquiescence of the investigator or the person conducting the investigation”.

⁴³⁷ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 68.

⁴³⁸ Art. 286(1), RF Criminal Code (above n. 142).

engaging in specific activities for a term of up to three years.⁴³⁹ The Department for Execution of Judgments noted that all of the provisions referred to by the Russian Federation concerned the personal responsibility of members of the security forces. In this regard, it was noted that provisions criminalizing abuses perpetrated in police custody were more effective in preventing torture and ill-treatment “when not only the perpetrators but also other officials whose behaviour during the investigation encourage or make torture and ill-treatment possible are held to account.”⁴⁴⁰ Accordingly, confirmation was requested as to whether the prosecution of superior officers, investigators and prosecutors who ordered, authorised or condoned torture and ill-treatment by their acts or omissions was indeed possible under the current legal framework.⁴⁴¹

It has been noted by some human rights groups that the general wording of Article 286 does not give a clear and unambiguous signal to public officials that torture and other forms of cruel treatment are criminalized, as the provision also applies to other types of excess of powers, in addition to torture.⁴⁴² The broad scope of the provision in question and its invocation in relation to cases of torture and ill-treatment has as a result that the Russian authorities do not have statistics specifically on prosecutions for torture and other types of ill-treatment.⁴⁴³

As far as killings by members of the security forces are concerned, the domestic legal system provides for criminalization of violations of Article 2. If a state official commits murder in abuse of his or her powers he/she may be prosecuted for murder under Article 105 of the Criminal Code, taken together with Article 286.⁴⁴⁴ Violations of Article 105 are punishable with deprivation of liberty for a term of eight to 20 years, or by deprivation of liberty for life, or by the death penalty. Further, Article 108(1) and (2) creates offences of homicide in excess of the requirements of justifiable defence, punishable by up to two years’ deprivation of liberty and homicide in excess of the measures needed for the detention of a person who has committed a crime, punishable by up to three years’ deprivation of liberty.

Finally, as regards disappearances, the Russian legal system criminalizes unlawful apprehensions of an individual by a public official. Under Article 301 of the Criminal Code, the unlawful apprehension of an individual is punishable by imprisonment of up to three years with disqualification from holding specified offices or from engaging

⁴³⁹ Ibid., Art. 286(3).

⁴⁴⁰ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 71.

⁴⁴¹ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 71.

⁴⁴² Shepeleva (above n. 425).

⁴⁴³ “Legal remedies for human rights violations in the Northern Caucasus” (above n. 434), § 20.

⁴⁴⁴ According to § 18 of the Decision of the Plenum of the Russian Federation Supreme Court of 27 January 1999 (no.1) as amended 6 February 2007.

in specific activities for up to three years, or without such disqualification. Knowingly illegal taking or keeping in custody is punishable by imprisonment of up to four years. If the deeds are considered grave, imprisonment is stipulated for three to eight years.⁴⁴⁵

In conclusion, in accordance with the obligations stemming from the Convention, legal provisions exist which would enable criminal prosecutions of members of the security forces who commit human rights violations undoubtedly exist in Russia, albeit that it appears that the law does not unequivocally criminalise *eo nomine* superior officers who order or condone torture or ill-treatment by their subordinates. The problem appears not to lie in the provisions of the criminal law as such, but rather in how those provisions are applied and the manner in which investigations and prosecutions are in fact carried out. In this regard, the Department for the Execution of Judgments has observed that “in order to assess the real impact of the existing provisions and their deterrent effect, an overview of the Russian court practice in this area would be most useful” and further requested information on whether the prison sentences imposed under the provisions indicated by the Russian Government could be converted into fines or be suspended.⁴⁴⁶

(b) Statutes of limitation

In its observations submitted to the Committee of Ministers, the Russian Government has noted that, under the relevant domestic criminal legislation, a fifteen-year limitation period applies to “especially grave crimes”.⁴⁴⁷ Under Article 15 of the Criminal Code “especially grave crimes” are defined as “[...] intentional acts, for the commission of which this Code provides a penalty in the form of deprivation of liberty for a term exceeding 10 years, or a more severe punishment”.

As noted above, the crimes committed by Russian servicemen in Chechnya have included killings, torture, ill-treatment and abductions; however the penalties envisaged for most of those crimes under the relevant criminal provisions do not exceed the 10-year period necessary for the offence to qualify as an “especially grave crime” under Article 15 of the Criminal Code.⁴⁴⁸ Only killings under Article 105 of the Criminal Code fall in this category. On the other hand, “compulsion to give evidence” under Articles 302

⁴⁴⁵ Art. 301, RF Criminal Code (above n. 427).

⁴⁴⁶ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 70.

⁴⁴⁷ The statement is reported in “Memorandum to the Committee of Ministers, Observations of the European Human Rights Advocacy Centre (EHRAC) and Memorial in response to the Government’s Observations on execution of judgments in cases concerning the security forces in the Chechen Republic”, 8 September 2008, available at <http://www.londonmet.ac.uk/londonmet/library/110114_3.pdf> [last accessed 10 May 2009], § 14. See also Art. 78 (Release from Criminal Responsibility in Connection with the Expiration of Statutes Limitation on Actions), RF Criminal Code (above n. 427).

⁴⁴⁸ In particular, neither Article 117 (Torture) nor Articles 301 (Illegal Detention, Taking into Custody, or Keeping in Custody), 302 (Compulsion to Give Evidence) or 286 (Exceeding Official Powers) of the Criminal Code stipulate deprivation of liberty *exceeding* 10 years

of the Criminal Code and “exceeding official powers” under Article 286 are considered as “grave crimes”, and therefore fall within the group of offences subjected to a 10-year limitation period.⁴⁴⁹ The offence of “illegal detention” under Article 301 of the Criminal Code is considered a “medium gravity crime” to which a 6-year limitation period applies.⁴⁵⁰

The relatively brief limitation periods that apply to the crimes committed by the Russian security forces in Chechnya, most of which date back to the period between 1999 and 2001, call for urgent action by the prosecuting authorities in order to meet their obligations and carry out effective investigations into these cases. It is now ten years since the start of the Second Chechen War and it is clear that the statute of limitation applies to crimes committed during that time. The issue of statutes of limitation is an important topic which has not been dealt with by the Committee of Ministers in its public memoranda on Chechnya. Since release from criminal responsibility comes into play ten years after the commission of the crime as regards torture, ill-treatment and unlawful apprehensions, there is an even more pressing need for the authorities to meet the requirements of effective investigations in these cases, if it is not already too late.

(c) Responsibility of military commanders

It is extremely unclear whether under the Russian criminal legislation military commanders can be prosecuted for failure to prevent abuses by their subordinates. In many cases, the servicemen who actually committed the abuses are not known, but the regiments which participated in those crimes and consequently, their commanders, were identified by domestic investigations.⁴⁵¹ The Department for the Execution of Judgments has in this respect noted that “all provisions referred to by the Russian authorities regarding sanctions against servicemen provide for the personal responsibility of members of the security forces. The Committee of Ministers’ practice in similar cases^[452] has shown that the effectiveness of such sanctions in preventing abuses, such as ill-treatment or torture in police custody, is more dissuasive when not only the perpetrators but also other officials whose behaviour during the investigation encourage or make

⁴⁴⁹ On the definition of “grave crimes”, see Article 15, Criminal Code. For the limitation period, see *ibid.*, Article 78(1)(c).

⁴⁵⁰ See Articles 15 and 78(1)(b) of the Criminal Code. If the conduct giving rise to the offence is considered serious, the offence of illegal detention falls into the category of “grave crimes” in accordance with Article 15 of the Criminal Code.

⁴⁵¹ See, e.g. *Khashiyev and Akayeva v. Russia* (above n. 408), *Goncharuk v. Russia* (above n. 469) and *Goygova v. Russia* (App. no. 74240/01), ECtHR 4 October 2007, in respect of the operation in the Staropromyslovskiy district of Grozny. On the events in and around the Novye Aldy settlement, *Estamirov and Others v. Russia* (App. no. 60272/00), ECtHR 12 October 2006 and *Musayeva and Others v. Russia* (above n. 413). “Legal remedies for human rights violations in the Northern Caucasus” (above n.431), § 15.

⁴⁵² See interim resolutions by the Committee of Ministers concerning the actions of the security forces in Turkey. See also the case study on Turkey and the PKK (below, Section 3).

torture and ill-treatment possible are held to account”.⁴⁵³ The Department for the Execution of Judgments has therefore asked for more information on whether the current legal framework allows the prosecution of commanding (superior) officers, investigators and prosecutors, who order, authorize and condone torture and ill-treatment by their acts or omissions.⁴⁵⁴ In addition, the Department for the Execution of Judgments has stressed that the Committee of Ministers’ experience in similar cases shows that “nothing is more effective to counter impunity and to put an end to the long-standing practice of ill-treatment in custody than a formal statement made at the highest political level announcing a ‘zero-tolerance’ policy in respect of such abuses”.⁴⁵⁵ Such a statement may serve to remind the law-enforcement officials of their obligation to respect the rights of persons in their custody and of their criminal responsibility for ill-treatment of such persons.

2.5.2 Investigations

In almost all of the Chechen judgments, the Court has found a procedural violation of Articles 2 and/or 3 ECHR due to the inadequacy of the investigation.⁴⁵⁶ The present section will look at specific problems identified by the Court as regards investigations, measures recommended by the Committee to rectify these shortcomings and measures taken by Russia in order to comply with the judgments.

(a) Measures to ensure that the investigations are carried out promptly

In many of the judgments under examination, the Court has criticized the fact that investigations were opened with an unacceptable delay and were plagued with further inexplicable shortcomings and delays, thereby violating the requirement of promptness of the investigation.⁴⁵⁷ With regard to the requirement that the authorities must act on their own motion and initiate criminal investigations once a matter has come to their attention, several issues have been identified by the Court. For example, in *Estamirov and Others v. Russia*, a case concerning five persons allegedly killed by Russian

⁴⁵³ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 71.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid., § 72.

⁴⁵⁶ On the standards of investigations under Articles 2 and 3, see above, Section 1.3.2.

⁴⁵⁷ See e.g. *Luluyev and Others v. Russia* (above n. 413), § 99, in which the investigation was adjourned and re-opened at least eight times and the prosecutor’s orders were followed with an unacceptable delay. In *Khatsiyeva and Others v. Russia* (above n. 410), §§ 66 and 146, after the case file had been transferred to a military prosecutor’s office two days later, the investigation appears to have become protracted and plagued with inexplicable shortcomings and delays in taking the most trivial steps.

servicemen in Grozny in early February 2000, the applicants notified the authorities of the crime in the end of February 2000. The officers of the local department of the interior were present at the site in early April 2000 and an investigation was opened one week later. The Court noted that “[a]lready such a substantial delay in opening of the investigation into a very serious crime could not but affect the future effectiveness of the proceedings. And once the investigation began, it continued to be plagued by inexplicable delays”.⁴⁵⁸ The Court found, that these unexplained delays “not only demonstrated the authorities’ failure to act of their own motion but also constitute a breach of the obligation to exercise exemplary diligence and promptness”.⁴⁵⁹

In addition, in a number of cases the Court found that the conduct of the investigating authorities had not complied with the requirement that, once an investigation is underway, investigative activities should proceed without any undue delay. For instance, in *Khamila Isayeva v. Russia*, the Court observed that the investigation into Mr. Sultan Isayev’s disappearance following his apprehension was “plagued by inexplicable failures to perform the most essential tasks in a situation where prompt action had been vital”.⁴⁶⁰ A breach of the requirement of promptness may result in crucial evidence being lost; further, carrying out forensic (medical) examinations weeks or months after the event is of little assistance for the purpose of establishing the truth. The Russian authorities have tried to excuse this lack of promptness by referring to the “general breakdown of all public institutions in the Chechen Republic” at the time of the events described in the judgments.⁴⁶¹

In relation to the shortcomings identified by the Court with respect to the promptness of the investigation, the Russian authorities have taken some steps towards ensuring prompt investigations. For instance, in June 2002, the Prosecutor’s Office of the Chechen Republic sent the municipal and district prosecutors an instruction concerning the issues to be dealt with as a matter of priority after criminal proceedings were opened into offences allegedly committed by members of the Unified Group of forces in the course of identity checks in the Chechen Republic.⁴⁶² The Department for the Execution of Judgments has also noted that these issues appear to have been addressed in an administrative order concerning the organization of investigations.⁴⁶³

⁴⁵⁸ *Estamirov v. Russia* (above n. 451), § 86.

⁴⁵⁹ *Estamirov v. Russia* (above n. 451), § 89.

⁴⁶⁰ *Khamila Isayeva v. Russia* (App. no. 6846/02), ECtHR 15 November 2007, § 131.

⁴⁶¹ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 85.

⁴⁶² See CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 93; see also the information contained in Committee Against Torture, “Consideration of reports from States Parties under Article 19 of the Convention, Fourth periodic report of States parties due in 2004, Russian Federation” (2005) UN Doc CAT/C/55/Add.11, p. 21, § 97.

⁴⁶³ Order No. 6 issued by the Head of the Investigating Committee, 7 September 2007: see CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 94

According to the Russian Federation, a comprehensive programme to prevent kidnappings and to ensure effective investigations into disappearances in the administrative district including Chechnya for 2006-2010 was adopted in March 2007; in this regard, the Russian Federation has stated that “[a]ll complaints relating to unlawful detention, unlawful apprehension and exceeding authority by the members of law-enforcement agencies are examined according to the established procedure. Criminal proceedings are launched if there are grounds to prosecute”.⁴⁶⁴ However, the Department for the Execution of Judgments has noted that, “notwithstanding the measures taken, reports of different monitoring bodies show that further measures are still needed in order, in particular, to provide prosecution services with the staff, resources and facilities needed for the effective investigation of cases involving allegations of ill-treatment, illegal detention and disappearances”.⁴⁶⁵ Furthermore, the Department for the Execution of Judgments, after conducting a preliminary analysis of the information provided by Russia on the issue of prompt and adequate investigations, has found a number of outstanding issues on which further information/measures are needed; those outstanding issues relate to, inter alia, the adoption of measures to ensure that investigations are commenced promptly and pursued with reasonable expedition.⁴⁶⁶

(b) Measures to ensure effective investigations

Regarding the requirement that the investigation should be capable of leading to the identification and punishment of those responsible, several problems have been identified by the Court in the Chechen judgments. In a number of cases, the Court has criticized the way in which the authorities have proceeded to collect and preserve evidence; a recurrent shortcoming in this context is the failure to question key witnesses. For instance, in *Khamila Isayeva v. Russia*, the Court noted that it appeared that the applicant's relatives and villagers who had witnessed Mr. Sultan Isayev being apprehended by armed servicemen were not questioned at all. With respect to the questioning of some servicemen by the investigating authorities, the Court noted that it was not clear from the information provided by the Government how their statements could have been relevant for the investigation. At the same time it appears that no servicemen directly involved in the special operation during which Mr Isayev had disappeared on 29 April 2001 were questioned. The Court found that these failures alone compromised the effectiveness of the investigation and “could not but have had a

⁴⁶⁴ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 86.

⁴⁶⁵ Ibid., at § 95. See also CPT, “Public statement concerning the Chechen Republic of the Russian Federation” (2003) CPT Doc CPT/Inf(2003)33, p. 5, § 8 and “Public statement concerning the Chechen Republic of the Russian Federation” (2007) CPT Doc CPT/Inf(2007)17, p. 15, § 55.

⁴⁶⁶ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 87.

negative impact on the prospects of arriving at the truth”.⁴⁶⁷ In *Magomadov and Magomadov v. Russia*, the statements of the servicemen questioned as witnesses and the official documents issued by the Oktyabrskiy Provisional Department of Internal Affairs, the Chechnya Department of the Federal Security Services (FSB) and the Chechnya Department of the Interior presented several mutually incompatible versions of the applicants' brother's arrest and questioning. The Court found that it did not “appear that the investigation took steps to resolve these inconsistencies” and had also “failed to identify and question the officers of the FSB who had participated in the arrest and questioning”.⁴⁶⁸

The failure by the investigating authorities to collect information which could lead to the identification of the military units and servicemen allegedly involved in abuses is another recurrent shortcoming in the investigations identified by the Court. In *Goncharuk v. Russia*, information was obtained that the “crime could have been committed by military servicemen”.⁴⁶⁹ However, the investigation failed to identify any military units or to obtain other information concerning the military operations in the district at the relevant time. In this regard, the Court found that “the investigation failed to obtain a general plan of the military operations conducted in the Staropromyslovskiy district of Grozny at the material time, despite strong evidence that such an operation had taken place. Such a plan could have constituted vital evidence in respect of the circumstances of the crimes in question”.⁴⁷⁰ In *Musayeva and Others v. Russia*, the Court found that “the investigation could only be described as dysfunctional when it comes to establishing the extent of military and security personnel’s involvement in the deaths of the applicants’ relatives”.⁴⁷¹ The Court found that, “although it was acknowledged by the domestic authorities that Ali and Umar Musayev had been apprehended by federal military officers in the course of a ‘sweeping’ operation, delivered to the headquarters and left there, it does not appear that any meaningful efforts were made to investigate the possible involvement of the aforementioned personnel in the murder”.⁴⁷² The Court was “sceptical about the Government’s submission that the investigating authorities had questioned a number of servicemen and officials of law-enforcement agencies who had worked in Chechnya at the material time, as the Government did not produce any documents relating to the interviews, such as transcripts of questioning, nor did they indicate the names of any of those officials or servicemen”.⁴⁷³

⁴⁶⁷ *Khamila Isayeva v. Russia* (above n. 460), § 131.

⁴⁶⁸ *Magomadov v. Russia* (above n. 412), § 107.

⁴⁶⁹ *Goncharuk v. Russia* (App. no. 58643/00), ECtHR 4 October 2007, § 42.

⁴⁷⁰ *Ibid.*, § 70.

⁴⁷¹ *Musayeva and Others v. Russia* (above n. 413), § 89.

⁴⁷² *Ibid.*, § 92.

⁴⁷³ *Ibid.*, § 92.

There have also been inefficiencies in the investigations regarding the gathering of forensic evidence and the performance of autopsies. In *Zubayrayev v. Russia*, the Court found that a number of indispensable steps were never taken, as no autopsies or forensic analysis were carried out, or even ordered, in the course of the investigation.⁴⁷⁴ The investigation was “thus deprived of information about the precise nature of the injuries sustained and the exact cause of death”.⁴⁷⁵ In *Musayeva and Others v. Russia*, it did not appear that the scene of the incident at the applicants' house or the site where the remains of the Musayev brothers and two other men had been found was ever inspected by the investigating authorities in the context of the criminal proceedings.⁴⁷⁶ In *Akhmadova and Others v. Russia*, the Government provided no explanations regarding the length of the forensic examination, or regarding a delay of more than two years between the date on which it had been completed and the date on which its results had been received by the investigators.⁴⁷⁷ Moreover, in spite of the Court's specific request in this regard, the Government did not submit copies of any documents regarding the outcome of the examination; instead, they provided very succinct and fragmentary information on the findings of the reports on the forensic examination drawn up in respect of each of the bodies.⁴⁷⁸ The Court noted that the information provided did not “clarify whether the cause of death of Zalina Mezhidova had at all been established, or whether any findings had been made as regards the alleged mutilation of Zalina Mezhidova's body, given the applicants' allegation that its upper half had been missing”.⁴⁷⁹

In relation to the collection of evidence, although all these deficiencies have been identified by the Court in most of the Chechen judgments, of which the cases cited above are but a few examples, the Russian authorities have not reported to the Committee of Ministers any specific measures aimed at rectifying these shortcomings. The Department for the Execution of Judgments noted in 2008 that “the repetitive character of the shortcomings identified by the European Court raises the issue of the powers of the investigative authorities vis-à-vis other law-enforcement agencies”.⁴⁸⁰ In 2003, the CPT stated that “[t]he Forensic Medical Bureau of the Chechen Republic faces

⁴⁷⁴ *Zubayrayev v. Russia* (App. no. 67797/01), ECtHR 10 January 2008, § 99.

⁴⁷⁵ *Ibid.*, § 99.

⁴⁷⁶ *Musayeva and Others v. Russia* (above n. 413), § 91.

⁴⁷⁷ *Akhmadov and Others v. Russia* (App. no. 21586/02), ECtHR 14 November 2008, § 103.

⁴⁷⁸ *Ibid.*, § 103. Russia has in many of the Chechen cases, despite the Court's request, refused to submit documents from the criminal files by reference to Art. 161 of the Criminal Procedure Code, which establishes the rule of impermissibility of disclosure of data from the preliminary investigation. Under Art. 161(3), information from the investigation file may be divulged with the permission of a prosecutor or investigator and only so far as it does not infringe the rights and lawful interests of the participants of the criminal proceedings and does not prejudice the investigation. Divulging information about the private life of the participants in criminal proceedings without their permission is prohibited (see, e.g., *ibid.*, § 111).

⁴⁷⁹ *Ibid.*, § 112.

⁴⁸⁰ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 97.

enormous limitations in terms of resources, equipment and staff, and there are still no possibilities to perform full autopsies on the territory of the Republic”.⁴⁸¹ In 2006, following a visit to the Republican Forensic Medical Bureau in Grozny, a CPT’s delegation reported that “[s]ignificant investments have been made in equipment and the physical facilities of the forensic bureau in Grozny, and the structure is now no doubt one of the best within the North Caucasian region. However, despite these investments, no progress had been made in establishing certain essential functions, such as an autopsy service”.⁴⁸²

(c) Measures to ensure independence of the investigation

The Court has criticized the lack of independence of the authorities carrying out investigations into alleged violations of Articles 2 and 3 in Chechnya in a number of cases.⁴⁸³

The Russian authorities have informed the Committee of Ministers that, following the Court’s judgments, new bodies have been set up to ensure effective investigations and prevent new similar violations in the future. In particular, according to the information provided by the Russian Government to the Department for the Execution of Judgments in 2006, the following measures were adopted:

- establishment of local offices of the civil and military prosecution authorities in Chechnya;⁴⁸⁴
- transformation of the local department of the Ministry of the Interior (created in December 1999) into the Ministry of the Interior of the Chechen Republic (2002);⁴⁸⁵
- the establishment of interagency investigative groups with a view to the investigation of grave crimes (November 2002);⁴⁸⁶
- the establishment of an interagency working group to coordinate investigative action concerning those crimes (June 2005). The working

⁴⁸¹ CPT/Inf(2003)33 (above n. 465), p. 5, § 8,

⁴⁸² CPT/Inf(2007)17 (above n. 465), p. 15, § 55.

⁴⁸³ See, e.g., *Isayeva v. Russia* (above n. 408), § 209; *Isayeva, Yusupova and Bazayeva v. Russia* (above n. 408), § 210. On the requirement of independence of the investigative bodies, see above, Annex, Section 1.3.2(d).

⁴⁸⁴ The Prosecutor’s Office of the Chechen Republic was established in February 2000, whilst the Military Prosecutor’s Office of the Joint Group of forces in the North Caucasian region was created in September 2002.

⁴⁸⁵ See CoE doc. CM/Inf/DH(2006)32 rev. 2 (above n. 396), § 74.

⁴⁸⁶ *Ibid.* The interagency investigative groups were established pursuant to Ruling No. 15 of the Prosecutor of the Chechen Republic of 30 November 2002.

group is headed by the Deputy Prosecutor of the Chechen Republic and includes the heads of law enforcement bodies and of the security forces;⁴⁸⁷

- the creation of a unified register of kidnapped or disappeared persons; the information contained in the register is regularly compared with the lists of detained or convicted persons;⁴⁸⁸
- the setting up of a programme providing for a set of measures to prevent kidnappings and to ensure the effective investigation into disappearances. The programme, adopted in 2004, was subsequently modified in January 2005 by the Prosecutor's Office of the Chechen Republic in cooperation with the Ministry of Interior of the Republic, the local department of the Federal Security Services and the Prosecutor's Office of the Russian Federation;⁴⁸⁹
- the enactment of a new Code of Criminal Procedure, entered into force on 1 July 2002, which contains new rules on investigation.⁴⁹⁰

The Department for the Execution of Judgments has expressed the view that these measures "should doubtlessly contribute to the establishment of effective remedies in the Chechen Republic, inasmuch as they provide the necessary infrastructure which was deficient at the time of events impugned by the Court".⁴⁹¹ Russia has informed the Department for the Execution of Judgments that, "[a]s from 7 September 2007 the investigation of offences, which previously fell within the jurisdiction of prosecutors, now falls within the jurisdiction of the Investigating Committee set up with the Prokuratura".⁴⁹² The Investigating Committee was created so as to separate the functions of investigation and oversight of the investigation and so as to ensure greater independence of the authorities in charge of the investigation.⁴⁹³ According to the information provided by the Russian Federation, the Investigating Committee is responsible for carrying out investigations "with proper care and without delay".⁴⁹⁴ As for

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid. However, as noted by the Department for the Execution of Judgments in 2007, the Russian authorities failed to indicate what specific provisions of the new Code of Criminal Procedure address the shortcomings previously identified by the Court with respect to the promptness and effectiveness of investigations and the Department for the Execution of Judgments requested further information in this regard (see *ibid.*, §§ 88-89). Although, as discussed further below, the Russian Federation has provided a certain amount of information as to measures taken in relation to those issues, it would appear that no comprehensive response has been given: see CoE doc. CM/Inf/DH(2008)33 (above n. 419), §§ 77-100; and the discussion of Russia's further responses and the various requests for further information by the Department for the Execution of Judgments in CoE doc. CM/Inf/DH(2010)26 of 27 May 2010.

⁴⁹¹ Ibid., § 85.

⁴⁹² CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 78.

⁴⁹³ Ibid.

⁴⁹⁴ Ibid., § 79.

the independence of the Investigating Committee from the prosecuting authorities, although the Investigating Committee is formally attached to the *Prokuratura*, its head (the First Deputy Prosecutor General) is appointed using the same procedure as is used for the Prosecutor General.⁴⁹⁵ Pursuant to a Presidential Decree adopted in August 2007, regional departments of the Investigating Committee have been set up within the Chechen Republic.⁴⁹⁶ These developments have been positively assessed by the Committee of Ministers, which, in March 2009, “noted with particular interest the recent reform of the *Prokuratura* separating the authorities responsible for investigation from the authorities responsible for supervision of the lawfulness of investigations”.⁴⁹⁷

(d) Measures to ensure public scrutiny and participation of the victims and their relatives in the investigation

The Court has found many shortcomings as regards the requirements of participation of the victims or their relatives in the investigation and of public scrutiny.⁴⁹⁸ For example, in *Zubayrayev v. Russia*, the Court noted that the relatives of the deceased were granted victim status only in October 2004, four years after the killing, and family members were not invited to participate in the proceedings. Noting that “[i]n connection with the murder of the applicant’s father, victim status in the proceedings was eventually granted to a distant relative of the victim, namely his daughter-in-law” and that “[e]ven then, the persons who had been granted victim status were only informed of the adjournment and re-opening of the proceedings, and not of any other significant developments”, the Court concluded that “the investigators had failed to ensure that the investigation received the required level of public scrutiny; or to safeguard the interests of the next-of-kin in the proceedings”.⁴⁹⁹ Likewise, the Court noted that in *Lyanova and Aliyeva v. Russia*, “the applicants were not duly informed of the progress of the investigation”; although “they were informed of a number of suspensions and resumptions of the investigation, no documents from the case file were ever made available to them and, apart from an unofficial outline of the investigation provided for the first applicant, they received very scarce information concerning the most important investigative actions”.⁵⁰⁰ In *Imakayeva v. Russia*, the applicant complained, inter alia, of the fact that her lawyer’s request for access to the documents relating to the criminal

⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid., § 80.

⁴⁹⁷ “Decisions adopted at the 1051st (DH) meeting, 17-19 March 2009”, CoE doc. CM/Del/Dec(2009)1051, 23 March 2009, Decision, § 4.

⁴⁹⁸ On the requirement that investigative activities be subjected to a degree of public scrutiny, and that, in any case, victims or their relative should, at a minimum, have the possibility of having access to the investigation case file, see above Annex, Section 1.3.2(e).

⁴⁹⁹ *Zubayrayev v. Russia* (above n. 475), § 100.

⁵⁰⁰ *Lyanova and Aliyeva v. Russia* (above n. 415), § 107.

case opened in relation to the abduction of her husband had been rejected by the Military Prosecutor's Office on the basis that "the applicant's status as a victim in the criminal proceedings had been withdrawn, and therefore the applicant no longer had the right to familiarize herself with the case file, either in person or through a representative".⁵⁰¹ In this regard the Court noted that "[...] the authorities' unjustified denial to the applicant of access to the documents of the criminal investigation files, which could shed light on the fate of her relatives, either directly or through the proceedings in this Court" constituted "an additional element contributing to the applicant's suffering".⁵⁰²

In response to the findings by the Court in the judgments mentioned above, the Russian Government has referred to Article 42 of the Criminal Procedure Code which sets out the rights and obligations of victims in a criminal case.⁵⁰³ Article 42 of the Criminal Procedure Code defines the "victim" as "a natural person, upon whom a physical, property or moral damage was inflicted by the crime"⁵⁰⁴ and specifies that in criminal cases concerning "crimes which have entailed the death of a person, the rights of the victim, stipulated by the present Article, shall pass on to one of his close relatives".⁵⁰⁵ Article 42 further stipulates that the "the decision on recognizing a person to be a victim shall be formalized by the resolution of the inquirer, investigator or prosecutor, or of the court".⁵⁰⁶ Russia has claimed that Article 42 of the Criminal Procedure Code satisfies the requirements of the Convention as regards the access of victims to the case-files in criminal proceedings, in that, under the provision in question, victims or their relative have a right, inter alia:

- (a) to be informed about the charge brought against the accused;
- (b) to furnish evidence and submit proof;
- (c) to request certain procedural actions to be taken and to challenge before the courts a refusal by the investigation bodies to grant the aforementioned requests;
- (d) to take part, with the permission of investigating authorities, in the investigative actions performed at their own petition and, in that regard, to get acquainted with the protocols on the investigative actions carried out with his participation, and to submit comments on them;
- (e) to get acquainted with the decision on the appointment of an expert and with the expert's report;

⁵⁰¹ *Imakayeva v. Russia* (App. no. 7615/02), Reports 2006-.... , § 84.

⁵⁰² *Ibid.*, § 165.

⁵⁰³ CM/Inf/DH(2008)33, § 101.

⁵⁰⁴ Art. 42(1), 2002 RF Criminal Procedure Code (above n. 424).

⁵⁰⁵ *Ibid.*, Art. 42(8).

⁵⁰⁶ *Ibid.*, Art. 42(1).

- (f) after the preliminary investigation is completed, to get acquainted with all materials in the case file and to make copies of the relevant documents;
- (g) to receive the copies of the decision on the institution of a criminal case, on recognizing him as a victim or on the refusal in this, on the termination of the criminal case, on the suspension of the proceedings on the criminal case, as well as the copies of the sentence of the court of the first instance and of the decisions of the courts of the appeals and of the cassation instances;
- (h) to participate in the judicial proceedings on the criminal case in the courts of the first, the second and the supervisory instances and to take part in the judicial debates;
- (i) to get acquainted with the protocol of the court session and to submit comments on it;
- (j) to lodge complaints against the actions (the lack of action) and decisions of the inquirer, the investigator, the prosecutor and the court;
- (k) to file appeals against the sentence, the ruling or the resolution of the court;
- (l) to know about the complaints and presentations submitted on the criminal case, and to submit objections to them.⁵⁰⁷

The Russian Government also emphasised that, under the relevant federal legislation, the Ombudsman of the Russian Federation also has a right to familiarize himself with criminal, civil and administrative cases in which decisions have become final and with the materials of the cases in which a decision not to prosecute was taken.⁵⁰⁸

With respect to the Russian authorities' reliance on Article 42 of the Code of Criminal Procedure, it is to be noted that Article 42(2)(12) prevents victims from gaining access to documents in the criminal case-file while the investigation is pending or suspended; judging from the investigations described in the judgments, this is often the case for substantial periods of time. Also, in one domestic case from 2005, the provision relating to access to the case file was interpreted by a Russian court as conferring on the investigator "an unlimited discretion to grant or refuse the victim access to the case file".⁵⁰⁹

⁵⁰⁷ See *ibid.*, Art. 42 (2); for discussion, see CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 101.

⁵⁰⁸ *Ibid.*, § 104 (referring to Russian Federal Constitutional Law No. 1-FKZ of 26 February 1997).

⁵⁰⁹ See the decision of the Urus-Martan District Court of the Chechen Republic on the application of Ms Raisa Bersunkayeva of 1 August 2005. When Ms Bersunkayeva applied to the investigator in charge of the criminal proceedings, in which she participated as a victim, she was refused access to the case-file. This refusal was confirmed on 11 November 2005 by the same district court and on 7 December 2005 on appeal by the Supreme Court of the Chechen Republic. Case referred to in "EHRAC and Memorial Memorandum" (above n. 447), p. 4, p. 11.

According to Articles 19 and 123 of the Criminal Procedure Code, the actions and omissions of investigating bodies may be challenged by participants in criminal proceedings as well as by other persons inasmuch as their interests are affected by the procedural steps undertaken before the court.⁵¹⁰ The courts also have the possibility to examine at the pre-trial stage of criminal proceedings any complaints lodged against actions or omissions of the prosecutor and the bodies in charge of the investigation.⁵¹¹

It is interesting to note that the provisions upon which the Russian Government relied before the Committee of Ministers were already in place when the Court delivered the judgments in which it found violations of the procedural limbs of Articles 2, 3 and 13 due to the authorities' failure to grant the applicants access to the case-files and to provide them with up-to-date and exhaustive information on the investigation. The Department for the Execution of Judgments has in this respect expressed concern over the fact that the applicants have made allegations in their submissions lodged within the framework of execution of the relevant cases to the effect that "they are still not properly informed of the progress of investigation and do not still have access to the relevant materials even though they were granted victim status in the pending domestic investigations".⁵¹² The Department for the Execution of Judgments has also taken note of the cases concerning disappearances which have resulted in a finding of a violation of Article 3 on behalf of the disappeared person's relatives and has drawn attention to the experience of other countries in resolving similar issues, e.g. the United Kingdom which created special family liaison officers, whose duty was to keep in contact with a victim's family during the course of an investigation.⁵¹³

(e) Supervision of investigations

The Court has repeatedly noted that the failures of the investigations "were obvious to the supervising prosecutors, who on several occasions criticized the investigation and ordered that certain steps be taken".⁵¹⁴ Supervision of compliance of the investigations with the requirements of promptness; expedition and effectiveness have to be carried out by Russian authorities to make sure that allegations of serious human rights

⁵¹⁰ For more detailed information regarding the possibility of challenging the progress of the investigation, see below Section 2.5.2(f).

⁵¹¹ Art. 123, 2002 RF Criminal Procedure Code (above n. 424).

⁵¹² See the submissions of the applicants in relation to execution of the judgments in *Chitayev and Chitayev, Luluyev and Imakayeva*, referred in CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 107.

⁵¹³ Interim Resolution ResDH(2005)20 Action of the Security Forces in Northern Ireland (Case of *McKerr* against the United Kingdom and five similar cases). Adopted by the Committee of Ministers on 23 February 2005 at the 914th meeting of the Ministers' Deputies.

⁵¹⁴ See e.g. *Luluyev and Others v. Russia* (above n. 413), § 99; *Musayeva and Others v. Russia* (above n. 413), § 95; and *Bazorkina v. Russia* (above n. 413), § 123.

violations are effectively investigated. According to the information provided by the Russian Government, investigations are supervised by the following bodies:

- (a) the prosecutor, who is entitled to request the bodies in charge of the investigation to eliminate violations of federal laws committed in the course of an investigation⁵¹⁵;
- (b) the head of the investigating body, who is entitled to check the materials of the investigating file, to quash an investigator's unlawful or unsubstantiated decision⁵¹⁶;
- (c) the head of the body in charge of the preliminary inquiry, who is entitled to quash investigators' unsubstantiated decisions concerning the adjournment and to give instructions to the investigator concerning procedural actions to be taken, preventive measures, qualification of the offence and the number of counts in an indictment.⁵¹⁷

In relation to the issue of supervision of investigations, a predominant role is played by the *Prokuratura* (the Prosecutor's Office). The Federal Law on the *Prokuratura*, which defines the powers, the organization and the procedure of activity of the Prosecutor's Office, provides that the core function of the Prosecutor's Office is to supervise compliance with the Constitution and execution of laws in force and sets out the key functions, which are, inter alia, supervision of the observance of human rights and freedoms; supervision of preliminary investigations, inquiries and searches; supervision of the execution of laws in prison and places of detention; and criminal prosecutions.⁵¹⁸ In this regard, the European Commission for Democracy through Law (the Venice Commission) has noted in 2005 that it is interesting that "the functions of supervision are set out before the reference to criminal prosecution which suggests these are seen as the primary role of the Procuracy".⁵¹⁹ The Venice Commission has criticized the organization of the *Prokuratura* on the ground that it is "too big, too powerful, not transparent at all, exercises too many functions which actually and potentially cut across the sphere of other State institutions, in which the function of supervision predominates

⁵¹⁵ Art. 37, 2002 RF Criminal Procedure Code (above n. 424).

⁵¹⁶ Art. 39, *ibid.*

⁵¹⁷ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 117.

⁵¹⁸ See Art. 1(1) and (2), Federal Law (No. 2202-1) on the *Prokuratura* of the Russian Federation. Articles 29-31 of the Law deal with supervision of preliminary investigations and searches and the prosecutor himself is empowered to conduct an investigation or assign it to a subordinate prosecutor. The Federal Law on the *Prokuratura* dates from 17 January 1992 but has been amended on a number of occasions by federal laws and following a number of decisions of the Constitutional Court. For more on the *Prokuratura*, see, e.g., Solomon and Foglesong, "The Procuracy and the Courts in Russia: A New Relationship?", *East European Constitutional Review*, vol. 9(4) (2000).

⁵¹⁹ European Commission for Democracy through Law (Venice Commission), "Opinion on the Federal Law on the *Prokuratura* (Prosecutor's Office) of the Russian Federation", Opinion No. 340/2005 of 13 June 2005, § 16.

over that of criminal prosecution, but which nevertheless, despite its powers, remains vulnerable to presidential and other political power. The strong hierarchical structure of the Procuracy, concentrating powers in the hand of the Prosecutor General, reinforces these concerns. As it stands, the system does not seem to comply with Recommendation (2000)19⁵²⁰ and raises serious concerns of compatibility with democratic principles and the rule of law.”⁵²¹ The Venice Commission concluded that a further reform of the system seemed indispensable.⁵²²

The UN Committee against Torture has similarly noted “the insufficient level of independence of the Procuracy, in particular due to the problems posed by the dual responsibility of the Procuracy for prosecution and oversight of the proper conduct of investigations, and the failure to initiate and conduct prompt, impartial and effective investigations into allegations of torture or ill-treatment”.⁵²³ The Committee Against Torture recommended “as a matter of priority, the State party should pursue efforts to reform the Procuracy, in particular by amending the current federal Law on the Prosecutor’s Office to ensure its independence and impartiality as well as to separate the function of criminal prosecution from the function of supervision of preliminary investigations into allegations of torture. The State party should establish effective and independent oversight mechanisms to ensure prompt, impartial and effective investigations into all reported allegations, and legal prosecution or punishment of those found guilty”.⁵²⁴

As mentioned in the previous section, to ensure better independence and cooperation between authorities, the investigation of offences, which previously fell within the jurisdiction of prosecutors, now falls within the jurisdiction of a separate Investigating Committee set up within the Prokuratura.⁵²⁵ Prior to the establishment of the Investigating Committee in 2007, the prosecutors had jurisdiction to decide whether or not a criminal investigation should be initiated. Action could be taken either upon the request of a private person or on the investigative authorities’ own motion. After the creation of the Investigating Committee, the power to initiate criminal investigations is possessed by the investigators. Although prosecutors can quash a decision to open a criminal investigation within 24 hours, they do not have the power to quash a decision not to prosecute taken by an investigator. If the prosecutor is of a view that a decision

⁵²⁰ Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers’ Deputies.

⁵²¹ Venice Commission, “Opinion on the Federal Law on the Prokuratura” (above n. 519), § 74.

⁵²² *Ibid.*, § 75.

⁵²³ *Conclusions and recommendations of the Committee against Torture: Russian Federation* (above n. 433), § 12.

⁵²⁴ *Ibid.*

⁵²⁵ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 78.

not to prosecute is unlawful, the only option is to refer the matter to a superior of the investigator or to a court.⁵²⁶

As to ensuring compliance with the Convention standards as regards investigations, pursuant to the new division of responsibility, although prosecutors have the power to supervise the actions of investigators and to ensure they comply with the rule of law, they can no longer give binding instructions to investigators. Accordingly, it appears that each time a prosecutor identifies a shortcoming in the investigation, it should be notified to a superior of the investigator and/or challenged before a court.⁵²⁷ The Department for the Execution of Judgments has asked for information regarding the existence of disciplinary measures or other sanctions (e.g. negative impact on future promotion, on payment of bonuses, etc.) against officials who repeatedly fail to undertake necessary investigative measures, even when they are ordered to do so by their superiors.⁵²⁸ In March 2009, the Committee of Ministers “noted with satisfaction [...] the reinforcement of prosecutors’ supervision to ensure that all shortcomings identified by the European Court are effectively remedied at domestic level”, and the “recent reform of the *Prokuratura* separating the authorities responsible for investigation from the authorities responsible for supervision of the lawfulness of investigations”.⁵²⁹ The Committee further encouraged the competent authorities “further to enhance their control of investigations” compliance with the requirements of the Convention⁵³⁰ In that regard, the latest decision adopted by the Committee of Ministers in June 2009 has taken note with satisfaction of a circular letter issued by the Deputy Prosecutor General “requiring all prosecutors to give direct effect to the Convention’s requirements when supervising the lawfulness of domestic investigations”.⁵³¹

(f) Possibility of challenging the refusal to open criminal proceedings or the way the investigation is progressing

The Court has reiterated that the possibility of appealing to a court against a refusal by the prosecution authorities to open criminal proceedings may, in principle, “offer a substantial safeguard against the arbitrary exercise of power by the investigating authority, given a court’s power to annul a refusal to institute criminal proceedings and

⁵²⁶ Ibid., §§ 89-91.

⁵²⁷ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 125.

⁵²⁸ Ibid., § 126.

⁵²⁹ CoE doc. CM/Del/Dec(2009)1051 (above n. 497), Decision, §§ 2 and 4

⁵³⁰ Ibid., Decision, § 4.

⁵³¹ “Decisions adopted at the 1059th (DH) meeting, 2-4 and 5 (morning) June 2009”, CoE doc. CM/Del/Dec(2009)1059, 8 June 2009, Decision, § 4.

indicate the defects to be addressed”.⁵³² Also, in the Committee of Ministers’ practice, the possibility of judicial review of a prosecutors’ decision not to prosecute is recognised an important safeguard to ensure adequate information and public scrutiny.⁵³³

At the material time of the events in 1999-2001, the 1960 Russian Soviet Federative Socialist Republic (“RSFSR”) Criminal Procedure Code was in force.⁵³⁴ Under Article 113 of the 1960 Code, if the investigating body refused to open a criminal investigation, a reasoned decision had to be given. The person who made the declaration was to be notified of the decision and was entitled to appeal against it to “a proper procurator or higher court”.⁵³⁵

The European Court had had the opportunity to assess the effectiveness of the remedy provided under Article 113 of the 1960 Criminal Procedure Code in *Medov v. Russia*, a case concerning allegations of torture in pre-trial detention.⁵³⁶ The complaints about the treatment allegedly suffered by the applicant during his pre-trial detention had been examined by local prosecutors, who, following an investigation, had decided not to institute criminal proceedings. The Court noted that, under Article 113 of the 1960 Criminal Procedure Code, the decision of the prosecution authorities was amenable to an appeal to a higher prosecutor or a court of general jurisdiction and that, although a complaint against the decision not to prosecute had been brought before the Prosecutor General, the applicant had not used the second avenue of appeal.⁵³⁷ With regard to the possibility of appealing to a higher prosecutor, the Court reiterated the principle that “an appeal to a higher prosecutor does not give the person employing it a personal right to the exercise by the State of its supervisory powers, and that such an appeal does not therefore constitute an effective remedy within the meaning of Article 35 of the Convention”.⁵³⁸ The Court went on to note that the position was, however, different with regard to the possibility of challenging a decision not to investigate complaints of ill-treatment before a court of general jurisdiction, as in such cases, contentious proceedings were instituted and an independent tribunal was called upon to assess in public and adversarial proceedings whether the applicant had a *prima facie* case of ill-treatment. If the tribunal concluded that a *prima facie* case was made out, it was empowered to reverse the prosecutor’s decision and order a criminal investigation. The

⁵³² *Chitayev and Chitayev v. Russia* (Application no. 59334/00), ECtHR 18 January 2007, § 139.

⁵³³ Interim Resolution CM/ResDH(2007)73, Action of the Security Forces in Northern Ireland (Case of McKerr against the United Kingdom and five similar cases). Measures taken or envisaged to ensure compliance with the judgments of the European Court of Human Rights in the cases against the United Kingdom listed in Appendix III. Adopted by the Committee of Ministers on 6 June 2007 at the 997th meeting of the Ministers’ Deputies.

⁵³⁴ The 1960 RSFSR Criminal Procedure Code was in force until July 2002.

⁵³⁵ Art. 113 of the 1960 RSFSR Criminal Procedure Code (English translation by W.B. Simons, *The Soviet Codes of Law* (Kluwer Law International, 1987), p. 210).

⁵³⁶ *Medov v. Russia* (App. no. 1573/02), ECtHR 8 November 2007, § 105.

⁵³⁷ *Ibid.*, § 100.

⁵³⁸ The Court here refers to *Slyusarev v. Russia* (dec.) (App. no. 60333/00), ECtHR 9 November 2006 in *Medov v. Russia* (above n. 536), § 101.

Court reiterated its finding in previous cases to the effect that, in the Russian legal system the power of a court to reverse a decision not to institute criminal proceedings constituted a substantial safeguard against the arbitrary exercise of powers by the investigating authorities.⁵³⁹ Accordingly, in light of the fact that the applicant had failed to make use of the judicial appeal option, the Court concluded that the application had to be declared inadmissible for non-exhaustion of domestic remedies pursuant to Article 35(1) ECHR.⁵⁴⁰

In light of the decision in *Medov*, it appears that, although the possibility of appealing to a higher prosecutor is not a sufficient remedy under the Convention, the possibility of challenging a decision not to prosecute before a court under Article 131 of the 1960 Code constituted an effective remedy in that regard. It is however important to note that, despite the theoretical effectiveness of the remedy in question, the way in which the authorities handled the investigations and the lack of transparency in relation to the decisions not to initiate or to discontinue proceedings gave rise to findings by the Court that the remedy in question would have been ineffective in practice. For instance, in the case of *Chitayev and Chitayev v. Russia*, concerning unlawful arrest and detention, torture and inhuman and degrading treatment as well as the absence of an effective investigation, the Court expressed strong doubts as to whether the remedy under Article 131 of the 1960 Criminal Procedure Code would have been effective in the circumstances of the case and concluded that the applicants would have had no realistic opportunity to effectively challenge the decision to dispense with criminal proceedings.⁵⁴¹

Following the entry into force of the new Code of Criminal Procedure in 2002, complaints against prosecutorial decisions are now regulated by Article 125 of the Code of Criminal Procedure, which provides for a procedure by which decisions of, inter alia, investigators and public prosecutors may be challenged before the local district court. In particular, complaints may be brought against decisions not to institute criminal proceedings, decisions to terminate proceedings, as well as inaction on the part of the relevant authorities, wherever the action of omission may harm the constitutional rights and freedoms of the participants in the proceedings, or may interfere with access to the administration of justice.⁵⁴² Such an application may be filed either by an applicant, his defence counsel or other legal representative, either directly or through, inter alia, the investigator or public prosecutor. The competent domestic court is required, within 5 days of receipt of the complaint, to hold a hearing at which the the legality and

⁵³⁹ See *Trubnikov v. Russia* (dec.) (App. no. 49790/99), ECtHR 14 October 2003.

⁵⁴⁰ *Medov v. Russia* (above n. 536), § 105.

⁵⁴¹ *Chitayev and Chitayev v. Russia* (above n. 532), § 140. In particular, the Court noted that, in light of the fact that the the authorities had notified the applicants of the decision to dispense with the criminal proceedings without providing them with a copy of the decision, it was highly unlikely that the applicants would have been able to detect possible defects in the investigation and bring them to the attention of a domestic court, or to present, in a comprehensive appeal, any other arguments they might have considered relevant.

⁵⁴² 2002 RF Criminal Procedure Code (above n. 424), Art. 125(1).

motivations underlying the the challenged decision or inaction are reviewed.⁵⁴³ The judge has power to quash the decisions and to order the taking of measures to remedy any inaction identified.⁵⁴⁴

In *Kukayev v. Russia*, the Russian Government argued that it had been open to the applicant to file a complaint as to the allegedly unlawful detention of his son or, in accordance with Article 125 of the Criminal Procedure Code, to challenge in court any actions or omissions of the investigative or other law-enforcement authorities during the investigation.⁵⁴⁵ The Court firstly observed that the Government had not indicated which particular actions or omissions of the investigators the applicant should have challenged before a court, and then noted that the legal instrument referred to by the Government had only become operative on 1 July 2002, as until that date criminal law matters had been governed by the 1960 Code of Criminal Procedure. Accordingly, the Court underlined that the applicant had clearly been unable to have recourse to the remedy invoked by the Government prior to that date.⁵⁴⁶ As regards the period thereafter, the Court noted that “in a situation where the effectiveness of the investigation was undermined from a very early stage by the authorities’ failure to take necessary and urgent investigative measures, where the investigation was repeatedly stayed and reopened, where the applicant was unable to access the case file at least until December 2005, i.e. five years after his son had disappeared, and most probably thereafter, and where he was only informed of the conduct of the investigation occasionally, it was highly doubtful that the remedy invoked by the Government would have had any prospects of success”.⁵⁴⁷

Since the Court has found the vast majority of the investigations carried out by the Russian authorities in the Chechen cases to be ineffective, the possibility of challenging the progress of the investigations and the refusal to open criminal proceedings is naturally vital for victims and their relatives. Even though there is a theoretical possibility of challenging the refusal to open criminal proceedings or the progress of the criminal investigation under Article 125 of the 2002 Criminal Procedure Code, such a possibility also has to be practically available to the victim or his/her relatives. There have been several examples of cases before the European Court in which the effectiveness of such a remedy was hampered, either by the authorities’ decision to withdraw the applicant’s status as a victim⁵⁴⁸ or by failing to inform the applicant of steps taken in the investigation.⁵⁴⁹ This practice shows that even though this remedy has been found by the

⁵⁴³ Ibid., Art. 125(3).

⁵⁴⁴ Ibid., Art. 125(6).

⁵⁴⁵ *Kukayev v. Russia* (above n. 412), § 73.

⁵⁴⁶ Ibid., § 80.

⁵⁴⁷ *Kukayev v. Russia* (above n. 412), § 101.

⁵⁴⁸ See e.g. *Imakayeva v. Russia* (above n. 501), § 84 and § 165.

⁵⁴⁹ See e.g. *Bazorkina v. Russia* (above n. 412), § 84 and § 165.

Court to be theoretically effective, the victims or their relatives are often in practice still prevented from using it.

As regards at least some of the problems relating to the application of Article 125 in practice, the Russian Government has recently relied on the fact that, on 10 February 2009, the Supreme Court of the Russian Federation adopted a ruling laying down guidelines on the application of Article 125 of the 2002 Criminal Procedure Code; in that regard, it was stressed that the exercise of the remedy under Article 125 was not contingent upon the formal procedural status of the party in criminal proceedings and that “any limitation of the right to challenge the investigators’ decisions, actions or omissions [...] on the sole ground that the complainant was not granted a procedural status in criminal proceedings was unacceptable.”⁵⁵⁰

As regards the effectiveness of Article 125 of the Criminal Procedure Code, the Department for the Execution of Judgments, having referred to the judgments of the Court in relation to the Chechen cases in which it was concluded that the availability of Article 125 could not be regarded as an effective remedy due to the prior failings in the investigation, observed that the provision in question “was clearly not designed for the situation of general breakdown of all public institutions or to combat general unwillingness or incapacity of the authorities to carry out the investigations.”⁵⁵¹ However, it observed that the current situation appeared to be different from that existing at the time of those events, and that it was necessary to assess whether the remedy could, in principle constitute an effective remedy under normal circumstances.⁵⁵² In that regard, having noted that another reason underlying the Court’s treatment of the remedy provided by Article 125 of the Criminal Procedure Code as being ineffective was the fact that the victims were denied access to the case-file, and therefore were prevented from effectively challenging decisions,⁵⁵³ the Department observed that “[...] although it is important to ensure the necessary level of public scrutiny over domestic investigations through the appropriate access of victims to the case-file, the ultimate purpose of the remedy provided by Article 125 CCP should be to rectify the shortcomings of domestic investigations.”⁵⁵⁴ The Department for the Execution of Judgments noted that at that time it was “difficult to reach a conclusion as to the capability of this remedy to rectify the shortcomings of domestic investigations”; having noted the Ruling of the Supreme Court, it called for information on the results of the application of Article 125 following the Ruling.⁵⁵⁵ It further noted that the effectiveness of the remedy provided by Article 125

⁵⁵⁰ CoE doc. CM/Inf/DH(2010)26 of 27 May 2010, §§ 58 and 59.

⁵⁵¹ Ibid. § 66.

⁵⁵² Ibid., § 67.

⁵⁵³ Ibid., § 68.

⁵⁵⁴ Ibid., § 70 (emphasis in original).

⁵⁵⁵ Ibid., § 71 (emphasis in original)

“cannot be appreciated *in abstracto* but remains closely contingent on other measures which are being taken by the Russian authorities”.⁵⁵⁶ Similarly, the Committee of Ministers, in a Decision adopted during its examination of the matter in June 2009, although taking note of the decision of the Supreme Court, noted that the effectiveness of that remedy remained to be assessed in practice.⁵⁵⁷

(g) Reopening of investigations

The Committee of Ministers has affirmed that “the respondent State has a continuing obligation to conduct effective investigations inasmuch as procedural violations of Articles 2 or 3 have been found” by the Court.⁵⁵⁸ As the Court has found a lack of effective investigations in the majority of the Chechen cases, the Committee normally examines the state of proceedings in each individual case. So far, the Committee has examined the individual measures taken in eight Chechen cases.⁵⁵⁹

An applicant is entitled to write to the Committee of Ministers to submit any complaints that he/she may have as to the adequacy of the measures proposed or taken by the respondent State.⁵⁶⁰ On 4 October 2005, the applicants in six of the first Chechen cases provided the Committee of Ministers with detailed submissions regarding individual measures to be adopted by the Russian authorities and noted that these cases represented “the first opportunity for the Committee of Ministers to begin to monitor the compliance of the Russian Federation vis-à-vis its actions in Chechnya”.⁵⁶¹

The judgments in question required the Russian Federation to pay damages and costs within three months of the judgments becoming final, that was, by 6 October 2005. Those payments were made by Russia to the applicants on 15 September 2005.⁵⁶² The

⁵⁵⁶ *Ibid.*, § 72.

⁵⁵⁷ CoE doc. CM/Del/Dec(2009)1059 (above n. 531), Decision, §§ 6 and 7.

⁵⁵⁸ CoE doc. CM/Inf/DH(2006)32 rev. 2 (above n. 396), § 7, citing Interim Resolution CM/ResDH(2005)20 (above n. 513). This obligation is in accordance with the Committee of Ministers’ practice. See notably Interim Resolution CM/ResDH(2005)20, adopted by the Committee of Ministers at its 914th meeting on 23 February 2005.

⁵⁵⁹ *Khashiyev and Akayeva v. Russia* (above n. 408); *Bazorkina v. Russia* (above n. 412); *Imakayeva v. Russia* (App. no. 7615/02), Reports 2006-....; *Estamirov v. Russia* (above n. 451); *Luluyev and Others v. Russia* (above n. 413); *Chitayev and Chitayev v. Russia* (App. no. 59334/00), judgment of 18 January 2007; *Isayeva, Yusupova and Bazaeva v. Russia* (above n. 408); and *Isayeva v. Russia* (above n. 408).

⁵⁶⁰ Rule 9(1), CoM Rules 2006 (above n. 330) (Communications to the Committee of Ministers). See previously, Rule 6 of the *Rules adopted by the Committee of Ministers for the Application of Art. 46, Paragraph 2 of the European Convention for Human Rights*, 10 January 2001. See also C. Ovey and R. White, *Jacobs and White: the European Convention on Human Rights* (4th ed., OUP, 2006), p. 102.

⁵⁶¹ “Applicants’ submission regarding compliance with the judgments of the European Court of Human Rights (Rule 6 of the Committee of Ministers’ Rules)”, 4 October 2005, p. 4, § 14, available at <http://www.londonmet.ac.uk/library/i81669_24.doc>. On 4 June 2007, the applicants in *Bazorkina* (above n. 412), *Estamirov* (above n. 451), *Luluyev and Others* (above n. 413), *Imakayeva* (above n. 501) and *Chitayev and Chitayev* (above n. 532) lodged similar observations: see Department for the Execution of Judgments, Pending Cases, State of Executions, Cases or groups of cases against Russia, available from <http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp> [accessed 15 May 2009].

⁵⁶² “Applicants’ submission” (above n. 561), p. 2, §§ 4-5.

applicants submitted that “in the light of the experience in the Turkish cases,^[563] the Committee should [...] adopt a very rigorous and comprehensive approach to the question of compliance in respect of Chechnya”.⁵⁶⁴ What is relevant for this case study is that the applicants, inter alia, requested investigations and the re-opening of domestic proceedings.⁵⁶⁵

Of the eight cases examined so far by the Committee, the investigations in seven of these cases were re-opened. However, in only one case was information submitted by Russia regarding new investigative actions which had been taken, such as the questioning of witnesses, ballistic examinations and gathering of materials.⁵⁶⁶ Although the investigations were re-opened, two of them were subsequently closed,⁵⁶⁷ five were adjourned⁵⁶⁸ and no information was provided about *Chitayev and Chitayev* or about the investigation into the abduction of the applicant’s son in *Imakayeva*. The majority of the re-opened investigations were closed or adjourned due to failure to identify the culprits on the basis of Article 208(1)(1) of the Russian Criminal Procedure Code; others were closed or adjourned on the basis of Article 24(2) of the Criminal Procedure Code for the absence of a *corpus delicti* in relation to the alleged acts of the servicemen.

In September 2008, the representatives of the applicants in three of the Chechen cases again submitted observations in response to the measures adopted notified by Russia. Noting that over three years had elapsed since the first three judgments concerning actions of the security forces in Chechnya had become final, the applicants stated that, notwithstanding Russia’s assurances that the investigations had been reopened, “neither the applicants nor their representatives have been informed about any of the decisions made in the course of these criminal investigations (in spite of the provisions to that effect in Article 42(2) of the Criminal Procedure Code)”.⁵⁶⁹ Further, the applicants submitted that it was “evident” that the Russian Federation had “manifestly failed to demonstrate either ‘rapid’ or ‘visible’ progress in the conduct of investigations, as it has

⁵⁶³ By 2005, the Court had issued 74 judgments and decisions finding that Turkey was responsible for numerous breaches of the Convention relating to the actions of its security forces, including disappearances, homicides, torture and ill-treatment, destruction of property and also relating to the lack of effective domestic remedies against responsible state officials, see cases and violations listed in Interim Resolution CM/ResDH(2005)43, adopted by the Committee of Ministers on 7 June 2005 at the 928th meeting of the Ministers’ Deputies, Appendix III.

⁵⁶⁴ “Applicants’ submission” (above n. 561), p. 4, § 14.

⁵⁶⁵ Ibid.

⁵⁶⁶ *Khashiyev and Akayeva v. Russia* (above n. 408). See Department for the Execution of Judgments, Pending Cases, State of Executions, Cases or groups of cases against Russia, available from <http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp> [accessed 15 May 2009].

⁵⁶⁷ *Isayeva, Yusupova and Bazaeva v. Russia* (above n. 408) and *Isayeva v. Russia* (above n. 408).

⁵⁶⁸ *Khashiyev and Akayeva v. Russia* (above n. 408); *Bazorkina v. Russia* (above n. 412); *Imakayeva v. Russia* (above n. 501); *Estamirov v. Russia* (above n. 451); and *Luluyev and Others v. Russia* (above n. 413).

⁵⁶⁹ “EHRAC and Memorial Memorandum” (above n. 447), § 8. The submissions concerned the measures taken in execution of the Court’s judgments in *Khashiyev and Akayeva v. Russia* (above n. 408); *Isayeva v. Russia* (above n. 408); and *Isayeva, Yusupova and Bazaeva v. Russia* (above n. 408).

been exhorted to do by the Committee of Ministers”.⁵⁷⁰ The applicants stated that “there is nothing to indicate that any measures taken since the judgments were adopted [...] have made any further progress whatsoever. There is also no sign that errors and omissions made in the course of the original investigations, and which were identified by the Court, have been eradicated.”⁵⁷¹ The applicants have submitted that “it is of vital importance that [the Russian Federation] should be required to provide full disclosure of the case files in each of the cases”.⁵⁷² The Russian Government acknowledges that domestic law (Article 42 of the Criminal Procedure Code) allows for such disclosure to victims.⁵⁷³ The applicants have in particular requested disclosure of documents which have been referred to by the Russian authorities, such as documents containing witness statements, forensic data etc.⁵⁷⁴ The applicants have also submitted that Russia should be “required to confirm what particular steps have been taken in order to identify and prosecute the persons named by the Russian authorities’ as responsible in *Isayeva, Yusupova and Bazaeva v. Russia*”⁵⁷⁵ and to confirm what steps have been taken in order to prosecute the servicemen “whose specific roles and responsibilities were referred to by the Court in the case of *Isayeva*”.⁵⁷⁶ In conclusion, the applicants invited the Committee of Ministers to find that the Russian Federation had failed so far to comply with its obligations under Article 46 of the Convention.⁵⁷⁷

According to the latest information provided by the Russian Federation to the Committee of Ministers which is publicly available, the reopened investigations required in those Chechen cases where the Court identified an inadequate initial investigation now fall under the authority of the Investigating Committee within the *Prokuratura* of the Russian Federation, which was established in September 2007.⁵⁷⁸ The Russian authorities indicated that at that time a special working group had been created within the Investigating Committee to deal with reopened investigations and to ensure the implementation of appropriate individual measures; subsequently, that group has been

⁵⁷⁰ “EHRAC and Memorial Memorandum” (above n. 447), § 10.

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*, § 11. Russia has in numerous cases relied on Art. 161 of the 2002 RF Criminal Procedure Code (above n. 424) in order to seek to justify its refusal to disclose documents from the domestic criminal case-files. The Article provides that, as a general rule, data from the preliminary investigation may not be disclosed; however, Art. 161(3) provides that information from the investigation file may be divulged with the permission of a prosecutor or investigator but only in so far as it does not infringe the rights and lawful interests of the participants in the criminal proceedings and does not prejudice the investigation. The Court has found that this stance is contrary to the Russian Government’s obligations under Article 38(1)(a) (examination of the case and friendly settlement proceedings) of the Convention (see e.g. *Estamirov and Others v. Russia* (above n. 451), § 103).

⁵⁷³ See information provided by Russia at the 1007th meeting of the Committee of Ministers’ Deputies, October 2007.

⁵⁷⁴ For a detailed list, see “EHRAC and Memorial Memorandum” (above n. 447), § 11.

⁵⁷⁵ *Isayeva, Yusupova and Bazaeva v. Russia* (above n. 408).

⁵⁷⁶ *Isayeva v. Russia* (above n. 408). See “EHRAC and Memorial Memorandum” (above n. 447), § 13.

⁵⁷⁷ *Ibid.*, § 14.

⁵⁷⁸ See “Annotated Agenda and Decisions, 1059th (DH) meeting, 2-4 and 5 (morning) June 2009”, CoE doc. CM/Del/OJ/DH(2009)1059 Section 4.3 PUBLIC rev, 2 July 2009.

formalised as a Special Investigative Unit within the Investigating Committee within the Prokuratura; in June 2009, the Committee of Ministers welcomed the adoption of these measures.⁵⁷⁹ The Department for the Execution of Judgments has expressed the view that, notwithstanding these positive developments, in view of the need for general measures to improve investigations, the issue of individual measures is to a large extent integrated into that of general measures.⁵⁸⁰

In conclusion, the Committee of Ministers has followed the actions taken in regards to the cases being re-opened and continues to follow their development. The Committee has welcomed the steps taken but has continuously encouraged the authorities to make rapid and visible progress in the conduct of the new investigations.⁵⁸¹ The Department for the Execution of Judgments has noted that, “[o]n a more general level, the progress and the results of these investigations may provide useful indications for the assessment of the effectiveness of the domestic investigative procedures set up by the new Code of Criminal Procedure in force since July 2002 and other subsequent rules (as opposed to rules in force at the time of the events impugned by the Court)”.⁵⁸²

The Russian Federation has so far failed to provide detailed information to the Committee of Ministers regarding how the re-opened investigations have been conducted, and it is therefore difficult to assess whether the defect identified by the Court in the original investigation have been addressed in a satisfactory manner.⁵⁸³ However, it appears that in none of the cases re-examined so far at the domestic level has the new investigation led to a different result than that reached in the original investigation; and in particular, none of the re-opened investigations has led to a prosecution. In particular, in a study published in September 2009, Human Rights Watch attempted to assess Russia’s compliance with 33 of the Chechen cases which had been decided at that time. The Report notes that up to that point, “no perpetrator in any of these cases has been brought to justice, even in cases in which the court has found that the perpetrators are known, and in some instances even named in its judgments”.⁵⁸⁴ Further, the Report noted continuing problems in a number of aspects concerning the investigations, including “failure to inform the aggrieved parties about the investigation;

⁵⁷⁹ CoE doc. CM/Del/Dec(2009)1059 (above n. 531), Decision, § 1.

⁵⁸⁰ See “Annotated Agenda and Decisions, 1059th (DH) meeting” (above n. 578).

⁵⁸¹ CoE doc. CM/Inf/DH(2006)32 rev. 2 (above n. 396), §§ 13-14. See also “Decisions adopted at the 955th (DH) meeting of the Ministers’ Deputies, 7-8 February 2006”, CoE doc. CM/Del/Dec(2006)955 of 22 February 2006.

⁵⁸² CoE doc. CM/Inf/DH(2006)32 of 29 June 2006, § 11.

⁵⁸³ The information provided by Russia to the Committee of Ministers is at present not publicly available in the documents regarding state of execution or in any other publicly available document; however, even with regard to information not publicly available, it has been observed that “only brief, skeletal details about the steps taken in the course of the investigations have been provided by the Russian authorities”; see “EHRAC and Memorial Memorandum” (above n. 447), § 9.

⁵⁸⁴ Human Rights Watch, “*Who Will Tell Me What Happened to My Son?: Russia’s Implementation of European Court of Human Rights Judgments on Chechnya*”, 27 September 2009, available at <http://www.hrw.org/en/reports/2009/09/28/who-will-tell-me-what-happened-my-son>, p. 1

failure to provide access to criminal case files; inexplicable delays in investigation; and legal obstacles preventing investigators from accessing key evidence held by Russian military or security services”.⁵⁸⁵ As the report noted, similar problems with investigations have led the Court to find violations in a number of the Chechen cases.⁵⁸⁶ In addition, Human Rights Watch noted that, in a number of cases, the relevant authorities had “flatly contested several of the European Court’s judgments apparently in order to justify closing investigations and refusing to bring charges against perpetrators. This has occurred even in cases in which those responsible or their superiors are known and named in European Court judgments, or could readily be known.”⁵⁸⁷ On the basis of that information, it would appear that the investigations conducted following the Court’s judgments have not been effective in ensuring the accountability of the members of the security forces responsible for abuses.

2.6 Impact

Some indications as to the impact of the Chechen judgments on the capability of the Russian legal system to carry out effective investigations and prosecutions of abuses by members of the security forces may be gleaned from the analysis of the statistical data concerning investigation and prosecutions before and after the Court’s judgments. In this regard, it has to be noted at the outset that it is particularly difficult to gather statistical information concerning domestic investigations and prosecutions of killings and acts of torture and ill-treatment perpetrated by Russian servicemen in Chechnya. Official statistics are not publicly available at the domestic level and even the statistics provided by the Russian authorities to the Committee of Ministers and other organs of the Council of Europe are unclear in a number of respects and incomplete. In order to obtain a clearer picture of the situation, in the present section reference is also made to statistics obtained from other sources, in particular from NGOs.

Further, some anecdotal evidence as to the level of impact may be gathered from the analysis of a few particularly notorious cases. Below, the outcomes of a number of domestic prosecutions, on which it was possible to obtain some detailed information from wider sources, are examined.

⁵⁸⁵ Ibid.

⁵⁸⁶ Ibid.

⁵⁸⁷ Ibid. and pp. 15, 17 and 18.

2.6.1 Examples of domestic prosecutions

The *Budanov* case was the first case concerning prosecution of a high-ranking Russian official for abuses committed against civilians in Chechnya. The case concerned the abduction in March 2002 from her home by Russian soldiers of a young Chechen woman, who was later found dead. Medical reports indicated that she had been beaten, raped, and then strangled.⁵⁸⁸ Russian authorities promptly started an investigation and arrested Colonel Yuri Budanov, who admitted that he had strangled the young woman in a fit of rage, but claimed that he had been “temporarily insane”. The investigation found that Budanov and three of his subordinates had kidnapped the girl at gunpoint from her home and took her to Budanov’s quarters. After he was alone with the woman for about two hours, Budanov ordered his subordinates, who stood guard outside, to bury her corpse. In the *Budanov* case, the Russian authorities devoted unprecedented resources, and launched an investigation which has been regarded as “diligent” by human rights groups.⁵⁸⁹ However, in December 2002, Colonel Budanov was found to have been “temporarily insane” and was acquitted by a military court.⁵⁹⁰ In February 2003, the Supreme Court ordered a retrial and in July of the same year, Colonel Budanov was eventually found guilty of kidnapping, murder and abuse of power and sentenced to 10 years imprisonment.⁵⁹¹ Budanov was then paroled on 15 January 2009.⁵⁹² Just a few days after Budanov’s parole, the lawyer representing the murdered woman was shot dead in Moscow.⁵⁹³

Quite apart from the eventual outcome of the case, the fact that defendants are found to have been “temporarily insane” is a relatively common occurrence in the context of proceedings against Russian servicemen accused of abuses. According to the Rapporteur of the Parliamentary Assembly’s Committee of Legal Affairs and Human Rights, “Russian soldiers responsible for killings of Chechen civilians and other human rights violations are often considered by the judges as non accountable for their crimes

⁵⁸⁸ For details of the case, see, e.g., Memorandum from Human Rights Watch, to Members of the Committee on the Elimination of Discrimination against Women of 10 January 2002.

⁵⁸⁹ Human Rights Watch, “Russia/Chechnya: Justice flouted in military murder case” (2002), available at <http://web.radicalparty.org/pressreview/print_right.php?func=detail&par=4111>. Elizabeth Andersen, executive director of Human Rights Watch’s Europe and Central Asia Division, has stated that “with this trial, Russia hoped to showcase a commitment to accountability. But even in this clear-cut case, justice was flouted. Russia’s commitment was obviously shallow” (ibid.).

⁵⁹⁰ Human Rights Watch, “Russia/Chechnya: Justice flouted in military murder case” (2002).

⁵⁹¹ See “Colonel jailed for Chechen murder”, BBC News, 25 July 2003, available at <<http://news.bbc.co.uk/2/hi/europe/3095003.stm>>.

⁵⁹² See e.g. A. Odynova, “Budanov granted early release”, *The Moscow Times*, 15 January 2009, available at <<http://www.themoscowtimes.com/article/373590/index.html>>; and A. Odynova, “Budanov granted parole from prison”, *The Moscow Times*, 16 January 2009, available at <<http://www.themoscowtimes.com/article/373610/index.html>>.

⁵⁹³ See e.g. N. Krainova, “Lawyer Fighting Budanov’s Release Killed in Moscow”, *The Moscow Times*, 19 January 2009, available at <<http://www.themoscowtimes.com/article/373669/index.html>>; and “Murdered Chechen girl’s lawyer shot dead in Moscow”, *Radio Free Europe Radio Liberty*, 14 September 2009, available at <http://www.rferl.org/content/Murdered_Chechen_Girls_Lawyer_Shot_Dead_In_Moscow/1372057.html>.

because they were drunk or psychologically disturbed at the moment of the facts” in question.⁵⁹⁴

The *Ulman* case concerned the trial of four Russian servicemen accused of killing six Chechen civilians, including a pregnant woman and a teenager, in January 2002. Captain Ulman and his men were acquitted by a jury in the town of Rostov-on-Don on the basis that they had obeyed orders from an unnamed commander. The acquittal was appealed by the prosecution. However, following an order for retrial from the Military Collegiate of the Supreme Court, the men were again found not guilty at the same court in May 2005. Although the four had admitted to the killings, the court ruled that their actions were not punishable as they had been following orders.⁵⁹⁵ In August 2005, the Supreme Court overturned the second verdict and sent the case back for retrial to the same court where a third retrial was scheduled for November 2005. While awaiting trial, the four men had not been suspended from service in the Russian military intelligence unit (GRU). On 14 June 2007, the military court in Rostov-on-Don found Ulman and his three subordinates guilty of the killing of the six civilians in 2002. However, Ulman and two other servicemen failed to attend court and were sentenced *in absentia* for 14, 12 and 11 years, respectively. The fourth serviceman, who was present in court, was jailed for nine years.⁵⁹⁶

The *Ulman* case is often referred to as one of the few examples where the authorities made efforts to fight against the still-prevailing climate of impunity in relation to the events in Chechnya.⁵⁹⁷ However, despite the efforts of the authorities in that regard, three of those convicted are still at large, and reprisals have been taken against the relatives of the victims. A demonstration was held in Grozny on 28 June 2007 to protest the searches that had been carried out of the homes of relatives of Chechen civilians who had been killed for which servicemen were facing trial. Further, according to a media reports, the protesters claimed that 15 relatives and a neighbour of the six victims of Ulman and his subordinates have disappeared since the trial of the officers began and “NGO representatives accused the federal Prosecutor General’s Office of returning to

⁵⁹⁴ PACE, Committee of Legal Affairs and Human Rights (R. Bindig, Rapporteur), “Human rights violations in the Chechen Republic: the Committee of Ministers’ responsibility vis-à-vis the Assembly’s concerns”, PACE Doc. 10774, 21 December 2005, available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc05/edoc10774.htm>; Explanatory Memorandum of Mr Bindig, § 12.

⁵⁹⁵ A. Osborn, “Russian soldiers cleared of Chechen murders”, *The Independent*, 1 May 2004, available at <http://www.independent.co.uk/news/world/europe/russian-soldiers-cleared-of-chechen-murders-568417.html>.

⁵⁹⁶ See “4 soldiers convicted in Chechen murders”, *The Moscow Times*, 15 June 2007, available at <http://www.themoscowtimes.com/article/196333/index.html>.

⁵⁹⁷ See, e.g., US Department of State, Bureau of Democracy, Human Rights, and Labor, “2007 Country Reports on Human Rights Practices – Russia”, 11 March 2008, available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100581.htm>, noting that “in most cases security forces acted against civilians with impunity, and even the limited efforts by authorities to impose accountability failed. One exception was the June 14 conviction of Eduard Ulman, who was sentenced to 14 years in prison for killing Chechen civilians”.

the practice of *total zachistki*, or security sweeps, of the kind carried out by the Russian military during the early years of the ‘counter-terrorist operation in Chechnya’.⁵⁹⁸

From the available sources, it appears that no one has been prosecuted for a disappearance in Chechnya. According to NGO sources, there has only been one case of disappearance for which a police officer or member of the armed forces has been held accountable, although the prosecution was not in relation to the disappearance itself, but for torture. Sergei Lapin, a senior lieutenant from the criminal investigation department of the Russian Internal Affairs Department, was arrested and charged in connection with allegations of torture in detention of a Chechen resident, Zelimkhan Murdalov, who had disappeared in January 2001 after having been detained by agents of the Russian Special Purpose Police Squad in Grozny. A criminal investigation was opened into his disappearance and the investigation concluded that the victim had been taken into custody Lapin and another unidentified official. Lapin had beaten the detainee with a truncheon and subjected him to electrical shock treatment; the next day, the victim was taken out of his cell by Lapin and other unidentified servicemen and he was never seen again.⁵⁹⁹ Lapin was arrested and charged in January 2002 with various offences related to Murdalov’s disappearance and murder, including “intentional infliction of serious harm to health under aggravating circumstances” but was released pending trial in May 2003. In March 2005, he was found guilty of torturing Murdalov and he was sentenced to 11 years’ imprisonment.⁶⁰⁰ Interestingly, Lapin was not charged with the murder of Murdalov, although Murdalov disappeared after his detention, but with inflicting serious harm. According to NGO sources, the cause of the lack of more domestic cases in relation to disappearances is that such cases are simply easier to “sweep under the rug” as there is no corpse.⁶⁰¹

2.6.2 Statistics

As observed by the Department for the Execution of Judgments, “statistics of criminal cases brought against officials before courts constitute a useful indicator of the effectiveness of criminal sanctions against abuses”.⁶⁰² However, as noted above, it is extremely difficult to find comprehensive and reliable information regarding

⁵⁹⁸ “Chechens Protest Disappearances Connected to Ulman Case”, *North Caucasus Weekly*, vol. 8 (2007), issue 26.

⁵⁹⁹ Amnesty International, “Russian Federation: Russian police officer found guilty of crimes against the civilian population in the Chechen Republic”, (2005) AI Index EUR 46/011/2005, available at <<http://www.amnesty.org/en/library/asset/EUR46/011/2005/en/4e77d14f-fa22-11dd-999c-47605d4edc46/eur460112005en.pdf>>, p. 1.

⁶⁰⁰ Trial Watch, “Sergei Lapin”, 11 August 2009, available at < http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/sergei_lapin_808.html>.

⁶⁰¹ Interview with Ole Solvang, former Director of the Russian Justice Initiative (phone interview, 9 October 2008).

⁶⁰² CM/Inf/DH(2006)32, 29 June 2006, § 47.

investigations and prosecutions of abuses committed by Russian servicemen in Chechnya. The following statement by the Russian authorities may indeed explain why it is almost impossible to obtain clear and reliable official statistics: “[a]s the practice of relations with international organizations has shown, a publication of statistics [on criminal convictions for the crimes of military officers against civilians] may be used to harm the interests of the Russia Federation”.⁶⁰³

The present section analyses statistics communicated to the Committee of Ministers by the Russian authorities, as well as statistics cited by United Nations Special Rapporteurs, the Council of Europe Rapporteurs, the United States, and NGOs. Such statistics often refer to investigations and prosecutions under different articles of the Russian Criminal Code or with no reference at all as to the legal basis of the prosecution, which makes any meaningful analysis extremely difficult.

According to statistics provided in 2007 by the Russian General Prosecutor’s Office to the Directorate General of Human Rights of the Secretariat of the Council of Europe, since 1999, the time of the first “anti-terrorist” operations in Chechnya, the Military Prosecutor’s Office had opened 245 criminal cases in relation to crimes allegedly committed by servicemen.⁶⁰⁴ Out of those cases, 98 cases concerning 127 servicemen had been transferred to military courts for trial; 62 cases had been discontinued for various reasons (including the application of an amnesty,⁶⁰⁵ the lack of a *corpus delicti* or following the death of the accused); and 85 cases were still under investigation.⁶⁰⁶ No statistics regarding the number of convictions were provided by the Russian authorities.⁶⁰⁷

In 2007, the Department for the Execution of Judgments asked for updates and details about the outcome of the criminal trials referred to in the statistic provided by the Russian authorities, as well as specific examples of relevant judicial decisions.⁶⁰⁸ In 2008, the Russian authorities stated that since 1999, the competent investigative bodies had investigated 271 criminal cases.⁶⁰⁹ Investigations had been completed in 186 cases,

⁶⁰³ “EHRAC and Memorial Memorandum” (above n. 447), § 8. The quote is from the Russian government’s submission to the Committee of Ministers.

⁶⁰⁴ See CoE doc. CM/Inf/DH(2006)32 rev. 2 (above n. 396), § 75.

⁶⁰⁵ It is worth noting that Art. 84 RF Criminal Code (above n. 427) deals with amnesties; it provides: “(1) Amnesty may be declared by the State Duma of the Federal Assembly of the Russian Federation with regard to a broad class of persons. (2) Persons who have committed crimes may be relieved from criminal responsibility by an act of amnesty. Persons convicted for the commission of crimes may be released from punishment, or the punishment imposed on them may be reduced or replaced with a milder penalty, or such persons may be released from the additional penalties. The criminal records may be struck from persons who have served punishment, through an act of amnesty.”

⁶⁰⁶ CoE doc. CM/Inf/DH(2006)32 rev. 2 (above n. 396), § 75.

⁶⁰⁷ *Ibid.*, § 76.

⁶⁰⁸ The Department for the Execution of Judgments asked, *inter alia*, for number of convictions for abuses per year, facts and legal grounds at their basis, indication of whether the sentence imposed has been or is being effectively served: see CoE doc. CM/Inf/DH(2006)32 rev. 2 (above n. 396), § 91.

⁶⁰⁹ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 127.

out of which 108 cases concerning 137 servicemen had been sent to trial, and the military courts had examined criminal cases concerning 130 servicemen.⁶¹⁰ The Department for the Execution of Judgments welcomed the statistics and took note of the fact that “the Supreme Court of the Russian Federation upheld the conviction of two former officers of the Russian Army to 15 and 17 years imprisonment for the unlawful killing of civilians during an anti-terrorist operation in the Chechen Republic”.⁶¹¹ However, it expressed the view that, given the reports by various monitoring bodies of the Council of Europe expressing serious concerns in relation to continuing instances of torture and ill-treatment by law enforcement agents in Chechnya,⁶¹² “the number of prosecutions opened in respect of [offences committed by servicemen] continues to be extremely small in relation to the number of complaints forwarded to the *Prokuratura*”.⁶¹³ The Department for the Execution of Judgments accordingly concluded that the Committee of Ministers should “invite the Russian authorities to intensify their efforts so as to ensure that all allegations are effectively investigated and lead, where necessary, to the prosecution of those responsible”.⁶¹⁴

It is not possible to draw any significant conclusions from the statistics provided by Russia to the Committee of Ministers as no reference is made to the legal basis for the prosecutions and no information is provided on the number of convictions. However, the number of cases discontinued in 2007 seems high in comparison with the total number of cases transferred to the courts, a fact which tallies with the developments in relation to the re-opening of cases examined earlier in this case study.⁶¹⁵ Furthermore, the number of cases must be compared with the real number of crimes committed by servicemen. Whether 271 criminal cases investigated by the Russian investigative bodies since the first anti-terror operations, now over 10 years ago, is a large or small quantity depends therefore on the actual number of crimes committed by servicemen during this period. There is no way of knowing exactly how many crimes were actually committed. However, one indicator which shows that the number of 271 cases investigated is exceptionally small is the fact that, according to NGOs, as many as 5000 civilians have disappeared in Chechnya since 1999. This number refers only to those who have disappeared, and does not cover all the killings and instances of torture and ill-treatment.

⁶¹⁰ Ibid.

⁶¹¹ Ibid., § 128..

⁶¹² CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 129; the Department for the Execution of Judgments especially referred to the conclusions of the Commissioner of Human Rights on his visit to the Chechen Republic in 2007 and the CPT’s public statement regarding the Chechen Republic made in 2007, to the effect that practices of torture and ill-treatment were widespread in Chechnya: see “Initial conclusions of the visit of the Commissioner for Human Rights in the Chechen Republic of the Russian Federation” (2007) CoE Doc CommDH(2007)6; “Public statement concerning the Chechen Republic of the Russian Federation” CPT/Inf(2007)17 (above n. 465), in particular § 15.

⁶¹³ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 130.

⁶¹⁴ Ibid.

⁶¹⁵ See above, Section 2.5.2(g).

Statistics from other sources as to the number of complaints of killings and ill-treatment reinforce the conclusion that the number of investigations is extremely low. More detailed statistics than those provided by the Russian authorities to the Committee of Ministers have been collected by other Council of Europe bodies. In the preparation of a report in relation to Chechnya as Rapporteur of the Committee of Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, Rudolph Bindig raised concerns as to a number of individual cases of human rights violations with the Prosecutor General of the Russian Federation.⁶¹⁶ The response from the Prosecutor General is summarized in the tables below.

Table 1 – Killings⁶¹⁷

Year	Total number of complaints relating to killings	Criminal cases opened	Opening of criminal case refused	Cases transferred (to the military prosecutor's office)	Cases referred to court
2004	251	151	93 (89 due to "absence of crime")	7	54 (involving 70 suspects)
2005 (first six months)	91	54	29 (26 due to "absence of crime")	8	31 (involving 34 suspects)

Table 2 – Abductions⁶¹⁸

Year	Total number of complaints relating to abductions	Criminal cases opened	Opening of criminal case refused	Cases transferred (to the military prosecutor's office)
2004	432	168	261	7
2005 (first six months)	211	62	145	8

⁶¹⁶ For a detailed list of the cases, see PACE, Committee of Legal Affairs and Human Rights, "Human rights violations in the Chechen Republic" (above n. 594), Appendixes I-II to Letter of 12 October 2005 from Mr. Rudolf Bindig to Mr. Vladimir V. Ustinov, Prosecutor General, Appendix A to the Explanatory Memorandum by Mr Bindig. Mr. Bindig asked for information on the state of investigations and statistical information on: the number of complaints relating to alleged serious violations received by civilian and military prosecutor's offices in the Chechen Republic; on criminal cases opened; indictments; and convictions by courts. See also *ibid.*, Explanatory Memorandum by Mr Bindig, at § 12.

⁶¹⁷ *Ibid.*, § 13b.

⁶¹⁸ *Ibid.*

The figures in Table 1 above show that 60% of the complaints regarding killings led to a criminal case being opened in 2004 and a similar proportion (ca. 59%) in the first six months of 2005. The proportion of complaints regarding abductions that led to a criminal case being opened was lower, with only some 40% of the complaints regarding abductions resulting in the opening of a criminal case in 2004, and 29% of the complaints in the first six months of 2005. As regards convictions, over the period 2000-2005⁶¹⁹ convictions were obtained for 30 persons accused in 21 criminal cases relating to abductions.⁶²⁰ So little information is provided regarding convictions and sentencing that it is impossible to evaluate the outcome of the investigations.

In 2004, the prosecutor's office examined 9 complaints of rape, compared to 12 in the first six months of 2005. In 2004, a criminal case was opened in only 1 case, and was refused in 8 on the basis of "absence of crime", while in 2005 a criminal case was opened in 7 cases and refused in 5. 6 criminal cases relating to rape were referred to the courts involving 9 defendants, while in 2005, 9 cases involving a total of 10 suspects were referred.

From the information provided by the Prosecutor General, it appears that the articles under which suspects were normally charged are Articles 105(1) (killing), 105(2) (assassination under aggravating circumstances), 109(3) (infliction of death by negligence), 126(1) (kidnapping), 126(2) (kidnapping under aggravating circumstances), 127 (illegal deprivation of liberty), and 286(3) (abuse of power with use of force) of the Russian Criminal Code.⁶²¹ It is encouraging to see that these provisions are being used for instituting investigations against servicemen as they all deal with serious crimes. However, again, in order to assess the actual impact on prosecutions, it is necessary to know the outcome of the investigations and criminal proceedings in order to be sure that the proceedings are not simply a sham. The data provided by the Prosecutor General also confirm the conclusion set out above, namely that a large number of investigations are discontinued for various reasons; in particular, according to the Prosecutor General, a large number of investigations were suspended on the basis of Article 208(1) of the Russian Code of Criminal Procedure (failure to identify the culprits).⁶²²

Leaving to one side the far from incomplete data provided to the Council of Europe by the Russian authorities, the most reliable data as to investigations and prosecutions would appear to be those painstakingly collected by the Russian NGO Memorial. In 2003, Memorial published a study on the situation of the investigation of crimes against civilians committed by members of the Russian armed forces in the Chechen Republic in

⁶¹⁹ Including the first six months of 2005.

⁶²⁰ PACE, Committee of Legal Affairs and Human Rights, "Human rights violations in the Chechen Republic" (above n. 594), Explanatory Memorandum by Mr Bindig, at § 13b.

⁶²¹ *Ibid.*, Appendix II.

⁶²² See the cases referred to *ibid.* Appendix I to the Explanatory Memorandum by Mr Bindig.

the period between 1999 and 2003.⁶²³ Memorial reported that, according to information provided by the Office of the Public Prosecutor of the Russian Federation to the organization, during the relevant period, courts martial had resulted in guilty verdicts against 51 servicemen in relation to crimes committed against Chechen civilians.⁶²⁴ However, only 19 out of the 51 servicemen found guilty were sentenced to meaningful deprivation of liberty, with the period of detention ranging from one to eighteen years.⁶²⁵ Of the remaining 32 soldiers, three were released under amnesties, 24 were condemned to various periods of deprivation of liberty but placed on probation; three were sentenced to a “restriction on military service”; while two were sentenced to pay a fine.⁶²⁶ In the report, Memorial provides countless examples of cases in which the guilty serviceman was given only a symbolic sentence for very serious crimes; in addition, in many of the cases examined, where prison sentences were imposed, they were combined with probation, making the period of actual deprivation of liberty non-existent or very limited.⁶²⁷

Memorial further noted that “the reports of the office of the public prosecutor show completely different approaches to investigations of crimes on the basis of whether they had been committed by members of the Federal Forces, or by rebel fighters”.⁶²⁸ Rebel fighters were often charged under Article 208 of the Criminal Code, which criminalizes the offence of “organization of or participation in an illegal armed group”; in this regard, statistics compiled by local NGOs show a pattern of more speedy and prioritized investigations in relation such offences. Table 3 below, showing the number of criminal investigations instituted during a three-year period and the number of those investigations which were concluded in the period under consideration, clearly demonstrates that the reaction to complaints of crimes allegedly committed by rebels is much more swift and rapid compared to the reaction to complaints of crimes allegedly committed by servicemen.

⁶²³ Memorial, “Deceptive Justice. Situation on the investigation on crimes against civilians committed by members of the Federal Forces in the Chechen Republic during military operations 1999-2003” (Moscow, 2003), available at http://www.memo.ru/hr/hotpoints/N-Caucas/do100603/orlov_2003_engl.pdf.

⁶²⁴ Ibid., p. 7.

⁶²⁵ Ibid. The 19 servicemen were found guilty of, inter alia, killing, robbery, hooliganism, deliberate causing of grave harm on health, deliberate causing of death, violation of the rules of use of arms and violation of the military car rules.

⁶²⁶ Ibid., p. 8.

⁶²⁷ One such instance is that of a serviceman who was found guilty of rape and robbery with use of force who was sentenced to 5 years of deprivation of liberty but put on probation for 5 years (ibid.).

⁶²⁸ Ibid., p. 13.

Table 3 – Investigations into allegations of crimes under Article 208 Criminal Code (“organization of or participation in an illegal armed group”)⁶²⁹

Year	Investigations initiated under Article 208	Investigations completed	Investigations suspended for “non identification of persons subjected to prosecution”
2000	325	143	3
2001	311	112	5
2002	322	170	11

According to information published by the US Department of State in its 2005 Country Report on Russia, based on statistics compiled by the Prosecutor General’s Office in Chechnya through mid-year, verdicts had been rendered in 103 cases involving federal servicemen charged with crimes against civilians since 1999 in Chechnya. Of these, 27 were given prison sentences from 1 to 18 years, 8 were acquitted, and 20 were amnestied. Sentences in the remainder were suspended or those found guilty were fined.⁶³⁰ According to the US Department of State, Russian Government statistics also showed that 34 law enforcement officers were charged with crimes against civilians, with 7 sentenced to prison and the rest convicted and given suspended sentences. Furthermore, it was noted that the Prosecutor General’s Office had released statistics to the Russian press in early December 2004 indicating that, since 2001, 1,749 criminal cases had been initiated in Chechnya to investigate approximately 2,300 cases involving disappeared persons.⁶³¹ Those figures are far higher than the data provided by other Russian authorities as to the number of investigations. According to these statistics only 50 out of 1,749 cases (less than 3% of the cases) concerning disappearances actually made it to court.⁶³² Furthermore, it was reported that, according to the Russian Ministry of Justice, from the start of the conflict up until November 2003, 54 servicemen, including 8 officers, had been found guilty of crimes against civilians in Chechnya.⁶³³ As the data in question contained no further elaboration or break-down, there is no way to know under which articles of the Criminal Code those convictions occurred, or whether the term “crimes against civilians” is in fact used to cover all types of crimes (killings, abductions, torture and ill-treatment etc.) committed against civilians. Nevertheless,

⁶²⁹ The data in the table is taken from Memorial, “Deceptive Justice” (above n. 623), Section 4.

⁶³⁰ US Department of State, Bureau of Democracy, Human Rights, and Labor, “2005 Country Reports on Human Rights Practices – Russia”, 8 March 2006, available at <<http://www.state.gov/g/drl/rls/hrrpt/2005/61671.htm>>. The US Department of State apparently received the information from the Russian NGO Memorial.

⁶³¹ Ibid.

⁶³² Ibid.

⁶³³ Ibid.

assuming the data is true, it at the least includes some information as to the outcome of prosecutions. Although some servicemen were given prison sentences, an alarmingly high number were either amnestied, given suspended sentences or simply got off with a fine. Doubts are accordingly raised as to whether the prosecutions are in fact effective.

2.6.3 Assessment of impact

The Court has been silent as regards prosecutions and convictions in Chechnya. This might be due to the fact that the majority of the investigations were deemed ineffective and inadequate and therefore the Court has not yet had to deal with this next stage of the domestic criminal proceedings. The Department for the Execution of Judgments has stated that “the number of prosecutions opened in respect of such offences continues to be extremely small in relation to the number of complaints forwarded to the *Prokuratura*” and has invited the Russian authorities to provide comprehensive official statistics of all complaints lodged.⁶³⁴ The number of prosecutions opened is extremely small compared to the number of complaints lodged with the authorities and certainly compared to the reported number of violations. In addition, numerous domestic cases have been discontinued due to amnesties being granted and, as noted above, proceedings may soon become time-barred due to the statute of limitations.⁶³⁵ The lack of a *corpus delicti* is another reason for many cases being terminated. The question is whether this is connected to the authorities’ lack of will to try to identify military units and servicemen allegedly involved in abuses.⁶³⁶

If a serviceman in the end is found guilty, the sanctions imposed have been rather lenient. Sentences have been suspended or the guilty servicemen simply made to pay a fine. Such light sanctions are arguably not in compliance with the European Court’s jurisprudence under Articles 2 and 3 of the Convention to the effect that there is an obligation upon the Contracting States to make sure that the punishment is sufficient to act as a deterrent against violations of the right to life and the prohibition of torture and other forms of ill-treatment.⁶³⁷ There are however also examples of cases in which servicemen receive stricter sentences, such as in the two cases referred to by the

⁶³⁴ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 130.

⁶³⁵ See above, Section 2.5.1(b).

⁶³⁶ For more on this issue, see above, Section 3.5.2(a).

⁶³⁷ On the obligation to ensure that individuals responsible for violations of Articles 2 and/or 3 are subjected to meaningful sentences, see above, Section 1.3.3(b).

Department for the Execution of Judgments in which the officers were sentenced to 15 and 17 years imprisonment for the unlawful killing of civilians.⁶³⁸

It is also evident from the statistics available that Article 117 (torture) of the Criminal Code is not used; this approach would not appear to be in compliance with the consistent case-law of the Court, which attributes great importance to the correct juridical qualification of conduct in violation of Article 3.⁶³⁹

Another important factor which may impede investigations and prosecutions is the fear on the part of the victims of reprisals. Reprisals against victims and family members who complain to the authorities of abuses committed by members of the security forces are a common occurrence in Chechnya.⁶⁴⁰ In 2008, Amnesty International reported that “victims of human rights violations and their relatives were frequently afraid to submit official complaints. In some cases the victim or their lawyer was directly threatened not to pursue a complaint. Human rights groups in the region publicizing the violations and offering assistance to victims came under pressure from the authorities. Some individuals were reportedly reluctant to lodge applications at the European Court of Human Rights, because of reprisals against applicants before them.”⁶⁴¹ The Rapporteur of the Committee of Legal Affairs and Human Rights of the Parliamentary Assembly in relation to Chechnya has also expressed concern about reports that a number of Chechen applicants to the European Court have been subjected to reprisals, which have ranged from harassment and threats up to the murder of applicants or their close relatives.⁶⁴²

2.7 Conclusions as to compliance and impact

The European Court is so far the only international judicial body where a victim of grave human rights violations in Chechnya can assert his or her rights and obtain just satisfaction. The Court has to date issued over one hundred judgments regarding, inter alia, killings, disappearances, torture and ill-treatment committed by servicemen in Chechnya and the lack of effective investigations. Scores of similar cases have been lodged with the Court, which will most likely result in further findings of violations of the Convention in respect of abuses committed by the Russian security forces in Chechnya.

⁶³⁸ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 128.

⁶³⁹ See, e.g., *Selmouni v. France* [GC] (App. no. 25803/94), Reports 1999-V.

⁶⁴⁰ See, e.g., Amnesty International, *State of the World's Human Rights 2008*, reporting that “[s]erious human rights violations were frequent [in Chechnya] and individuals were reluctant to report abuses, fearing reprisals”.

⁶⁴¹ *Ibid.*

⁶⁴² According to the Rapporteur, “Chechen victims of human rights violations not only have extremely limited access to justice in the Russian Federation, but [...] their lives are endangered when they attempt to seek justice through international mechanisms”; see PACE, Committee of Legal Affairs and Human Rights, “Human rights violations in the Chechen Republic” (above n. 594), Explanatory Memorandum by Mr Bindig, at § 27; see also §§ 28-31.

The findings of violation by the Court impose a legal obligation on Russia both to adopt measures to provide redress to the applicants as well as to prevent similar violations in the future in accordance with Article 46 of the Convention.

In response to the Court's judgments, the Russian authorities have taken measures to reopen certain domestic investigations, adopt new legislation and amend existing legislation in order to comply with the judgments. Domestic provisions criminalizing conduct in violation of Articles 2 and 3 of the Convention is in place and, since 2003, the Russian Criminal Code includes a definition of torture. The problem has not been a lack of provisions but rather the manner in which these provisions were applied. Further, it seems that statutes of limitation are applicable to the crimes under consideration and hence there is an urgent need for effective investigations to be conducted prior to the expiry of the relevant limitation period. Some measures have been adopted to ensure effective and adequate investigations and a new Code of Criminal Procedure came into force in 2002. The Department for the Execution of Judgments has expressed the view that "the basic infrastructures lacking at the time of events are now in place" but that "numerous outstanding issues remain to be addressed to ensure effective investigations into abuses".⁶⁴³ Accordingly, the issue of accountability of members of the security forces who commit abuses, which includes the matter of effective investigations, is still an outstanding issue for the Committee of Ministers and more information is still awaited from Russia.

Although the Department for the Execution of Judgments believes that the basic infrastructure is in place, it is however clear from the study that Russia has only taken relatively minor steps towards full compliance with the judgments as regards ensuring effective investigations and the Russian authorities have often referred to legislation that was already in place during the Second Chechen War which has self-evidently proven useless to guarantee effective investigations. Russia has in the majority of cases paid the just satisfaction awarded by the Court within the specified time limit. It has however not been as eager to make sure that suspended or closed investigations are reopened or that perpetrators are held accountable. Obviously, where a State simply pays any sums awarded by way of just satisfaction but refrains from taking other much-needed measures in order to prevent similar violations in the future, suspicions are raised that the State is content merely to pay off the violations committed by its own security forces.

The large number of crimes committed, including killings, disappearances, torture and ill-treatment and the findings of the Court to date would appear to indicate that the violations by security forces, were systematic and, if not actually ordered by the upper echelons of the military, at the least no sufficient steps were taken to prevent them and they were not adequately condemned. Further, globally, the measures of investigation

⁶⁴³ CoE doc. CM/Inf/DH(2008)33 (above n. 419), executive summary.

have been very far from adequate. In such circumstances, any hope that Russia will simply change its practice solely due to the judgments is probably overly optimistic. Accordingly, the maintenance of pressure, in particular through prompt, close and thorough supervision of the execution of the judgments is of the utmost importance. Furthermore, both official reports and reports of local NGOs indicate that the Russian authorities adopt a completely different approach to investigations of crimes on the basis of whether they have been committed by members of the Federal Forces or by rebel fighters and that the reaction to complaints of crimes allegedly committed by rebels is much more swift and rapid compared to the reaction to complaints of crimes allegedly committed by servicemen. This would seem to indicate that the authorities are in fact capable of carrying out effective investigations and that the persistent problem of ineffective investigations might not be due to faulty legislation, but to defective implementation. The will to investigate needs to come from above, be clear and unyielding. Nevertheless, the will to carry out such effective investigations seems to be largely lacking when it comes to investigations of crimes committed by Russian servicemen in Chechnya.

As regards impact of the judgments and the issue of accountability of members of the security forces, the Department for the Execution of Judgments has that found the number of prosecutions opened in respect of offences committed by servicemen continues to be extremely small in relation to the number of complaints forwarded to the Prokuratura.⁶⁴⁴ The same conclusion can be drawn after examining statistics gathered by other bodies such as Council of Europe organs, States, and NGOs. Although there is no way of knowing how many crimes were actually committed by servicemen in Chechnya during the Second Chechen War, the number of investigated cases is very small when compared to the number of violations reported. Of the cases which have been investigated, the number of cases that have been discontinued is high in comparison with the total number of cases transferred to the courts. In addition, numerous domestic cases have been discontinued due to amnesties being granted and proceedings may soon become time-barred due to the statute of limitations. The lack of a *corpus delicti* is another reason for many cases being terminated. If a serviceman in the end is found guilty, the sanctions imposed have been rather lenient. Sentences have been suspended or the guilty servicemen simply made to pay a fine. Furthermore, as can be seen from the statistics, the provision of the Russian Criminal Code criminalizing torture (Article 117) is not applied, although the Court has found that many of the acts committed by servicemen in Chechnya amount to torture.

Over a decade has passed since the events giving rise to the judgments of the European Court began. Almost five years have passed since the Court handed down its

⁶⁴⁴ CoE doc. CM/Inf/DH(2008)33 (above n. 419), § 130.

first Chechen judgments in 2005. Although at present the situation in Chechnya is better than it was in the period of the Second Chechen War in 1999-2001, serious violations of human rights still take place on a day-to-day basis.⁶⁴⁵ The Committee of Ministers has been engaged in supervision of Russia's execution of the Chechen judgments for over four years and there are still a large number of outstanding issues, including relating to the effectiveness of investigations and the virtual impunity of members of the security forces who commit human rights violations. Further, little progress has been in ensuring adequate investigations in individual cases where a violation in that regard was identified by the Court in individual cases. The Committee of Ministers continues to follow the execution process of the judgments closely; in addition, the situation in Chechnya has been monitored for years by other bodies of the Council of Europe, including the CPT, the Commissioner for Human Rights and the Parliamentary Assembly.

⁶⁴⁵ On the widespread occurrence of abuses committed, inter alia, by members of the Russian security forces in Chechnya see, e.g., "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak" (2008), UN Doc A/HRC/7/3/Add.2, at § 533; CPT, "Public statement concerning the Chechen Republic of the Russian Federation" (above n. 465). See also S.A. Gannushkina (ed.), *On the Situation of Residents in Chechnya in the Russian Federation, June 2004 - June 2005* (Memorial, Moscow, 2006).

3. Case Study: Turkey and the PKK

3.1 Introduction

From 1996 until 2009, the European Court has delivered numerous judgments concerning actions of the Turkish security forces. The cases have mainly concerned instances of disappearances, unlawful killings, unacknowledged detentions, torture and ill-treatment and destruction of property committed by members of the Turkish security forces and the Court has repeatedly found substantive violations of the right to life protected under Article 2 of the Convention and the right not to be subjected to torture or ill-treatment under Article 3, as well as violations of Articles 5 (right to liberty and security), 6 (right to fair trial), 8 (right to respect for private and family life) and Article 1 of Protocol No. 1 (protection of property).⁶⁴⁶ In most cases concerning allegations of unlawful killings, disappearances and torture or ill-treatment perpetrated by members of the security forces, the Court also found violations of the procedural obligations deriving from Articles 2 and 3 in respect of the inadequacy and inefficiency of official investigations carried out by the Turkish authorities.

Most of the abuses which have given rise to cases before the Court have taken place in the context of the conflict in South-East Turkey between the Turkish government and the Kurdistan Workers' Party (*Partiya Karkeran Kurdistan* or PKK). The conflict between Turkey and the PKK stems from the tension between Kurdish groups and the Turkish establishment which dates back to the founding of the Turkish Republic. Kurds were not recognized as an ethnic group, the use of the Kurdish language was banned and Kurdish customs were discouraged. Several organizations were founded to assert the identity of the Kurdish people, including the PKK, founded in 1978, which was the first pro-Kurdish organization which posed a serious challenge to the Turkish Government. In 1984, the PKK launched a militant insurgency which necessitated the deployment of units of the Turkish army and elite police forces in the eastern part of Turkey.

The Turkey–PKK conflict has resulted in a large number of casualties. In the *Aksoy* judgment delivered in 1996, the Court noted that, according to the Turkish Government, since 1985 the confrontation had claimed the lives of 4,036 civilians and 3,884 members of the security forces.⁶⁴⁷ According to figures provided by the Governor of the Emergency District in 2001, more than 23,000 persons accused of being PKK militants had been killed since the imposition of the state of emergency in 1987.⁶⁴⁸ According to this

⁶⁴⁶ A number of other cases involving similar complaints have been struck off the list by the Court following the conclusion of friendly settlements (69 cases to date) or other solutions found.

⁶⁴⁷ *Aksoy v. Turkey* (App. no. 21987/93), Reports 1996-VI.

⁶⁴⁸ Office of the UN High Commissioner for Human Rights (OHCHR), "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Ms. Asma Jahangir", (2001) UN Doc E/CN.4/2002/74/Add.1.

information, more than 4,400 unarmed civilians were killed and some 5,400 wounded in the same period. More than 5,000 police officers and gendarmes have been killed and some 11,000 injured in the line of duty.⁶⁴⁹ The conflict is still ongoing today, although on a much smaller scale compared to the 1990s.

Although the conflict has been ongoing since 1984, the majority of the actions of the security forces that have been challenged in the cases under consideration in the present case study took place in the particular context of the increase in terrorist activity during the years 1991–1993. However, although all cases under consideration relate to actions of the Turkish security forces, not all of them relate directly to the PKK conflict. The present case study examines Turkey's compliance with the Court's judgment in those cases and the impact of those judgments on the ability of the domestic legal system to ensure effective accountability for those responsible for violations of Articles 2 and 3. The concept of compliance is for the purpose of this case study understood as the measures taken by Turkey in order to comply with these judgments. The measures examined are limited to the actions that have been ordered by the Court (such as just satisfaction) and recommended by the Committee of Ministers in its supervisory role. In particular, the case study will examine individual measures taken to re-open domestic investigations in specific cases and compliance with general measures will be understood narrowly so as to include an examination of measures taken which affect national prosecutions, that is measures to ensure effective investigations, the possibility of challenging proceedings, and measures aimed at ensuring the imposition of appropriate sanctions against servicemen responsible for abuses. The notion of impact is understood narrowly, as relating to the extent to which the relevant judgments and the measures taken have resulted in an improvement in the quality of domestic investigations and prosecution rates in Turkey as regards allegations against servicemen of grave violations of human rights.

3.2 Turkey and the Convention

Turkey ratified the European Convention on 18 May 1954.⁶⁵⁰ At the time of ratification of the Convention, the 1924 Constitution which was then in force contained no explicit

⁶⁴⁹ Ibid.

⁶⁵⁰ Turkey is party to a number of other international human rights instruments, including the International Covenant on Civil and Political Rights (New York, 16 December 1966), 999 UNTS 171 and its two optional protocols: (First) Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171; and Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (15 December 1989), 1642 UNTS 414, the Convention on the Rights of the Child (20 November 1989), 1577 UNTS 3; the Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979), 1249 UNTS 13 and the UN Convention Against Torture (above n. 355) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (26 November 1987), CETS No. 126. Turkey is also a party to the four Geneva Conventions of 12 August 1949, 75 UNTS 31, 75 UNTS 85, 75 UNTS 135 and 75 UNTS 287. Turkey has not signed the International Convention for

reference to the status of international agreements in domestic law. Similarly, provisions of the 1961 and 1982 Constitutions were not clear as to the issue of legal hierarchy, which was controversial; some claimed that international agreements had an equal status with ordinary domestic laws, while others considered them superior.⁶⁵¹ The debate was put to an end in 2004, when the Turkish Parliament adopted an amendment to Article 90 of the Turkish Constitution, which now provides that international human rights agreements prevail over incompatible domestic law. In that regard, the Turkish government has claimed that, through the amendment to Article 90 of the Constitution and the development of case law in domestic courts giving direct effect to judgments of the European Court it may be expected that all Turkish courts will give direct effect to the European Court's judgments, thus fulfilling Turkey's obligation under Article 46 of the Convention to grant redress for violations of the Convention identified by the Court and to prevent new, similar violations in the future.⁶⁵²

As far as the conflict with the PKK is concerned, following the escalation of the conflict in the 1990s, the Turkish Government stated that it considered it necessary to make derogations from certain of its obligations under the Convention, pursuant to Article 15 of the Convention.⁶⁵³ In the original Notice of Derogation dated 6 August 1990, Turkey stated that it was exposed to threats to its national security in South-East Anatolia, that the situation amounted to a threat to the life of the nation within the meaning of Article 15 ECHR, and that because of the "intensity and variety" of the terrorist actions, the Government had to use its security forces and "take steps appropriate to cope with a campaign of harmful disinformation of the public".⁶⁵⁴ In that regard, the Government stated that it had promulgated two decrees conferring extraordinary powers upon the Governors of provinces within the emergency region, the application of which could result in derogations from various rights under the Convention. Modifications to the legislation in question were made during the course of 1990,⁶⁵⁵ and in 1992 the scope of the derogation was reduced so that a derogation was only maintained in relation to the

the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, not yet entered into force), General Assembly Resolution A/RES/61/177.

⁶⁵¹ Y. Özdek and E. Karacaoğlu, "Turkey" in Blackburn and Polakiewicz (eds), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (OUP, 2001), p. 882.

⁶⁵² See Interim Resolution CM/ResDH(2005)43 (above n. 563), Appendix I, §§ 11-14. The Turkish government pointed to two judgments of the Court of Cassation to highlight that Turkish courts refer to and take into account the requirements of the Convention (ibid., at §§ 13-14). On the status of the Convention in Turkey, see also A.E. Kellermann et al., *The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-) Candidate Countries: Hopes and Fears* (Cambridge University Press, 2006), p. 273.

⁶⁵³ Between 1961 and 1990, Turkey filed with the Council of Europe more than 50 notices of derogation from substantive provisions of the Convention. The large number of derogations was, to some extent, explained by the practice of the Turkish authorities of declaring martial law for a period of one or two months and then renewing it: see, e.g., "Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 21 September 1990" (2007) CPT Doc CPT/Inf (2007)1, at p. 20.

⁶⁵⁴ Notice of Derogation from the European Convention on Human Rights (6 August 1990), § 3.

⁶⁵⁵ Notice of Derogation from the European Convention on Human Rights (3 January 1991).

right to personal liberty under Article 5 of the Convention.⁶⁵⁶ The derogation was finally withdrawn completely on January 2002.⁶⁵⁷

3.3 The European Court and the Turkey-PKK conflict

In 1987, Turkey recognized the competence of the European Commission on Human Rights to receive individual petitions. Three years later, Turkey recognized the jurisdiction of the European Court. As of June 2009, Turkey ranks second (after the Russian Federation) in the list of countries with the largest number of human rights violation cases pending at the European Court, with 11.300 cases pending or 10.6 % of the total number of applications pending before the Court.⁶⁵⁸ As far as the situation in South-East Turkey is concerned, since 1996 the Court has issued over 175 judgments concerning actions of the security forces in Turkey relating to the conflict with the PKK, as well as 69 friendly settlements and strike-outs concerning actions of the Turkish security forces and involving undertakings by the Turkish government.⁶⁵⁹

In the cases concerning alleged abuses committed in the context of the conflict with the PKK, the Court found numerous violations of Article 2 ECHR, in relation to killings by members of the security forces, deaths caused as a result of excessive use of force by members of the security forces, failure to protect the right of life, disappearances.⁶⁶⁰ Similarly, the action of the Turkish security forces in South-East Turkey have given rise to a number of judgments where the Court found violations of Article 3 ECHR.⁶⁶¹ The finding of substantive violations of the State's obligations under Articles 2 and 3 ECHR have invariably been accompanied by findings of violations of the procedural obligations enshrined in the provisions in question.⁶⁶²

The possibility for the Court to exercise full scrutiny on the events in South East Turkey has been somewhat limited due to the Turkish derogations under Article 15 ECHR, mentioned above. However, for the purposes of the present case study, the relevance of the derogations entered by Turkey in the period 1990-2002 is relatively minor. Indeed, as noted above, those derogations did not concern (nor they could have concerned),

⁶⁵⁶ Notice of Derogation from the European Convention on Human Rights (12 May 1992).

⁶⁵⁷ Declaration in respect of a previous Notice of Derogations from the ECHR (29 January 2002).

⁶⁵⁸ European Court of Human Rights, "Pending applications allocated to a judicial formation" (updated June 2009).

⁶⁵⁹ See, e.g., Department for the Execution of Judgments, Pending Cases, State of Executions, Cases or groups of cases against Turkey, available from <http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp> [accessed 27 June 2009].

⁶⁶⁰ See Interim Resolution CM/ResDH(2008)69, "Actions of the security forces in Turkey: Progress achieved and outstanding issues", adopted by the Committee of Ministers at the 1035th meeting on 18 September 2008.

⁶⁶¹ Ibid.

⁶⁶² See, e.g. *Kurt v. Turkey* (above n. 686), *Çakıcı v. Turkey* [GC] (App. no. 23657/94), Reports 1999-IV; *Ertak v. Turkey* (App. no. 20764/92), Reports 2000-V; *Timurtaş v. Turkey* (App. no. 23531/94), Reports 2000-VI; and *Taş v. Turkey* (App. no. 24396/94), ECtHR 14 November 2000.

Turkey's substantive obligations under Articles 2 and 3 ECHR. Further, although some of the notices of derogations concerned the obligation to provide an effective domestic remedy for violations of the Convention under Article 13, those derogations did not exempt the Turkish authorities from respecting in full the procedural obligations of effective investigation and prosecutions enshrined in Articles 2 and 3.

A further preliminary point to note is that, in relation to several cases concerning actions of the Turkish armed forces in South East Turkey, the Court has in the past applied the strike-out procedure envisaged by Article 37(1)(c) ECHR.⁶⁶³ A prime example of such a controversial approach is the 2001 case of *Akman v. Turkey*, concerning the unlawful killing of the applicant's son by members of the Turkish security forces.⁶⁶⁴ After the application had been lodged with the Court, the Turkish Government issued a unilateral declaration in which it admitted a violation of Article 2 and undertook "to issue appropriate instructions and to adopt all necessary measures to ensure that the right to life – including the obligation to carry out effective investigations – is respected in the future".⁶⁶⁵ The Government also offered compensation to the applicant.⁶⁶⁶ The Court carefully examined the terms of the Government's declaration and "having regard to the nature of the admissions contained in the declaration as well as the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed", it considered that it was no longer justified to continue the examination of the application and, for the first time, struck out the application without the applicant's consent.⁶⁶⁷

A similar approach was adopted by the Turkish Government in other cases concerning abuses committed by members of the security forces in South East Turkey, including the case of *Tahsin Acar v. Turkey*.⁶⁶⁸ The *Tahsin Acar* case concerned the disappearance of the applicant's brother in 1994, following his abduction by two unidentified persons – allegedly plain-clothes police officers; according to the applicant, no effective investigation had been carried out into the disappearance.⁶⁶⁹ With a view of resolving the application and to have the case struck out under Article 37(1) of the Convention, the Turkish Government made a unilateral declaration, in which it

⁶⁶³ The Court can, according to Art. 37(1)(c) of the Convention, decide to strike out an application of its list of cases if "for any other reason established by the Court, it is no longer justified to continue the examination of the application".

⁶⁶⁴ *Akman v. Turkey* (strike out) (App. no. 37453/97), Reports 2001-VI.

⁶⁶⁵ *Ibid.*, § 24. In this latter connection, the Government referred to new legal and administrative measures which had been adopted recently, which they said had already resulted in a reduction of deaths in circumstances similar to that of the applicant's son (*ibid.*). A unilateral declaration is different from strictly confidential friendly-settlement proceedings in that unilateral declarations are made by the respondent Government in public and adversarial proceedings before the Court.

⁶⁶⁶ *Ibid.*, § 30.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Tahsin Acar v. Turkey* (preliminary objection) [GC] (App. no. 26307/95), Reports 2003-VI.

⁶⁶⁹ *Tahsin Acar v. Turkey* (preliminary objection) (above n. 668).

expressed its regret for the occurrence and the anguish caused to the family and accepted that unrecorded deprivations of liberty and insufficient investigations into allegations constituted violations of Articles 2, 5 and 13 of the Convention.⁶⁷⁰ In addition, the Government offered to pay the applicant the sum of 70,000 GBP *ex gratia*.⁶⁷¹ On this basis, the Second Section of the Court had struck the application out of the list under Article 37(1).⁶⁷² The applicant, in his request under Article 43 of the Convention for the referral of the case to the Grand Chamber, submitted that the application should not be struck out based on the Government's unilateral declaration; in particular, the applicant argued, there were substantial grounds for holding that "respect for human rights" required the continuation by the Court of its examination of the merits.⁶⁷³ The applicant "acknowledged that there could be circumstances in which an application could be struck out [...] on the basis of a unilateral declaration [...] outside the framework of friendly-settlement negotiations and without the State accepting any liability".⁶⁷⁴ However, he submitted that "this would only be acceptable if the State concerned were to undertake to provide an effective domestic remedy; in the present case, that would mean conducting an effective domestic investigation".⁶⁷⁵ The Government argued that "where no agreement on a friendly settlement could be reached [...] and the state of evidence in a case did not allow the Court to decide it in one way or the other, it should be possible for the Court to strike the application out [...] provided that the respondent Government undertook measures aimed at providing redress [...] and preventing the reoccurrence [...], and that such measures were accepted by the Court ...".⁶⁷⁶

The Grand Chamber decided to limit the scope of its examination to the question whether the unilateral declaration submitted offered a sufficient basis for holding that it was no longer justified in continuing examination of the application within the meaning of Article 37(1)(c).⁶⁷⁷ The Grand Chamber, referring to the Court's decision in *Akman v. Turkey*, noted that a situation in which the Government had admitted that an undisputed killing by security forces was the result of the use of excessive force in violation of Article 2 of the Convention could not be compared to the unresolved disappearance of a person after an abduction allegedly by, or with the alleged connivance of, State agents.⁶⁷⁸ In the case at issue, the unilateral declaration of the Turkish Government did not adequately

⁶⁷⁰ The respondent Government later changed this statement to "it is accepted that unrecorded deprivations of liberty and insufficient investigations into allegations of disappearances, such as in the present case, constitute violations of Articles 2, 5 and 13 of the Convention" (ibid., § 69).

⁶⁷¹ Ibid., § 60.

⁶⁷² *Tahsin Acar v. Turkey*, sub nom *T.A. v. Turkey* (strike out) (App. no. 26307/95), (strike out), Judgment of the Second Section of the Court, 9 April 2002.

⁶⁷³ *Tahsin Acar v. Turkey* (preliminary objection) (above n. 668), § 62.

⁶⁷⁴ Ibid., § 67.

⁶⁷⁵ Ibid., § 67.

⁶⁷⁶ Ibid., § 68.

⁶⁷⁷ Ibid., § 64.

⁶⁷⁸ Ibid., § 82.

address the applicant's grievances under the Convention as the Government had merely undertaken a general obligation to pursue efforts to prevent future disappearances, but it had made no reference to any measures to deal with the applicant's complaints as to the lack of effective investigation into his brother's disappearance.⁶⁷⁹ The Grand Chamber concluded that "in cases concerning persons who have disappeared or have been killed by unknown perpetrators and where there is prima facie evidence in the case-file supporting allegations that the domestic investigation fell short of what is necessary under the Convention, a unilateral declaration should at the very least contain an admission to that effect, combined with an undertaking by the respondent Government to conduct, under the supervision of the Committee of Ministers [...], an investigation that was in full compliance with the requirements of the Convention as defined by the Court in previous similar cases".⁶⁸⁰ Accordingly, the Grand Chamber concluded that the application could not be struck out of the list under Article 37(1)(c). Subsequently, the Grand Chamber considered the merits of the application and found a procedural violation of Article 2.⁶⁸¹

3.4 Execution of judgments

Cases involving Turkey represented roughly 14% of all pending cases before Committee as at the end of 2007, rising to 15% as at the end of 2008 and 16% as at the end of 2009.⁶⁸² Since the Committee oversees many similar cases, it sometimes examines compliance with the cases in groups. The groups of major relevance for the purpose of the present case study are the "Aksoy group", which groups together cases concerning, inter alia, violations of Article 2 and Article 3 of the Convention resulting from actions of the security forces, in particular in the southeast of Turkey, mainly in the 1990's and the subsequent lack of effective investigations into the alleged abuses,⁶⁸³ and the "Bati group", which, as of May 2010, includes 43 judgments, concerning the lack of effective investigations in respect of the actions of members of the Turkish security forces in later cases.⁶⁸⁴

⁶⁷⁹ Ibid., § 83.

⁶⁸⁰ Ibid., § 84.

⁶⁸¹ *Tahsin Acar v. Turkey* (Merits), (App. no. 26307/95), Reports 2004-III.

⁶⁸² Council of Europe, Execution of judgments of the European Court of Human Rights, Statistical information: 2008: *Table 7*: and 2009, *Table 12*, available from http://www.coe.int/t/dghl/monitoring/execution/Reports/Stats/Default_en.asp [accessed 5 May 2010].

⁶⁸³ As of 5 May 2010, the "Aksoy group" consists of 198 judgments and 69 friendly settlements and striking-out decisions (see <http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp> (accessed 5 May 2010).

⁶⁸⁴ See <http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp> (accessed 5 May 2010).

The Committee of Ministers has so far adopted four interim resolutions regarding the Aksoy group.⁶⁸⁵ The first Interim Resolution was adopted on 9 June 1999 (hereinafter the “1999 Interim Resolution”) and concerned measures of a general character adopted in execution of the Court’s judgments in the cases in question.⁶⁸⁶ When the 1999 Interim Resolution was adopted, a state of emergency was still in force in all areas of South-East Turkey and Turkey’s derogations from its obligations under the Convention were in force.⁶⁸⁷ The second Interim Resolution was adopted in July 2002 (hereafter the “2002 Interim Resolution”) and concerned forty-two judgments and decisions finding Turkey responsible for numerous breaches of the Convention.⁶⁸⁸ The Turkish Government concurred with the Committee in the 2002 Interim Resolution that, despite improvements introduced since 1996 as a result of the Court’s judgments, more effective results were required.⁶⁸⁹ When the third Interim Resolution was adopted in June 2005⁶⁹⁰ (hereafter “the 2005 Interim Resolution”), the number of judgments and decisions had grown to 74.⁶⁹¹ The most recent Interim Resolution was adopted on 18 September 2008 (hereafter “the 2008 Interim Resolution”) and deals with 175 judgments concerning the actions of Turkish security forces and 69 friendly settlements.⁶⁹²

In the 2005 Interim Resolution, the Committee of Ministers found that the violations in the Aksoy group resulted from a number of structural problems, in particular:

- (a) the ineffectiveness of procedural safeguards in relation to individuals in police custody;
- (b) the general attitude and practices of the security forces, their education and training system and the legal framework governing their activities;
- (c) shortcomings in establishing criminal liability for abuses at the domestic level; and
- (d) shortcomings in ensuring adequate reparation to victims.⁶⁹³

⁶⁸⁵ Interim Resolution CM/ResDH(99)434 of 9 June 1999; Interim Resolution CM/ResDH(2002)98 of 10 July 2002; Interim Resolution CM/ResDH(2005)43 (above n. 563); and Interim Resolution CM/ResDH(2008)69 (above n. 660).

⁶⁸⁶ Interim Resolution CM/ResDH(99)434 (above n. 685). At the time, four of the cases in the “Aksoy group” concerned violations of Art. 2 of the Convention (*Kaya v. Turkey* (App. no. 22729/93), Reports 1998-I; *Güleç v. Turkey* (App. no. 21593/93), Reports 1998-IV; *Ergi v. Turkey* (App. no. 23818/94), Reports 1998-IV; and *Yaşa v. Turkey* (App. no. 22495/93), Reports 1998-IV), other four cases concerned violations of Art. 3 (*Aksoy v. Turkey* (above n. 647); *Aydin v. Turkey* (App. no. 23178/94), Reports 1997-VI; *Kurt v. Turkey* (App. no. 24276/94), Reports 1998-III; and *Tekin v. Turkey* (App. no. 22496/93), Reports 1998-IV), whilst the remaining cases concerned violations of Arts 6 or 8, or Art. 1 of Protocol No. 1.

⁶⁸⁷ For more about the derogation, see above, Section 3.2.

⁶⁸⁸ See Interim Resolution CM/ResDH(2002)98 (above n. 685). See also cases and violations listed in Appendix II to the Resolution.

⁶⁸⁹ *Ibid.*

⁶⁹⁰ Interim Resolution CM/ResDH(2005)43 (above n. 563).

⁶⁹¹ *Ibid.*, cases and violations listed in Appendix II.

⁶⁹² Interim Resolution CM/ResDH(2008)69 (above n. 660).

⁶⁹³ *Ibid.*

As to individual measures required in both the “*Aksoy*” and the “*Batı*” groups of cases, the individual measure that is most relevant for present purposes is the re-opening of domestic proceedings (discussed below, Section 3.5.3(b)). Although it is recognized that the main issue as far as individual measures are concerned is the possible resumption of criminal investigations in each of the individual cases where the Court had found violations of the procedural obligation to carry out an effective investigation into allegations of abuses by the security forces. However, as concerns the *Aksoy* group of cases, the Committee of Ministers has recognized that, in view of the need for general measures to improve investigations, “the issue of individual measures has been largely integrated into that of general measures”.⁶⁹⁴ It is however possible to follow at least some of the cases in the *Batı* group where the Committee of Ministers has taken a particular interest and/or in relation to which Turkey has provided specific information.

3.5 Compliance with judgments

In response to the judgments of the Court examined above, in 2003 Turkey announced a “zero-tolerance policy for torture”⁶⁹⁵ and measures have been taken with the aim to increase procedural safeguards for individuals in custody, to provide education of members of the security forces and the police, to ensure training of judges and prosecutors, to disseminate the Court’s judgments, to provide victims with compensation and to reinforce education of the security forces and training of prosecutors and judges and, finally, to give direct effect to the Convention within the domestic legal system.⁶⁹⁶

The range of measures taken by Turkey in this respect have permitted the Committee of Ministers to close its examination of some of the issues highlighted in the Interim Resolutions cited above, having been satisfied that proper safeguards are now in place.⁶⁹⁷ However, what is particularly relevant for present purposes is that the principal outstanding issue relates to the accountability of members of the security forces.⁶⁹⁸

⁶⁹⁴ See http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp, under “Aksoy” (accessed 5 May 2010).

⁶⁹⁵ See the statement of the Deputy Prime Minister, Abdullah Gül, to the Grand National Assembly, 10 December 2003 (referred to in KHRP, “Implementation Gaps in Turkey’s Domestic Law” (last updated June 2006), available at <http://www.khrp.org/component/option.com_docman/task.doc_view/gid.93/Itemid.47/>).

⁶⁹⁶ For information on the specific measures taken, see Interim Resolution CM/ResDH(2008)69 (above n. 660); CM/ResDH(2005)43 (above n. 563); CM/ResDH(2002)98 (above n. 685); and CM/ResDH(99)434 (above n. 685). See CoE doc. CM/Inf/DH(2006)24 of 26 May 2006; CoE doc. CM/Inf/DH(2006)24 rev. of 30 November 2006; and CoE doc. CM/Inf/DH(2006)24 rev. 2 of 10 October 2007.

⁶⁹⁷ See Interim Resolution CM/ResDH(2008)69 (above n. 660).

⁶⁹⁸ *Ibid.* The Committee asked Turkey to clarify the issue of administrative authorization for prosecution and urged Turkey to ensure that members of the security forces of all ranks could be prosecuted without an administrative authorization. The Committee also regretted that no information was made available with regard to the number of investigations, convictions and acquittals regarding serious offences other than torture and ill-

3.5.1 Measures concerning the obligation to criminalize conduct in violation of Articles 2 and 3

(a) Domestic provisions criminalizing conduct in violation of Articles 2 and 3⁶⁹⁹

In its 2002 Interim Resolution, the Committee of Ministers noted that:

Recent official statistics continue to demonstrate that, where crimes of torture or ill-treatment are established, they are sanctioned by light custodial sentences, which are frequently converted into fines and, in most cases, subsequently suspended, thus confirming the persistence of the serious shortcomings in the criminal-law protection against abuses highlighted in the European Court's judgments.⁷⁰⁰

The Committee therefore urged “Turkey to accelerate without delay the reform of its system of criminal prosecution for abuses by members of the security forces, in particular by [...] establishing sufficiently deterrent minimum prison sentences for persons found guilty of grave abuses such as torture and ill-treatment”.⁷⁰¹

As far as the normative framework concerning criminalization of abuses committed by the security forces and other state officials is concerned, starting in 2002 a number of amendments to the relevant domestic rules were introduced in the context of the adoption of so-called “EU Harmonization Packages”.⁷⁰² Although the primary reason for the adoption of the harmonization legislation is the process of negotiation relating to possible future accession of Turkey to the EU, the EU has conditioned the possibility of membership *inter alia* upon compliance with obligations under the Statute of the Council of Europe and therefore compliance by Turkey with judgments of the Court. Accordingly, the harmonization legislation contained important legal changes which were directly and expressly aimed at addressing the shortcomings in the domestic legal system identified by the European Court, including in the context of repression of abuses committed by members of the police and security forces. In addition to the changes to the relevant

treatment allegedly committed by members of the security forces. The Committee will resume its consideration of these issues at its third DH meeting in 2009.

⁶⁹⁹ See above, Section 1.3.1 (on the obligation to criminalize conduct in violation of Articles 2 and 3) and Section 1.3.3(b) (on the obligation to impose meaningful sanctions).

⁷⁰⁰ Interim Resolution CM/ResDH(2002)98 (above n. 685).

⁷⁰¹ *Ibid.*

⁷⁰² With a view to fulfilling the criteria for eventual European Union membership, the Justice and Development Party (*Adalet ve Kalkınma Partisi* or “AKP”) government, which assumed power in 2002, instituted an ambitious program of legal reforms. The reforms were mainly introduced in the form of large mixed reform packages, known as “EU Harmonization Packages”, containing changes to a variety of laws in different areas. On the EU accession process and its impact on the domestic protection of human rights in Turkey, see, e.g., Kivanc Ulusoy, “Turkey’s Reform Efforts Reconsidered”, *Democratization*, vol. 14:3 (2007), 472.

procedures contained in the “EU Harmonization Packages”, important reforms have been introduced following the entry into force of the new Turkish Penal Code and Criminal Procedure Code in 2005.⁷⁰³

The shortcomings identified by the Court and the concerns expressed by the Committee of Ministers as to the weakness of the legal framework criminalizing torture and ill-treatment have, according to the Turkish Government, been addressed, and the Turkish criminal law system is now in full compliance with the requirements under Article 3 of the Convention. In particular, as far as criminalization of conduct contrary to Article 3 is concerned, the Government noted that the existing provisions criminalizing torture and ill-treatment have been strengthened with a view to address the concerns expressed by the Strasbourg bodies. The use of torture or ill-treatment by public employees, already prohibited under the Turkish Constitution⁷⁰⁴ and criminalized under the 1926 Criminal Code, remains an offence under Article 94 of the new 2005 Criminal Code, which defines it as actions by a public official toward an individual which “cause [...] severe bodily or mental pain, or loss of conscious [sic] or ability to act, or dishonor [...]” the individual in question.⁷⁰⁵ In addition, Article 95 provides for the new offence of “aggravated torture”. The crime of “torment” is punished under Article 96 of the 2005 Criminal Code,⁷⁰⁶ and Articles 86 and 87 of the new Code penalize “felonious injury” and “aggravated injury”. The Turkish Government also pointed out that further protections against torture and ill-treatment were contained in the domestic criminal procedure rules, which, since 1992, “prohibits the use of torture or ill-treatment as methods of interrogation and specified that evidence obtained as a result of these methods is null and void regardless of the consent of the person concerned”.⁷⁰⁷ Although abuses committed against individuals potentially fall within the ambit of Article 94, as reported by some human rights groups, the pattern of prosecution shows that prosecutors often opt

⁷⁰³ Criminal Code (*Ceza Kanunu*), Law no. 5237 of 26 September 2004, Official Gazette No. 25611 (12 October 2004), entered into force on 1 June 2005 (hereinafter “2005 Turkish Criminal Code”), unofficial English translation available at <<http://legislationline.org/documents/action/popup/id/6872/preview>>; Criminal Procedure Code (*Ceza Muhakemesi Kanunu*), Law no. 5271 of 4 December 2004, entered into force 1 June 2005 (hereinafter “2005 Turkish Criminal Procedure Code”), unofficial English translation of selected articles available at <<http://legislationline.org/documents/action/popup/id/8976>>.

⁷⁰⁴ See Art. 17(3), 1982 Turkish Constitution, available at <http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf>.

⁷⁰⁵ Art. 94, 2005 Turkish Criminal Code (above n. 703). For commentary, see Human Rights Watch, “Closing Ranks against Accountability: Barriers to Tackling Police Violence in Turkey” (2008), available at <<http://www.hrw.org/en/reports/2008/12/05/closing-ranks-against-accountability-0>>, p. 16.

⁷⁰⁶ The crime of “torment” is defined as any action which “causes suffering of another person; see Art. 96, 2005 Turkish Criminal Code (above n. 703). Some human rights groups have criticized the formulation of this provision, noting that it is worded in such a way as to make it not clearly applicable to public officials: see, e.g., Human Rights Watch, “Closing Ranks” (above n. 705), p. 16.

⁷⁰⁷ The prohibition is now enshrined in Art. 148 of the 2005 Turkish Criminal Procedure Code (above n. 703). On the previous formulation of the rule in question, originally contained in Art. 135(A) of the 1992 Code of Criminal Procedure, see Interim Resolution DH(99)434 (above n. 685), Annex I, § I(A).

not to apply Article 94, but choose to apply other articles of the Criminal Code such as Article 86, criminalizing “felonious injury”.⁷⁰⁸

Regarding penalties, in order to address the criticisms made by the Court as to the excessive lenience of the punishments imposed on public officials responsible for abuses, a number of amendments to the sentences applicable to offences constituting violations of Article 3 were put in place by Turkey even prior to the reform of the criminal justice system in 2005.

When the question of execution of the judgments relating to actions of the Turkish security forces were first examined the Committee of Ministers in June 1999, the penalties applicable to agents of the security forces found guilty of torture or ill-treatment were three to five years’ imprisonment and disqualification, whether temporary or permanent, from public service.⁷⁰⁹ In its first Interim Resolution on the issue, the Committee of Ministers called upon Turkey to establish sufficiently deterrent minimum prison sentences for personnel found guilty of torture or ill-treatment.⁷¹⁰ In response to that call, in the information provided prior to the following examination of the matter by the Committee of Ministers in 2002, the Turkish Government stated that it had “placed before the Turkish National Assembly a Bill aimed at stiffening the penalties applicable to agents of the security forces found guilty of torture or ill-treatment”.⁷¹¹ In addition, it suggested that, in light of the amendment of the Constitution, it was possible that domestic courts would give direct effect to the requirements of the Convention as highlighted by the European Court’s judgments and would thus impose more severe sentences leading to the effective punishment of those State officials found guilty of torture or ill-treatment.⁷¹² The relevant provision of the 1926 Criminal Code had in fact previously been modified in August 1999 as part of a wider “Harmonization Package”, so as to increase the maximum sentences which could be imposed on officials found guilty of torture or ill-treatment from five to eight years’ imprisonment for torture and from three to five years’ imprisonment for ill-treatment.⁷¹³ The provisions in question were further amended in 2003 so that penalties under these provisions could no longer be converted into fines or be suspended.⁷¹⁴

⁷⁰⁸ See, e.g., Human Rights Watch, “Closing Ranks” (above n. 705), p. 16. On Art. 86 of the Criminal Code, see also below, text accompanying n. 721 *et seq.*

⁷⁰⁹ Interim Resolution DH(99)434 (above n. 685), Appendix I, at § I(A).

⁷¹⁰ Interim Resolution DH(99)434 (above n. 685).

⁷¹¹ See Interim Resolution CM/ResDH(2002)98 (above n. 685), Appendix I, § 19.

⁷¹² *Ibid.*

⁷¹³ *Ibid.*, § 18; the Law of 26 August 1999 modified Articles 243(1) and 245, respectively, of the previous Criminal Code.

⁷¹⁴ The amendments in question were introduced by Law no. 4778 of 10 January 2003 and Law no. 4963 of 7 August 2003: see Interim Resolution CM/ResDH(2005)43 (above n. 563), Appendix I, § 25.

In the context of the Committee of Minister’s examination of the execution of the group of cases in June 2005, the Turkish Government gave assurances that the amendments in question would be incorporated into the new Criminal Code which had recently entered into force.⁷¹⁵ However, in fact, the relevant provisions had already been reproduced in the new Criminal Code.⁷¹⁶ The 2005 Criminal Code increased the maximum sentence for torture *simpliciter* to twelve years, and made harsher sentences available for particular aggravated forms of torture, in particular involving sexual harassment;⁷¹⁷ further, it finally introduced a minimum sentence of three years where there had previously been no minimum for the crime of torture and a minimum sentence of only three months for ill-treatment.⁷¹⁸ Article 95 dealing with “aggravated” torture applies a scale of sentences according to the gravity of the damage inflicted on the victim and whether lasting health conditions are caused as a result of the torture, with a sentence of up to life imprisonment possible where death is caused.⁷¹⁹ A conviction for “torment” results in a two to five year prison sentence, with three to eight year sentences provided for when the victim is a minor, a vulnerable person, a pregnant woman, or antecedents or descendents or father/mother or spouse relative.⁷²⁰

Under Article 86 of the 2005 Criminal Code, when the crime of “felonious injury” is committed by a public official, the punishment applicable is increased from that applicable when committed by an ordinary individual. Thus, the normal sentence of between one and three years is increased to from two to five years.⁷²¹ Similarly, in the case of “consequential heavy injury”, which is characterised by the particularly grave consequences, involving permanent injury, damage to health, or the causing of death as a result of the intentional infliction of injury, the sentence is increased commensurate with the gravity of the injury.⁷²²

The Committee of Ministers has welcomed “the enhanced accountability of the security forces in the new Criminal Code as a result of the introduction of minimum prison sentences for crimes of ill-treatment and torture, which may no longer be converted into fines or suspended”.⁷²³ However, as noted above, some human rights groups have expressed serious concerns in relation to the use of Article 86 of the 2005 Criminal Code

⁷¹⁵ Ibid.

⁷¹⁶ See the 2005 Turkish Criminal Code (above n. 703).

⁷¹⁷ Art. 94(3), 2005 Turkish Criminal Code (above n. 703), providing for a sentence of between ten and fifteen years.

⁷¹⁸ Art. 94(1), 2005 Turkish Criminal Code (above n. 703). Note that in its statement to the Committee of Ministers, in 2005, Turkey stated that “a minimal [*sic*] sanction of 5 years of imprisonment has been introduced for torture and ill-treatment with the coming into force of the new Criminal Code”: see Interim Resolution CM/ResDH(2005)43 (above n. 563), Appendix I.

⁷¹⁹ Human Rights Watch, “Closing Ranks” (above n. 705), p. 16.

⁷²⁰ Art. 96, 2005 Turkish Criminal Code (above n. 703).

⁷²¹ Art. 86, 2005 Turkish Criminal Code (above n. 703).

⁷²² Art. 87, 2005 Turkish Criminal Code (above n. 703).

⁷²³ Interim Resolution CM/ResDH(2005)43 (above n. 563).

rather than the provisions criminalizing torture *per se*.⁷²⁴ Quite apart from the fact that such a legal characterization permits the perpetrator of serious abuses to escape the “special stigma” which attaches to the commission of torture, as far as sentences are concerned, it has been noted, *inter alia*, that a public official sentenced to a low penalty under Article 86 would be able to benefit from a suspended sentence applicable to all prison terms of two years and under Article 51 of the Criminal Code.⁷²⁵ Indeed, it appears that in the past, the few officials who had been convicted often benefited from suspended sentences.⁷²⁶ Accordingly, it appears possible that some public officials, even if convicted, may escape a sentence involving deprivation of liberty. This issue has not yet been addressed by the Committee of Ministers in the documents which have been made public.

Furthermore, the application of Law No. 4616, which is commonly referred to as the “Amnesty Law”, has led to many trials being suspended.⁷²⁷ Although the Turkish Constitutional Court ruled on 18 July 2001 that torture should not be included under the scope of the law, the law in question remains applicable to cases of ill-treatment committed prior to April 1999.⁷²⁸

Finally, the package of harmonization legislation adopted in 2003 also provided that investigations and prosecutions in cases of torture and ill-treatment were to be carried out with particular speed, as priority cases; in particular, hearings of cases relating to these offences could not be adjourned for more than 30 days, unless there were compelling reasons, and hearings in such cases were to be held notwithstanding judicial recess.⁷²⁹ However, implementation of those reforms reportedly proved difficult for some courts to abide by – above all because of their heavy workload – and, despite the impression given by the Government, they were in fact left out of the new Criminal Procedure Code and no amendment was ever made.⁷³⁰

⁷²⁴ See, e.g., Human Rights Watch, “Closing Ranks” (above n. 705), p. 18.

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*

⁷²⁷ Law on Conditional Release, Suspension of Trials and Punishments for (Certain) Crimes committed until 23 April 1999 (Law No. 4616 of 21 December 2001). For discussion, see Amnesty International, “Turkey: The ‘Amnesty Law’: An Ambiguous Step” (2001) AI Index: EUR 44/052/2001, available at <[http://asiapacific.amnesty.org/library/pdf/EUR440522001ENGLISH/\\$File/EUR4405201.pdf](http://asiapacific.amnesty.org/library/pdf/EUR440522001ENGLISH/$File/EUR4405201.pdf)>.

⁷²⁸ See *ibid.*, p. 3.

⁷²⁹ *Ibid.* See also Ministry of Foreign Affairs, Secretariat General for EU Affairs, Department of Political Affairs “Political Reforms in Turkey” (February 2004), available from <www.turkishembassy.com/ii/O/Political%20Reforms%20in%20Turkey.doc>; KHRP, “Briefing Paper - Implementation Gaps in Turkey’s Domestic Law” (2006), obtainable from <http://www.khrp.org/componen.t?option.com_docman/task.doc_view/gid.93/Itemid.47/>.

⁷³⁰ For comment, see Human Rights Watch, “Closing Ranks” (above n. 705), p. 17.

(b) Statutes of limitation

There are several examples of Turkish cases regarding torture that have come before the Court, where the statute of limitation has come into play. In these cases, the Court has found that the judicial authorities have failed to act with sufficient promptness or reasonable diligence, with the result that the perpetrators have enjoyed impunity. The case of *Batı and Others v. Turkey* concerned a series of violations suffered by 15 applicants following their arrest during a police operation in 1996.⁷³¹ The Court found it established that the applicants had been subjected to treatment which amounted to torture. The Court also found, inter alia, that the investigation into the applicants' allegations of torture had been extremely lengthy and that the proceedings against the police officers were still pending before the Turkish Court of Cassation eight years after the events. In 2004, the Court of Cassation decided to discontinue the proceedings against all the police officers because the limitation period had expired. Likewise, in *Türkmen v. Turkey*,⁷³² the charges against the police officers were discontinued by a decision of the Court of Cassation in 2000 on the ground that the prescription period of 5 years had expired in 1999.⁷³³ Furthermore, in *Erdoğan Yılmaz and Others v. Turkey*, the Court stated that:

[...] when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible.⁷³⁴

The new Criminal Code of 2005 provides for longer prescription periods than those previously applicable under the old Criminal Code. In accordance with Article 66 of the 2005 Criminal Code, since torture is now punished with a term of imprisonment of three to twelve years, in cases of torture, the prescription period is now fifteen years;⁷³⁵ in cases of aggravated torture, the prescription period is twenty years⁷³⁶ and if the victim dies as a result of infliction of torture, the prescription period is thirty years.⁷³⁷ The Turkish Ministry of Justice has also issued a circular to judges and public prosecutors, stating that “public prosecutors should calculate with diligence the prescription periods and should do all that is necessary in order to finalise the investigations pending without

⁷³¹ *Batı and Others v. Turkey* (App. no. 33097/96 and 57834/00), Reports 2004-IV. The Court found violations of Articles 3, 5(3) and 13 of the Convention.

⁷³² *Türkmen v. Turkey* (above n. 776).

⁷³³ See also *Yaman Abdülsamet v. Turkey* (above n. 778); and *Tamer Fazıl Ahmet v. Turkey* (above n. 776).

⁷³⁴ *Erdoğan Yılmaz and Others v. Turkey* (App. no. 19374/03), ECtHR 14 October 2008, § 57.

⁷³⁵ Art. 66(1)(d), 2005 Turkish Criminal Code (above n. 703).

⁷³⁶ Art. 66(1)(c), 2005 Turkish Criminal Code (above n. 703).

⁷³⁷ Art. 66(1)(a), 2005 Turkish Criminal Code (above n. 703).

any outcome” (Circular No. 2).⁷³⁸ The Committee of Ministers has asked for further information regarding prescription periods in cases of death of victims under circumstances which engage the responsibility of the security forces, as well as in cases where victims are killed by unknown perpetrators.⁷³⁹

3.5.2 Investigations

(a) Measures to ensure that the investigations are conducted promptly and effectively

Most of the applicants in the relevant cases alleged that there had been a procedural violation of Articles 2 and/or 3 of the Convention on account of the State’s failure to carry out an adequate and effective investigation into the events of which complaint was made. The investigation is self-evidently of the utmost importance for the victims and their relatives as only an investigation can determine the cause of death, the whereabouts of a disappeared, and the identity of the perpetrator/s etc. Additionally, the facts in the investigation file are what the prosecutor uses to decide whether to prosecute or not and ultimately provides the source for the evidence in any criminal trial.

It is clear from the case-law of the Court that, in the cases regarding actions of the Turkish security forces, investigations have been far from effective. The Court has found, *inter alia*, that significant omissions characterized the investigations;⁷⁴⁰ autopsies were carried out improperly;⁷⁴¹ there had been no suitable inspection of the crime scene;⁷⁴² there had been a failure on behalf of the prosecutors to take statements from key witnesses;⁷⁴³ and there had been inadequate questioning of police officers, members of the security forces or other officials.⁷⁴⁴

⁷³⁸ Circular issued on 1 June 2005; see Interim Resolution CM/ResDH(2008)69 (above n. 660), Appendix I.

⁷³⁹ Department for the Execution of Judgments, Pending Cases, State of Executions, Cases or groups of cases against Turkey, available from <http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp>, under *Bati and Others v. Turkey* [accessed 15 May 2009].

⁷⁴⁰ See e.g. *Gül v. Turkey* (App. no. 22676/93), ECHR 14 December 2000, in which, *inter alia*, no attempt to find the bullet fired were made, there was no proper recording of the alleged firing of guns and a spent cartridge, no photograph taken of the weapons at the alleged location, no testing of Mr Gül’s hands for traces (§§ 89-90).

⁷⁴¹ See e.g. *Salman v. Turkey* [GC] (App. no. 21986/93), Reports 2000-VII, § 106, in which the difficulties of establishing facts derived in a large part from the failings of the post-mortem examination. See also *Yasin Ateş v. Turkey* (App. no. 30949/96), ECtHR 31 May 2005, §§ 108-109; and *Demiray v. Turkey* (App. no. 27308/95), Reports 2000-XII, § 51.

⁷⁴² See e.g. *Yasin Ateş v. Turkey* (above n. 741), in which Turkey had not submitted any information to suggest that the scene of the shooting was forensically searched for evidence (§ 96).

⁷⁴³ See e.g. *Gül v. Turkey* (above n. 741) in which the officers involved were not required to account for the use of their weapons and ammunition (§§ 89-90); and *Şemsi Önen v. Turkey* (App. no. 22876/93), ECtHR 14 May 2002 in which the authorities failed to show photos of the suspect to the applicants or to carry out a formal confrontation (§ 88).

⁷⁴⁴ See e.g. *Demiray v. Turkey* (above n. 741), in which none of the gendarmes present at the scene of Demiray’s death appears to have been questioned; *Aktaş v. Turkey* (above n. 378), in which there was a delay in taking

Quite apart from the adoption of the new Criminal Procedure Code in 2005, the main action taken by Turkey as regards effective investigations has been the issuing by the Ministry of Justice of a series of circulars addressed to the relevant authorities, which reiterated that investigations and prosecutions had to be conducted in the full respect of the standards under the Convention. In a circular issued by the Ministry of Justice on 20 October 2003, public prosecutors were reminded of the provisions of international, constitutional and national legislation concerning prevention of torture and ill-treatment.⁷⁴⁵ The circular stated that investigations into allegations of torture and ill-treatment were to be carried out speedily and effectively by public prosecutors and not by members of the security forces.

Following the entry into force in 2004 of the constitutional amendment giving direct effect to the Convention in the Turkish legal system, the Minister of Justice issued a series of further circulars on 1 June 2005, drawing the attention of the judges and prosecutors to newly enacted legislation, recalling Turkey's obligations under the Convention and enumerating the principal shortcomings concerning investigations and prosecutions which had been identified by the Court in its judgments against Turkey. In particular, the circulars recalled the following principles:

- all criminal investigations should be carried out speedily and effectively in compliance with the requirements of the Convention. Respect for human rights presupposes that the interrogation of a suspect in custody should not be used to incriminate the suspect but to collect evidence for and against him or her. Public prosecutors should calculate with diligence the prescription periods and should do all that is necessary in order to finalise the investigations pending without any outcome (Circular No. 2);
- the shortcomings identified by the Court regarding previous criminal investigations should be remedied in order to avoid future violations, in particular those relating to ineffective investigations into allegations of torture and ill-treatment, discrepancies in autopsy reports, the absence of photos that should be taken during autopsies and decisions of non-prosecution issued by public prosecutors without the necessary investigation being carried out into the facts (Circular No. 4);
- investigations into killings where the perpetrator is unknown should be carried out rapidly and effectively, taking into account the requirements of the Convention; in particular the investigation of such crimes should be carried out in coordination with the security forces. All necessary evidence should be collected from the

statements and the gendarmerie officers involved in the interrogation of Mr Aktaş were not questioned to account for bruising and injuries found on the body (§ 306).

⁷⁴⁵ See Interim Resolution CM/ResDH(2005)43 (above n. 563), Appendix I, § 19.

scene of the crime and should be preserved with care. The rules on ballistic examinations, autopsy reports and identification of the body should be followed strictly. Furthermore, such investigations should be carried out directly by public prosecutors who should examine the investigation files at regular intervals and do their utmost to make sure that the perpetrators are found rapidly and in any case within the prescription period (Circular No. 22).⁷⁴⁶

The Department for the Execution of Judgments found the circulars encouraging and in 2007 it suggested that the Committee of Ministers might wish to close its examination of the issue of ensuring effective investigations.⁷⁴⁷ In September 2008, the Committee of Ministers recalled “the Turkish authorities’ repeated commitments before the Committee that the measures taken shall be applied in compliance with the Convention standards [...], as well as their undertaking that the implementation of these measures shall strictly be supervised”.⁷⁴⁸ The Committee accordingly decided to close the examination of this issue.⁷⁴⁹

As regards public scrutiny of the investigation, a positive development is represented by the introduction in the new Criminal Procedure Code of a provision intended to give effect to the requirement that victims and their relatives have a right to be involved in the proceedings.⁷⁵⁰ Under Article 243 of the 2005 Criminal Procedure Code the victim or complainant is entitled: (a) to request the public prosecutor to collect evidence; (b) to request a copy of the investigation file; (c) to receive free legal assistance; (d) to request a copy of the evidence; (e) to be informed of hearings; (f) to take part in the proceedings as an intervening party; (g) to request a copy of the case-file; (h) to apply to be permitted to call witnesses; (i) to have the assistance of a lawyer during the proceedings; and (j) to appeal a decision.⁷⁵¹

(b) Measures to ensure independence of criminal investigations

In a number of cases, the Court has also found that the investigation into allegations of abuses committed by the security forces did not comply with the requirement of independence. In particular, deficiencies have been found as a result of the fact that the

⁷⁴⁶ See Interim Resolution CM/ResDH(2008)69 (above n. 660), Appendix I, para C(4). For access (in Turkish only) to all the circulars issued by the Ministry of Justice since 1 January 2006, see <<http://www.adalet.gov.tr/duyurular/genelgeler/genelgeler.html>>.

⁷⁴⁷ CoE doc. CM/Inf/DH(2006)24 rev. 2 (above n. 121).

⁷⁴⁸ Interim Resolution CM/ResDH(2008)69 (above n. 660).

⁷⁴⁹ Ibid.

⁷⁵⁰ See above, Section 1.3.2(e).

⁷⁵¹ Art. 243, 2005 Turkish Criminal Procedure Code (above n. 703); see also Interim Resolution CM/ResDH(2005)43 (above n. 563), Appendix I, § 23.

investigation was delegated to officers belonging to the same unit as those accused, or to units under the same hierarchical command as the unit to which those suspected of having committed the acts belong.⁷⁵² For instance, in the case of *İpek v. Turkey*, the Court observed that

[the] appointment of a lieutenant-colonel, [...] as investigator was inappropriate given that the allegations were directed against the security forces of which he was a member.⁷⁵³

The main actions taken by Turkey with regard to the shortcomings identified by the Court has consisted of the issuing of circulars. For instance, the Circular issued by the Ministry of Justice on 20 October 2003, mentioned above, directed that investigations into allegations of torture and ill-treatment were to be carried out by public prosecutors and not by members of the security forces.⁷⁵⁴ Further indications in that regard were given in some of the circulars issued by the Minister of Justice on 1 June 2005. In particular, according to the instructions issued by the Ministry, “[i]nvestigations into allegations of torture or ill-treatment should be carried out by the chief public prosecutors or a public prosecutor appointed by him or her (not by the police or members of the security forces) in accordance with the requirements of international conventions on human rights, the case-law of the Court, the Constitution and the relevant provisions of domestic law”.⁷⁵⁵

(c) Possibility of challenging the refusal to open criminal proceedings or the way the investigation is progressing

The Court has affirmed that the possibility of appealing to a court against the refusal of the investigating authorities to open criminal proceedings may, in principle, offer a substantial safeguard against the arbitrary exercise of power by the investigating authority, given the power of the courts to annul a refusal to institute criminal proceedings and indicate the defects to be addressed.⁷⁵⁶ Also, in the practice of the

⁷⁵² In *Koku v. Turkey* (App. no. 27305/95), ECtHR 31 May 2005, the investigation was carried out by the Governor who was himself responsible for the security forces whose conduct was at issue. The Court found that this did not comply with the requirements of impartiality and independence (at § 142). See also *Orhan v. Turkey* (App. no. 25656/94), ECtHR 18 June 2002, §§ 264 and 342; *Aktaş v. Turkey* (App. no. 24351/94), Reports 2003-V, § 304; *Ergi v. Turkey* (App. no. 23818/94), Reports 1998-IV, at §§ 83-84; *Güleç v. Turkey* (App. No. 21593/93), Reports 1998-IV, at §§ 81-82; *Oğur v. Turkey* [GC] (App. no. 21954/93), Reports 1999-III, at §§ 91-92; *Incal v. Turkey* (App. no. 22678/93), Reports 1998-IV, § 172; *Kaya v. Turkey* (above n. 686), § 81; *İpek v. Turkey* (App. no. 25760/94), Reports 2004-II, § 174; Cf. *Tahsin Acar v. Turkey* (Merits), (App. no. 26307/95), Reports 2004-III; §§ 228-234.

⁷⁵³ *İpek v. Turkey* (above n. 752), Reports 2004-II, § 174.

⁷⁵⁴ Interim Resolution CM/ResDH(2005)43 (above n. 563).

⁷⁵⁵ See Interim Resolution CM/ResDH(2008)69 (above n. 660), Appendix I, para. C(4).

⁷⁵⁶ *Chitayev and Chitayev v. Russia* (App. no. 59334/00), ECtHR 18 January 2007, § 139.

Committee of Ministers, the possibility of judicial review of prosecutors' decision not to prosecute has been recognized as an important safeguard for ensuring adequate information and public scrutiny.⁷⁵⁷

In Turkey, according to Article 173 of the 2005 Criminal Procedure Code (Article 165 of the Old Code), decisions of public prosecutors not to prosecute can be challenged by the interested persons before the competent assize courts. There are at least two examples of applications which have come before the Court in which the applicants successfully appealed against the decisions of the public prosecutor not to prosecute.⁷⁵⁸ If an applicant does not avail him or herself of this remedy, the Court will find that there has been a failure to exhaust domestic remedies under Article 35(1) of the Convention.⁷⁵⁹

3.5.3 Prosecution and sentencing

In Turkey, complaints about the destruction of property, killings and infliction of torture or ill-treatment can be made to the public prosecutor or to the local administrative authorities. The public prosecutor and the police are under an obligation to investigate complaints made to them and the prosecutor decides whether or not proceedings should be brought.⁷⁶⁰ However, as will be seen below, prosecutions in some cases may require an administrative authorization.

(a) *Administrative authorization to prosecute*

Under the Turkish Constitution, as a general matter, investigations and prosecutions of civil servants for crimes committed during the exercise of their functions are, as a general matter, subject to the grant of permission by the relevant administrative authority.⁷⁶¹ Accordingly, at the material time of the events dealt with in the judgments, administrative authorization was requested to prosecute members of the security forces for any offence committed during the performance of their duties, with only very limited exceptions provided for by law.

The preliminary investigation of offences committed by State officials was governed by the Law of 1914 on the Prosecution of Civil Servants, which restricted the public

⁷⁵⁷ Interim Resolution CM/ResDH(2007)73, 6 June 2007.

⁷⁵⁸ See *Keçeci v. Turkey* (dec) (App. no. 38588/97), ECtHR 17 October 2000; *Fidan v. Turkey* (dec) (App. no. 24209/94), ECtHR 29 February 2000.

⁷⁵⁹ See *Epözdemir v. Turkey* (dec) (App. no. 57039/00), ECtHR 31 January 2002.

⁷⁶⁰ Information provided by Turkey for the 1999 Interim Resolution, see Annex I, § II(B).

⁷⁶¹ Turkish Constitution (above n. 704), Art. 129; see also *ibid.*, Art. 144 in relation to judges and public prosecutors.

prosecutor's jurisdiction *ratione personae* at that stage of the proceedings. In such cases it was for the relevant local Administrative Council (for the district or province, depending on the suspect's status) to conduct the preliminary investigation and, consequently, to decide whether to prosecute. In many cases, the Administrative Council simply decided not to authorize an investigation and prosecution. Once a decision to prosecute had been taken, it was then for the public prosecutor to investigate the case.⁷⁶² The Court has in numerous cases found this procedure to be incompatible with the right of victims to an effective remedy, consistently holding that the preliminary investigation carried out by the Administrative Councils for the purposes of granting authorization could not be regarded as independent since they are chaired by the governors, or their deputies, and composed of local representatives of the executive, who are hierarchically dependent on the governors.⁷⁶³

In 1999, the Committee of Ministers called upon the Turkish authorities to "rapidly complete the reform of the present system of criminal proceedings against members of the security forces, in particular by abolishing the special powers of the local administrative councils in engaging criminal proceedings [...]"⁷⁶⁴

Law No. 4483 on Prosecution of Civil Servants and Other Public Officials of 2 December 1999 repealed and replaced the Law of 1914 on the Prosecution of Civil Servants.⁷⁶⁵ Under the new law it is still not possible to open an investigation against civil servants who commit a crime without the permission of a superior; the decision as to whether an investigation should be initiated by the prosecutor is no longer given by the local administrative councils, but is taken by a high State officer (a prefect or sub-prefect) personally.⁷⁶⁶ A decision denying administrative authorization is subject to appeal before the Council of State; the law also provides that these proceedings must be concluded within four and a half months (including the appeal before the Council of State).⁷⁶⁷

⁷⁶² *Yaşa v. Turkey* (App. no. 22495/93), Reports 1998-VI, § 49.

⁷⁶³ There are more than 50 cases reaching this conclusion on the procedure, see e.g. *Güleç v. Turkey* (App. no. 21593/93), Reports 1998-IV, § 80; *Oğur v. Turkey* [GC] (App. no. 21594/93), Reports 1999-III, § 91; *Kılıç v. Turkey* (App. no. 22492/93), Reports 2000-III; *Yöyler v. Turkey* (App. no. 26973/95), ECtHR 24 July 2003, § 93; *İpek v. Turkey* (App. no. 25760/94), ECtHR 2004-II, § 207; and *Kurnaz and Others v. Turkey* (App. no. 36672/97), ECtHR 24 July 2007, § 62.

⁷⁶⁴ Interim Resolution DH(99)434 (above n. 685). Reaffirmed in Interim Resolution CM/ResDH(2002)98 (above n. 685).

⁷⁶⁵ Law No. 4483 of the Prosecution of Civil Servants and Other Public Employees was adopted by the Grand National Assembly of Turkey on 2 December 1999 and entered into force on 5 December. However, the former procedure remains applicable to facts prior to 2 December 1999 when the Law of 1914 was still in force. Amnesty International criticized this law when it came into force, stating that it was "not a major step towards ending impunity for torturers", given that "[...] under the new law it is still not possible to open an investigation against civil servants who commit a crime unless their superior grants permission". See Amnesty International, "Turkey: New law on the prosecution of civil servants: not a major step towards ending impunity for torturers", available at <<http://www.amnesty.org/en/library/asset/EUR44/038/2000/en/dom-EUR440382000en.html>>.

⁷⁶⁶ Articles 3 and 5 of Law No. 4483 provide that "the authority to which the civil servant belongs carries out a preliminary inquiry and then gives an opinion on prosecuting within 30 days of the date which the case came to its attention." See <http://www.oecd.org/dataoecd/13/46/39862163.pdf>.

⁷⁶⁷ Interim Resolution CM/ResDH(2002)98 (above n. 685), Appendix I, § 20.

Originally, express exceptions to the requirement were made only in limited circumstances: in cases of investigations and prosecutions of civil servants subject to special procedures due to the nature of their duties or because of the nature of the crime at issue; in situations of *flagrante delicto* requiring severe punishment; and in relation to disciplinary proceedings.⁷⁶⁸ Following its examination in 2002 of the measures taken by Turkey by way of execution, the Committee of Ministers regretted “that repeated demands for the reform of Turkish criminal procedure to enable an independent criminal investigation to be conducted without prior approval by the State’s prefects have not yet been met”.⁷⁶⁹

The obstacle of administrative authorization required in order for criminal investigations to be initiated against members of the security forces was finally abolished in cases of alleged torture or ill-treatment when Law No. 4483 on Prosecution of Civil Servants was amended by Law No. 4778 of 10 January 2003 by the addition of a further express exception to the relevant provision requiring administrative authorisation.⁷⁷⁰ However, the initiation of an investigation and eventual prosecution in relation to offences other than torture and ill-treatment generally remains subject to authorization by the relevant administrative authorities under Law No. 4483.⁷⁷¹ In that regard, in 2005 the Turkish Government argued, apparently on the basis of the 2004 constitutional amendment to Article 90 of the Constitution which gives the Convention a hierarchical status above that of normal laws that “in line with the Convention requirements, [...] the criminal investigation into all other violations of the Convention (e.g. unlawful killings, destruction of property etc) by members of security forces was not subject to any administrative authorization,”⁷⁷² It has further argued, that the authorities have consistently

[...] encouraged the developing practice of administrative courts to quash administrative decisions refusing the indictment of members of security forces of other unlawful actions, such as unintentional homicide, causing bodily harm, causing death in traffic accident, burning of houses. The administrative courts have concluded that Law No. 4483 on the Prosecution of Civil Servants does not grant judicial powers to the administrative authorities but only provides that the relevant administrative councils should send the outcome of their examinations to the judicial authorities in the cases of all abuses. These decisions also stress that it is for the judicial authorities to investigate and decide whether the accused public officials committed the offences and whether they were liable or not.⁷⁷³

⁷⁶⁸ See Interim Resolution CM/ResDH(2008)69 (above n. 660), Appendix I.

⁷⁶⁹ Interim Resolution CM/ResDH(2002)98 (above n. 685), § 12.

⁷⁷⁰ Interim Resolution CM/ResDH(2005)43 (above n. 563), § 20. See also Interim Resolution CM/ResDH(2008)69 (above n. 660), Appendix I, § E.

⁷⁷¹ Further, prosecutions against the highest ranking members of the security forces are subject to the provisions applicable to prosecutions against judges: see CoE doc. CM/Inf/DH(2006)24 rev. 2 (above n. 121) and Interim Resolution CM/ResDH(2008)69 (above n. 660), Appendix I, § E.

⁷⁷² Interim Resolution CM/ResDH(2002)98 (above n. 685), Appendix I, § 20.

⁷⁷³ Interim Resolution CM/ResDH(2005)43 (above n. 563), Appendix I, § 21.

In response, the Committee of Ministers noted that the 2003 amendment appeared to have lifted the requirement of administrative authorisation only with respect to allegations of torture and ill-treatment but that it continued to exist with respect to other allegations of serious crimes; it accordingly asked Turkey to take measures so as to remove any ambiguity in that regard.⁷⁷⁴ Again, in 2008, the Committee of Ministers reiterated that it appeared that the requirement of administrative authorisation had only been lifted in relation to allegations of torture and ill-treatment but remained for other serious crimes. Although noting that there were indeed examples of cases in which prosecutions had been initiated against members of the security forces without administrative authorisations having been sought, it again urged the Turkish authorities

[...] to take the necessary legislative measures to remove any ambiguity regarding the fact that the administrative authorisation is no longer required to prosecute not only for torture and ill-treatment but also any other serious crimes and to ensure that members of security forces of all ranks could be prosecuted without an administrative authorisation;⁷⁷⁵

Quite apart from the question of whether the requirement of administrative authorisation is only advisory or in fact constitutes a substantive obstacle to investigations and prosecutions, in any event the requirement is capable of delaying the progress of investigations and therefore impacting negatively on the effectiveness of any investigation.

(b) Re-opening of investigations

The cases in the *Batı* group concern shortcomings of proceedings (some of which are still pending before the Turkish domestic courts) relating to the investigation of abuses by members of the security forces, in particular the ill-treatment of the applicants or the death of their relatives in circumstances engaging the responsibility of the State.

Criminal proceedings in two of the cases in the *Batı* group were discontinued because the limitation periods had expired.⁷⁷⁶ The decision of a court or a prosecutor to discontinue criminal proceedings on this basis is subject to appeal and the Committee of

⁷⁷⁴ Interim Resolution CM/ResDH(2005)43 (above n. 563).

⁷⁷⁵ Interim Resolution CM/ResDH(2008)69 (above n. 660), § E.

⁷⁷⁶ *Demir Ceyhan and Others v. Turkey* (App. no. 34491/97), ECtHR 13 January 2005; and *Sunal v. Turkey* (App. no. 43918/98), ECtHR 25 January 2005. Given the fact that criminal cases were time-barred, the Committee has enquired what measures are envisaged (including possible disciplinary sanctions against the police officers) in the following cases: *Sunal v. Turkey*; *Yeşil and Sevim v. Turkey* (App. no. 34738/04), ECtHR 5 June 2007; *Tamer Fazıl Ahmet and Others v. Turkey* (App. no. 19028/02), ECtHR 24 July 2007; *Öktem v. Turkey* (App. no. 74306/01), ECtHR 19 October 2006; and *Türkmen v. Turkey* (App. no. 43124/98), ECtHR 19 December 2006. See Council of Europe, Department for the Execution of Judgments, "Supervision of execution; Implementation of judgments of the European Court of Human Rights; Turkey" available from <http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp>, under *Batı and Others v. Turkey* [last accessed 5 May 2010]

Ministers is still awaiting information on the outcome of these appeal proceedings in the case of *Demir Ceyhan*.⁷⁷⁷ In other cases, the Committee is still waiting for information on the possibility of the re-opening of domestic investigations against members of the security forces in relation to abuses or any other ad hoc measures taken or envisaged in execution of the Court's judgments.⁷⁷⁸

The defects found by the Court in these cases as regards the criminal investigations are particularly serious. In the case of *Batı and Others v. Turkey* itself, the Court found that the flaws in the investigation and the failure to conduct the investigation with the necessary promptness and diligence had resulted in according virtual impunity to the police officers involved, which rendered the criminal remedy ineffective (violations of Articles 3, 5(3) and 13 ECHR). In the case of *Ağdaş v. Turkey*,⁷⁷⁹ the applicant informed the Department for the Execution of Judgments that he did not accept the just satisfaction awarded by the Court but demanded instead that the perpetrators of his brother's killing be identified, prosecuted and punished.⁷⁸⁰ The Committee of Ministers is in the progress of supervising the execution of the judgments; however, unfortunately, little information regarding the re-opening of investigations is available. This is regrettable as individual measures taken by Turkey after the European Court's judgment are potentially an excellent indicator of Turkey's will to remedy the shortcomings found by the Court.

3.6 Impact

3.6.1 Domestic prosecutions

One of the requests made by the Committee of Ministers to the Turkish authorities was to "continue to keep the Committee of Ministers informed of the concrete effects of the measures adopted, in particular by providing statistics concerning compensation awarded, the number of criminal complaints and their outcome".⁷⁸¹ Although, some data on investigations, convictions and sentencing have been provided by Turkey to the Committee of Ministers, there is a marked lack of reliable and consistent statistics concerning accountability of members of the security forces in Turkey. The official statistics compiled by various Turkish authorities regarding rates of investigations,

⁷⁷⁷ Ibid.

⁷⁷⁸ *Karabulut Mustafa v. Turkey* (App. no. 40803/02), ECtHR 20 November 2007; *Yılmaz Hürriyet v. Turkey* (App. no. 17721/02), ECtHR 5 June 2007; *Ağdaş v. Turkey* (App. no. 34592/97), ECtHR 27 July 2004; *H.Y. and Hü. Y v. Turkey* (App. no. 40262/98), ECtHR 6 October 2005; *Şahin Zülchihan and Others v. Turkey* (App. no. 53147/99), ECtHR 3 February 2005; *Şimşek and Others v. Turkey* (App. no. 35072/97 and 37194/97), ECtHR 26 July 2005; and *Yaman Abdülsamet v. Turkey* (App. no. 32446/96), ECtHR 2 November 2004.

⁷⁷⁹ *Ağdaş v. Turkey* (above n. 778).

⁷⁸⁰ State of execution, Turkey, *Batı and Others v. Turkey* (above n. 777).

⁷⁸¹ Interim Resolution DH(99)434 (above n. 685).

prosecutions and convictions with respect to charges of torture and ill-treatment seem to contradict one another.⁷⁸² In addition to the official data provided by Turkey, detailed descriptions of investigations and prosecutions in cases of killings and torture can be obtained from reports by the CPT, as well as reports of international NGOs.⁷⁸³

(a) Statistics presented by Turkey to the Committee of Ministers

The first data on proceedings against Turkish officials charged with torture and ill-treatment was provided by Turkey in 1999, after the Committee of Ministers had adopted its first Interim Resolution on the actions of the security forces in Turkey.⁷⁸⁴ These first statistics covered the 13-year period from 1985 to 1998.⁷⁸⁵ According to those statistics, in the period in question criminal proceedings had been brought against 1,918 members of the Gendarmerie accused of ill-treatment.⁷⁸⁶ At the time of reporting to the Committee, proceedings were still pending against 1,448 officials, 246 officials had been acquitted and 224 had been convicted. However, no information as to what sentence these officials had received or whether the sentences had actually been served was provided by Turkey.⁷⁸⁷ In relation to allegations of torture, criminal proceedings had been brought against 191 members of the Gendarmerie;⁷⁸⁸ proceedings were still pending against 130 officials at the time of reporting, while 44 officials had been acquitted and 18 officials convicted.⁷⁸⁹ Additionally, details of 18 judgments were submitted to the Committee of Ministers concerning crimes of homicide, intentional injury, torture and ill-treatment committed by members of the security forces (police and Gendarmerie) in south-east Turkey. The Committee of Ministers noted that “in a great majority of cases, the prison sentence imposed had been commuted to a fine. Furthermore, in 14 of the 18 cases considered, the courts suspended the enforcement of the sentence and the sentenced officials have therefore been able to continue to perform their duties in the security forces”.⁷⁹⁰

In 2000, the Department for the Execution of Judgments did not receive any recent overall statistics from the Turkish authorities, but, referring to the above mentioned data,

⁷⁸² Amnesty International, “Turkey: The Entrenched Culture of Impunity Must End” (2007), AI Index: EUR 44/008/2007, p. 7.

⁷⁸³ See *ibid.*; see also Amnesty International, “Turkey: No impunity for state officials who violate human rights. Briefing on the Semdinli bombing investigation and trial” (2006), AI Index: EUR 44/006/2006; Human Rights Watch, “Closing Ranks” (above n. 705).

⁷⁸⁴ Interim Resolution DH(99)434 (above n. 685).

⁷⁸⁵ CoE doc. CM/Inf(99)58 of 17 November 1999.

⁷⁸⁶ *Ibid.*, specifically, the agents in questions were 193 officers, 1,479 non-commissioned officers and 246 sergeants.

⁷⁸⁷ *Ibid.*, II(A)(1).

⁷⁸⁸ Of which, 65 officers, 110 non-commissioned officers and 16 sergeants (*ibid.*).

⁷⁸⁹ *Ibid.*, II(A)(2)

⁷⁹⁰ *Ibid.*, II(B). The relevant details of the 18 cases are included in the information document.

stated that “in the light of the very general information provided and the length of period covered, these statistics did not, however, allow for an evaluation of the efficiency of Turkish criminal law ensuring that perpetrators of acts of torture and ill-treatment are effectively brought before justice and sentenced”.⁷⁹¹ The Department for the Execution of Judgments took however into account more recent and detailed official statistics which had been reported by different NGOs, including Amnesty International. According to these figures, only 10 out of 577 investigations into allegations of torture (corresponding to approximately 1.7% of the total) had, during the period 1995-1999, led to convictions. During the same period, only 84 out of 2,851 investigations into allegations of ill-treatment (i.e. 2.9%) had led to convictions.⁷⁹²

Subsequently, following pressure from some delegations in the Committee of Ministers to see statistics, the Turkish authorities provided official statistics for 1999-2000 on criminal prosecution of members of the National Police and Gendarmerie.⁷⁹³ The data regarding the National Police included no information about criminal convictions or sentences imposed and the data regarding the Gendarmerie contained no information on either criminal or disciplinary sanctions imposed.⁷⁹⁴ Table 1 below shows that sanctions were only imposed on a small minority of those prosecuted and that the large majority of the defendants (over 90%) received no sanction at all.

Table 1 – Criminal prosecution and disciplinary sanctions of members of the National Police and Gendarmerie for torture and ill-treatment (1999)

Year		Number of prosecutions	Suspended for short period*	Suspended for long period*	No disciplinary sanctions
1999	Agents prosecuted for torture	45	4	0	41
1999	Agents prosecuted for ill-treatment	659	41	13	605

* Period unspecified

In 2000, the Turkish authorities presented to the Department for the Execution of Judgments a number of documents relating to prosecution of the members of the security forces. The Department for the Execution of Judgments identified fifty-three

⁷⁹¹ CoE doc. CM/Inf(2000)27 of 11 May 2000.

⁷⁹² Ibid.

⁷⁹³ CoE doc. CM/Inf(2000)50 of 15 September 2000.

⁷⁹⁴ Ibid.

judgments delivered by the Turkish courts which concerned prosecution of members of the security forces for human rights violations (homicides, wounding, and ill-treatment, etc.), most of which were delivered in 1999–2000 notably in regions covered by the state of emergency. Fourteen of these fifty-three judgments had resulted in criminal convictions. The Department for the Execution of Judgments summarized the convictions in the following way:

The sentence imposed varied from 1 year and 1 month imprisonment in case of homicide, to a fine and expulsion from public service in some cases of ill-treatment. Still, only 3 sentences have been effectively served by the persons found guilty. All other sentences have been suspended, and the agents found guilty thus continued to exercise functions in the security forces.⁷⁹⁵

On the basis of the data provided by Turkey, the Committee of Ministers expressed serious concerns in relation to the fact that the sentences imposed on members of the security forces were very light and often converted into fines and suspended.⁷⁹⁶ The Turkish authorities were therefore asked to consider increasing the minimum prison sentences for personnel found guilty of abuses.⁷⁹⁷

As noted above, the Committee of Ministers in its 2002 Interim Resolution expressed concern at the excessive lenience of sentences imposed on those responsible for torture or ill-treatment.⁷⁹⁸ In response, Turkey stated that:

The number of criminal proceedings taken against members of security forces suspected of torture and ill-treatment has increased in the two last years. According to official statistics for 2000-2001, 1,472 proceedings on charges of ill-treatment and 159 proceedings on charges of torture were opened against the police and gendarmerie officers. As a result, 36 officers received prison sentences and 50 others were dismissed from the service.⁷⁹⁹

The Department for the Execution of Judgments noted that in two judgments from October and December 2002, the Turkish courts had established or confirmed the charge of torture brought against a number of police officers and stated that “these [judgments] may be indicative of a positive evolution within the Turkish judiciary”.⁸⁰⁰ Additional examples of indictment decisions were provided by Turkey in 2004 but, once

⁷⁹⁵ Ibid. The relevant details of the 53 cases are included in the information document, Annex III.

⁷⁹⁶ CoE doc. CM/Inf(2000)50 rev., Addendum of 1 October 2001, § 14.

⁷⁹⁷ Ibid.

⁷⁹⁸ See Interim Resolution CM/ResDH(2002)98 (above n. 685), quoted above, text accompanying n. 700.

⁷⁹⁹ Statistics from Interim Resolution CM/ResDH(2002)98 (above n. 685), Annex I, § 24.

⁸⁰⁰ CoE doc. CM/Inf(2003)12 Addendum of 9 April 2003, § 33.

again, the Department did not find them “sufficient to convincingly demonstrate the establishment of effective and adequate criminal accountability of members of security forces”.⁸⁰¹ The Department for the Execution of Judgments again reiterated the Committee of Ministers’ request for recent detailed statistics from Turkey.⁸⁰²

As noted above, a new Criminal Code and Criminal Procedure Code came into force in June 2005 and in the information submitted prior to the 2005 Interim Resolution, the Turkish government referred to a number of domestic court decisions convicting members of the security forces responsible for, inter alia, causing the death of a suspect and ill-treatment of detainees, and imposing severe penalties.⁸⁰³ The Turkish Government stated that it “encouraged these developments in domestic courts’ practice tending to impose more severe sanctions for abuses, thus contributing to effective implementation by Turkey of the European Court’s judgments”.⁸⁰⁴

In information provided in the period prior to the 2008 Interim Resolution,⁸⁰⁵ the Turkish authorities provided detailed statistical information regarding the number of investigations, acquittals and convictions of crimes of torture and ill-treatment in 2003, 2004, 2005 and 2006 (see summary in Table 2 below).⁸⁰⁶

⁸⁰¹ CoE doc. CM/Inf(2004)12 rev. of 27 September 2004, § 52.

⁸⁰² Ibid.

⁸⁰³ Interim Resolution CM/ResDH(2005)43 (above n. 563), Appendix I, § 26.

⁸⁰⁴ Ibid., § 27.

⁸⁰⁵ CoE doc. CM/Inf/DH(2006)24 (above n. 190); CoE doc. CM/Inf/DH(2006)24 rev. (above n. 190); and CoE doc. CM/Inf/DH(2006)24 rev. 2 (above n. 121); and see Interim Resolution CM/ResDH(2008)69 (above n. 660), Appendix I, § G. For a detailed breakdown of the statistics, see the Annexes to the information documents.

⁸⁰⁶ Prior to the entry into force of the new Criminal Code in 2005, investigation files were opened pursuant to Articles 243(1) (torture, ill-treatment and degrading treatment with the aim of obtaining evidence), 243(2) (death as a result of torture) and 245 (causing bodily harm as a result of disproportionate use of force by members of the security forces) of the old Turkish Criminal Code. When the new Code entered into force, Articles 94 (torture), 95(1-2) (aggravated torture), 95(4) (death as a result of torture) and 256 (disproportionate use of force) were used.

Table 2 – Investigations and prosecutions for torture and ill-treatment (2003 – 2007)

Year	Number of investigations opened	Number of members of security forces indicted	Decision not to prosecute	Number of members of security forces convicted	Number of members of security forces acquitted
2003	2612 (against 5588 members of security forces)	2333	1153	862	1375
2004	2413 (against 5173 members of security forces)	1824	1230	462	1631
2005	1721 (against 4277 members of security forces)	1052	1005	459	1870
2006	1965 (against 4443 members of security forces)	831	1216	1921	146
2007 (first nine months)	1421 (against 3722 members of security forces)	426	1068	139	590

From the table above, it is evident that the number of members of the security forces indicted has declined over the years (45% decrease in the number of investigations opened from 2003 to 2007), which may be explained by the declining intensity of the conflict. The Department for the Execution of Judgments has also noted this decrease and found that “this conclusion would appear to be in line with the drop in the number of cases lodged with the European Court in these last years, as well as findings of the CPT during December 2005”.⁸⁰⁷ The number of complaints could however in reality be higher than the number of investigations opened. Although, as noted above, the requirement of administrative authorization for criminal investigations was abolished in cases of alleged torture and ill-treatment in 2003, administrative authorizations appear in practice to be required in some cases.⁸⁰⁸ In particular, administrative authorization still seems to be required in relation to other serious crimes and, to date, no statistical information

⁸⁰⁷ CoE doc. CM/Inf/DH(2006)24 rev. (above n. 190).

⁸⁰⁸ See above, Section 3.5.3(a).

regarding number of investigations, convictions and acquittals into allegations of killings as a result of disproportionate use of force by members of the security forces have been submitted to the Committee of Ministers.

In relation to the crimes of torture and ill-treatment, the proportion of acquittals was 24.6% in 2003, reached an all time high in 2005 with 43.7%, before dropping to 15.9% in 2007. No real conclusions can be drawn from this as it cannot be assumed that investigation files opened into complaints lodged in a given year were finalized in the same year. However, the proportion of decisions not to prosecute has increased from 44% in 2003 to 75% in 2007, when one could have expected an inverse development.

The question then becomes what happened to those convicted of torture or ill-treatment after 2003. Did they receive the same lenient sanctions as other members of the security forces have received before them or has there been a change in the last years? Judging from the case-files finalized in 2003-2005, as portrayed in the Tables 3–5 below, the majority of the convicted members of the security forces received “other sanctions” than imprisonment and/or a fine.⁸⁰⁹ The convictions in the tables refer to Articles of the old Criminal Code, namely Article 243(1) and (2) which criminalized torture, and Article 245, which concerned disproportionate use of force. When the new Criminal Code entered into force, these Articles became Articles 94, 95(1)-(4) and 256.

⁸⁰⁹ Data from CoE doc. CM/Inf/DH(2006)24 rev. (above n. 190).

Table 3 – Sentences imposed for torture or ill-treatment (2003)

Convictions 2003				
Articles of old Criminal Code	Imprisonment	Fine	Imprisonment and fine	Other sanction*
243(1) ¹	27	12	2	440
243(2) ²	9	0	0	0
245 ³	89	122	20	141
Total	125	134	22	581

Table 4 – Sentences imposed for torture or ill-treatment (2004)

Convictions 2004				
Articles of old Criminal Code	Imprisonment	Fine	Imprisonment and fine	Other sanction*
243(1) ¹	21	7	0	40
243(2) ²	6	2	0	2
245 ³	72	76	16	220
Total	99	85	16	262

Table 5 – Sentences imposed for torture or ill-treatment (2005)

Convictions 2005				
Articles of new Criminal Code	Imprisonment	Fine	Imprisonment and fine	Other sanction*
94, 95(1)-(3) ⁴	28	20	0	55
95(4) ⁵	0	0	0	2
256 ⁶	34	86	11	243
Total	62	106	11	300

¹ Art. 243(1) (torture, ill-treatment and degrading treatment with the aim of obtaining evidence)

² Art. 243(2) (death as a result of torture)

³ Art. 245 of the old Criminal Code (causing bodily harm as a result of disproportionate use of force by members of the security forces).

⁴ Arts 94 (torture) and 95(1)-(3) (aggravated torture),

⁵ Art. 95(4) (death as a result of torture)

⁶ Art. 256 (disproportionate use of force)

* May refer to earlier laws which allowed courts to impose sanctions such as temporary suspension from duty or permanent disbaring from the profession.

(b) Statistics from other sources

The CPT has since the early 1990s requested information and data from Turkey on measures adopted in order to implement the provisions of Articles 243 and 245 of the old Criminal Code and the Turkish Government has provided figures on several occasions. Tables 6 to 9 below reflect the statistics provided by Turkey to the CPT and refer to the period 1995-2004. By examining those statistics, it is evident that most officials were charged with ill-treatment rather than torture. The greater part (approximately 78%) of judicial proceedings concerning either torture or ill-treatment did not lead to a conviction as the defendants were either acquitted, the proceedings were dismissed by the court, a decision not to prosecute was given, or the trials were suspended under Law No. 4616.⁸¹⁰ According to the statistics in question, 98.7% of the judicial proceedings concerning charges of torture⁸¹¹ and 95.5% of those concerning charges of ill-treatment⁸¹² during the period under consideration led to a finding of “no grounds for penalty”. Only 3.6% of the proceedings in relation to charges of torture and 0.7% of those relating to ill-treatment resulted in a short or long-term suspension. Further, the fact that in 18.1% of cases, the defendant received a prison sentence following a conviction under Article 245 of the old Criminal Code, criminalizing torture, compared to 5.1% under Article 243 which criminalized ill-treatment, could be indicative of the Turkish authorities’ lack of willingness to punish officials for torture, in contrast to the “less serious” crime of ill-treatment.

⁸¹⁰ On Law No. 4616, see above n. 728 and accompanying text.

⁸¹¹ Under Art. 243 of the old Criminal Code.

⁸¹² Under Art. 245 of the old Criminal Code.

Table 6 – Total personnel in respect of whom *judicial* proceedings were brought under Article 243 (torture) of the Criminal Code between 1 January 1995 and 31 December 2004 (date of offence)⁸¹³

Outcome	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	Total
Suspended sentence under Law No. 4616*	2	0	0	11	4	0	0	0	0	0	17
Acquittal	48	106	69	88	78	51	35	57	32	3	567
Imprisonment	26	12	10	9	6	13	2	1	1	0	80
Trial pending	0	0	5	5	38	12	60	80	36	6	242
Charges dismissed by court	7	17	9	9	6	6	0	0	0	0	54
Decision not to prosecute	18	20	19	7	38	46	93	275	74	4	594
Total	101	155	112	129	170	128	190	413	143	13	1554

* Law No. 4616 on the conditional release and the suspension of trials and sentences for offences committed up until 23 April 1999.

Table 7 – Personnel in respect of whom *disciplinary* proceedings were brought under Article 243 (torture) of the Criminal Code between 1 January 1995 and 31 December 2004 (date of offence)⁸¹⁴

Outcome	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	Total
No grounds for penalty	51	79	81	90	87	63	135	381	139	5	1102
Loss of one day's salary	0	1	0	0	0	0	0	0	0	0	1
Reprimand	0	0	0	0	0	2	0	0	0	0	2
Short-term suspension	0	0	0	0	0	0	0	1	0	0	1
Dismissal from police force	0	0	0	0	0	1	0	2	0	0	3
Long-term suspension	1	0	0	0	0	0	0	5	1	0	7

⁸¹³ “Response of the Turkish Government to the report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Turkey from 16 to 29 March 2004” (2005) CPT Doc CPT/Inf(2005)19, Appendix 3.

⁸¹⁴ Ibid.

Table 8 – Total personnel in respect of whom *judicial* proceedings were brought under Article 245 (ill-treatment) of the Criminal Code between 1 January 1995 and 31 December 2004 (date of offence)⁸¹⁵

Outcome	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	Total
Suspended sentence under Law No. 4616*	66	122	217	648	175	0	1	1	0	0	1203
Acquittal	124	250	298	273	221	368	219	289	227	6	2275
Imprisonment	39	62	28	33	87	73	44	30	15	1	412
Trial pending	6	18	34	38	110	190	201	534	487	155	1773
Charges dismissed by court	240	409	395	350	335	17	0	0	0	0	1746
Decision not to prosecute	93	81	81	91	189	369	404	541	462	72	2383
Total	568	942	1053	1433	1090	1017	869	1395	1191	234	9792

* Law No. 4616 on the conditional release and the suspension of trials and sentences for offences committed up until 23 April 1999.

Table 9 – Total personnel in respect of whom *disciplinary* proceedings were brought under Article 245 (ill-treatment) of the Criminal Code between 1 January 1995 and 31 December 2004 (date of offence)⁸¹⁶

Outcome	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	Total
No grounds for penalty	379	693	632	868	810	702	806	1255	1155	129	7429
Loss of one day's salary	6	6	11	4	5	3	0	5	0	0	40
Reprimand	4	3	3	1	0	2	1	1	1	0	16
Short-term suspension	5	7	25	13	52	22	30	32	10	10	206
Warning	7	0	1	1	1	2	0	0	0	0	12
Long-term suspension	1	9	2	7	10	12	14	12	4	2	73
Total	402	718	674	894	878	743	851	1305	1170	141	7776

⁸¹⁵ Ibid.

⁸¹⁶ Ibid.

The data contained in Tables 6 – 9 above differs from that provided by the Turkish Government's in its response to the CPT's visit in September 2003.⁸¹⁷ The CPT has questioned the reliability of the information provided by Turkey, at times going so far as to query "whether the statistics provided are accurate".⁸¹⁸ The CPT, however, found that:

[r]egardless of which statistics are examined, it would appear that convictions under Articles 243 and 245 of the Criminal Code remain a rare occurrence. Similarly, the statistics provided in the Turkish authorities' response to the report on the September 2003 visit indicate that administrative sanctions are very rarely imposed against law enforcement officials subject to proceedings under Articles 243 and 245 of the Criminal Code.⁸¹⁹

Amnesty International has found that the data referred to above present a very different picture from the statistics available from the General Directorate of Judicial Records (the very same authority that has provided the data above to the CPT) and the statistics produced by the Ministry of Justice.⁸²⁰ Furthermore, Amnesty International has observed that "the figures indicated in the tables reproduced in the [Committee of Minister's] Memorandum [CM/Inf/DH(2006)24] in general seem to be between 15 and 30 per cent lower than those recorded by the General Directorate of Judicial Records and Statistics of the Ministry of Justice."⁸²¹

Further insight may be gained from the analysis of the data collected by a Turkish NGO, the Human Rights Association (İnsan Hakları Derneği - İHD), which has conducted a project to monitor 52 trials concerning allegations of torture and ill-treatment and 59 investigations into claims of torture and ill-treatment during 2004 and 2005. The results of the thirteen trials where a verdict had been given in the lower court, but an appeal was pending, were as follows: nine trials resulted in acquittal and four in a conviction. However, the servicemen convicted in two of the trials got their sentences suspended. Of two trials which were finalized (by the Court of Cassation), one resulted in acquittal and the other ended in impunity because it exceeded the statute of limitations and was

⁸¹⁷ "Response of the Turkish Government to the report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Turkey from 7 to 15 September 2003" (2004), CPT Doc CPT/Inf(2004)17, Appendix 3.

⁸¹⁸ "Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 29 March 2004" (2005), CPT Doc CPT/Inf(2005)18, § 22. The CPT provided the following example: "it is stated that, in 2003, 32 law enforcement officials were prosecuted in Turkey on charges of torture (Art. 243 of the Criminal Code); however, according to statistics provided by the Chief Prosecutor of Izmir to the delegation that carried out the March 2004 visit, 18 law enforcement officials were prosecuted on charges of torture during 2003 in that province alone."

⁸¹⁹ Ibid.

⁸²⁰ Amnesty International, "The Entrenched Culture" (above n. 782).

⁸²¹ Ibid. For information on statistics included in CoE doc. CM/Inf/DH(2006)24 (above n. 190), see above, Section 3.6.1(a).

dropped.⁸²² Of the 59 investigations into torture or ill-treatment followed by the İHD, in 32 cases a decision not to pursue an investigation was issued by the public prosecutor, in two cases the court issued a decision of non-competency, and in one case non-competency on the basis of geographical location of the court, with 24 investigations still continuing when the project ended. Thus, 59% of the cases had ended with the prosecutor's decision that there was no need for legal proceedings to be started.⁸²³

(c) General assessment of impact

The Committee of Ministers found that shortcomings in establishing criminal liability for abuses at the domestic level was one of the structural problems from which the violations found by the Court resulted. The practices of the Turkish judicial authorities in effectively prosecuting members of the security forces who commit crimes are developing but not fast enough. It is of course positive that it would appear that the number of cases requiring investigation is decreasing, a development which is paralleled by fewer cases being filed with the European Court. However, an alarming development lies in that fact that the proportion of decisions not to prosecute has risen to the level of 75% in relation to the cases in 2007. Sentences are also still lenient with the majority of those convicted receiving "other sanctions" than imprisonment or fines, even though they are convicted of committing torture and/or ill-treatment. In respect of sentences of imprisonment, as detailed information is not provided regarding the length of the sentences imposed, no conclusions can be drawn as to whether the penalties have in fact been stiffened, nor as to whether the sentences are so short that the sentence is in fact suspended. It is also interesting to note that fines are still imposed as a sanction although the Criminal Code was amended in 2003 so that penalties under these provisions can no longer be converted into fines.⁸²⁴

A further problem, underlined, *inter alia*, by Amnesty International, is that members of the security forces or police officers on trials for killings or torture are generally not suspended from active duty pending the outcome of the trial against them, posted to different cities, and are not prevented from receiving promotions. It is extremely rare for members of the security forces to be placed in pre-trial detention pending verdict; and

⁸²² The other 37 trials (12 for torture and 25 for ill-treatment) were not completed by the end of the İHD project and continued.

⁸²³ Amnesty International, "The Entrenched Culture" (above n. 782), citing M. Erdal (İHD - Human Rights Association), "Sorusturma ve Dava Örnekleriyle Đskencenin Cezasızlığı Sorunu" ("The Problem of Impunity for Torture with examples from investigations and trials") (Ankara 2006), published in the context of the İHD's 2003-2005 "Don't Remain Silent on Torture" campaign ("Đskenceye sessiz Kalma!") and Meryem Erdal (İHD - Human Rights Association), "Đskence ve Cezasızlık" ("Torture and impunity") (Ankara 2005) which, according to Amnesty International, provide the most detailed studies of the problem of impunity in Turkey.

⁸²⁴ See above, text accompanying n. 714.

according to Amnesty International, in some cases this has had implications for the security of witnesses.⁸²⁵

3.6.2 Establishment of new investigative and supervisory bodies

In an attempt to establish enhanced accountability of security forces, some new investigative bodies for human rights violations have been established in Turkey. Amongst the bodies create to ensure prompt and effective investigations into allegation of abuses by members of the security forces, a prominent role is played by the Human Rights Violations' Investigation and Evaluation Center (JIHIDEM), a special unit established within the Turkish Gendarmerie in 2003 with the mandate to investigate and evaluate complaints and applications relating to allegations of human rights violations taking place in the Gendarmerie area of responsibility or while officers are carrying out the duties related to the Gendarmerie. The JIHIDEM has five main missions: (1) to receive complaints and applications about human rights violations forwarded to JIHIDEM by various means (telephone, fax, mail, petition, personal application etc.); (2) evaluate whether or not the complaints and applications received fall within the scope of the notion of human rights violations; (3) investigate allegations and initiate judicial and administrative investigations in accordance with legal procedures; (4) reply to complaints and applications after investigation; and (5) prepare reports about the replies given to the complaints and applications and statistical information about those replies and inform the public about the activities of JIHIDEM.⁸²⁶ Prior to the 2008 Interim Resolution, the Turkish Government stated that, since its introduction in 2003, the JIHIDEM had received 770 complaints, 185 of which involved allegations of human rights violations. Of those complaints, 18 had been referred to judicial organs, 34 were the object of an ongoing investigation and in 3 cases disciplinary sanctions had been imposed. 130 complaints had been found to be ill-founded.⁸²⁷

In a 2006 report by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while countering terrorism, the Special Rapporteur noted that the number of complaints received by the JIHIDEM was relatively low, 162 since the establishment of the unit, and that only 1% of all complaints were found to be well-founded.⁸²⁸ The Special Rapporteur also reported that many civil society

⁸²⁵ Amnesty International, "The Entrenched Culture" (above n. 782).

⁸²⁶ Main missions of the JIHIDEM found on the website of the unit, <http://www.jandarma.gov.tr/jihidem/jihidem_eng/home_page.htm> [accessed 27 August 2008].

⁸²⁷ Interim Resolution CM/ResDH(2008)69 (above n. 660).

⁸²⁸ UN Human Rights Council (UNHRC), "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism" (2006) UN doc A/HRC/4/26/Add.2, § 54.

actors doubted that the public knew about the body and that, in any case, the public would trust a unit within the Gendarmerie to conduct independent investigations.⁸²⁹

A further body created to ensure effective accountability for human rights abuses is the Parliamentary Human Rights Investigation Committee, with the mandate to oversee compliance with human rights provisions of domestic law and international agreements, and, more importantly for present purposes, to investigate alleged abuses, although its role is merely advisory. It consists of members of Parliament and is composed in accordance with representation in Parliament. Human rights organizations reported that the purely advisory role limited its efficacy.

More significant is the role played by the Human Rights Presidency under the Prime Ministry in Ankara, which constitutes the umbrella institution for the Human Rights Boards that have been created in all 81 provinces and 850 sub-provinces. These boards are intended to institutionalize consultations among NGOs, professional organizations and the Government. The Human Rights Boards are also responsible for monitoring law enforcement establishments and have a mandate to carry out announced and unannounced visits.⁸³⁰ The CPT, when visiting Turkey in late 2005, found that some Human Rights Boards had begun to carry out on-site visits to law enforcement establishments. Some provinces had not yet had a visit and the CPT delegation raised this question with the Vice Governor of the İstanbul Province, to whom the task of chairing the provincial board had been delegated. He confirmed that the İstanbul Provincial Human Rights Board had not carried out any visits to law enforcement establishments during 2005. In this connection, he expressed the view that if the board began to organise such visits, this could be interpreted as a lack of confidence in the work of the public prosecutors and representatives of the Governor's Office who already visited law enforcement establishments on a regular basis.⁸³¹ The CPT considered such a position to be untenable and that Chairmen of Human Rights Boards should see it as their responsibility to ensure the fulfilment of all the duties assigned to the boards by law.⁸³²

As regards complaints filed with the Human Rights Boards, between October 2001 and June 2002, 1,192 complaints were filed. Of these, 924 were directly related to human rights violations; 420 were investigated, and 146 were referred to the judiciary. According to the Government, in 2002, of 11,500 council members, 6,500 were public

⁸²⁹ Ibid.

⁸³⁰ See Regulation on the Establishment, Duties and Working Principles of Provincial and Sub-provincial Human Rights Boards, November 23, 2003.

⁸³¹ "Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 14 December 2005" (2006) CoE Doc CPT/Inf(2006)30, § 28.

⁸³² Ibid.

officials, 3,000 belonged to professional associations, and 2,000 were NGO members.⁸³³ A total of 847 applications were lodged in 2004 and 1377 in 2005. 64% of the applications lodged in 2004 concerned complaints of ill-treatment.⁸³⁴

Although the Department for the Execution of Judgments has welcomed the effective functioning of the Regional and Local Human Rights Boards and has noted that it “appears that these bodies provide non-judicial recourse for those who claim that they had been subjected to torture or ill-treatment”,⁸³⁵ NGOs members were generally sceptical of the Boards because they were dominated by government-affiliated members. Some human rights NGOs have boycotted the Boards, while others have not been invited to participate.⁸³⁶

3.7 Conclusions as to compliance and impact

Turkey’s conflict with the PKK has resulted in a great amount of judgments concerning actions of the Turkish security forces and the Court has found numerous violations of Articles 2 and 3 of the Convention in respect of, *inter alia*, killings, disappearances, torture and ill-treatment; further, the Court has also found the investigations carried out in the majority of the cases to be ineffective and inadequate and therefore in breach of the procedural obligations deriving from Articles 2 and 3 ECHR. The Committee of Ministers has found that the violations resulted from a number of structural problems, *inter alia*, shortcomings in establishing criminal liability for abuses at the domestic level.⁸³⁷

In accordance with the obligations stemming from Articles 2 and 3 ECHR, criminal law remedies are available in Turkish legislation and it is possible to bring a prosecution in circumstances where there has been a breach of the right to life or a breach of the prohibition of torture or ill-treatment as a result of the action of a public official. In this regard, provision enabling prosecutions for those offences have long been present in the Turkish criminal law system. In practice, the domestic provisions which are mainly used for indicting and prosecuting members of the security forces for torture, ill-treatment and excessive use of force are Articles 94, 95 and 256 of the new Criminal Code.⁸³⁸ As regards penalties, following criticism by the Court in relation to the leniency of the sentences imposed on public officials responsible of human rights abuses and repeated

⁸³³ US Department of State, Bureau of Democracy, Human Rights, and Labor, “2002 Country Reports on Human Rights Practices – Turkey” (2003).

⁸³⁴ Interim Resolution CM/ResDH(2008)69 (above n. 660).

⁸³⁵ CoE doc. CM/Inf/DH(2006)24 rev. 2 (above n. 121).

⁸³⁶ “2002 Country Reports on Human Rights Practices – Turkey” (above n. 833).

⁸³⁷ See above n. 694 and accompanying text.

⁸³⁸ See above, Section 3.6.1.

requests by the Committee of Ministers to strengthen the penalties applicable to members of the security forces who are found guilty of human rights violations, Turkey has increased maximum sentences and introduced minimum sentences for acts of torture and ill-treatment.⁸³⁹ However, as discussed above, there has been a tradition of very light penalties in Turkey (if penalties were even imposed) - a tradition which seems to carry on today.⁸⁴⁰

As far as measures to eliminate obstacles to investigations and prosecutions are concerned, following repeated criticism by the Court as to the incompatibility of the requirement that administrative authorization be granted before the investigative authorities were able to open an investigation against public officials, and reiterated requests by the Committee of Ministers to rapidly abolish the special powers of the administrative councils, the requirement of administrative authorization was lifted as regards accusations of torture and ill-treatment by State officials in 2003. However, the requirement of administrative authorization seems to have been lifted only in respect of torture and ill-treatment and continues to exist with respect to other allegations of serious crimes.⁸⁴¹ Nevertheless, the Committee of Ministers has noted that there exist instances where prosecutions concerning other serious crimes than torture and ill-treatment have been initiated against members of the security forces without administrative authorizations being sought.⁸⁴² This is indeed a positive development. With regard to the question of effectiveness of the investigations into allegations of abuses committed by the security forces, in numerous judgments regarding actions of the security forces, the Court has found the criminal investigations ineffective and inadequate. Turkey adopted a new Criminal Code and a new Criminal Procedure Code in 2005 and has issued Circulars in order to remind law enforcement personnel of their responsibilities under both domestic and international law. The Committee of Ministers has accepted that the measures taken by Turkey to ensure effective investigations are sufficient and has decided to close its examination of this issue. It is surprising that the issuance of a few administrative circulars should be thought enough to change the entrenched culture of abuses committed by police and members of the security forces. By looking at examples of investigations carried out today, the problems identified by the Court in the judgments are still evident and the Committee of Ministers may be thought to have closed its examination of the issue prematurely. Amnesty International has summarized the failures in the investigations in following manner:

⁸³⁹ See above, 3.5.1(a).

⁸⁴⁰ See above, Section 3.5.1(a).

⁸⁴¹ Interim Resolution CM/ResDH(2008)69 (above n. 660).

⁸⁴² *Ibid.*

At the investigation stage, prosecutors are too often unwilling or unable to assert their authority over the scene-of-crime investigation in cases of alleged violations by law enforcement officers. They frequently fail to initiate investigations into possible cases of torture or ill-treatment of their own accord, although obliged to do so by law, or the focus in such investigations is too narrow. These failings often contribute to a high proportion of complaints of torture and ill-treatment resulting in decisions by prosecutors that there is no case to answer [...]. The investigations can take months and months, and sometimes years, before a decision is issued by a prosecutor.⁸⁴³

A 2008 report by Human Rights Watch provides a series of examples of cases which appear to confirm that the circulars have not had the desired effect of enhancing the effectiveness and the expedition of investigations carried out into allegations of abuses committed by members of the police or the security forces.⁸⁴⁴ On the basis of the examination of twenty-eight cases of abuses committed in 2008 and of the ensuing investigations, the report denounces that, in general, “[t]he conduct of flawed investigations into allegations of police abuse remains an entrenched problem”.⁸⁴⁵ Amongst the shortcoming identified in the cases analysed by the organization, the absence of independent and effective investigation mechanisms into police abuses is a serious obstacle to the effectiveness of the investigations. In addition, Human Rights Watch points out that there is a general lack of promptness and expedition in the investigations carried out by the prosecutors, that the way in which evidence is handled in the context of investigation of police abuses remains a source of great concern and, finally, that there are still numerous instances in which the prosecuting authorities fail to initiate investigations despite ample public evidence of abuses by the police.

According to NGOs’ reports, there are also indications that the victims of abuses by members of the security forces, and their relatives, are frequently intimidated if they try to complain and that, in general, most people are too frightened to report instances of ill-treatment by law-enforcement officers for fear that the justice system will not protect them if they do. For instance, local lawyers have reported to Amnesty International that, “allegedly under police pressure, some clients will readily withdraw a complaint and that some witnesses will refuse to testify in court, knowing that witness protection schemes are lacking”.⁸⁴⁶ In addition, both Amnesty International and Human Rights Watch denounce the practice of the Turkish authorities to bring “counter charges” against victims of abuses by law-enforcement officers who decide to complain about their

⁸⁴³ Amnesty International, “The Entrenched Culture” (above n. 782), p. 11.

⁸⁴⁴ Human Rights Watch, “Closing Ranks” (above n. 705), p. 13.

⁸⁴⁵ *Ibid.*, p. 6.

⁸⁴⁶ *Ibid.*

treatment.⁸⁴⁷ Typically, the victims who denounce abuses are in turn accused of having “us[ed] violence or threats against a public official to prevent them from carrying out a duty”.⁸⁴⁸ Investigations into these “counter charges” are carried out swiftly and prosecutions speedily initiated, while in contrast investigations into allegations of police ill-treatment are carried out at a much slower pace. Victims have found themselves on trial on such charges before the investigation into their own complaint of ill-treatment by police has even been concluded by the prosecutor.⁸⁴⁹ Human Rights Watch has found this to be a “disturbing indication of a common pattern of the police having recourse to the law in an attempt to cover up abuses they commit and to intimidate individuals who see fit to complain”.⁸⁵⁰ Where the counter-charges do not result in prosecution, Amnesty International has found that they seem “nevertheless to be effective in discrediting a family’s reputation. Such investigations are possibly intended to represent the victim and their immediate circle as guilty and may therefore constitute an attempt to influence a court into being more lenient in relation to members of the security forces on trial for human rights violations”.⁸⁵¹

With regard to more specific defects in the investigations noted by the Court, as far as the question of deficiencies in the recording of medical evidence of abuses is concerned, it appears that, notwithstanding the series of circulars issued by the Ministry of Justice, such evidence is still often “not recorded in the appropriate manner for reasons of lack of expertise, incompetence or a readiness to comply with suggestions by law enforcement officials accompanying suspects that there is no need for an examination”.⁸⁵²

A further obstacle to effective accountability for the violations committed in the period at issue in the cases analyzed in the present case study is the fact that the domestic legislation provides that some of the crimes at issue are subjected to limitation periods.⁸⁵³ Even though longer prescription periods than those previously applicable were introduced with the new Criminal Procedure Code of 2005, the events at issue took place in the 1990s which means that even the longer prescription periods may not be long enough to ensure accountability of perpetrators. Furthermore, and in any case, the

⁸⁴⁷ See Amnesty International, “The Entrenched Culture” (above n. 782), p. 10; Human Rights Watch, “Closing Ranks” (above n. 705), Section VII.

⁸⁴⁸ See Art. 265(1), Turkish Criminal Code; this type of charge is normally used where a person has violently resisted apprehension or arrest or responded violently to a lawful request by a public official; see Human Rights Watch, “Closing Ranks” (above n. 705), p. 69.

⁸⁴⁹ *Ibid.*

⁸⁵⁰ *Ibid.*, p. 70.

⁸⁵¹ Amnesty International, “The Entrenched Culture” (above n. 782), p. 10.

⁸⁵² *Ibid.*

⁸⁵³ See above, Section 3.5.1(b).

application of the statute of limitations to the crime of torture in any circumstances is inconsistent with Turkey's obligations as a party to CAT.⁸⁵⁴

Turkey has re-opened some domestic investigations and taken some remedial action aimed at establishing enhanced accountability of the security forces, such as issuing circulars to draw the attention of prosecutors and judges to the shortcomings identified by the Court, especially as regards the effectiveness of investigations; announcing a "zero-tolerance" policy aimed at total eradication of torture and other forms of ill-treatment; abolishing the precondition for administrative authorisation required for the investigation of accusations of torture and ill-treatment; increased the maximum sentences which may be imposed on officials found guilty of torture or ill-treatment; amended legislation so that penalties under provisions dealing with torture and ill-treatment can no longer be converted into fines or be suspended; and established new investigative bodies (the JIHIDEM, the Human Rights Presidency, and regional and local Human Rights Councils). Turkey has also adopted a new Criminal Code and a new Code of Criminal Procedure, both of which entered into force in 2005.

The Committee of Ministers has found that the measures taken by Turkey to ensure effective investigations are satisfactory and has decided to close its examination of this issue. However, as regards the practical impact of the actions taken, the Committee has urged Turkey to provide more detailed statistics regarding investigations, acquittals and convictions with a view of demonstrating the positive impact of measures taken so far. The Committee will continue to supervise the execution of the judgments until it is satisfied that all outstanding general measures have been adopted and their effectiveness in preventing new, similar violations has been established.⁸⁵⁵

Although positive efforts have been made by Turkey to rectify the shortcomings identified in the judgments by the Court, the changes made might not have had the wished outcome, at least not yet. In practice, very little information regarding the investigations that have been reopened is available; limitation periods prevent criminal proceedings concerning serious human rights violations from being finally investigated and resolved; accountability of members of the security forces is being shielded by the defence of superior orders. As far as the investigative procedures themselves are concerned, a number of the problems identified by the Court in the judgments considered above are still evident in investigations carried out today: in particular, a generalized lack of expertise makes proper recording of medical evidence problematic, there is evidence that investigations are obstructed and evidence is concealed by the police and the security forces, victims and their relatives that have brought claims

⁸⁵⁴ In this sense, see, e.g., Committee against Torture, *Conclusions and recommendations of the Committee against Torture: Denmark* (2007) UN Doc CAT/C/DNK/CO/5, § 11, where the Committee reiterated that "taking into account the grave nature of acts of torture, [...] acts of torture cannot be subject to any statute of limitations".

⁸⁵⁵ Interim Resolution CM/ResDH(2008)69 (above n. 660).

against servicemen have been either intimidated and threatened or accused of counter-charges, the requirement of administrative authorization seems to have been lifted only in respect of torture and ill-treatment and continues to exist with respect to other serious crimes. Further, as far as sanctions are concerned, the tradition of very light penalties for acts of torture and ill-treatment continues: the majority of those convicted for torture and ill-treatment receive “other sanctions” than imprisonment or fines, and fines are still imposed as a sanction although penalties for these types of crimes should no longer be converted into fines; furthermore, members of the security forces or police officers on trial for killings and torture are generally not suspended from active duty pending the outcome of the trial, posted to different cities, and are not prevented from receiving promotions. With respect to violations of Article 2, it is more difficult to assess what the impact of the Court’s judgment has been, as the statistics presented by Turkey mainly refer to the crimes of torture and ill-treatment, apparently ignoring the fact that many of the cases brought before the Court dealt with killings and disappearances.

4. Case Study: Turkey's Occupation of Northern Cyprus

4.1 Introduction

This third case study on Cyprus and Turkey is different from the other three case studies insofar as it deals with the invasion and continuing occupation of a Member State of the Council of Europe by another Member State. In 1960, Cyprus attained independence from the British Empire after the conclusion of agreements in Zurich and London between the United Kingdom, Greece and Turkey.⁸⁵⁶ A constitutional crisis erupted in 1963 which led to inter-communal clashes and fighting and to the withdrawal of representatives of the Turkish-Cypriot community from government institutions. A United Nations peacekeeping force (UNFICYP) was therefore dispatched to Cyprus in 1964 and the UN mission is today one of the longest-running UN peacekeeping missions.⁸⁵⁷ After Greek-Cypriots carried out a coup d'état in 1974, with the support of the military junta in Greece, Turkey undertook a military intervention in Cyprus, with the stated aim of protecting the Turkish-Cypriot community, which resulted in the still-ongoing occupation of the northern part of Cyprus.⁸⁵⁸ In November 1983, the "Turkish Republic of Northern Cyprus" ("the TRNC") was proclaimed and the "Turkish Republic of Northern Cyprus Constitution" was enacted in May 1985.⁸⁵⁹ The TRNC has been recognized as a *de jure* state only by Turkey and it is considered legally invalid by the United Nations,⁸⁶⁰ the Council of Europe,⁸⁶¹ and an overwhelming majority of states worldwide.

As at 9 January 2009, 447 applications against Turkey were pending before the Court concerning the situation in Cyprus in which a complaint under Articles 2 and/or 3 of the

⁸⁵⁶ Zürich and London Agreements 1960, which set the basis for the Constitution of the Republic of Cyprus 1960, and the Treaty of Guarantee (February 19, 1959) and the Treaty of Alliance (February 11, 1959), available at <<http://www.cyprus.gov.cy>>.

⁸⁵⁷ SC Res. 186 of 4 March 1964 mandated UNFICYP. See A. James, "The UN Force in Cyprus", *International Affairs*, vol. 65 (1989), 481-500; M. Doyle and N. Sambanis, *Making War and Building Peace: United Nations Peace Operations* (Princeton, 2006), pp. 257-280

⁸⁵⁸ This occurred under the terms of the *Treaties of Alliance and Guarantee* 1960. See the official position of Turkey on this matter on the Republic of Turkey Ministry of Foreign Affairs Website: <<http://www.mfa.gov.tr/how-did-the-situation-change-after-july-1974-.en.mfa>>, according to which Turkey's action in 1974 as a guarantor power under the 1960 Treaty of Guarantee stopped the persecutions of Turkish-Cypriots by Greek-Cypriots. See generally M. Moran, "Britain and the 1960 Cyprus Accords: A Study in Pragmatism" (2009), available at <www.gpotcenter.org/dosyalar/Britain.pdf>.

⁸⁵⁹ Declaration of Independence of the Turkish Republic of Northern Cyprus, ratified by unanimous resolution by the Turkish Cypriot Parliament on 15 November 1983. On 7 May 1985, the "TRNC Constitution" was enacted.

⁸⁶⁰ SC Res. 541 (1983), which was reaffirmed by SC Res. 550 (1984). Turkey is the sole state that has recognized the statehood of the TRNC.

⁸⁶¹ CoM Resolution (83)13 on Cyprus. adopted by the Committee of Ministers on 24 November 1983 at its 73rd Session.

Convention had been raised.⁸⁶² The present case study focuses on Turkey's compliance with, and on the impact of, the Courts' judgments relating to two distinct situations which have taken place in Northern Cyprus. The first situation concerns the forced disappearances which took place not only in the context of the Turkish invasion in July 1974,⁸⁶³ but also during the inter-communal fighting which erupted in December 1963 and continued until 1964 when many Turkish Cypriots went missing. The second situation concerns more recent cases of killings of Greek Cypriots and one Turkish Cypriot by the Turkish and/or "Turkish Republic of Northern Cyprus" forces.

The next parts will take a closer look at the judgments and decisions of the Court which are of relevance for this case study: the renowned inter-state case, *Cyprus v. Turkey*, from 2001; an individual application regarding missing persons, *Varnava and Others v. Turkey*, which has recently resulted in a judgment by the Court's Grand Chamber; two unsuccessful applications by Turkish-Cypriot families regarding missing persons (*Karabardak and Others v. Cyprus* and *Baybora and Others v. Cyprus*); and four cases regarding killings allegedly committed by the Turkish and/or "Turkish Republic of Northern Cyprus" forces (*Adalı v. Turkey*, *Isaak v. Turkey*, *Solomou and Others v. Turkey* and *Kakoulli v. Turkey*).

The judgment in the inter-state case (*Cyprus v. Turkey*) was the fourth application concerning the events of July and August 1974 made by the Republic of Cyprus against Turkey. The first⁸⁶⁴ and second⁸⁶⁵ applications were joined by the Commission⁸⁶⁶ and led to the adoption on 10 July 1976 of a report under former Article 31 of the Convention in which the Commission expressed the opinion that Turkey had violated Articles 2, 3, 5, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1.⁸⁶⁷ The third application⁸⁶⁸ was the subject of a further report under former Article 31 adopted by the Commission on 4 October 1983. In that report the Commission found that Turkey was in breach of its obligations under Articles 5 and 8 of the Convention and Article 1 of Protocol No. 1.⁸⁶⁹

⁸⁶² Statement by Judge David Thor Björgvinsson, European Court of Human Rights (email correspondence, 9 January 2009).

⁸⁶³ The description of Turkey's military intervention as an "invasion" is highly contested by Turkey. While the Turks and Turkish-Cypriots assert that the 1974 military operation was an intervention on humanitarian grounds – with many describing it as a "peace operation" – the Greeks and the majority of the international literature on the subject defines it as an "invasion".

⁸⁶⁴ App. no. 6780/74.

⁸⁶⁵ App. no. 6950/75.

⁸⁶⁶ For an analysis of these two cases see: V. Coufoudakis, "Cyprus and the European Convention on Human Rights: The Law and Politics of *Cyprus v. Turkey*, Applications 6780/74 and 6950/75", *Human Rights Quarterly*, vol. 4 (1982), 450-473.

⁸⁶⁷ "Report of the Commission of 10th July 1976, published on 31st August 1979 in Resolution DH (79) I, of the Committee of Ministers of the Council of Europe", *HRLJ*, vol. 13 (1992), p. 181

⁸⁶⁸ App. no. 8007/77.

⁸⁶⁹ *Cyprus v. Turkey*, App. No. 8007/77. Report of the Commission of 10th July 1983 published on 2nd April 1992 by the Committee of Ministers in Resolution DH (92), reprinted in *HRLJ*, vol. 12 (1991), p.169.

4.2 The applicability of the Convention in Cyprus

The Republic of Cyprus became a member of the Council of Europe in 1961 and ratified the European Convention on Human Rights the following year.⁸⁷⁰ Following the invasion and occupation of the northern part of the island by Turkey, and the declaration of the TRNC, the Committee of Ministers adopted a resolution in 1983 by which it declared that it continued to regard the government of the Republic of Cyprus as the sole legitimate government of Cyprus.⁸⁷¹ In the Republic of Cyprus, the Convention has constitutional force and domestic legislation conflicting with conventional norms is invalid. Part II of the Constitution of the Republic of Cyprus is modelled upon the European Convention on Human Rights. Articles 6 to 35 provide a list of human rights similar to those contained in the Convention. Further, the Republic of Cyprus being a monist country, the European Convention prevails in case of conflict with the Constitution.⁸⁷² Upon Cyprus entering the EU in 2004, the application of the *acquis communautaire* was suspended in those areas in which the government of the Republic of Cyprus does not exercise effective control.⁸⁷³

Turkey ratified the Convention in 1954.⁸⁷⁴ In 1987, Turkey recognized the right of individual petition under Article 25 (1) of the Convention.⁸⁷⁵ Turkey adopts a monist approach and, although the status of the Convention in the domestic legal system was for a long time relatively unclear; following a constitutional amendment adopted in 2004, Article 90 of the Turkish Constitution now makes clear that international human rights agreements prevail over incompatible domestic law.⁸⁷⁶

In *Loizidou v. Turkey*, a case concerning the right of a Greek-Cypriot to her property in Northern Cyprus, the Court found that the acts complained of were capable of falling

⁸⁷⁰ The Republic of Cyprus signed the Convention on 16 December 1961 and ratified it by Law No. 39 of 1962. The instrument of ratification was deposited with the Secretary-General of the Council of Europe on 6 October 1962 and on that date the Convention came into force as regards the Republic of Cyprus. See A. N. Loizou, "Cyprus" in R. Blackburn and J. Polakiewicz (eds), *Fundamental rights in Europe: the European Convention on Human Rights and its Member States, 1950-2000* (OUP, 2001), p. 217.

⁸⁷¹ Article 169 (3) of the Constitution of the Republic of Cyprus provides "Treaties, conventions and agreements concluded in accordance with the foregoing provisions of this Article shall have, as from their publication in the official Gazette of the Republic, superior force, to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto".

⁸⁷² Article 169 (3) of the Constitution of the Republic of Cyprus provides "Treaties, conventions and agreements concluded in accordance with the foregoing provisions of this Article shall have, as from their publication in the official Gazette of the Republic, superior force, to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto".

⁸⁷³ Article 1(1) Protocol No. 10 on Cyprus to the Act concerning the conditions of accession [to the European Union] of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 955).

⁸⁷⁴ See <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>>

⁸⁷⁵ The Turkish declaration contained a series of reservations aimed at excluding the jurisdiction of the Court over questions concerning the responsibility of Turkey for acts performed in violation of human rights in the occupied areas of Cyprus. Those reservations were held to be invalid by the Court in the case of *Loizidou v. Turkey* (below n. 877).

⁸⁷⁶ On the incorporation and the status of the Convention in the Turkish legal system, see above, Annex, Section 3.2.

within Turkish “jurisdiction” within the meaning of Article 1 of the Convention, although they had been carried out in Northern Cyprus.⁸⁷⁷ Although Turkey urged the Court to find that it had no jurisdiction to examine the case as the allegations related to matters falling outside the jurisdiction of Turkey within the meaning of Article 1, the Court recalled that the concept of jurisdiction under Article 1 is not restricted to national territory. The Court found that Turkey exercised overall effective control of the TRNC territory, mainly due to the large number of Turkish troops in the northern half of the island, and that Turkey therefore entailed responsibility for actions of the TRNC authorities.⁸⁷⁸ Turkey furthermore argued that, as a result of limitations contained in its declarations of acceptance of jurisdiction under Articles 25 and 46 of the Convention did not give the Commission or the Court the competence to examine acts and events outside its metropolitan territory.⁸⁷⁹ The Court found that the purported restrictions *ratione loci* were invalid and severable, and that the declarations contained valid acceptances of the competence of the Commission and the Court.⁸⁸⁰

4.3 Missing persons

4.3.1 Background

The issue of missing persons is one of the most tragic and continuing consequences of the inter-communal fighting in 1963-1964 and the Turkish invasion in 1974. In the inter-state application which gave rise to the *Cyprus v. Turkey* judgment of 2001, discussed below, the Cypriot Government claimed that about 1,500 Greek Cypriots were still missing twenty years after the cessation of hostilities following the Turkish invasion in

⁸⁷⁷ *Loizidou v. Turkey* [GC] (App. no. 15318/89) (Preliminary Objections), Series A No. 310, § 63. See also *Loizidou v. Turkey* [GC] (App. no. 15318/89) (Merits), Reports 1996-VI and *Loizidou v. Turkey* [GC] (App. no. 15318/89), Reports 1998-IV. For discussion see B.H. Oxman and B. Rudolf, “*Loizidou v. Turkey*”, *American Journal of International Law*, vol. 91 (1997), 532-7; L.J. Klarevas, “Turkey’s Right v. Might Dilemma in Cyprus: Reviewing the Implications of *Loizidou v. Turkey*”, *Mediterranean Quarterly*, vol. 10 (1999), 91-122. Cf. N.M. Ertekun, “The *Loizidou* Case: A Miscarriage of Justice”, *Perceptions*, vol. 4(1999), 143-148.

⁸⁷⁸ *Loizidou v. Turkey* (Preliminary Objections) (above n. 877), § 54.

⁸⁷⁹ *Loizidou v. Turkey* (Preliminary Objections) (above n. 877), § 55. On 28 January 1987, Turkey deposited a declaration pursuant to Art. 25 of the Convention. Paragraph (i) stated that “the recognition of the right of petition extends only to allegations concerning acts or omissions of public authorities in Turkey performed within the boundaries of the territory to which the Constitution of the Republic of Turkey is applicable”. After various reactions from other members of the Council of Europe, Turkey renewed its declaration in 1990 and paragraph (i) was changed to “the recognition of the right of petition extends only to allegations concerning acts or omissions of public authorities in Turkey performed within the boundaries of the national territory of the Republic of Turkey”. A further renewal for a three-year period was made in 1993 which reads: “The Government of Turkey, acting pursuant to Art. 25 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, hereby declares to accept the competence of the European Commission of Human Rights, to receive petitions which raise allegations concerning acts or omissions of public authorities in Turkey in as far as they have been performed within the boundaries of the national territory of the Republic of Turkey.” The Turkish declaration of 22 January 1990 under Art. 46 of the Convention reads: “... performed within the boundaries of the national territory of the Republic of Turkey ...”

⁸⁸⁰ *Ibid.*, § 98.

1974.⁸⁸¹ The Court has to date issued two judgments concerning missing persons and two decisions of inadmissibility. The judgments in *Cyprus v. Turkey* and *Varnava and Others v. Turkey* will be examined first, followed by the decisions in *Karabardak and Others v. Cyprus* and *Baybora and Others v. Cyprus*.

In 1981, a specialized body, the Committee on Missing Persons in Cyprus (CMP), was set up to “look into cases of persons reported missing in the inter-communal fighting as well as in the events of July 1974 and afterwards”⁸⁸² and “to draw up comprehensive lists of missing persons of both communities, specifying as appropriate whether they are still alive or dead, and in the latter case approximate time of deaths”.⁸⁸³ The CMP’s activities are purely humanitarian and are limited to locating, exhuming, identifying and returning the remains to the families; in accordance with its mandate, the Committee does not attempt to establish the cause of death or attribute responsibility for the death of missing persons.⁸⁸⁴ Its mandate is limited to the territory of Cyprus. The CMP was established after a number of inter-communal meetings on the issue from 1974-1977 had made no significant progress. Between 1977 and 1981 negotiations on the establishment of the CMP took place in Nicosia, Geneva and New York. The UN General Assembly had from 1975 to 1979 adopted three different resolutions on the missing persons issue in Cyprus, calling for the establishment of an investigatory body to tackle the humanitarian problem.⁸⁸⁵ In 1981 and 1982, the UN General Assembly adopted two additional resolutions,⁸⁸⁶ welcoming the establishment of the CMP and urging the CMP to proceed without delay in carrying out its mandate. The CMP was established in April 1981 by agreement between the Greek Cypriot and Turkish Cypriot communities under the auspices of the United Nations. The CMP is composed of one Member appointed by each of the two communities and a Third Member, selected by the International Committee of the Red Cross (ICRC) and appointed by the UN Secretary-General. According to an agreement between the leaders of both communities made in 1997, both sides are to exchange information regarding known burial sites and the return of remains of Greek Cypriot and Turkish Cypriot missing persons.

The work of the Committee has progressed slowly since 1981, giving rise to criticism in particular from the Republic of Cyprus.⁸⁸⁷ The CMP’s work was revived in August 2004 and

⁸⁸¹ Ibid., § 20.

⁸⁸² Art. 7, CMP Terms of Reference, available on the CMP website, <www.cmp-cyprus.org> [accessed 18 May 2009].

⁸⁸³ Ibid., Art. 13.

⁸⁸⁴ Ibid., Art. 11.

⁸⁸⁵ UNGA Res 3450 (XXX) (9 December 1975); UNGA Res 33/172 (20 December 1978) UN Doc A/RES/33/172; and UNGA Res 34/30 (20 November 1979) UN Doc A/RES/34/30.

⁸⁸⁶ UN GA Resolution 36/164 (1981) UN doc A/RES/36/164 and UN GA Resolution 37/181 (1982) UN Doc A/RES/37/181.

⁸⁸⁷ In particular, according to the Republic of Cyprus, the work of the CMP has been hindered by a number of factors including Turkey’s non-cooperation and non-participation in the proceedings of the CMP; the CMP’s limited terms of reference (as noted above, the Committee is unable to attribute responsibility for the death of any

experienced a turning point in 2006 when the Project on the Exhumation, Identification and Return of Remains of Missing Persons was launched.⁸⁸⁸ The Project consists of four phases: the Archaeological Phase; the Anthropological Phase; the Genetic Phase; and the Return of Remains Phase. In July 2007, the CMP began returning remains of Greek Cypriots and Turkish Cypriots to their families. The CMP and especially the Project on the Exhumation, Identification and Return of Remains of Missing Persons have created expectations for the families of missing persons and families on both sides are getting impatient with the Committee's progress. The CMP has reported that as a result of violence generated during that period a total of 502 Turkish Cypriots and 1493 Greek Cypriots were officially reported as missing by both communities.⁸⁸⁹

4.3.2 The *Cyprus v. Turkey* case

(a) *The Court's judgment*

The fourth inter-state application, which resulted in the 2001 *Cyprus v. Turkey* by the Court judgment related to the continuing division of the territory of Cyprus and the situation that has existed in Northern Cyprus since the conduct of military operations there and occupation by Turkey in July and August 1974.⁸⁹⁰ The Court found in total 14 violations of the Convention in relation to, inter alia: violations of the right of Greek Cypriot missing persons and their relatives; violations of the right of displaced persons to respect for their home and property; violations arising out of the living conditions of Greek Cypriots in Northern Cyprus; and violations of the right of displaced Greek Cypriots to participate in elections. According to Judge Loucaides, the judgment was “the first time in the history of the Convention that the Court found a High Contracting

missing persons or to determine the cause of death); the CMP's lack of authority to conduct investigations in Turkey, interview Turkish officials, or compel witnesses to testify; the consensus case decisions of the CMP; budgetary issues and, until recently, the absence of appropriate technical support; the reluctance of witnesses to testify, fading memories of events and the death of witnesses; heavy construction and land use projects in areas of occupied Cyprus suspected to be burial sites; mistrust among CMP members; and the ineffective leadership of early UN representatives to the CMP. See Press and Information Office, Republic of Cyprus, *Human Rights Violations in Cyprus by Turkey* (Cyprus 2008), p. 22.

⁸⁸⁸ A detailed account of the activities of CMP is contained in the report of the Secretary-General on the United Nations Operations in Cyprus (S/2005/743 and Corr. 1). See also Commission on Human Rights, “Questions on the Violation of Human Rights and Fundamental Freedoms in any part of the world, including the question of Human Rights in Cyprus” E/CN.4/2006/31 (27 March 2006) at para 14, Note by the Secretary General transmitting the Report of the Office of the High Commissioner for Human Rights on the question of human rights in Cyprus A/HRC/4/29 (9 March 2007) paras 14-16, Ibid A/HRC/7/46 (6 March 2008) at paras 14-15, Ibid A/HRC/10/37 (5 March 2009) at paras 15-17, Ibid A/HRC/13/24 at paras 8-10.

⁸⁸⁹ Committee on Missing Persons in Cyprus, Fact Sheet, December 2009, available at <http://www.cmp-cyprus.org/nqcontent.cfm?a_id=1307>.

⁸⁹⁰ *Cyprus v. Turkey* (above n. 295).

Party responsible for continuing violations of so many rights affecting such a large number of persons over such a long period of time”.⁸⁹¹

For the purpose of this case study, the focus will be on compliance with and the impact of the judgment in respect of the Greek Cypriot missing persons and their relatives. The Cypriot Government had claimed in the inter-State complaint that about 1491 Greek Cypriots were still missing twenty years after the cessation of hostilities, that these persons were last seen alive in Turkish custody and that their fate has never been accounted for by the Turkish Government.⁸⁹² In its application, the Cypriot Government argued that there had been violations of Articles 2 (right to life), 3 (prohibition of torture), 4 (prohibition of slavery and forced labour), 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private and family life), 13 (right to an effective remedy), 14 (prohibition of discrimination) and 17 (prohibition of abuse of rights) of the Convention in respect of the missing persons themselves, as well as a violation of Article 3 in respect of their relatives.

The Court found no substantive violation of Article 2 as the evidence of killings carried out directly by Turkish soldiers related to a period, which was outside the temporal scope of the Court’s jurisdiction due to the six month rule.⁸⁹³ The Court also noted in this respect that the Commission had been unable to establish on the facts whether any of the missing persons were killed in circumstances for which Turkey could be held responsible under the substantive limb of Article 2 of the Convention.⁸⁹⁴ However, even though there was no proof that any of the missing persons had been unlawfully killed, the Court held that the procedural obligation to investigate under Article 2 also arose when an individual, who was last seen in the custody of State agents, subsequently disappeared.⁸⁹⁵ The Court observed that many persons now missing had been detained either by Turkish or Turkish-Cypriot forces and that their detention had occurred at a time when the conduct of military operations was accompanied by arrests and killings on a large scale.⁸⁹⁶ The Court noted that the Turkish authorities had never themselves undertaken any investigation into the claims made by the relatives of the missing persons. As to the work of the CMP, the Court adopted the findings of fact made by the Commission;⁸⁹⁷ as summarised by the Court, the Commission had held that the work of

⁸⁹¹ L. G. Loucaides, “The Judgment of the European Court of Human Rights in the Case of *Cyprus v. Turkey*”, LJIL, vol. 15 (2002), 225-236.

⁸⁹² *Cyprus v. Turkey* (above n. 295), § 20.

⁸⁹³ *Ibid.*, § 130. The Court, in line with the Commission’s approach, confirmed that in so far as the applicant Government alleged continuing violations resulting from administrative practices, it would disregard situations which ended six months before the date on which the application was introduced, namely 22 November 1994. Therefore, like the Commission, the Court considered that practices which were shown to have ended before 22 May 1994 fell outside the scope of its examination (*ibid.*, § 104).

⁸⁹⁴ *Ibid.*, § 130.

⁸⁹⁵ *Ibid.*, § 132.

⁸⁹⁶ *Ibid.*, § 133.

⁸⁹⁷ *Ibid.*, § 120.

the CMP was not such as to preclude its examination of the application, noting in that regard that:

[...] the scope of the investigation being conducted by the CMP was limited to determining whether or not any of the missing persons on its list were dead or alive; nor was the CMP empowered to make findings either on the cause of death or on the issue of responsibility for any deaths so established. Furthermore, the territorial jurisdiction of the CMP was limited to the island of Cyprus, thus excluding investigations in Turkey where some of the disappearances were claimed to have occurred. The Commission also observed that persons who might be responsible for violations of the Convention were promised impunity and that it was doubtful whether the CMP's investigation could extend to actions by the Turkish army or Turkish officials on Cypriot territory.⁸⁹⁸

Accordingly, the Court held that, although the procedures of the CMP were “undoubtedly useful for the humanitarian purpose for which they were established,” they were not themselves sufficient to meet the standard of an effective investigation required by Article 2, especially in view of the narrow scope of the body's investigations.⁸⁹⁹ As a result, the Court concluded that there had been a continuing violation of Article 2 on account of the Turkish authorities' failure to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek Cypriot missing person who had disappeared in life-threatening circumstances.⁹⁰⁰

The Cypriot Government had further contended that in the absence of any conclusive findings that the missing persons were dead, it should be presumed that they were still being detained in conditions which should be described as servitude in breach of Article 4.⁹⁰¹ The Commission had concluded that there had been no breach of Article 4 since there was nothing in the evidence that supported the assumption that during the relevant period any of the missing persons were still in Turkish custody and were being held in conditions which violated Article 4.⁹⁰² The Court agreed with the Commission's findings and found that no breach of Article 4 had been established.⁹⁰³

As to the alleged violations of Article 5, the Court referred to the irrefutable evidence that Greek Cypriots had been held by Turkish or Turkish-Cypriot forces. There was no evidence of any records having been kept of either the identities of those detained or the dates or the location of their detention. The Court noted that, from a humanitarian point of view, that failing could not be excused by reference either to the fighting which was

⁸⁹⁸ Ibid., § 27.

⁸⁹⁹ Ibid., § 135.

⁹⁰⁰ Ibid., § 136.

⁹⁰¹ Ibid., § 138.

⁹⁰² Ibid., § 139.

⁹⁰³ Ibid., §§ 140-141.

taking place at the relevant time or to the overall confused and tense state of affairs.⁹⁰⁴ In a fashion similar to its conclusion under Article 2, the Court concluded that there had been a continuing violation of Article 5 by virtue of the failure of the Turkish authorities to conduct an effective investigation into the whereabouts of the missing persons.⁹⁰⁵

The Commission had concluded that the violations of Articles 3, 6, 8, 13, 14 and 17 alleged by the Cypriot Government were outside the scope of its admissibility decision and on that account could not be examined.⁹⁰⁶ The Court observed in that regard that the Government had not pursued these complaints and accordingly did not find it necessary to examine the complaints under those Articles in respect of missing persons.⁹⁰⁷

Finally, the Cypriot Government had argued that the continuing suffering of the families of missing persons constituted an aggravated violation of Article 3. The Court held that, in the absence of any information about their fate, the relatives of persons who went missing during the events of July and August 1974 were condemned to live in a prolonged state of acute anxiety, which could not be said to have been erased with the passage of time.⁹⁰⁸ The Court did not consider that the fact that certain relatives may not have actually witnessed the detention of family members or complained in that regard to the Turkish authorities deprived them of status of victims under Article 3.⁹⁰⁹ The military operation had resulted in considerable loss of life, large-scale arrests and detentions and the enforced separation of families. The Court held that the fact that a large number of Greek Cypriots had had to seek refuge in the south, coupled with the continuing division of Cyprus, had to be considered to constitute very serious obstacles to the relatives' quest for information and that the provision of such information was the responsibility of the Turkish authorities. For the Court, the silence of the Turkish authorities in the face of the real concern of the relatives of the missing persons attained a level of severity, which could only be categorised as inhuman treatment within the meaning of Article 3.⁹¹⁰

(b) Measures taken by the Turkish authorities

In 2004, the Parliamentary Assembly of the Council of Europe asked Turkey to continue to co-operate fully with the Committee of Ministers in its difficult task of securing the proper implementation of judgments.⁹¹¹ Written statements provided by Turkey to the Committee of Ministers are annexed to the two Interim Resolutions adopted in 2005 and

⁹⁰⁴ Ibid., §148.

⁹⁰⁵ Ibid., § 151.

⁹⁰⁶ Ibid., § 152.

⁹⁰⁷ Ibid., § 153.

⁹⁰⁸ Ibid., § 157.

⁹⁰⁹ Ibid., § 157.

⁹¹⁰ Ibid., § 157.

⁹¹¹ Resolution 1380 (2004)1, Honoring of obligations and commitments by Turkey, 22 June 2004.

2007 relating to the execution of the judgment of *Cyprus v. Turkey*; in addition, the Department for the Execution of Judgments has prepared a number of documents, some of which have been made public, which summarise the position adopted by the Turkish authorities in correspondence with the Department for the Execution of Judgments.–In this regard, it appears that the only information provided by the Turkish Government concerning measures taken by way of compliance in relation to missing persons relates to the functioning of the CMP and there has been no indication that any other measures have been taken in relation to investigation of the fate of the missing persons.

The CMP, which had previously been more or less dormant due to internal disagreements among its members, was re-activated by Turkey in 2004 precisely with the aim of being able to argue that it had thereby fulfilled its obligations of investigation.⁹¹² In that regard, in support of its reliance on the CMP, the Turkish government has stated that it believes that “... any unilateral action such as the introduction of a new system of investigations would be detrimental to the overall solution of the missing persons issue for both Greek Cypriots and Turkish Cypriots...”.⁹¹³ In the statement by Turkey annexed to the 2005 Interim Resolution, Turkey’s observations in relation to the issue of missing persons were extremely brief, limited to inviting the Committee “to follow ongoing developments in this context since the reactivation of the CMP in 2004”⁹¹⁴ In the document annexed to the 2007 Interim Resolution, Turkey was not much more expansive or forthcoming, stating only:

[...] the reactivated CMP continues to function. In August 2005 an Exhumation and Identification Programme was launched, which has been supported by financial donations from several countries. This Programme entails exhumations on both sides and DNA analysis in an anthropological laboratory established in the buffer zone of remains found, for purposes of identification of those remains. The Turkish authorities invite the Deputies to follow ongoing developments in this context.⁹¹⁵

Further, in a recent case before the Court brought by relatives of missing persons, in defending its position that it had complied with the duty to investigate, the Turkish government argued that “the possibility of obtaining help through an investigating body such as the CMP, which was the most appropriate body for such investigations, could also fulfil the duty to investigate”, and that “it was not practical or logical, if not futile, to expect Turkey to carry out its own independent investigations in addition”.⁹¹⁶

⁹¹² See “Case of Cyprus against Turkey, judgment of 10/05/2001 – Grand Chamber - Greek Cypriot missing persons and their relatives. Memorandum prepared by the Secretariat – Version updated for the 906th meeting”, CoE doc. CM/Inf/DH(2004)4/1 rev 4, 26 November 2004, §§ 7-8.

⁹¹³ See *ibid.*, § 6

⁹¹⁴ See Interim Resolution CM/ResDH(2005)44, Appendix I.

⁹¹⁵ Interim Resolution CM/ResDH(2007)25, Appendix I.

⁹¹⁶ *Varnava and Others v. Turkey* (Apps nos 16064-16066/90 and 16068-16073/90) Judgment of 10 January 2008 (Chamber Judgment), § 123. As discussed further below, the case was then referred to the Grand Chamber, which released its final judgment on 18 September 2009.

Furthermore, Turkey also argued that “the CMP had become an effective investigative body”.⁹¹⁷

According to the latest publicly available information provided by the Turkish Government to the Committee of Ministers, over 450 missing persons from both sides have now been exhumed and transferred to the CMP anthropological laboratory as a consequence of the Exhumation and Identification Programme.⁹¹⁸ DNA analyses have been carried out by a bi-communal team from the Cyprus Institute of Neurology and Genetics and by 1 December 2008, the remains of 110 persons had been identified and returned to their families.⁹¹⁹ The first funerals took place in July 2007. It appears that the families of missing persons may be able to obtain some information when the remains are returned, such as information regarding where the body was found, any signs of trauma on the remains etc. Further, any artefacts found near the body have been given to the families, as well as the anthropological and DNA reports.⁹²⁰

In relation to the position of the relatives of missing persons, a special information unit for families has been functioning since 12 November 2004 within the Office of the Turkish-Cypriot Member of the CMP.⁹²¹ The unit receives requests, directly or by telephone, and provides information that is available and already submitted to the CMP within a period of 48 hours. The unit also collects information from the families and, according to the Turkish authorities, a dialogue favourable to reconciliation is gradually being established.⁹²² The Department for Enforcement has expressed the view that although the special information unit represents an instance of significant progress in the execution of the Court’s judgment as regards the violation of Article 3, such a unit will only be capable of fully fulfil its role as a remedy for the violation when concrete results for the families will be available as a result of the ongoing work of the CMP.⁹²³ Further, the Cypriot authorities have contested the description given by the Turkish authorities of the special unit,⁹²⁴ and have expressed doubts as to the information that the unit is capable of providing to the families. In that regard, they have stated that their view is that there are only two hypotheses; either the Turkish Cypriot authorities are in possession of information that should have been provided to the CMP a long time ago; or the Turkish

⁹¹⁷ Ibid., § 124. As discussed further below, the Court rejected those arguments.

⁹¹⁸ Committee of Ministers, *Supervision of the execution of judgments of the European Court of Human Rights - 2nd annual report 2008* (Council of Europe, 22 April 2009), at 203; see also “Annotated Agenda and Decisions, 1059th (DH) meeting” (above n. 578).

⁹¹⁹ Ibid.

⁹²⁰ Ibid.

⁹²¹ Ibid.

⁹²² Ibid.

⁹²³ CoE doc. CM/Inf/DH(2006)6/1 rev. of 30 May 2006, § 31.

⁹²⁴ Ibid., § 27.

Cypriot authorities have no information to provide and the unit is no more than a deception.⁹²⁵

(c) Supervision of execution as regards missing persons

As noted above, the Court found continuing violations of Articles 2 and 5 ECHR as a result of the failure of the authorities of the Turkish Government to conduct an effective investigation into the whereabouts and fate of the Greek Cypriot missing persons and a continuing violation of Article 3 of the Convention in relation to the relatives of missing persons. Judge Loucaides has expressed the view that, in finding those violations of the Convention “the Court has proved once more that it can act judicially and defend the public order of Europe in situations where the violations are intertwined with political issues leading to them”.⁹²⁶ However, he predicted that “because of its dimensions and the attitude of Turkey so far, the case is bound to test the efficiency of the Convention system”.⁹²⁷ Those concerns have proved well-founded, at least as concerns the issue of missing persons.

The Committee of Ministers commenced its supervision of execution of the judgment in June 2001. Following the provision of information by Turkey and the preparation of a number of information documents by the Department for the Execution of Judgments, the first Interim Resolution, relating to Turkey’s compliance with the judgment in *Cyprus v. Turkey* as a whole, was adopted in 2005. The Committee emphasised, as a general matter, that the need to adopt measures by way of compliance with the judgment was all the more pressing given the violations at issue, as well as the time that had elapsed since they had been found.⁹²⁸

In relation specifically to the issue of missing persons, having recalled that the Court had noted “in particular the continuing absence of effective investigations into the fate of missing Greek Cypriots, as well as the silence of the Turkish authorities in the face of the real concerns of the relatives of missing persons”, and it had concluded that this amounted to a continuing violation of Articles 2, 3 and 5 ECHR, the Committee took note of the reactivation of the CMP at the end of 2004. However, it drew attention to the Court’s comments that the work of the CMP was not sufficient to comply with the obligation to carry out an effective investigation, in particular given the narrow scope of its investigations and the fact that its territorial jurisdiction was limited to Cyprus. In that connection the Committee further took note of the fact that the sole mandate of the CMP

⁹²⁵ Ibid., § 29.

⁹²⁶ Loucaides, “The Judgment of the European Court” (above n. 891), p. 237.

⁹²⁷ Ibid.

⁹²⁸ Interim Resolution CM/ResDH(2005)44 concerning the judgment of the European Court of Human Rights of 10 May 2001 in the case of Cyprus against Turkey, adopted by the Committee of Ministers on 7 June 2005, at the 928th meeting of the Ministers’ Deputies.

was “to draw up an exhaustive list of missing persons of both communities; and determine whether they are alive or dead, and, in the latter case, determine the approximate date of their deaths.” The Committee stated that it considered that

[...] concrete results obtained in the framework of this mandate can constitute a positive development in the execution of the present judgment, but that further measures are in any event required in order to comply fully with the requirements of the Convention concerning effective investigations, aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances or of whom there is an arguable claim that they were in custody when they disappeared.⁹²⁹

The Committee invited Turkey “to ensure that its contribution to the work of the CMP facilitates the achievement of concrete and convincing results”, stating that it considered that if such results were not achieved in the near future “it will be incumbent on Turkey to take other measures to enable the fate of missing persons to be determined”, and called upon Turkey “in any event, to envisage the necessary further measures so that the effective investigations required by the Court’s judgment can be conducted as soon as possible”.⁹³⁰

The second Interim Resolution in relation to the *Cyprus v. Turkey* judgment was adopted in 2007.⁹³¹ In relation to the issue of missing persons, the Committee made reference to the work of the CMP in the period since the last resolution and noted with satisfaction the commencement and operation of the Exhumation and Identification Programme.⁹³² However, it again recalled that the Court had found that the procedures of the CMP were “not of themselves sufficient to meet the standard of an effective investigation required by Article 2”, again emphasizing the “narrow scope” of its investigations and the fact that its territorial jurisdiction is limited to the island of Cyprus.⁹³³ In that regard, the Committee, while welcoming the work of the CMP reiterated that “additional measures are required in order to ensure full compliance with the Court’s judgment” as well as “regretting” that in the period since the first Interim Resolution, Turkey had provided no further information in that regard. Accordingly, it called upon Turkey “to rapidly provide

⁹²⁹ Interim Resolution CM/ResDH(2005)44; for the previous assessment by the Secretariat, see e.g. CoE doc. CM/Inf/DH(2004)4/1 rev. 4 (above n. 912), § 19 (emphasising that actions taken by Turkey should be carried out *in addition* to the work carried out by the CMP).

⁹³⁰ Ibid.

⁹³¹ Interim Resolution CM/ResDH(2007)25, adopted by the Committee of Ministers at the 992nd meeting on 4 April 2007.

⁹³² Ibid.

⁹³³ Ibid.

information on additional measures required to ensure the effective investigations called for by the Court's judgment".⁹³⁴

An important factor in the recent approach of the Committee has been the decisions of the Chamber and subsequently Grand Chamber in *Varnava and Others v. Turkey*,⁹³⁵ discussed in more detail below, a case brought by the relatives of individuals who had disappeared. Before the Court, mirroring the position adopted before the Committee of Ministers, the Turkish government relied upon the CMP as fulfilling its obligation to undertake investigations into the disappearances.⁹³⁶ The Chamber of the Court in response reiterated that the work of the CMP does not constitute an adequate procedure so as to satisfy the requirements of an effective investigation under Article 2 ECHR.⁹³⁷ The Chamber also noted that, despite Turkey's reliance upon the start of work under the CMP's Exhumation and Identification Programme, there had been "no developments, legal or factual", which changed its previous assessment.⁹³⁸ The Grand Chamber, to which the case was subsequently referred, in its judgment acknowledged "the importance of the CMP's ongoing exhumations and identifications of remains and gives full credit to the work being done in providing information and returning remains to relatives ...". However, it nevertheless concluded, that, "important though these measures are as a first step in the investigative process, they do not exhaust the obligation under Article 2".⁹³⁹ In that regard, it observed:

It may be that both sides in this conflict prefer not to attempt to bring out to the light of day the reprisals, extra-judicial killings and massacres that took place or to identify those amongst their own forces and citizens who were implicated. It may be that they prefer a "politically-sensitive" approach to the missing persons problem and that the CMP with its limited remit was the only solution which could be agreed under the brokerage of the UN. That can have no bearing on the application of the provisions of the Convention.⁹⁴⁰

The aim of the Committee of Ministers in its latest considerations of the case of *Cyprus v. Turkey* appears to be that of ensuring Turkey's continued engagement with the CMP, in spite of the reaffirmation by the Court in *Varnava* of its position that the work of the CMP cannot fulfil the obligation incumbent on Turkey to carry out an effective

⁹³⁴ Ibid. See also "Decisions adopted at the 1020th (DH) meeting, 4-6 March 2008", CoE doc. CM/Del/Dec(2008)1020, 27 March 2008, Decision, §§ 1 and 2; "Decisions adopted at the 1028th (DH) meeting, 3-5 June 2008", CoE doc. CM/Del/Dec(2008)1028, 9 June 2008.

⁹³⁵ *Varnava and Others v. Turkey* [GC] (App. no. 16064-16066/90 and 16068-16073/90), ECHR 18 September 2009; see also *Varnava and Others v. Turkey* (App. nos 16064-16066/90 and 16068-16073/90), ECtHR 10 January 2008 (Chamber Judgment).

⁹³⁶ *Varnava v. Turkey* [GC] (above n. 935), §§177; 188; *Varnava v. Turkey* (Chamber Judgment) (above n. 935) § 124.

⁹³⁷ Ibid., § 131

⁹³⁸ Ibid.

⁹³⁹ *Varnava and Others v. Turkey* [GC] (App. no. 16064-16066/90 and 16068-16073/90), Judgment of 18 September 2009, §189

⁹⁴⁰ Ibid., §193.

investigation. In this regard, the Committee has explicitly recognized the value of the work being carried out by the CMP and recognized the contribution it makes to Turkey's compliance with the judgment, apparently hoping thereby to prevent Turkey simply abandoning the CMP and withdrawing its cooperation from its work. However, the Committee has also maintained its position that additional measures, above and beyond the work of the CMP, are required.

In this regard, following the decision of the Chamber in *Varnava* but prior to the judgment of the Grand Chamber, at the 1035th meeting in September 2008, the Committee of Ministers expressed its "evident interest" in the work of the CMP, but reaffirmed, given the limits of the CMP's mandate, its previous position as to the need for the Turkish authorities to take additional measures "to ensure that the effective investigations required by the judgment are carried out", and in that regard urged Turkey "to provide without further delay information on the concrete means envisaged to achieve this result".⁹⁴¹

At the 1051st meeting in March 2009, the Committee held an exchange of views with the three members of the CMP on a number of issues relating to the execution of their mandate. The Committee of Ministers observed that that it was crucial that the current work of the CMP should be carried out under the best possible conditions and without delay, and that, while execution of the judgment required effective investigations, "these should not jeopardise the CMP's mission".⁹⁴² The Committee further considered that the sequence of the measures to be taken within the framework of the effective investigations and carrying out of the work of the CMP should take into consideration those two essential aims.⁹⁴³ Furthermore, the Committee once again emphasised "the urgent need for the Turkish authorities to take concrete measures having in mind the effective investigations required by the judgment, in particular relating to the CMP's access to all relevant information and places"⁹⁴⁴ and "in this context, underlined, moreover the importance of preserving all the information obtained during the Programme of Exhumation and Identification carried out by the CMP".⁹⁴⁵

In a decision adopted at the 1059th meeting in June 2009, the Committee of Ministers again noted the information provided by Turkey in relation to the work of the CMP and reaffirmed the importance of the work of the CMP.⁹⁴⁶ The Committee also drew attention

⁹⁴¹ Committee of Ministers, "Decisions adopted at the 1035th (DH) meeting, 17-18 September 2008", CoE doc. CM/Del/Dec(2008)1035, 22 September 2008, Decision, §§ 1 and 2. See similarly, Committee of Ministers, "Decisions adopted at the 1043rd (DH) meeting, 2-4 December 2008", Decision; CoE doc. CM/Del/Dec(2008)1043, 8 December 2008, Decision, §§ 1 and 2

⁹⁴² CoE doc. CM/Del/Dec(2009)1051 (above n. 497), §§2 and 3.

⁹⁴³ *Ibid.*, §4.

⁹⁴⁴ *Ibid.*, §5.

⁹⁴⁵ *Ibid.*, § 6.

⁹⁴⁶ CoE doc. CM/Del/Dec(2009)1059 (above n. 531), Decision, § 1.

to the fact that “the sequence of measures to be taken in the framework of the effective investigations required by the judgment and the continuing work of the CMP should take into consideration both the obligation of the respondent state to conduct such investigations and the necessity for the CMP to carry out its work under the best conditions and as speedily as possible”.⁹⁴⁷ On the other hand, it once again reiterated the urgency for the Turkish authorities to “to take concrete measures, having in mind the effective investigations required by the judgment”⁹⁴⁸ Among those concrete measures, it singled out in particular the need to ensure the “CMP’s access to all relevant information and places,”⁹⁴⁹ as well as taking note of the declaration by Turkey that it was “ready to consider any request from the CMP relating to access to information and places relevant for its work,”⁹⁵⁰ Further, it reiterated the importance of preserving all the information obtained during the Programme of Exhumation and Identification carried out by the CMP.⁹⁵¹

Following the decision of the Grand Chamber of the Court in *Varnava* in September 2009, at the next examination of compliance with the *Cyprus v. Turkey* judgment which took place at the 1072nd meeting in December 2009, the Committee noted with satisfaction the information provided by the Turkish authorities on the progress of the work of the CMP, in particular on the measures aimed at expediting the work of the CMP (particularly the increase in the number of exhumation teams).⁹⁵² The Committee once again encouraged the Turkish authorities to take concrete measures to ensure the CMP’s access to all relevant places and information.⁹⁵³ It once again invited the Turkish authorities to inform it immediately of the concrete measures that they envisaged adopting “in continuity with the CMP’s work with a view to the effective investigations required”⁹⁵⁴.

At the 1078th meeting, held in March 2010, the most recent meeting at which compliance with the *Cyprus v. Turkey* judgment has been examined, as regards the question of missing persons the Committee took note with interest of the presentation of the CMP’s activities given by the Turkish delegation,⁹⁵⁵ and recalled its invitation to the Turkish authorities to take concrete measures to ensure the CMP’s access to all relevant information and places, without impeding the confidentiality essential to the carrying-out

⁹⁴⁷ Ibid., § 2

⁹⁴⁸ Ibid., § 3

⁹⁴⁹ Ibid.

⁹⁵⁰ Ibid., §4.

⁹⁵¹ Ibid., §5.

⁹⁵² Committee of Ministers, “Decisions adopted at the 1072nd (DH) meeting, 1-3 December 2009”, CoE doc. CM/Del/Dec(2009)1072, 7 December 2009; Decision, §1.

⁹⁵³ Ibid., §2.

⁹⁵⁴ Ibid., §3

⁹⁵⁵ “Decisions adopted at the 1078th (DH) meeting, 2-4 March 2010”, CoE doc. CM/Del/Dec(2010)1078, 8 March 2010; Decision, §1.

of its mandate.⁹⁵⁶ In that regard, it noted with satisfaction that, according to the information provided, the Turkish authorities had acceded to several requests from the CMP for access to places situated in military zones.⁹⁵⁷ However, it reiterated and insisted upon its request that the Turkish authorities inform it of the concrete measures envisaged “in the continuity of the CMP’s work” with a view to carrying out the effective investigations required by the judgment.⁹⁵⁸

It accordingly seems that, in the continued absence of any willingness on the part of Turkey to adopt any further concrete measures by way of effective investigation into historical disappearances in Cyprus, the Committee is anxious to ensure that, at the very least, the progress made by the CMP is not jeopardised. Despite the decisions of the Court in *Varnava* to the effect that the activities of the CMP cannot of itself constitute an effective investigation by Turkey under Article 2 of the Convention, the Committee of Ministers appears to be trying to encourage Turkey to build upon the progress achieved through the work of the CMP with a view to carrying out such investigations.

In general, the Republic of Cyprus has expressed disappointment with the executive organs of the Council of Europe, as well as with the EU, stating that “the Foreign Ministers have often subordinated the importance of human rights under the Convention to broader political, economic and security considerations”.⁹⁵⁹ However, the Republic of Cyprus has stated that it believes that “the joint pressure of the European Court of Human Rights’ decisions and Turkey’s aspiration for EU accession has brought about renewed political efforts to force Turkey’s compliance with its obligations under the Convention”.⁹⁶⁰ In addition to the Committee of Ministers, the Commission of the European Communities has added another layer of monitoring of Turkey’s compliance with the judgments emanating from the European Court.⁹⁶¹

Decades have passed since the events at issue in the Court’s judgment took place. Some commentators argue that historic injustice may be overtaken by changes in circumstances so that a situation that was unjust when it was brought about may coincide with what justice requires at a later time.⁹⁶² Although this “supersession” thesis might conceivably eventually result in the legitimization of situations resulting from violations of international law as regards the situation in relation to property in northern

⁹⁵⁶ *Ibid.*, §2.

⁹⁵⁷ *Ibid.*, §3.

⁹⁵⁸ *Ibid.*, §4.

⁹⁵⁹ *Human Rights Violations in Cyprus by Turkey* (above n. 887), p. 11.

⁹⁶⁰ *Ibid.*

⁹⁶¹ Regular Reports from the Commission on Turkey’s Progress Towards Accession 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, available at: http://ec.europa.eu/enlargement/candidate-countries/turkey/key_documents_en.htm

⁹⁶² See, e.g., J. Waldron, “Superseding Historic Injustice”, *Ethics*, vol. 103 (1992), 4-28. Cf A. Marmor, “Entitlement to Land and the Right of Return: An Embarrassing Challenge for Liberal Zionism”, *USC Public Policy Research Paper No. 03-17* (2003).

Cyprus,⁹⁶³ it is difficult to transpose to situations of enforced disappearance. Nevertheless, it is undoubtedly true that the passage of time renders evidence stale, and witnesses become increasingly unavailable. However, as the Grand Chamber in *Varnava* observed, making reference to the measures taken by the United Kingdom in Northern Ireland in response to judgments of the Court:

It may be that investigations would prove inconclusive, or insufficient evidence would be available. However, that outcome is not inevitable even at this late stage and the respondent Government cannot be absolved from making the requisite efforts. By way of example, the Court recalls that in the context of Northern Ireland the authorities have provided for investigative bodies (variously, the Serious Crimes Review Team and Historical Enquiry Team) to review the files on past sectarian murders and unsolved killings and to assess the availability of any new evidence and the feasibility of further investigative measures; in cases before the Court, these measures were found, given the time that had elapsed, to have been adequate in the particular circumstances [...]. It cannot therefore be said that there is nothing further that could be done.⁹⁶⁴

In the face of Turkey's intransigence and especially given the lack of willingness on the part of Turkey to engage in further proper investigations itself, the very least that can be done is that the CMP should collect available forensic information, found when exhumations take place, which is saved for possible use in the future. The expectations of relatives of missing persons and others have been frustrated by the lack of effective investigations, the lack of compliance by Turkey with the relevant Court's judgments and the lack of measures available to the Committee of Ministers to ensure compliance with the judgment of the Court in relation to missing persons. As will be examined in more detail further below in relation to the *Varnava* case, some relatives of disappeared persons have brought individual applications before the Court and have asked it to order Turkey to take remedial measures and pay damages on a daily basis in the event that there is no compliance, hoping that an order of this type from the Court will increase the pressure on Turkey to fulfil its obligations under the Convention.

4.3.3 *Varnava and Others v. Turkey*

In *Varnava and Others v. Turkey*, the applicants alleged that the first applicants (9 individuals – 8 combatants and 1 civilian) had been detained by Turkish security forces since 1974 and that the Turkish authorities had not accounted for them since. The applicants claimed a violation of Articles 2, 3, 4, 5, 6, 8, 10, 12, 13 and 14 ECHR. Turkey

⁹⁶³ J. Waldron, "The Palestinian Refugee and the Right of Return: Theoretical Perspectives Settlement, Return, and the Supersession Thesis", *Theoretical Inquiries*, vol. 5 (2004), 237.

⁹⁶⁴ *Varnava v. Turkey* [GC] (above n. 935), §192.

responded that no issue arose under Article 2 as none of the applicants had been detained by Turkish military or other authorities.⁹⁶⁵ The Chamber found a continuing violation of Article 2 on account of the failure of the Turkish authorities to carry out an effective investigation into the whereabouts and fate of the nine first applicants who had disappeared in life-threatening circumstances.⁹⁶⁶ It also found continuing violations of Article 3 in relation to the relatives of the victims.⁹⁶⁷ Relying on the decision in *Cyprus v. Turkey*, the Chamber found a violation of Article 5 in relation to all of the applicants' relatives due to the failure to carry out an effective investigation into their whereabouts in circumstances in which there was an arguable claim that they had been deprived of their liberty at time of their disappearance.⁹⁶⁸ It also held that it was not necessary to examine the other complaints under Articles 4, 6, 8, 10, 12, 13 and 14 of the Convention.⁹⁶⁹

Regarding just satisfaction under Article 41, the applicants took an innovative approach, requesting that “the Court direct the respondent Government to take specific remedial measures so as to ensure that they conformed to their obligations under the Convention and that the Government be required to pay CYP 24 for every day between the date on which the judgment became final and the implementation of the said remedial measures, such rate doubling every twelve months”.⁹⁷⁰ Before the Chamber, the Republic of Cyprus, intervening, submitted that “the Court should seek to make an order that ensured compliance by the respondent State with their obligations”.⁹⁷¹ Although the Chamber noted “the applicants’ concern to induce the respondent Government to take action as promptly as possible under pain of increased damages”, it found “no precedent for such an ongoing, indefinite and prospective award in its case-law and perceived no basis of principle on which to embark on such a course in the present case”.⁹⁷²

The judgment was referred by Turkey to the Grand Chamber, which handed down its judgment on 18 September 2009. In anticipation of that judgment, Mr Achilleas Demetriades, lawyer representing five of the relatives of the victims, said that if they were to get an order providing for aggravated damages “it would be the biggest thing that has happened for missing persons in Strasbourg”.⁹⁷³

⁹⁶⁵ See *Varnava v. Turkey* (Chamber Judgment) (above n. 935), § 122.

⁹⁶⁶ *Ibid.*, § 133.

⁹⁶⁷ *Ibid.*, §138.

⁹⁶⁸ *Ibid.*, §145.

⁹⁶⁹ *Ibid.*, §147.

⁹⁷⁰ *Ibid.*, § 151.

⁹⁷¹ *Ibid.*, § 154.

⁹⁷² *Ibid.*, § 156.

⁹⁷³ Interview with Achilleas Demetriades, lawyer, and Costas Paraskevas, lawyer, in Nicosia, Cyprus, on 25 November 2008. On the power of the Court to order remedial measures, see above, text accompanying n. 314 et seq.

In its 2009 judgment, the Grand Chamber essentially affirmed the decision of the Chamber, rejecting Turkey's preliminary objections as to lack of temporal jurisdiction, as well as the preliminary objection regarding the applicability of the six month rule.⁹⁷⁴ The Grand Chamber went on to hold that there had been a continuing violation of Article 2 on account of the failure of Turkey to provide for an effective investigation aimed at clarifying the fate of the nine men who went missing in 1974,⁹⁷⁵ as well as a violation of Article 3, agreeing with the Chamber judgment on the basis of "the length of time over which the ordeal of the relatives has been dragged out and the attitude of official indifference in face of their acute anxiety to know the fate of their close family members".⁹⁷⁶ Although finding that there had been a violation of Article 5 in relation to two of the disappeared individuals, in relation to which there was prima facie evidence that they had last been seen under the control of the Turkish or Turkish-Cypriot forces,⁹⁷⁷ the Grand Chamber found no violation of Article 5 in respect of the other seven missing men, holding that there was no sufficient evidential basis for any such finding.⁹⁷⁸ As regards the applicants' other claims under Articles 4, 6, 8, 10, 12, 13 and 14 of the Convention, the Grand Chamber, as the Chamber had done, considered that there was no need to provide a separate ruling given the findings under Articles 2, 3 and 5.⁹⁷⁹

In relation to just satisfaction, in response to the applicants' arguments as regards the making of specific orders, the Grand Chamber reaffirmed previous jurisprudence to the effect that, in principle, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention it concluded that consequently it fell to the Committee of Ministers "to address the issues as to what may be required in practical terms by way of compliance".⁹⁸⁰ As to the applicants' request for daily fines for such period as Turkey was in continued non-compliance, the Grand Chamber noted that it had consistently rejected claims for punitive damages, and that there was "little, if any, scope under the Convention for directing Governments to pay penalties to applicants which are unconnected with damage shown to be actually incurred in respect of past violations of the Convention; in so far as such sums would purport to compensate for future suffering of the applicants, this would be speculative in the extreme."⁹⁸¹

The *Varnava* case touches upon several interesting issues. Firstly, it is of note that the applications were brought in the names of the missing persons themselves as the

⁹⁷⁴ *Varnava v. Turkey* [GC] (above n. 935), §§ 150 and § 172.

⁹⁷⁵ *Ibid.*, § 194.

⁹⁷⁶ *Ibid.*, § 202.

⁹⁷⁷ *Ibid.*, § 208.

⁹⁷⁸ *Ibid.*, § 209.

⁹⁷⁹ *Ibid.*, § 211.

⁹⁸⁰ *Ibid.*, § 222.

⁹⁸¹ *Ibid.*, § 223.

principal applicants. The Court does not in principle normally accept applications in the name of deceased persons; however, as their relatives believe they are still alive and no evidence that they had died in 1974 or since has been identified, complaints have been filed in the name of the missing persons. Secondly, concerning Turkey's objection *ratione temporis*, Turkey stated that its recognition of the jurisdiction of the Court ran from 22 January 1990 and included a temporal clause limiting it to matters raised in respect of facts which occurred subsequent to the Turkish declaration. Turkey submitted that the complaints related to "spontaneous" [sic] acts, which had occurred more than 15 years before its acceptance of jurisdiction.⁹⁸² The Chamber found no reason to differ from the conclusions reached in *Cyprus v. Turkey*, and as the facts disclosed a continuing obligation under Article 2, held that it had competence *ratione temporis*. The Grand Chamber, although entering into far more detailed analysis, likewise rejected the preliminary objection.⁹⁸³ Thirdly, regarding the six-month rule contained in Article 35(1) of the Convention, Turkey relied on the fact that two cases regarding missing Turkish Cypriots, *Karabardak v. Cyprus* and *Baybora v. Cyprus*, had been rejected due to delays in bringing the cases before the Court (in *Karabardak v. Cyprus*, the Court found the delay to be over thirty years).⁹⁸⁴ Nevertheless, by contrast, the applications in *Varnava* case were held to be admissible, although the events dated back to 1974. The Chamber found that the complaints in the *Varnava* case had been introduced in 1990, some three years after the right of individual petition became applicable to Turkey following its ratification of the Convention in 1987. However, it was not until 22 January 1990 that Turkey recognized the jurisdiction of the Court to examine individual applications, with the possibility of a public hearing and a binding judgment in which an award for just satisfaction might be made. The *Varnava* applications were introduced three days after Turkey's acceptance of the jurisdiction of the Court. In the circumstances neither the Chamber nor the Grand Chamber found any element of unreasonable delay in bringing the applications to Strasbourg.⁹⁸⁵

4.3.4 *Baybora and Others v. Cyprus and Karabardak and Others v. Cyprus*

Two cases regarding Turkish Cypriots who were allegedly abducted by Greek Cypriot forces in 1964 have been deemed inadmissible by the Court due to failure to comply

⁹⁸² *Varnava v. Turkey* (Chamber Judgment) (above n. 935), § 103; *Varnava v. Turkey* [GC] (above n. 935), §§130-150. Presumably, the reference to "spontaneous" acts is intended to imply that the acts were not due to a Turkish policy but rather to individual acts carried out by certain servicemen.

⁹⁸³ *Ibid.*, §§ 130-150.

⁹⁸⁴ For the Grand Chamber's discussion in this regard, see *ibid.*, § 171.

⁹⁸⁵ *Varnava v. Turkey* (Chamber Judgment) (above n. 935), § 118; *Varnava v. Turkey* [GC] (above n. 935), §§156-172.

with the six-month rule contained in Article 35(1) of the Convention. In *Baybora and Others v. Cyprus*, the applicants submitted that in view of the political situation prevailing on the island and the sensitive nature of the issue, no effective judicial and administrative remedies existed in the part of Cyprus controlled by the Republic of Cyprus.⁹⁸⁶ They contended that, without the co-operation of the Republic of Cyprus, any theoretical “remedy” that might have been asserted to be available in southern Cyprus would have been hypothetical and totally futile. The applicants went on to argue that since relatives, living in southern Cyprus, of Greek Cypriot missing persons are able to make individual applications to the Court against Turkey without having to exhaust domestic remedies in the “Turkish Republic of Northern Cyprus” or in Turkey,⁹⁸⁷ applicants living in the “Turkish Republic of Northern Cyprus” should be able to apply to the Court without having to exhaust domestic remedies in southern Cyprus. The Court noted that nothing had been done by the applicants to bring the alleged disappearance of the first applicant to the attention of the authorities of the Republic of Cyprus in the twenty years before the lodging of the application with the Court. The Court did not consider whether the applicants were correct in their belief that they had no effective remedies in the respondent State or whether the CMP could be considered an effective remedy. The Court found that, even assuming that the applicants had no effective remedies as alleged, the applicants must have been aware of this long before 30 October 2001 when they introduced their application to the Court. The Court therefore concluded that the application had been introduced out of time and was to be rejected in accordance with Article 35(1) and (4) of the Convention. The Court came to the same conclusion in *Karabardak and Others v. Cyprus*.⁹⁸⁸

4.4 Killings by security forces

To date, the Court has examined four cases regarding the alleged killing of three Greek Cypriots and one Turkish Cypriot by the Turkish or TRNC forces. Two of the judgments are from 2005 and the Committee of Ministers has commenced its supervision of execution. The other two cases are more recent, from June and September 2008, and very little information on their execution is yet available.

⁹⁸⁶ *Baybora and Others v. Cyprus* (dec) (App. no. 77116/01), ECtHR 22 October 2002.

⁹⁸⁷ See the decision on admissibility: *Varnava and Others v. Turkey* (dec) (App. no. 16064-66/90 and 16068-16073/90), ECtHR 14 April 1998.

⁹⁸⁸ *Karabardak and Others v. Cyprus* (dec) (App. no. 76575/01), ECtHR 22 October 2002.

4.4.1 *Kakoulli v. Turkey*

The case of *Kakoulli v. Turkey* concerned the killing in 1996 of Petros Kakoulli by Turkish soldiers on guard duty along the cease-fire line in Cyprus and the lack of effective and impartial investigation into his killing.⁹⁸⁹ The Court found a violation of Article 2 of the Convention under both its substantive and procedural aspects.⁹⁹⁰ In particular, as far as the investigation was concerned, the Court identified the following shortcomings:

- (a) the initial autopsy had failed to record fully the injuries on Petros Kakoulli's body, an omission which hampered an assessment of the extent to which he was caught in the gunfire, and his position in relation to the soldiers on guard duty;
- (b) the investigating authorities had based their findings solely on the soldier's account of the facts, without casting any doubt on it and without seeking any further eyewitnesses;
- (c) these same authorities failed to inquire as to whether the victim, allegedly in possession of arms, could have posed a serious threat to the soldiers from a long distance or whether the soldiers could have avoided using excessive lethal force;
- (d) the investigators did not examine whether the soldier who shot Mr Kakoulli had complied with the rules of engagement laid down in the military instructions concerning the guard post where the events took place.

With regard to the execution of the Court's judgment, as far as individual measures are concerned, the Turkish Government informed the Committee of Ministers that after the judgment of the Court, the case had been promptly re-examined at the national level in order to decide whether a new investigation should be conducted.⁹⁹¹ The Turkish authorities also noted that no limitation period exists in relation to the crimes at issue under the relevant legislation of the TRNC. A person who has previously been either convicted or acquitted cannot be tried again for the same offence, although as regards proceedings that have been discontinued due to a prosecutors' decision not to bring charges, reopening of the case is possible if new evidence is obtained.⁹⁹² Having stated that the consideration of the possibility of reopening the case had begun without delay following the final judgment of the European Court, Turkey also informed the Committee of the fact that "the Prosecutor General's decision was based on a preliminary

⁹⁸⁹ *Kakoulli v. Turkey* (App. no. 38595/97), ECtHR 22 November 2005.

⁹⁹⁰ *Ibid.*, §§ 121 and 128.

⁹⁹¹ See "Annotated Agenda and Decisions, 1035th meeting (DH), 17-18 September 2008", CoE doc. CM/Del/OJ/DH(2008)1035 Section 4.2 PUBLIC, 8 October 2008.

⁹⁹² *Ibid.*

examination, carried out by security forces [...], which considered each and every deficiency in the investigation as identified by the European Court in a detailed unprejudiced manner as to the possible reopening of the investigation”.⁹⁹³ Turkey stated that the Prosecutor General had concluded that an additional investigation would not have been able to change witness statements provided already, and that, given that on the basis of these statements it had been established that the soldier had acted in full conformity with relevant orders and instructions, reopening the investigation would amount to judging a person for having acted lawfully.⁹⁹⁴ The Prosecutor General had also concluded that a new investigation as described by the Court was impossible given that some of the witnesses were Greek Cypriots, some were persons who worked for UNFICYP and had since left the territory, the body of Petros Kakoulli was buried in southern Cyprus and that 12 years had elapsed since the events at issue.⁹⁹⁵

As for the general measures adopted to address the shortcoming in investigations identified by the Court, no particular general measures appear to have been taken, as Turkey simply stated that military or civilian persons may complain to superiors or the military prosecutor general of any offence they consider to have been committed by a serviceman and that such complaints were processed immediately with a view to opening an investigation into the situation.⁹⁹⁶ The Turkish authorities added that the competent court in such cases was the Security Forces Tribunal.⁹⁹⁷

In relation to the decision not to reopen the investigation, the Department for the Execution of Judgments found that

[...] the provided information concerning the decision adopted by the Prosecutor General not to reopen the investigation represents a detailed and thorough examination of all the main elements pointed out by the European Court as deficient in the initial investigation. It should be noted, however, that this analysis was based on the same investigation acts criticised by the European Court, giving rise to a violation of the procedural aspect of Article 2. In this connection, it suffices to emphasise that carrying out a new effective investigation would make it possible to establish, in the light of the conclusions of the European Court, whether or not the soldier in question had acted in compliance with relevant orders and instructions. This in turn would make it possible to establish responsibility for the killing of Mr. Kakoulli, an element of the concept of effective investigation. However, from the information provided by the Turkish authorities [in 2008] it seems that the authorities are not in a position to carry out an exhumation of, and perform an autopsy on, the body of Mr Petros Kakoulli, as it is buried in the southern part of Cyprus. Now, the fact of performing another autopsy is crucial for determining the position of Mr Kakoulli's body in relation to the soldiers on guard duty when the shots were fired,

⁹⁹³ Ibid.

⁹⁹⁴ Ibid.

⁹⁹⁵ Ibid.

⁹⁹⁶ See “Annotated Agenda and Decisions, 1035th meeting (DH), 17-18 September 2008”, CoE doc. [CM/Del/OJ/DH\(2008\)1035](#) Section 4.2 PUBLIC, 8 October 2008.

⁹⁹⁷ Ibid.

and ultimately for determining whether the soldier who shot could have avoided using excessive lethal force, and also if the rules of engagement laid down in the military instructions concerning the Haşim 8 Guard Post had been respected. Consequently, in the absence of a new autopsy, it would seem impossible at present to take action for effectively remedying the deficiencies of the initial investigation as concluded by the European Court.⁹⁹⁸

In a Decision adopted in June 2009, the Committee of Ministers noted with interest “the information provided by the Cypriot authorities concerning a possible further forensic investigation of Mr Kakoulli’s body” and “the ongoing consideration on possible further general measures” and decided to resume consideration of this case at their 1059th (DH) meeting in June 2009.⁹⁹⁹ At that meeting, the Committee of Ministers adopted a Decision in which, noting the information presented during the debate by the Turkish and Cypriot authorities concerning the individual measures in the case of *Kakoulli*, scheduled further consideration of the issue for its 1072nd meeting in December 2009.¹⁰⁰⁰ When it met next met, the Committee noted that further information had only very recently provided by the Turkish authorities as to the individual and general measures, and resolved to defer consideration until its 1078th meeting in March 2010.¹⁰⁰¹ At that meeting, the Committee noted that the Prosecutor General had taken the position that it was not possible to carry out a new investigation as the victim’s corpse was buried in southern Cyprus, took note of the indication by the Cypriot authorities that it would be possible to carry out a further forensic examination, found that the other grounds put forward by the Prosecutor General did not seem to justify the absence of a new investigation and accordingly held that “in these circumstances, it is for the competent Turkish authorities to reassess the possibility of carrying out a new investigation into the death of Mr Kakoulli” and invited them to submit information in this respect.¹⁰⁰²

4.4.2 *Adalı v. Turkey*

The case of *Adalı v. Turkey* differs from the other cases as it concerns the killing of a Turkish Cypriot by Turkish security forces, in contrast to the other cases, which concerned the killing of Greek Cypriots by the Turkish and/or TRNC forces.¹⁰⁰³ In her application before the Court, the victim’s wife alleged that her husband had been shot by

⁹⁹⁸ Ibid.

⁹⁹⁹ CoE doc. CM/Del/Dec(2009)1051 (above n. 497)

¹⁰⁰⁰ CoE doc. CM/Del/Dec(2009)1059 (above n. 531), Decision, §§ 1 and 5.

¹⁰⁰¹ “Decisions adopted at the 1072nd (DH) meeting, 1-3 December 2009”, CoE doc. CM/Del/Dec(2009)1072, 7 December 2009, Decision, §§1 and 2.

¹⁰⁰² CoE doc. CM/Del/Dec(2010)1078 (above n. 955), Decision, §§ 1-4.

¹⁰⁰³ *Adalı v. Turkey* (App. no. 38187/97), ECtHR 31 March 2005.

members of the Turkish and/or TRNC security forces in front of his house in Nicosia (north of the “green line”) and that the national authorities had failed to carry out an adequate investigation into his death. The Court did not find a substantive violation of Article 2 due to the inability to conclude beyond all reasonable doubt the involvement of any State agent in the killing of the applicant’s husband. However, it did find a procedural violation of Article 2 due to the failure to conduct an effective investigation into the circumstances of the death of the applicant’s husband, as well as a violation of Article 13 in respect of the complaints under Article 2. With respect to the investigation, the shortcomings identified by the Court included:

- failure of the investigating authorities to take fingerprints on the terrace or inside the applicant’s home and the absence of real coordination or monitoring of the scene of the incident;
- insufficient ballistic examination, in particular the failure to compare the cartridges found with those classified in the police archives in Turkey;
- failure of the investigating authorities to take statements from some key witnesses (although additional witness statements were taken in 2002, after the application in the case had been communicated to the government);
- failure of the authorities to inquire sufficiently into the motives behind the killing of the applicant’s husband; and
- lack of public scrutiny of the investigation as a result of no information being provided to the deceased’s family, in particular the lack of transmission of the autopsy and ballistics reports.

As far as the adoption of individual measures is concerned, after the judgment of the Court, an additional inquiry into the death of Mr Adalı was carried out. The Turkish authorities stated that all points criticized by the Court as having been deficient in the initial investigation had been considered in the new inquiry: new witnesses were heard and files were established. However, the victim’s mobile phone was sought but not found, the collection of new fingerprints turned out to be objectively impossible, given the time which had elapsed since the events, the environmental changes affecting the place and the fact that external people had been at the crime scene and a ballistics report which had already been prepared and had been taken into account in the original investigation could not be obtained (as its physical whereabouts could not be established) and it could therefore not be re-examined. The Turkish authorities concluded that, despite the additional investigative acts undertaken, it had not been possible to obtain new evidence on the basis of which criminal charges could be brought against any person. On the other hand, Turkey underlined that as no period of limitation

applied in this case, any new element could at any moment, give rise to an appropriate follow-up.¹⁰⁰⁴

With regard to general measures, the Turkish authorities have provided the Department for the Execution of Judgments with an action plan regarding the general measures taken or envisaged in execution of the *Adali* judgment. Regarding the violations of Article 2 and 13 of the Convention, the Turkish authorities stressed that the shortcomings in the investigation generally stemmed from the practice of the authorities and not the legislation in force, which is broadly compliant with the requirements of the Convention. The authorities referred in particular to the fact that the Coroners Law and to the Law on Criminal Procedure of the TRNC provide for investigations of deaths to be conducted *ex officio* by investigating magistrates and under their exclusive control. Regarding the involvement of victims' families into the investigation, the authorities relied upon Article 14 of the Coroners Law, which states that every interested party may appear at an inquest. In addition, the Turkish authorities noted that the role of the Attorney General in police investigations had been strengthened by the adoption in March 2006 of an amendment to Article 29 of the Act on the Law Office, which now provided for the power of the Attorney General to supervise or direct investigations carried out by the General Directorate of the Police Forces and give orders in this respect, if he finds it necessary.¹⁰⁰⁵

Regarding the individual measures adopted by Turkey, the initial assessment of the Department for the Execution of Judgments was that the investigative acts carried out following the judgment of the Court corresponded to the deficiencies identified in the initial criminal investigation, although further information was required as to whether the applicant had been informed of this new inquiry.¹⁰⁰⁶ In December 2008, the Committee of Ministers endorsed that assessment, insofar as it took note of the information provided, “invited the Turkish authorities to provide clarification as to whether the applicant has been informed of the results of the additional inquiry carried out after the European Court’s judgment”, and “noted that no limitation period applies to this type of crimes and any new element brought to the attention of the Attorney General could lead potentially to a reopening of the investigation”.¹⁰⁰⁷ At its 1078th meeting in March 2010, the Committee of Ministers, having considered further information from Turkey concerning the communication of the results of the investigation to the applicant, decided to terminate its consideration of execution of the Court’s judgment.¹⁰⁰⁸

¹⁰⁰⁴ “Annotated Agenda and Decisions, 1035th (DH) Meeting, 17-18 September 2008”, CoE doc. CM/Del/OJ/DH(2008)1035 section 4.2 PUBLIC, 8 October 2008.

¹⁰⁰⁵ *Ibid.*

¹⁰⁰⁶ *Ibid.*

¹⁰⁰⁷ CoE doc. CM/Del/Dec(2008)1043 (above n. 941), §§ 2 and 3.

¹⁰⁰⁸ Resolution CM/ResDH(2010)12 of 4 March 2010.

The assessment by the Department for the Execution of Judgments of the further investigations carried out by Turkey, and its endorsement by the Committee of Ministers, is disappointing as it is clear that the re-opened investigation was flawed on numerous points. It is surprising that the Department for the Execution of Judgments appears to have accepted without any adverse comment that the whereabouts of the ballistics report could not be established. It is obviously very easy for the State to allege that material reports have simply disappeared and therefore cannot be re-examined; of course, a new ballistics report cannot now be prepared. Further, northern Cyprus has been experiencing unprecedented construction and a boom in sales of property; it may therefore legitimately be asked to what extent the “environmental changes” which were alleged to have frustrated further investigations were due to such construction, which the Turkish authorities have permitted to take place.

Regarding general measures, the argument presented by the Turkish authorities that the shortcomings in the investigation generally stem from the practice and not the legislation in place is hard to judge; only the future will tell if this is true or not. In this respect, further information is required as to what other measures have been taken in order to ensure that the legislation is correctly followed.

4.4.3 *Solomou and Others v. Turkey and Isaak v. Turkey*

The case of *Isaak v. Turkey* concerned the killing of Anastasios Isaak during a demonstration organized by the Cyprus Motorcycle Federation that took place on 11 August 1996 at several points of the UN buffer zone east of Nicosia.¹⁰⁰⁹ Mr Isaak had been attacked, thrown to the ground and beaten to death by a group of at least 15 persons, including members of the Turkish or TRNC forces. The Court concluded that there had been both a substantive and procedural violation of Article 2 of the Convention.¹⁰¹⁰

The case of *Solomou and Others v. Turkey* concerned the killing of Solomos Solomou by Turkish forces.¹⁰¹¹ The killing occurred during a demonstration held in close proximity to the United Nations Buffer Zone, near the Deryneia checkpoint in the aftermath of the funeral of Solomou's cousin Anastasios Isaak (the victim in the case of *Isaak v. Turkey*). Although UNFICYP and the UN Civil Police (UNCIVPOL) staff tried to stop them, Mr Solomou and other demonstrators managed to enter the buffer zone and ran towards the Turkish side. Mr Solomou crossed the barbed wire at the Turkish ceasefire line and entered the occupied territory where he attempted to climb a flagpole flying the Turkish flag. He was hit by five shots fired by at least three policemen from the Turkish side and

¹⁰⁰⁹ *Isaak v. Turkey* (App. no. 44587/98), ECtHR 24 June 2008.

¹⁰¹⁰ *Ibid.*, §§ 120 and 125.

¹⁰¹¹ *Solomou and Others v. Turkey* (App. no. 36832/97), ECtHR 24 June 2008.

was fatally injured. Two members of the UNFICYP, a civilian in the buffer zone and a civilian who was standing behind the Cypriot Government's ceasefire line were also wounded by shots fired from the Turkish side. The Turkish Government argued that the Turkish-Cypriot police had been fully justified under Article 2(2) of the Convention in using the force necessary to abate the danger caused by the Greek Cypriot demonstrators, with the active support of the Greek Cypriot authorities.¹⁰¹² The Court found that Solomos Solomou had been killed by agents of the Turkish State and that his shooting had not been justified as he had been unarmed and had not attacked anyone.¹⁰¹³ The Court accordingly concluded that there had been a violation of the substantive obligation under Article 2.¹⁰¹⁴ It then proceeded to find a procedural violation of Article 2 in respect of the failure of the Turkish authorities to conduct an effective investigation into the circumstances in which Mr Solomou had died.¹⁰¹⁵

The two judgments are relatively recent and the Committee of Ministers has only comparatively recently begun its supervision of execution of these cases, although they have been grouped with the ongoing supervision of the execution of the *Kakoulli* judgment. To date, the Committee has asked for information as to whether the Turkish authorities have re-opened investigations into the killings following the Court's judgments.¹⁰¹⁶ The Committee is also awaiting information on the measures taken or envisaged to ensure that effective investigations are carried out into killings of civilians by and/or with the tacit agreement of members of the police or the security forces in the TRNC.¹⁰¹⁷

4.5 Issues relating to admissibility of cases

4.5.1 Exhaustion of domestic remedies

Compliance with the requirement of exhaustion of domestic remedies pursuant to Article 35 ECHR has been disputed in each of the aforementioned cases. This issue is of interest for this study as the interpretation of the requirement has an effect on domestic procedures. Both Greek and Turkish Cypriots argue that access to and the effectiveness of domestic remedies in the other part of Cyprus is imbalanced. By contrast, Greek Cypriots argue that Turkish Cypriots have full access to the Cypriot courts. Achilleas

¹⁰¹² *Ibid.*, § 57.

¹⁰¹³ *Ibid.*, §§ 74-75.

¹⁰¹⁴ *Ibid.*, § 79.

¹⁰¹⁵ *Ibid.*, § 84.

¹⁰¹⁶ See, most recently, "Decisions adopted at the 1078th (DH) meeting, 2-4 March 2010", CoE doc. CM/Del/Dec(2010)1078, 8 March 2010; Decision, §5.

¹⁰¹⁷ *Ibid.*, § 7.

Demetriades, lawyer representing five of the relatives in the *Varnava* case, stated that “the Turkish Cypriot relatives can have recourse to the Cyprus courts in order to exhaust the local remedies while Greek Cypriots are not offered such remedy”.¹⁰¹⁸ The Turkish Cypriots feel the same way – Greek Cypriots can use the TRNC courts but the Turkish Cypriots do not believe that they would get a fair trial if they went to the Cypriot courts. Greek Cypriots say that they cannot use the TRNC courts for a number of reasons. Firstly, the TRNC does not exist and is not recognized and using the courts on the northern side would equal some sort of recognition of the TRNC and deny the sovereignty of the Republic of Cyprus over the northern part of Cyprus.¹⁰¹⁹ The applicants have felt that such action would be in direct conflict with their status and duties as citizens of the Republic of Cyprus.¹⁰²⁰ Secondly, at the time of the events at issue, Greek Cypriots living in the south simply could not physically access the TRNC to file a complaint. Thirdly, the applicants are of the opinion that the courts in the TRNC would not offer a remedy which is effective and available to them. Fourthly, applicants feel that the total lack of any adequate investigations has showed, in itself, that there were no effective remedies, available to the applicants in the TRNC. Fifthly, the applicants also doubted whether the TRNC courts would be independent and/or impartial.¹⁰²¹

The Cypriot Government has supported the applicants’ views and has maintained that the applicants could not be required to exhaust the remedies provided by a subordinate local administration whose existence was dependent upon the control of an occupying power.¹⁰²² By contrast, the Turkish Government has continuously argued that applicants have failed to exhaust domestic remedies as they have not had recourse to the local remedies within the judicial and administrative system of the TRNC. Turkey has argued that “those remedies were effective, accessible and capable of providing redress for their complaints”.¹⁰²³

In the recent case of *Demopoulos v. Turkey*, a decision relating to property in northern Cyprus, it was held that the Immoveable Property Commission set up by the TRNC was an accessible and effective framework of redress in respect of complaints about

¹⁰¹⁸ *Cyprus Weekly*, 21-27 November 2008, p. 64.

¹⁰¹⁹ See Y. Ronen, “Non-Recognition, Jurisdiction and the TRNC before the European Court of Human Rights”, *Cambridge Law Journal*, vol. 62 (2003), 534-537.

¹⁰²⁰ For a reflection of the impact of the opening of the “green line” on the reconciliation process in Cyprus, see M. Hadjipavlou, “The ‘crossings’ as part of citizens’ reconciliation efforts in Cyprus?”, *Innovation: The European Journal of Social Science Research*, vol. 20 (2007), 53–73.

¹⁰²¹ On this latter point, in *Isaak v. Turkey*, the applicants stated that “the very raison d’être of these courts was to support the position taken by Turkey that the “TRNC” was not a part of the Republic of Cyprus. Any action on the part of the applicants was bound to fail. In the eyes of the “TRNC”, its police and military personnel did not belong to Turkey. Its courts would therefore have refused any claim based on a different point of view. If Turkey had been named the defendant in an action before the “TRNC” courts, the latter would have treated Turkey as a sovereign independent State, entitled to sovereign immunity” (*Isaak v. Turkey*, above n. 1009, § 69).

¹⁰²² *Kakoulli v. Turkey* (above n. 989), § 86.

¹⁰²³ *Isaak v. Turkey* (above n. 1009), § 59. See also *Kakoulli v. Turkey* (above n. 989), § 80.

interference with property owned by Greek Cypriots, and that the rule of exhaustion of local remedies is applicable to this mechanism.¹⁰²⁴ Specifically, the Court held that “borders, factual or legal, are not an obstacle *per se* to the exhaustion of domestic remedies; as a general rule applicants living outside the jurisdiction of a Contracting State are not exempted from exhausting domestic remedies within that State, practical inconveniences or understandable personal reluctance notwithstanding”.¹⁰²⁵

In *Cyprus v. Turkey*, the Court had already found that the remedies available in the TRNC may be regarded as “domestic remedies” of the respondent State and that the question of their effectiveness is to be considered in the specific circumstances in which it arises.¹⁰²⁶ The Court came to this conclusion after a rather lengthy discussion, mainly relying on the Advisory Opinion of the International Court of Justice in the *Namibia* case. The Court characterised the developments that have occurred in Northern Cyprus since 1974 in terms of the exercise of *de facto* authority by the TRNC.¹⁰²⁷ With reference to the Advisory Opinion in the *Namibia* case, the Court found that international law recognises the legitimacy of certain legal arrangements and transactions in situations such as the one obtaining in the TRNC, for instance as regards the registration of births, deaths, and marriages, “the effects of which can only be ignored to the detriment of the inhabitants of the [t]erritory”.¹⁰²⁸ In the Court’s view, the Advisory Opinion confirms that where it can be shown that remedies exist to the advantage of individuals and offer them reasonable prospects of success in preventing violations of the Convention, use should be made of such remedies.¹⁰²⁹ The Court stated that

[t]he conclusion to be drawn is that it cannot simply disregard the judicial organs set up by the TRNC in so far as the relationships at issue in the present case are concerned. It is in the very interest of the inhabitants of the TRNC, including Greek Cypriots, to be able to seek protection of such organs; and if the TRNC authorities had not established them, this could rightly be considered to run counter to the Convention. Accordingly, the inhabitants of the territory may be required to exhaust these remedies, unless their inexistence or ineffectiveness can be proven – a point to be examined on a case-by-case basis.¹⁰³⁰

The Court has also applied this line of reasoning in two cases regarding the killing of Greek Cypriots. In *Kakoulli v. Turkey*, the applicants (Greek Cypriots) went directly to the

¹⁰²⁴ *Demopoulos v. Turkey and 7 other cases* [GC] (App. Nos. 46113/99, 3843/02, 13751/02, 13466/03, 14163/04, 10200/04, 19993/04 and 21819/04), decision on admissibility of 1 March 2010, §127.

¹⁰²⁵ *Ibid.*, § 98.

¹⁰²⁶ *Cyprus v. Turkey* (above n. 295), § 102. However, the Court has been careful to add that “to allow the opportunity to the respondent State in the framework of the present application in no way amounts to an indirect legitimization of a regime which is unlawful under international law” (*ibid.*, § 101).

¹⁰²⁷ *Ibid.*, § 90.

¹⁰²⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) 1971 ICJ Reports*, p. 16, § 125.

¹⁰²⁹ *Cyprus v. Turkey* (above n. 295), § 91.

¹⁰³⁰ *Ibid.*, § 98. See similarly, *Demopoulos v. Turkey* [GC] (above n. 1024), at §§ 92-98.

Court without trying to exhaust domestic remedies in Northern Cyprus. The Turkish Government argued that the applicants had failed to exhaust domestic remedies. The Court noted that “it is incumbent on the respondent Government claiming non-exhaustion to indicate to the Court with sufficient clarity the remedies to which the applicant has not had recourse and to satisfy the Court that the remedies were effective and available in theory and in practice in respect of the applicants’ complaints and offered reasonable prospects of success”.¹⁰³¹ The Court chose to join this examination to the merits. When examining whether the investigation into the killing of Mr Kakoulli was adequate and effective as required by Article 2, the Court came to the conclusion that the investigation conducted by the TRNC authorities was neither effective nor impartial and accordingly dismissed the respondent State’s objection of non-exhaustion of domestic remedies.¹⁰³² In *Isaak v. Turkey*, the Court noted that the Turkish Government had failed to indicate precisely what remedies were available to the applicants. It stated that in principle, legal systems provide two avenues of recourse for victims of illegal and criminal acts attributable to the State or its agents, namely civil and criminal remedies.¹⁰³³ As regards criminal-law remedies, the Court observed that the Turkish Government alleged that an investigation into the killing of Mr Isaak had been carried out by the TRNC authorities. No documents from the alleged inquiry had been produced before the Court and the investigation had been pending since 1996.¹⁰³⁴ The Court considered that these circumstances cast doubt on the effectiveness of the inquiry and that the applicants were not obliged to await its conclusion before having the merits of their case examined by the Court.¹⁰³⁵ As regards civil actions to obtain redress for damage, the Court found that “it has not been shown that, without the benefit of the conclusions of an effective criminal inquiry, the civil courts in the TRNC would have been able to pursue any independent investigation and would have been capable of making any meaningful findings...”¹⁰³⁶ Therefore, the applicant was not obliged to pursue civil remedies in the TRNC either.

The question arises as to whether this rule is applied differently if a Turkish Cypriot living in the TRNC fails to exhaust domestic remedies before going to the Court. In *Adalı v. Turkey*, a case concerning the killing of a Turkish Cypriot living in the TRNC by Turkish and/or TRNC forces, the Court considered this question at the same time as its examination of the merit of the applicant’s complaints and, in light of the finding that the national authorities had failed to carry out an adequate and effective investigation into the killing of Mr Adalı, it dismissed the Turkish Government’s objection of non-

¹⁰³¹ *Kakoulli v. Turkey* (above n. 989), § 88.

¹⁰³² *Ibid.*, § 128.

¹⁰³³ *Isaak v. Turkey* (above n. 1009), § 79.

¹⁰³⁴ *Ibid.*, § 80.

¹⁰³⁵ *Ibid.*, § 81.

¹⁰³⁶ *Ibid.*, § 82.

exhaustion of domestic remedies.¹⁰³⁷ The conclusion that can be drawn is that, as a general rule, both Greek Cypriots and Turkish Cypriots have to exhaust domestic remedies in the TRNC. This corresponds to the conclusions reached by the Court in *Cyprus v. Turkey* that the remedies available in the TRNC may be regarded as “domestic remedies” of the respondent State.¹⁰³⁸ However, the question of effectiveness of the remedies is to be considered in the specific circumstances in which it arises and, as seen in the above-mentioned cases, the burden of proof is on the respondent Government to show that the remedy was an effective one. If the respondent Government fails to prove that the remedies were effective and/or the applicant manages to show that the investigation was not adequate and effective, the applicants are relieved from having to exhaust domestic remedies.

4.5.2 Application of the six-month rule

Another problem presented to potential applicants is the six month rule contained in Article 35(1) of the Convention. According to this provision, an application must be filed with the Court within six months from the conclusion of any court proceedings that the applicant has taken that could have provided him/her with a remedy. In the absence of domestic remedies or if they are judged to be ineffective, the six-months time-limit runs from the date of the act complained of.¹⁰³⁹ The Court has found that special considerations may apply in exceptional cases where an applicant first availed herself of a domestic remedy and only at a later stage becomes aware, or should have become aware, of circumstances which make that remedy ineffective. In such situations, the six-month period may be calculated from the time when the applicant becomes aware, or should have become aware, of these circumstances.¹⁰⁴⁰

Two of the cases that were dealt with above were deemed inadmissible by the Court due to failure to abide by the six month rule, while the others were considered admissible in this regard. The question is how the Court reached these conclusions, accepting the cases concerning Greek Cypriot missing persons but not the cases concerning Turkish Cypriot missing persons. In *Cyprus v. Turkey*, the Court followed the Commission's approach and disregarded situations, which ended six months before the date on which the application was introduced, namely 22 November 1994. Therefore, the Court, like the Commission, considered that practices which were shown to have ended before 22

¹⁰³⁷ *Adalı v. Turkey* (above n. 1003), § 233.

¹⁰³⁸ *Cyprus v. Turkey* (above n. 295), § 102. However, the Court has been careful to add that “to allow the opportunity to the respondent State in the framework of the present application in no way amounts to an indirect legitimization of a regime which is unlawful under international law” (*ibid.*, § 101).

¹⁰³⁹ *Hazar and Others v. Turkey* (dec) (App. no. 62566/00), ECtHR 10 January 2002; see also *L.C.B. v. the United Kingdom* (dec) (App. no. 23413/94) EComHR (1995) 83 DR 31.

¹⁰⁴⁰ *Laçın v. Turkey* (dec) (App. no. 23654/94) EcomHR (1995) 81 DR 76.

May 1994 fell outside the scope of its examination.¹⁰⁴¹ Consequently, the Court found continuing violations of Articles 2, 3 and 5 of the Convention. In *Varnava v. Turkey*, Turkey referred to the cases of *Karabardak v. Cyprus* and *Baybora v. Cyprus*, in order to argue that the application should be considered out of time as the applicants should have brought their applications to Strasbourg within six months of the acceptance of the right of individual petition by Turkey on 27 January 1987, but had not done so for some four years.¹⁰⁴² The applicants considered that the violations were of a continuing nature to which the six month rule did not apply.¹⁰⁴³ In response, the Grand Chamber noted that

[i]n cases of disappearances, just as it is imperative that the relevant domestic authorities launch an investigation and take measures as soon as a person has disappeared in life-threatening circumstances, it is indispensable that the applicants, who are the relatives of missing persons, do not delay unduly in bringing a complaint about the ineffectiveness or lack of such investigation before the Court. With the lapse of time, memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and the prospects that any effective investigation can be undertaken will increasingly diminish; and the Court's own examination and judgment may be deprived of meaningfulness and effectiveness. Accordingly, where disappearances are concerned, applicants cannot wait indefinitely before coming to Strasbourg. They must make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay.¹⁰⁴⁴

The Court then went on to explain what would amount to “undue delay” in bringing a claim in disappearance cases “where there is a state of ignorance and uncertainty and, by definition, a failure to account for what has happened, if not an appearance of deliberate concealment and obstruction on the part of some authorities”.¹⁰⁴⁵ The Court recognized that, in these circumstances, it is difficult for the relatives of the missing person to assess what the situation is and how it is going to develop and that therefore and therefore “the standard of expedition expected of the relatives cannot be rendered too rigorous in the context of Convention protection”.¹⁰⁴⁶ The Court then went on to note that

Nonetheless, [...] applications can be rejected as out of time in disappearance cases where there has been excessive or unexplained delay on the part of applicants once they have, or should have, become aware that no investigation has been instigated or that the investigation has lapsed into inaction or become ineffective and, in any of those eventualities, there is no immediate, realistic prospect of an effective investigation being provided in the future. Where there are initiatives being pursued in regard to a disappearance situation, applicants may reasonably await

¹⁰⁴¹ *Cyprus v. Turkey* (above n. 295), § 104.

¹⁰⁴² *Varnava v. Turkey* [GC] (above n. 935), § 152-153.

¹⁰⁴³ *Ibid.*, § 154.

¹⁰⁴⁴ *Ibid.*, § 161.

¹⁰⁴⁵ *Ibid.*, § 162..

¹⁰⁴⁶ *Ibid.*, § 163.

developments which could resolve crucial factual or legal issues. Indeed, as long as there is some meaningful contact between families and authorities concerning complaints and requests for information, or some indication, or realistic possibility, of progress in investigative measures, considerations of undue delay will not generally arise. However, where there has been a considerable lapse of time, and there have been significant delays and lulls in investigative activity, there will come a moment when the relatives must realise that no effective investigation has been, or will be provided. When this stage is reached will depend, unavoidably, on the circumstances of the particular case.

In a complex disappearance situation such as the present, arising in a situation of international conflict, where it is alleged that there is a complete absence of any investigation or meaningful contact with the authorities, it may be expected that the relatives bring the case within, at most, several years of the incident. If there is an investigation of sorts, even if sporadic and plagued by problems, the relatives may reasonably wait some years longer until hope of progress being made has effectively evaporated. Where more than ten years has elapsed, the applicants would generally have to show convincingly that there was some ongoing, and concrete, advance being achieved to justify further delay in coming to Strasbourg. Stricter expectations would apply in cases where the applicants have direct domestic access to the investigative authorities.¹⁰⁴⁷

Applying those principles to the applicants' case, the Court noted that their relatives had disappeared in the course of an internal armed conflict, when no normal investigative procedures had been available and that the applicants had been entitled to wait for the outcome of the initiatives taken by the Cypriot Government and the United Nations. The Court concluded that, by lodging their application in 1990, when it had become apparent that those initiatives did no longer offered any realistic hope of progress in either finding the bodies of their relatives or accounting for their fate, the applicants had acted, in the special circumstances of their cases, with reasonable expedition for the purposes of Article 35(1) ECHR.¹⁰⁴⁸

¹⁰⁴⁷ Ibid., § 165-166.

¹⁰⁴⁸ Ibid., § 170. The Court explained the difference in approach in the cases which had been relied upon by Turkey in the following manner: "The Court has, in reaching this conclusion, given careful consideration to the respondent Government's submissions concerning the applications introduced by the families of Turkish Cypriots who went missing during inter-communal strife in the 1960 (*Baybora* and *Karabardak*, cited above). It is particularly sensitive to any appearance that differing, and inconsistent, approaches have been taken in these cases. Nonetheless, it is not persuaded that this is so. The Chamber decisions in the aforementioned cases are very concise; and in the absence of arguments from the parties, there is no explanatory reasoning. Their conclusion, however, that the applications were introduced out of time is in line with the principles and case-law outlined above. It is not disputed that the applicants' relatives disappeared or were killed in 1964, that there was no ongoing process of exhaustion of domestic remedies or other relevant procedures in the following years and that the matter was eventually brought before the CMP in 1989. However in accordance with the Court's approach above, it must have been apparent by the end of 1990 that this body could not realistically be expected to bring about any positive results in the near future. By waiting therefore until 2001, a further period of eleven years, during which there were no intervening events capable of suspending the running of time, the applicants in those cases had unduly delayed in introducing their complaints before the Court." (ibid., 171)

4.6 Impact

It is not possible to measure impact of the judgments in the same way as in the case studies concerning Russia and Chechnya and Turkey and the PKK, as there have to date been no domestic prosecutions because of the inter-communal fighting, the military intervention and occupation, or the killing of persons by the Turkish/ TRNC forces. Regarding missing persons, there may never be any prosecutions as many seem to be of the opinion that prosecutions would be at the expense of ever finding the truth. The success of the CMP has been dependent on the confidentiality of its procedures. Providing the CMP with information is done in a very informal way involving no interrogations.

It may be asked whether the families of victims really desire prosecutions or if they would be satisfied with simply discovering the truth. According to the UN-appointed Member of the CMP, of those families that have obtained the return of the remains of their relatives, the majority are content with knowing what happened while only a minority wants prosecutions.¹⁰⁴⁹ There are discussions at the grass-roots level between both communities regarding the establishment of some kind of truth and reconciliation commission.¹⁰⁵⁰ However, the TRNC authorities believe that such a commission would be politically destabilizing. Even if they accept that it has to be done at some point, they want to leave it until after the identification of a permanent solution for Cyprus.¹⁰⁵¹

4.7 Conclusions as to compliance and impact

As regards missing persons, despite the progress of the Committee on Missing Persons in Cyprus (CMP) and the Exhumation and Identification Programme, the work of the CMP only deals in part with the requirements of the Convention. According to the Court, the CMP's procedures are not themselves sufficient to meet the standard of an effective investigation required by Article 2 of the Convention. The Committee of Ministers has also underlined the urgent need for the Turkish authorities to take measures to ensure effective investigations. In spite of this, Turkey continues to state that the CMP is the most appropriate body for such investigations and that it would not be practical or logical, if not futile, to expect Turkey to carry out its own independent investigations in addition. Furthermore, Turkey has repeatedly stated that the CMP in the two previous

¹⁰⁴⁹ Interview with Christophe Girod, Third Member of the CMP, and Jennifer Wright, Assistant to the Third Member, Nicosia, Cyprus, 25 November 2008.

¹⁰⁵⁰ V. Ladisch and A. Paige, "Truth Commissions and Public History: Possibilities for Cyprus?" available at <www.prio.no/upload/Ladisch&Arthur.doc>; E. Kaymak, "Does Cyprus need a Truth and Reconciliation Commission?", *The Cyprus Review*, vol. 19 (2007), 71-98.

¹⁰⁵¹ Interview with Ermine Erk, lawyer and President of the Turkish Cypriot Human Rights Foundation's Board of Trustees, Nicosia, Cyprus, 27 November 2008.

years has become an effective investigative body. This attitude of the Turkish government towards the need for additional measures to ensure investigations can only be seen as disrespect for the requirements of the Convention and non-compliance with the Court's judgments, at least as far as violations of the procedural obligations arising under Articles 2 and 3 of the Convention are concerned. In respect of persons killed by Turkish or TRNC security forces, so far two domestic investigations were reopened after the Court's judgments but none of them has led to a breakthrough as regards establishing accountability of the responsible servicemen directly involved in the violations or of their superior officers.

At least as regards the question of missing persons, impact cannot be measured in the same way as in the other case studies as no steps have been taken to ensure that investigations are conducted into the fate of the missing persons. As regards the more recent killings by security forces, apart from a number of relatively minor modifications to legislation, very few measures have been taken and the judgments have accordingly had very little impact on the capability of the domestic legal system to carry out effective investigations in the future or to ensure prosecution of those responsible. Nevertheless, the judgments of the Court have certainly had an impact on Cypriot society in general. There is a high-awareness of the Court and the population is familiar with the inter-state case of *Cyprus v. Turkey*, and other cases brought regarding missing persons and killings. Property cases, such as *Loizidou*, which produced a sharp increase in the filing of applications with the Court relating to property in Northern Cyprus, have contributed to this high awareness and the ruling of the Grand Chamber in *Varnava and Others v. Turkey* is likely to have a similar effect. About 1,500 cases regarding property rights violations were recently struck off the docket of the Court in Cyprus by Turkey, in light of the recent *Demopoulos* ruling. Similarly, 447 applications concerning the situation in Cyprus are currently pending against Turkey before the Court in which a complaint under Articles 2 and/or 3 of the Convention has been raised.

5. Case Study: Action of the United Kingdom in Northern Ireland

5.1 Introduction

The interaction between the United Kingdom and the European Court and European Commission of Human Rights in the cases arising out of the Troubles in Northern Ireland provides a fertile ground for study of the impact of international monitoring and adjudication of international human rights on domestic legal processes. The Troubles, a prolonged situation of internal unrest characterized by terrorist violence, find their source in the long history of British involvement in Ireland. More particularly, they result from the sectarian divisions between Catholics, who generally favoured the rejoiner of the counties of Northern Ireland with the Republic of Ireland, and Protestants, who were generally in favour of the continuation of the status of Northern Ireland as an integral part of the United Kingdom.

Violent actions by the Ulster Volunteer Force (a Loyalist paramilitary group) against Catholics, a series of situations of civil unrest and the reaction of the authorities to them in the late 1960s and the early 1970s led to a rekindling of Republican sentiment. As a result, there was a reactivation of the Provisional Irish Republican Army (IRA) and other paramilitary groups dedicated to the reintegration of the counties of Northern Ireland into the Republic of Ireland by means of campaigns of terrorist acts. The increasing terrorist violence in Northern Ireland in the late 1960s and early 1970s led the British and Irish Governments to resort to extrajudicial arrest and detention; at its most extreme, between 1971 and 1975, this involved internment by the British authorities of suspected members of (predominantly Nationalist) paramilitary groups, without charge or trial and without judicial supervision.¹⁰⁵² In 1972, “direct rule” was imposed from London and the operation of the Parliament of Northern Ireland was suspended.¹⁰⁵³ The imposition of direct rule and the practice of internment, as well as particular violent instances involving the security forces (in particular the events of Bloody Sunday in 1972) resulted in a further sharpening of the existing divisions within Northern Irish society, and the stepping up of the Republican terrorist campaign; at the same time, the terrorist acts of the IRA led to the re-emergence of Loyalist Protestant paramilitary groups, which themselves engaged in acts of violence and terrorism, both against the Catholic community, as well as, in some instances, among themselves. Over

¹⁰⁵² See e.g. the account of events (including the legislative and other measures adopted by the United Kingdom government) in *Ireland v. United Kingdom* (above n. 295).

¹⁰⁵³ See Northern Ireland (Temporary Provisions) Act 1972; Northern Ireland Constitution Act 1973.

the course of the Troubles, more than 3,500 persons were killed. The major turning point for the calming of the Troubles and the ending of the campaigns of violence by paramilitary groups on both sides of the sectarian divide was the political settlement entered into by the governments of the United Kingdom and the Republic of Ireland in 1998, which was endorsed by the major Northern Ireland political parties.¹⁰⁵⁴

5.2 The United Kingdom and the Convention

The United Kingdom was one of the original signatories to the European Convention, having signed on 4 November 1950; it ratified the Convention on 8 March 1951, being the first State to do so. The Convention entered into force for the United Kingdom on 3 September 1951 having obtained the requisite 10 ratifications. However, despite its apparent initial enthusiasm for the Convention, the United Kingdom only made the declarations accepting the right of individual petition to the Commission and accepting the compulsory jurisdiction of the Court under original Articles 25 and 46 of the Convention on 14 January 1966.

Prior to examining the concrete impact of the decisions of the Strasbourg organs upon the domestic legal system of the United Kingdom in relation to particular types of violations, it is useful to note a number of features of the English and Northern Irish legal systems which have mediated the manner in which findings of violations by the European Court and Commission have been given effect.

As a consequence of the strongly dualist attitude of the English (and Northern Irish) legal systems in relation to treaties, an unincorporated treaty cannot be directly relied upon by an individual before the English or Northern Irish courts.¹⁰⁵⁵ Accordingly, prior to the adoption of the Human Rights Act 1998, which renders the majority of the substantive rights under the European Convention on Human Rights applicable as a matter of domestic law,¹⁰⁵⁶ the scope for direct impact of decisions of the European Court was somewhat limited. Nevertheless, even prior to the passing of the Human Rights Act 1998, some account was taken of the European Convention and decisions of the European Court. The effects of the Convention were felt principally in an indirect manner, for instance through interpretation of ambiguous legislation in accordance with the presumption that Parliament had intended to legislate in accordance with the

¹⁰⁵⁴ See Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, annexed to the Northern Ireland Peace Agreement, Belfast, 10 April 1998 (commonly known as “the Good Friday Agreement”), available at <http://www.taoiseach.gov.ie/attached_files/Pdf%20files/NIPeaceAgreement.pdf> [accessed 18 May 2009].

¹⁰⁵⁵ In general, see *Maclaine Watson v. Department of Trade and Industry* [1990] 2 AC 418; [1989] 3 All ER 523 (HL); in relation specifically to the European Convention, see e.g. *Malone v. Metropolitan Police Commissioner (No. 2)* [1979] Ch. 344 at 378-380; *R v. Ministry of Defence, ex parte Smith* [1996] QB 517 at 558H (Bingham MR)

¹⁰⁵⁶ The Human Rights Act 1998 extends to Northern Ireland: see s. 22(6), Human Rights Act 1998.

Convention, or through judicial development of the common law in a direction which (more or less explicitly) paralleled the Convention.¹⁰⁵⁷

It is also important to note from the outset that assessing the impact of the jurisprudence of the Court upon decisions of the domestic judiciary specifically in relation to the situation in Northern Ireland faces a number of problems. First, in a number of cases, by the time that cases had made their way through the domestic courts, had been heard by the Commission and eventually found their way before the Court, the specific legislation at issue had already been repealed, replaced or modified some considerable time previously. In particular, as regards the use of the “Five Techniques” in interrogating terrorist suspects and the use of internment, both of which were at issue in *Ireland v. United Kingdom*),¹⁰⁵⁸ there had already been a general change of policy as to how best to deal with the threat of terrorist violence in Northern Ireland long before the case had been heard by the Commission. Nevertheless, in some cases (for instance in relation to extraordinary powers of arrest and detention) although the specific legislation in force at the time was no longer in force by the time the case was considered by the Court, similar language to that impugned before the Strasbourg bodies had been re-enacted.

Further, as a result of the doctrine of Parliamentary sovereignty, the domestic courts are unable to give direct effect to the Convention and jurisprudence of the European Court by striking down primary legislation, even where they find that a law directly contravenes the Convention.¹⁰⁵⁹ In these circumstances, in many cases the only practicable way in which to remedy a breach identified by the European Court is by legislative action; this remains the case even after the adoption of the Human Rights Act 1998.¹⁰⁶⁰

However, despite these limitations arising from the characteristics of the domestic legal system, the cases brought before the European Commission and Court concerning the Troubles in Northern Ireland have undoubtedly had an important impact on the legal system of the United Kingdom. Many of the decisions delivered by the European Court

¹⁰⁵⁷ See e.g., M. Beloff and H. Mountfield, “Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales” [1996] EHRLR 467; see also the observation of Lord Bingham in *DPP v. Jones* [2002] UKHL 44; [2003] 1 AC 976, at [13], and the cases referred to in S. Fatima, *Using International Law in Domestic Courts* (Hart, 2005), pp. 345; 353-356.

¹⁰⁵⁸ *Ireland v. United Kingdom* (above n. 295).

¹⁰⁵⁹ On the other hand, under the Human Rights Act 1998, the domestic courts are now able to strike down secondary/delegated legislation as being inconsistent with or in violation of Convention rights, as given effect by the Human Rights Act 1998.

¹⁰⁶⁰ In this regard, although the domestic courts are required by s 2 Human Rights Act 1998 to take account of decisions of the European Court in relation to any question concerning a right under the Convention, and by s. 3 to read legislation so as far as possible compatibly with the Convention rights, the position has not fundamentally changed where primary legislation is unambiguously in conflict with the requirements of the Convention; in such a situation, the most that the courts can do is make a declaration of incompatibility pursuant to s. 4, which has no effect on the continued validity and applicability of the legislation, or on the situation of the claimant. Further, the fact of an adverse ruling by the European Court produces no effects as a matter of English law, despite the obligation on the United Kingdom as a matter of the international law of State responsibility to make reparation for the violation, including, where appropriate, by ensuring *restitutio in integrum*: see, e.g., *R v. Lyons* [2002] UKHL 44; [2003] 1 AC 476.

in relation to claims coming from Northern Ireland related to the Troubles remain leading cases on the issues with which they deal and, as such, have been referred to in other contexts once the unrest in Northern Ireland had subsided.¹⁰⁶¹

5.3 The European Court and the Troubles in Northern Ireland

Viewed as a whole, the decisions of the European Court and Commission arising out of the Troubles in Northern Ireland have had a profound impact on the law of the United Kingdom. At the height of the Troubles, between the early 1970s and the 1998 Good Friday agreement (a period which commenced shortly after the United Kingdom's acceptance of the jurisdiction of the European Commission and Court in 1966), there was a steady stream of applications against the United Kingdom, in particular challenging the exercise of the extraordinary police powers adopted in order to deal with the unrest and sectarian violence which engulfed Northern Ireland. Even after the Good Friday Agreement, the Troubles have been the ultimate source of important changes in the law of the United Kingdom. The delayed impact in this regard is at least in part due to the time it took for cases to reach judgment by the Court, including the requirement of exhaustion of domestic remedies. Further, what may be seen as a "second generation" of cases resulting from the Troubles have concerned the adequacy of investigations into newly-emerging allegations of involvement and/or complicity of members of the security forces in sectarian murders committed at the height of the Troubles. The impact of these cases is still yet to be fully felt, but they have resulted in important changes in relation to both the system of coroner's inquests and in the way in which internal investigations within the police are carried out.¹⁰⁶²

The ongoing Troubles during the 1970s and 1980s led to a sequence of cases being brought before the European Commission and European Court against the United Kingdom. The reaction of the United Kingdom in many of the cases in which violations were found to have occurred discloses a form of dialogue, in which the United Kingdom took note of and internalized the rulings of the Court relating to the manner in which it was dealing with the threat posed by terrorism in Northern Ireland. However, in other cases, the United Kingdom signally failed to give effect to decisions of the Court; for instance, in response to the finding of violation of Article 5 of the Convention as a result

¹⁰⁶¹ Although outside the scope of this study, see, e.g., the decision of the House of Lords in *A and Others v. Secretary of State for the Home Department; X and another v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87 in relation to the permissibility of the derogation from Art. 5 permitting indefinite detention of foreign nationals suspected of involvement in terrorism who could not be deported. The judgments in the House of Lords made extensive reference to, inter alia, the decisions of the European Court relating to the United Kingdom's previous derogation to Art. 5 made following the decision of the European Court in *Brogan*.

¹⁰⁶² Although cf. the decision of the House of Lords in *In Re McKerr* [2004] UKHL 12; [2004] 1 WLR 807.

of the extra-judicial detention of terrorist suspects in *Brogan and Others v. United Kingdom*,¹⁰⁶³ the response of the United Kingdom was to maintain the powers in question and to enter a derogation under Article 15 of the Convention in respect of its obligations under Article 5(3).¹⁰⁶⁴ By doing so, the United Kingdom took a conscious decision to attempt to insulate future action from review by the Court, rather than to modify its domestic law and practice. The Court subsequently upheld the validity of the derogation.¹⁰⁶⁵ In these latter instances, the experience in Northern Ireland demonstrates and provides examples of both the limitations of international adjudication of human rights claims in situations of emergency and the problems of enforcement in the international sphere more generally.

The cases against the United Kingdom taken to Strasbourg under the European Convention in relation to the Troubles in Northern Ireland can be broadly divided into two groups:

- (1) cases concerning alleged breaches of Convention rights as a result of the actions of State agents (as well as connected procedural failings in relation to the investigation of such breaches);
- (2) cases concerning killings by sectarian groups, in relation to which it is alleged that the State breached its positive procedural obligations of investigation.

In relation to the first category of cases, the vast majority of cases dealt with alleged infringements by the United Kingdom of the right to liberty and associated guarantees in the context of operational anti-terrorism enforcement measures,¹⁰⁶⁶ or with violations of other rights in the context of the criminal justice system following arrest, charge and conviction.¹⁰⁶⁷ That said, there have been a number of cases concerning alleged violations of either the right to life or the prohibition of torture and other ill-treatment by State agents. Quite apart from the ill-treatment of suspected terrorist detainees at issue in the landmark case of *Ireland v. United Kingdom*,¹⁰⁶⁸ certain incidents of violence by

¹⁰⁶³ *Brogan and Others v. United Kingdom* (App. no. 11209/84, 11234/84, 11266/84 and 11386/85), Series A no. 145-B.

¹⁰⁶⁴ For the derogation, see *Yearbook of the ECHR*, vol. 31 (1988), pp. 15-16.

¹⁰⁶⁵ See *Brannigan and McBride v. United Kingdom* (App. no. 14553/89 and 14554/89), Series A no. 258-B; the continued validity of the derogation was upheld in *Marshall v. United Kingdom* (dec) (App. no. 41571/98), ECtHR 10 July 2001.

¹⁰⁶⁶ See, e.g., before the Court: *Brogan and Others v. United Kingdom* (above n. 1063); *Fox, Campbell and Hartley v. United Kingdom* (App. no. 12244/86, 12245/86 and 12383/86), Series A no. 182; *Brannigan and McBride v. United Kingdom* (above n. 1065); *Murray v. the United Kingdom* (App. no. 14310/88), Series A no. 300-A; *O'Hara v. United Kingdom* (App. no. 37555/97), ECtHR 2001-X.

¹⁰⁶⁷ See, e.g., *Campbell and Fell v. United Kingdom* (App. no. 7819/77 and 7878/77), Series A no. 80 (fairness of internal prison disciplinary proceedings; interference with correspondence of prisoners, and access to legal advice); *John Murray v. United Kingdom* (App. no. 18731/91), Reports 1996-I (presumption of innocence and permissibility of court drawing adverse inferences from silence of defendant); *Brennan v. United Kingdom* (App. no. 39846/98), Reports 2001-X (consultation with solicitor in presence of police officer).

¹⁰⁶⁸ *Ireland v. United Kingdom* (above n. 295).

State agents stand out, for instance the infamous “Death on the Rock” case concerning the shooting by British paratroopers of three terrorist suspects in Gibraltar.¹⁰⁶⁹ The group of cases relating to the alleged “shoot to kill” policy of the Royal Ulster Constabulary¹⁰⁷⁰ are obviously of a different character, although the Court refused to be drawn into an examination of that question. On the other hand, other incidents of lethal use of force by State agents, for instance the infamous “Bloody Sunday” shootings of civilians by members of the British Army in 1972, resulted in complaints to the Strasbourg organs which were unsuccessful.¹⁰⁷¹

With regard to the second category of cases outlined above, in the absence of any suggestion of involvement of State agents in those incidents, the violent actions of the various sectarian paramilitary groups in Northern Ireland in the context of the terrorist campaigns do not as such directly engage the responsibility of the United Kingdom under the European Convention for the acts in question; prosecution and punishment of those crimes committed by private actors is a question of enforcement of domestic criminal law, although issues may be raised in relation to the positive obligation of the State to carry out an effective investigation into killings by private groups and individuals.

In addition to the two broad categories of cases identified above, there is what may be seen as an additional or hybrid group of cases, concerning killings by sectarian groups in relation to which it is alleged that State agents were in some way complicit. A number of cases of this type have recently been brought before the Court on the basis of the alleged failure by the authorities to adequately investigate allegations from a particular source that members of the British security services in Northern Ireland were involved in paramilitary groups or otherwise complicit in sectarian killings.¹⁰⁷² However, in those cases the Court has limited itself to finding breaches of the procedural obligations under Article 2 specifically in relation to investigations of the allegations of complicity, and has

¹⁰⁶⁹ *McCann and Others v. the United Kingdom* (App. no. 18984/91), Series A no. 324.

¹⁰⁷⁰ *McKerr and Others v. United Kingdom* (App. No. 28883/95), Reports 2001-III; *Hugh Jordan v. United Kingdom* (App. No. 24746/94), judgment of 24 May 2001; *Kelly and Others v. United Kingdom* (App. No. 30054/96); judgment of 24 May 2001; and *Shanaghan v. United Kingdom* (App. no. 37715/97), ECtHR 24 May 2001, discussed further below, Section 4.1, text accompanying n. 1084 onwards.

¹⁰⁷¹ The events of “Bloody Sunday” formed the basis one of the complaints originally brought by the Irish Government in the *Ireland v. United Kingdom* case before the European Commission; the Commission held that the complaint was inadmissible on the basis that there was no substantial evidence of an administrative practice consisting of a failure to protect life and that the domestic remedies available in Northern Ireland in respect of these deaths had not been shown to have been exhausted: *Ireland v. United Kingdom* (dec) (App 5310/71) EComHR (1972); *Yearbook of the ECHR*, vol. 15, p. 76 at pp. 240-242. A subsequent application brought by the relatives of 13 of the victims in 1994 alleging a violation of Art. 2 as a result of the killing of their relatives and the failure by the Government to conduct an effective investigation was declared inadmissible by the Commission on the basis of a failure to comply with the six-month rule: *McDaid and Others v. United Kingdom* (dec) (App. no. 25681/94), ECtHR 9 April 1996. A Tribunal of Inquiry under the chairmanship of the Lord Chief Justice was set up immediately after the events of Bloody Sunday; see *Report of the Tribunal appointed to inquire into the events on Sunday, 30th January 1972, which led to loss of life in connection with the procession in Londonderry on that day*. HC 220; HL 101(1972) (the “Widgery Report”). A further judicial inquiry was commenced in 1998 under the chairmanship of a judicial member of the House of Lords (Lord of Appeal in Ordinary), Lord Saville; its report is expected in late 2009.

¹⁰⁷² See the cases discussed below, in relation to under Art. 2.

refused to be drawn into investigating the truth of the allegations of whether State agents were in fact involved or whether the actual killings might therefore be attributable to the United Kingdom for the purposes Article 2. A final preliminary point to be made is that the sectarian violence in Northern Ireland has never realistically been suggested to be anything other than (serious) civil unrest. In particular, the level of violence never rose to the level characterising a non-international armed conflict.¹⁰⁷³ Accordingly, alleged violations of fundamental rights do not fall to be considered under international humanitarian law, but on the basis of international human rights law alone.

5.4 Approach of the case study

The present case study deals exclusively with those relevant violations of Articles 2 and 3 ECHR in relation to which cases have been brought before the European Commission and Court. In the context of each of the major substantive typologies of violations (ill-treatment and killings) arising in the context of the Troubles, preliminary consideration is given to the development of the relevant standards by the European Commission and the European Court in the context of cases brought against the United Kingdom in relation to Northern Ireland. Moving from the shortcomings identified by the Convention bodies, consideration will be given to the measures adopted by the United Kingdom by way of compliance with judgments of the Court identifying violations of the Convention and the recommendations and resolutions of the Committee of Ministers in supervision thereof; in this latter regard, the possibility must be borne in mind that, at least in some areas, the United Kingdom modified its legislation or practice, even before the Commission or Court had identified a violation.¹⁰⁷⁴

In relation to each measure, the study will also consider the broader question of the particular impact which those decisions have had on the United Kingdom legal system. In this regard, in consideration of the scope of the research project, the notion of impact is to be understood narrowly, as involving exclusively those consequences of the judgments which are relevant to prosecutions of those responsible for the particular type of violation under consideration. This may be the case not only in circumstances in which a particular judgment of the Court has resulted in the adoption of legislation by way of compliance therewith by the United Kingdom, such legislation being generally applicable for the future, but also to the extent that a decision of the Court may be relied

¹⁰⁷³ Cf. W. Abresch, "A Human Rights Law of Armed Conflict: The European Court of Human Rights in Chechnya", EJIL, vol. 16 (2005), 741.

¹⁰⁷⁴ See for instance the modification of the position of the United Kingdom government regarding use of the Five Techniques in questioning of terrorist suspects, at issue in *Ireland v. United Kingdom* (above n. 295); the modification appears to have been motivated as much by domestic public opinion following the publication of the Compton and Parker Reports, as by the prospect of the finding of a violation by the Commission or Court.

upon by the domestic courts in interpreting existing legislation, or in developing the common law in other cases, whether or not of precisely the same type.¹⁰⁷⁵

5.5 Measures adopted consequent upon findings of violation of Article 2

There have been a number of applications brought before the Commission and the Court alleging violations of the right to life by the security forces in the context of anti-terrorism operations related to Northern Ireland. Some of these applications have concerned instances of the deliberate, targeted use of lethal force against terrorist suspects, while others have concerned the use of force by State agents in situations of unrest and rioting, resulting in death.¹⁰⁷⁶ Further, there have been a number of cases in which the applicants relied upon the United Kingdom's positive procedural obligations under Article 2 in alleging that the investigations into the deaths of their relatives (whether at the hand of the security forces, or at the hands of members of sectarian groups), were insufficient.¹⁰⁷⁷

Perhaps the most notorious case brought against the United Kingdom under Article 2 is *McCann and Others v. United Kingdom* (sometimes referred to as the "Death on the

¹⁰⁷⁵ See, e.g., the decision of the House of Lords in *R (on the application of Middleton) v. West Somerset Coroner's Court* [2004] UKHL 10; [2004] 2 AC 182; [2004] 2 WLR 800, in relation to the extent of the powers of a Coroner's Court to make findings as to the circumstances in which a person had died; in reaching its decision, the House of Lords referred extensively to the decision of the European Court in *Hugh Jordan v. United Kingdom* (above n. 1070).

¹⁰⁷⁶ As noted above, the "Bloody Sunday" massacre formed part of the complaint originally submitted by the Government of the Republic of Ireland in *Ireland v. United Kingdom*, although the Commission declared that part of the application inadmissible, while individual complaints brought by family members of a number of the victims were declared inadmissible by the Commission for failure to comply with the six-month rule; see above n. 1071.

¹⁰⁷⁷ In addition, there have been a number of cases in which applicants attempted to invoke the United Kingdom's procedural obligations under Art. 2 in order to complain of an alleged lack of investigation by the United Kingdom of incidents in the Republic of Ireland, or a lack of cooperation by the United Kingdom in relation to investigations or inquests in the Republic of Ireland in relation to terrorist atrocities. Such applications have been dismissed as inadmissible: see e.g., *Patrick Doyle v. the United Kingdom* (dec) (App. no. 36157/97), ECtHR 6 July 1999; *Byrne v. United Kingdom* (dec) (App. no. 36158/97), ECtHR 6 July 1999; *P.A. v. United Kingdom* (dec) (App. no. 36159/97), ECtHR 6 July 1999; *Grace v. United Kingdom* (dec) (App. no. 36160/97), ECtHR 6 July 1999; *Massey v. United Kingdom* (dec) (App. No. 36161/97), ECtHR 6 July 1999 (all declared inadmissible on the basis of a failure to comply with the six-month rule); *O'Loughlin v. United Kingdom* (dec) (App. no. 23274/04), ECtHR 25 August 2002 (failure to comply with the six-month rule); and *Cummins and others v. United Kingdom* (dec) (App. no. 27306/05), ECtHR 13 December 2005 (doubts raised as to compliance with the six month rule, and in any case, no proof on facts of a failure to cooperate). Despite the finding of inadmissibility by the Court in *O'Loughlin*, it may be noted that the Court observed that "where suspected perpetrators of a bombing attack carried out elsewhere are known to be present within the jurisdiction of a Contracting State, and evidence of a criminal offence may be secured, the fundamental importance of Art. 2 requires that the authorities of that State of their own motion take effective measures in that regard. Otherwise, those indulging in cross-border attacks will be able to operate with impunity and the authorities of Contracting State where the unlawful attacks have taken place will be foiled in their own efforts to protect the fundamental rights of their citizens. The nature and scope of those measures will, inevitably, depend on the circumstances of the particular case and it is not appropriate for the Court to attempt to be more specific in this decision"; further, the Court expressly refrained from expressing a view on the issue of "whether, or to what extent, Art. 2 could impose an obligation on one Contracting State to cooperate with inquiries or hearings conducted within the jurisdiction of another Contracting State concerning the use of unlawful force resulting in death".

Rock” case) concerning the shooting of three members of the Provisional IRA by British soldiers in Gibraltar in 1988.¹⁰⁷⁸ The three victims had been under surveillance by the British security services, which had received information to the effect that they were planning an attack in Gibraltar. On the day of the shootings, the security forces feared that they had in fact planted a car bomb near a military barracks; the three victims were followed and then shot by soldiers, who, on the basis of the intelligence available, feared that they were about to detonate the bomb. The applicants, the relatives of the victims and representatives of their estates, raised various issues under Article 2. In particular, they claimed a violation of Article 2 on the basis that the use of lethal force and had not been “no more than absolutely necessary”, as required by Article 2(2) of the Convention; in that regard, they alleged, inter alia, that there had been an premeditated plan on the part of the security services to shoot the victims, as part of which they were intentionally permitted to enter Gibraltar, or alternatively that there had been flaws in the assessment of the intelligence and in the planning of the operation. They further alleged that the law of Gibraltar regulating the use of lethal force was inadequate, and that the investigation into the shootings had been flawed.

The Court rejected the applicants’ submission that there was evidence of premeditation, or a plot to kill the victims;¹⁰⁷⁹ it further found that in the circumstances of the operation, the soldiers who had fired the shots had honestly held the view that it was necessary to use lethal force and that, on that basis, there had not been any breach of Article 2.¹⁰⁸⁰ However, the Court, by ten votes to nine, found that there had been a violation of Article 2, insofar as the use of force had not been “no more than absolutely necessary” as required by Article 2(2). That conclusion was reached on the basis that the three suspects could have been prevented from entering Gibraltar, that there had been flaws in the planning and conduct of the operation – in particular as regards the assessment of the accuracy of the intelligence received – and that a decision had been taken that the operation should be carried out by soldiers who were trained to shoot to kill and whose reflex reactions therefore did not include an assessment of whether merely wounding the victims might have been sufficient.¹⁰⁸¹

Despite the finding of a violation of Article 2, the Court refused to award damages by way of just satisfaction, observing that “having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make an award under this head”.¹⁰⁸² Nevertheless the applicants were awarded a sum in respect of their legal costs and expenses. When the

¹⁰⁷⁸ *McCann and Others v. United Kingdom* (above n. 1069).

¹⁰⁷⁹ *Ibid.*, §§ 174-184.

¹⁰⁸⁰ *Ibid.*, §§ 195-200.

¹⁰⁸¹ *Ibid.*, §§ 201-213.

¹⁰⁸² *Ibid.*, § 219.

matter came before the Committee of Ministers, having verified that the United Kingdom had paid the sums ordered by the Court in the judgment and taken note of the information provided by the United Kingdom, the Committee concluded its consideration of the matter.¹⁰⁸³

A further group of six cases relating to Article 2 were decided by the Court between 2001 and 2003. The first cluster of four cases (*McKerr, Hugh Jordan, Kelly and Shanaghan*), decided together in 2001, related to fatal shootings of the victims by police officers in Northern Ireland.¹⁰⁸⁴ In each of the cases, the relatives of the victims alleged that there had been a disproportionate use of force by the security services, in breach of Article 2, resulting in the death of their relatives and in particular, they alleged that there had been a “shoot-to-kill” policy in force at the relevant time. Further, they claimed that there had been delay and other inadequacies in the investigation into the death of their family members, in breach of the positive obligations incumbent on the United Kingdom under Article 2.

In relation to the first issue, in each of the cases the Court held that, although it was not disputed that the victims had been killed by the security forces, the question of whether the killing of the victim in each case had been lawful was a matter which was still the subject of proceedings before the domestic courts and there were a number of factual issues which remained unresolved. In the circumstances, the Court was not prepared to undertake that fact-finding mission itself, but opined that it should be left to the proceedings in the domestic courts.¹⁰⁸⁵ Further, in rejecting the applicants’ claim that there had existed a “shoot-to-kill” policy, the Court stated that it was not prepared to embark on “an analysis of incidents over the past thirty years with a view to establishing whether they disclose a practice by security forces of using disproportionate force”.¹⁰⁸⁶ On the other hand, in relation to the procedural limb of Article 2, the Court held that there had been various deficiencies in the investigations carried out into the shootings, including the lack of independence of the officers carrying out the initial police investigations, as well as deficiencies resulting from the manner in which the inquests had been conducted. On that basis, it found violations of Article 2 in its procedural aspect in each of the cases.

The group of four judgments from 2001 was swiftly followed by two other decisions. In *McShane v. United Kingdom*, the Court held that there had been a violation of the procedural obligations incumbent upon the United Kingdom under Article 2 as a result of

¹⁰⁸³ Committee of Ministers Resolution DH(96)102 of 22 March 1996 concerning the case of McCann and Others v. the United Kingdom. The communication made by the United Kingdom was not annexed to the Resolution.

¹⁰⁸⁴ *McKerr and Others v. United Kingdom* (above n. 1070); *Hugh Jordan v. United Kingdom* (above n. 1070); *Kelly and Others v. United Kingdom* (above n. 1070); and *Shanaghan v. United Kingdom* (above n. 1070) (extracts of the latter three cases are reproduced following the decision in *McKerr* in Reports 2001-III).

¹⁰⁸⁵ *McKerr and Others v. United Kingdom* (above n. 1070), §§ 116-119.

¹⁰⁸⁶ See, e.g., *ibid.*, § 120.

defects in the investigation of the death of the applicants' relative who was crushed by an army armoured personnel carrier during a civil disturbance in Northern Ireland in 1996.¹⁰⁸⁷ *Finucane v. United Kingdom* concerned the killing of the applicant's husband by a paramilitary group in 1989, in relation to which the applicant alleged that there had been inadequate investigation of new allegations of collusion between the security forces and the paramilitary group.¹⁰⁸⁸ The Court again held that there had been a violation of the United Kingdom's procedural obligations under Article 2 as the result of the inadequate investigation of the allegations of collusion.¹⁰⁸⁹ The six cases identified a number of recurring issues relating to the procedure for the investigation and inquests into deaths in Northern Ireland involving the security forces. In particular, recurring issues arose as to: the lack of independence of the police investigations into the deaths; the lack of reasonable expedition of the police investigation; the lack of sufficient public scrutiny and information provided to the victims' families as to decisions not to prosecute; the inadequacy of the inquest procedure in securing a prosecution in respect of any relevant criminal offence; the limited scope of the inquest; the non-compellability as witnesses of members of the security forces who had carried out the shootings; the non-disclosure of witness statements to the families of the victims prior to the giving of live evidence by the witness, resulting in an inability to adequately prepare or participate; the issuing of public interest immunity certificates by the Government in relation to certain documents, which restricted the ability of the inquest from examining relevant issues; and a lack of promptness and reasonable expedition of the inquest proceedings.¹⁰⁹⁰

The six cases were dealt with together by the Committee of Ministers. The measures and matters relied upon by the United Kingdom as showing compliance with the judgments prior to the first Interim Resolution of the Committee in 2005 included:

- a) the creation of "calling in" arrangements for police investigations, whereby an investigation in Northern Ireland could be conducted by officers from another force;¹⁰⁹¹
- b) the creation of a Serious Crimes Review Team to examine historic unresolved cases in Northern Ireland;¹⁰⁹²

¹⁰⁸⁷ *McShane v. United Kingdom* (App. no. 43290/98), ECtHR 28 May 2002; the Court also found a violation of Art. 34 on the basis of actions taken by the Royal Ulster Constabulary in seeking to have disciplinary action taken against the applicant's solicitor in related domestic proceedings.

¹⁰⁸⁸ See *Finucane v. United Kingdom* (App. no. 29178/95), Reports 2003-VIII.

¹⁰⁸⁹ *Ibid.*

¹⁰⁹⁰ See, e.g., *McKerr and Others v. United Kingdom* (above n. 1070), §§ 157-161. For a summary of the various shortcomings identified in each of the cases, see Interim Resolution CM/ResDH(2005)20, adopted by the Committee of Ministers on 23 February 2005 at the 914th meeting of the Ministers' Deputies, Appendix III.

¹⁰⁹¹ See Interim Resolution CM/ResDH(2005)20 (above n. 1090), Appendix I.

¹⁰⁹² See *ibid.*

- c) a change in practice relating to the provision of reasons by the Director of Public Prosecutors in certain categories of cases where a decision was taken not to prosecute, such that reasons would be provided to the families;¹⁰⁹³
- d) court decisions, including in particular the decision of the House of Lords in *R (on the application of Middleton) v. West Somerset Coroner's Court*,¹⁰⁹⁴ which, relying, inter alia on the decision of the European Court in *Hugh Jordan*,¹⁰⁹⁵ had held that in the light of Article 2, the relevant procedural rules governing inquests were to be interpreted as meaning that a coroner's jury was able to rule not only how a person had died, but also in what circumstances;
- e) the entry into force of the Human Rights Act 1998; the fact that a coroner was a public authority within the meaning of the Act; and that it was therefore unlawful for a coroner to act in a manner incompatible with Article 2. As a consequence, the United Kingdom stated, that "if an issue is now raised at an inquest which, under Article 2 of the Convention, ought to be the subject of investigation (such as an allegation of collusion by the security forces), it is the duty of the coroner to act in a manner compatible with Article 2 and in particular to ensure that the scope of the inquest is appropriately wide";¹⁰⁹⁶
- f) the adoption of changes in the rules of procedure for inquests, so as to make witnesses suspected of involvement in a death (including members of the security services) compellable to appear to give evidence (although they can not be forced to give self-incriminating answers);¹⁰⁹⁷

¹⁰⁹³ See *ibid.* In relation to Northern Ireland, see also the Public Prosecution Service for Northern Ireland, Code for Prosecutors, available at <www.ppsni.gov.uk>, § 4, in particular § 4.12.4: "the Prosecution Service recognises that there may be cases arising in the future, which it would expect to be exceptional in nature, where an expectation will arise that a reasonable explanation will be given for not prosecuting where death is, or may have been, occasioned by the conduct of agents of the State. Subject to compelling grounds for not giving reasons, including duties under the Human Rights Act 1998, the Prosecution Service accepts that in such cases it will be in the public interest to reassure a concerned public, including the families of victims, that the rule of law has been respected by the provision of a reasonable explanation. The Prosecution Service will reach a decision as to the provision of reasons, and their extent, having weighed the applicability of public interest considerations material to the particular facts and circumstances of each individual case." In relation to England and Wales, see the Code of Practice for Crown Prosecutors, available at <<http://www.cps.gov.uk/publications/docs/code2004english.pdf>>, § 2.6 (applicability of the Human Rights Act 1998); The Prosecutor's Pledge (21 October 2005), available at <http://www.cps.gov.uk/publications/prosecution/prosecutor_pledge.html>; The Code of Practice for Victims of Crime (4 April 2006), available at <http://www.cps.gov.uk/victims_witnesses/victims_code.pdf>, §§ 7.4, 7.6 and 7.7.

¹⁰⁹⁴ *R (on the application of Middleton) v. West Somerset Coroner's Court* [2004] UKHL 10; [2004] 2 AC 182; [2004] 2 WLR 800; for a more recent application, see also *R (on the application of Smith) v. Assistant Deputy Coroner for Oxfordshire*, [2008] 3 WLR 1284.

¹⁰⁹⁵ *Ibid.*, [10]

¹⁰⁹⁶ Resolution DH(2005)20 (above n. 1090), Appendix I.

¹⁰⁹⁷ See the Coroners (Practice and Procedure) (Amendment) Rules (Northern Ireland) 2002 (SI 2002/37), amending the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 (S.R. & O. (above n.l.) 1963 No. 199). On the impact of the amendments on inquests relating to killings by the security forces, see, e.g., BBC News, "Policeman given inquest summons", 8 March 2002 (available at http://news.bbc.co.uk/1/hi/northern_ireland/1862932.stm).

- g) changes in practice relating to the disclosure of witness statements for inquests, such that the families of victims were given access to such statements prior to live evidence being given, thereby allowing adequate preparation and participation;¹⁰⁹⁸
- h) new judicial decisions and changes in practice in relation to withholding of material issued by government departments on the basis of public interest immunity certificates;¹⁰⁹⁹ as a result of these modifications of the law, documents are no longer withheld on the basis of particular broad classes of documents and the final decision as to whether material is subject to disclosure is now decided by the court or coroner;
- i) changes in the rules and practice relating to legal aid so as to allow the granting of financial assistance on an *ex gratia* basis to the families of victims, in order to permit the provision of legal representation to the families and relatives of the deceased in the coroner's court;¹¹⁰⁰
- j) various steps taken to ensure that inquest proceedings are commenced promptly and pursued with reasonable expedition, including the appointment of additional coroners in Northern Ireland, including the appointment of additional Deputy Coroners in Northern Ireland, and the initiation of a review of the entire system of Coroner's Courts.¹¹⁰¹

In Interim Resolution DH (2005) 20 of 23 February 2005, the Committee of Ministers took note of the general measures adopted by the United Kingdom in compliance with the judgments, and resolved to continue with its supervision of compliance.¹¹⁰²

In relation to the individual measures required, the United Kingdom had provided details of the situation in relation to the case of each of the applicants. It also stated its position that, in the absence of fresh evidence, no further inquest was required in relation to the case of *McKerr* and that the case of *Finucane* would be the subject of further investigation under a new system of inquiries to be created by fresh legislation. In relation to the *McKerr* case, the United Kingdom also set out its position, relying on the decision of the House of Lords under the Human Rights Act in the domestic litigation to the effect that there was no continuing breach of Article 2¹¹⁰³ and that any obligation to

¹⁰⁹⁸ See Resolution DH(2005)20 (above n. 1090), Appendix I.

¹⁰⁹⁹ In particular the decision of the House of Lords in *R (ex parte Wiley) v. Chief Constable of Nottinghamshire Constabulary* [1995] 1 AC 274; [1994] 3 WLR 433.

¹¹⁰⁰ See Resolution DH(2005)20 (above n. 1090), Appendix I.

¹¹⁰¹ See Resolution DH(2005)20 (above n. 1090), Appendix I.

¹¹⁰² For the United Kingdom's communication summarizing the general measures taken in response to the Court's judgments, see Resolution DH(2005)20 (above n. 1090), Appendix I.

¹¹⁰³ See *In Re McKerr* [2004] UKHL 12; [2004] 1 WLR 807.

hold an investigation arose solely under Article 46 as a consequence of the UK's obligation to comply with judgment of the Court.¹¹⁰⁴

In response, in Interim Resolution DH (2005) 20, the Committee of Ministers took note of “the information provided by the government of the respondent State regarding individual measures to erase the consequences of the violations”, and recalled

[...] the respondent State's obligation under the Convention to conduct an investigation that is effective “in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible”, and the Committee's consistent position that there is a continuing obligation to conduct such investigations inasmuch as procedural violations of Article 2 were found in these cases.¹¹⁰⁵

The Committee of Ministers concluded that further general and individual measures were required and therefore resolved to pursue its consideration of the matters.¹¹⁰⁶ Further consideration was given to the question of compliance at the 948th (DH) meeting of the Committee of Ministers in November 2005, at which point the Committee of Ministers adopted a further Interim Resolution by which it concluded its examination of a number of the general measures at issue, including: the role of the inquest procedure in securing a prosecution in respect of any criminal offence; issues relating to the scope of examination of inquests; questions relating to the compellability of witnesses at inquests; the issues relating to disclosure of witness statements prior to the appearance of a witness at the inquest; and issues relating to legal aid to permit representation of the victim's family.¹¹⁰⁷

A further Interim Resolution was adopted on 6 June 2007.¹¹⁰⁸ In the second Interim Resolution, having taken note of the matters consideration of which had been concluded in November 2005, the Committee assessed the further information provided by the United Kingdom as to the outstanding general measures.¹¹⁰⁹

As to the practice of “calling in” outsider investigators, the Committee took note of the information provided by the United Kingdom in relation to its practice in that regard, including the role of the Office of the Police Ombudsman for Northern in relation to complaints regarding police investigations of deaths at the hands of the security forces, and invited the government to provide the Committee of Ministers with a copy of the

¹¹⁰⁴ Resolution DH(2005)20 (above n. 1090), Appendix II.

¹¹⁰⁵ Resolution DH(2005)20 (above n. 1090).

¹¹⁰⁶ Ibid.

¹¹⁰⁷ See the references contained in CoM, Resolution DH (2007) 73, 6 June 2007.

¹¹⁰⁸ CoM, Resolution DH (2007) 73, 6 June 2007.

¹¹⁰⁹ CoM, Resolution DH (2007) 73, 6 June 2007, Appendix I; see also CoE doc. CM/Inf/DH(2006)4 rev. 2 and CoE doc. CM/Inf/DH(2006)4 Add. rev. 3.

report of the Police Ombudsman and the response of the authorities as to its contents. A similar approach was taken in relation to the defects identified in police investigations.¹¹¹⁰ The Committee took particular note of the creation in late 2005 of the Historical Enquiries Team (HET) within the SCRT, a special independent investigative unit with power to reinvestigate historical unresolved cases relating to the security situation in the period between 1968 and 1998. The HET has a particular mandate to conduct the investigations using a “family-centred” approach, working in close cooperation with the families of the victims to resolve issues of particular concern to the families.

As to the question of the level of public scrutiny of decisions of the Director of Public Prosecutor not to proceed in particular cases, the Committee of Ministers took note of the fact that a new Code for Prosecutors had in the meantime been brought into force setting out the policy of the Prosecution Service in relation to decisions not to prosecute where State agents were implicated in a death,¹¹¹¹ as well as the fact that such decisions were open to judicial review.¹¹¹² On that basis, the Committee of Ministers closed its consideration of that aspect of the case.¹¹¹³

In relation to the issue of the non-disclosure of documents on the basis of public interest immunity certificates, having taken note of the information provided by the United Kingdom government, in particular the fact that claims to immunity were now decided by the courts, the Committee of Ministers likewise concluded its consideration of that aspect of the cases.¹¹¹⁴

Despite the modifications to the staffing levels and the reform of the Coroner’s Service in Northern Ireland, the Committee stated that it retained some concerns as to the length of inquest proceedings as well as to their prompt conclusion and therefore requested to be kept informed in that regard.¹¹¹⁵ Finally, as to the overall effect of the various measures adopted in relation to the situation in Northern Ireland, the Committee was satisfied with the measures in question and therefore also closed its consideration of that aspect of the cases.¹¹¹⁶

As concerns individual measures, the United Kingdom maintained its position that the obligations of investigation in relation to deaths incumbent upon it arose out of Article 46 of the Convention, rather than directly as a continuing obligation under Article 2.¹¹¹⁷ As to the measures actually taken in each of the cases, the United Kingdom Government

¹¹¹⁰ CoM, Resolution DH (2007) 73, 6 June 2007.

¹¹¹¹ CoM, Resolution DH (2007) 73, 6 June 2007.

¹¹¹² Ibid.

¹¹¹³ Ibid.

¹¹¹⁴ Ibid.

¹¹¹⁵ Ibid.

¹¹¹⁶ Ibid.

¹¹¹⁷ For the communication in relation to individual measures, see Committee of Ministers, Resolution DH (2007) 73, 6 June 2007, Appendix II.

stressed the difficulties involved in conducting investigations, and further noted that investigations were under way.¹¹¹⁸

By contrast to the satisfaction expressed with the majority of the general measures adopted by the United Kingdom, the Committee of Ministers has been much less impressed by the measures taken by the United Kingdom in relation to the individual cases. In that regard, in 2007 the Committee expressed its regret that “progress [had] been limited and that in none of the cases an effective investigation [had] been completed”.¹¹¹⁹ It urged the United Kingdom “to take, without further delay, all necessary investigative steps in these cases in order to achieve concrete and visible progress.”¹¹²⁰ The United Kingdom’s compliance with the judgments was next considered at the 1020th meeting in March 2008. In light of the measures taken by the United Kingdom, the Committee decided to close its consideration of the general measures adopted to remedy the fact that inquest proceedings had not commenced promptly and were not pursued with reasonable expedition.¹¹²¹ The outstanding questions after the 1020th meeting therefore, as regards general measures, concerned the adoption of effective general measures aimed at preventing new, similar violations relating to the lack of independence of police investigators investigating an incident from the officers implicated in the incident itself, as well as the issue relating to defects in the police investigation. In relation to individual measures the question of the adoption of individual measures to erase the consequences of the violations found for each of the applicants likewise remained outstanding.¹¹²²

At its meeting in early December 2008, the Committee took note of the further information submitted by the United Kingdom in relation to the actions undertaken in relation to the outstanding matters relating to compliance with the judgments of the Court,¹¹²³ including in particular the provision of the report of the Police Ombudsman, and the ongoing work of the HET.¹¹²⁴ It resolved to resume consideration of the matter at its 1051st meeting scheduled for 17-19 March 2009 “[...] in the light of a draft Interim resolution to be prepared by the Secretariat taking stock of the measures taken so far, with a view to closing some of the issues raised in Interim Resolution

¹¹¹⁸ Ibid.

¹¹¹⁹ Committee of Ministers, Resolution DH (2007) 73, 6 June 2007.

¹¹²⁰ Ibid.

¹¹²¹ See CoE doc. CM/Del/Dec(2008)1020 (above n. 934); see also CoE doc. CM/Inf/DH(2008)2 rev., 19 November 2008, Section II.A.2.

¹¹²² See *ibid.*, Section II.B. For discussion of the decision in *Jordan* and the related cases and the summary of the information provided by the United Kingdom in this regard, see *ibid.*, Section III.

¹¹²³ For an overview of the additional measures adopted, see *ibid.*, Section III.

¹¹²⁴ *Ibid.* With regard to the measures required in relation to the individual cases, the Department for the Execution of Judgments had reserved its position in five of the cases, awaiting further information, and in the case of *Finucane*, had suggested that “the Committee of Ministers may consider that the requirements of public scrutiny and accessibility of family have been met in the present case”, *ibid.*, § 144.

CM/ResDH(2007)73, on the basis of the memorandum, and other outstanding measures to be taken”¹¹²⁵.

The extent of compliance by the United Kingdom was next considered at the meeting held in March 2009, at which the Committee of Ministers adopted a further Interim Resolution.¹¹²⁶ The United Kingdom provided additional information in addition to that previously provided for the meetings in March and December 2008.¹¹²⁷ As regards general measures, the government gave notice that a 12 week consultation on the Police Ombudsman’s Five Year Review had started on 11 December 2008 and ended on 5 March 2009.¹¹²⁸ As to the individual measures, the United Kingdom once again provided detailed information as to the situation in relation to each of the cases, including: legal action taken on behalf of the family in *Hugh Jordan* challenging a decision by the coroner in relation to anonymity/screening of the identity of police witnesses, as a result of which it was not likely that the inquest would commence before June 2009; the carrying out of further enquiries by the HET in relation to the case of *Kelly and others*; ongoing proceedings in *McKerr*; the fact that the HET had completed its enquiries and was in the process of preparing its final report in the case of *Shanaghan*; the fact that a verdict had been delivered on 4 July 2008 in the inquest in relation to *McShane*, the fact that the inquest had established the facts concerning the incident in which Mr McShane died, and that the coroner had referred evidence relating to the possible commission of criminal offences to the Director of Public Prosecutions for Northern Ireland on 30 January 2009 and the Director of Public Prosecutions was considering the matter and had requested further information from the coroner.¹¹²⁹ No additional information was provided as to the case of *Finucane*.

As regards the general measures adopted, the Committee of Ministers took note of the publication of the report of the Police Ombudsman and the consultation exercise, and invited the Government to provide its response to the report. On the basis of the information previously provided by the Government, the Committee also took note of the work of the HET, and, although noting that the HET’s work was taking longer than

¹¹²⁵ CoE doc. CM/Del/Dec(2008)1043 (above n. 941).

¹¹²⁶ Interim Resolution CM/ResDH(2009)44, “Action of the Security Forces in Northern Ireland (*McKerr v. United Kingdom* and five similar cases)”, adopted by the Committee of Ministers at the 1051st meeting on 19 March 2009.

¹¹²⁷ See Interim Resolution CM/ResDH(2009)44 (above n. 1126), Appendix I. For the information previously provided, see CoE doc. CM/Inf/DH (2008) 2 (declassified at the 1020th meeting (March 2008)); and CoE doc. CM/Inf/DH (2008) 2 rev. (declassified at the 1043rd meeting (December 2008)).

¹¹²⁸ Interim Resolution CM/ResDH(2009)44 (above n. 1126), Appendix I; information was also provided in relation to the violation of Art. 34 of the Convention identified by the Court in *McShane* resulting from disciplinary action being initiated against the applicant’s solicitor in the domestic proceedings as a result of disclosure of witness statements to the applicant’s advisors in the application before the Court: *ibid*.

¹¹²⁹ *Ibid*.

anticipated, decided to close its examination of the issue “as the HET has the structure and capacities to allow it to finalise its work”.¹¹³⁰

At the outset of the section of the Resolution relating to individual measures, the Committee of Ministers recalled the obligation of the United Kingdom to conduct an effective investigation “capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible” and that this obligation was “not an obligation of result, but of means”.¹¹³¹ The Committee then went on to note that it had “consistently noted that there is a continuing obligation to conduct effective investigations inasmuch as procedural violations of Article 2 were found by the Court”. This appears to be an attempt to find a compromise between the conflicting positions of the United Kingdom, which had insisted that any obligation of investigation arose solely under the obligation to comply with a judgment under Article 46, and the Committee in its previous resolutions, which had affirmed that the obligation was a continuing one under Article 2.¹¹³²

In relation to the cases of *Hugh Jordan*, *Kelly and Others*, *McKerr* and *Shanagan*, having noted with concern that progress as concerns individual measures had been limited (in particular in relation to the case of *Hugh Jordan*), the Committee again “strongly urge[d]” the United Kingdom “to take all necessary measures with a view to bringing to an end, without further delay, the ongoing investigations while bearing in mind the findings of the Court in these cases”.¹¹³³ In relation to *McShane*, having noted the rendering of a verdict in the inquest which had established the circumstances in which the death of Mr McShane had taken place and that the Director of Public Prosecutions was considering whether to bring charges on the basis of the evidence referred to him by the Coroner, the Committee of Minister resolved to close its examination in relation to individual measures in that case.¹¹³⁴

As concerns the case of *Finucane*, the Committee took note of the fact that the Public Prosecution Service had concluded that no further prosecutions should be brought in relation to the case as the test for prosecution had not been met, that the Director of Public Prosecutions had made a public statement giving reasons in that regard, and that that decision was susceptible to judicial review, although no application had been made challenging it. The Committee further noted that the authorities were in correspondence with the Finucane family as to the basis on which a possible statutory inquiry would be held, and strongly encouraged the authorities to continue discussions in that regard. On

¹¹³⁰ Interim Resolution CM/ResDH(2009)44 (above n. 1126). The Committee of Ministers also resolved to finalise its examination of the issue relating to Art. 34 in relation to *McShane* “in light of the assurances given by the United Kingdom authorities to prevent interference with the right of individual petition”: *ibid.*

¹¹³¹ *Ibid.*; cf, e.g. *McKerr* (above n. 1070), § 113.

¹¹³² See the discussion of the previous difference of opinion, text accompanying nn. 1103-1105, above.

¹¹³³ Interim Resolution CM/ResDH(2009)44 (above n. 1126).

¹¹³⁴ *Ibid.*

that basis, it likewise resolved to close its examination of the *Finucane* case in relation to individual measures.¹¹³⁵

In conclusion, the Committee of Ministers resolved to continue its supervision of execution of the judgments “until the Committee has satisfied itself that the outstanding general measures as well as all necessary individual measures in the cases of *Jordan, Kelly and Others, McKerr* and *Shanagan* have been taken” and decided to consider the question of the outstanding individual measures in those cases as well as the outstanding general measures at intervals of not more than six months.¹¹³⁶

At its 1078th meeting in March 2010,¹¹³⁷ the Committee considered further information provided by the United Kingdom and the assessment of the Department for Execution of Judgments in that regard.¹¹³⁸ As regards the outstanding general measures relating to the independence of investigations, it was noted that the Government had provided its response to the Police Ombudsman’s report and that their response was being currently being assessed.¹¹³⁹ As regards individual measures, the United Kingdom had provided further information as to events and progress in the individual investigations, including relevant domestic court proceedings in relation to the coroner’s inquiry in relation to *Jordan* and *McKerr* and developments in the HET inquiries in the cases of *Shanagan* and *Kelly and Others*.¹¹⁴⁰ As a consequence of that information, the Committee decided to resume its consideration of execution of the cases at its 1086th meeting scheduled for June 2010, in the light of further information to be provided on the individual measures taken.¹¹⁴¹

A further group of cases involving allegations of lack of an effective investigation into newly emergent allegations of collusion of the security forces in killings by paramilitary groups were decided together in late 2007, and the judgments became final in early 2008.¹¹⁴² In these cases, the Court found a violation of the procedural obligation under Article 2 on the basis of the lack of independence of the Royal Ulster Constabulary

¹¹³⁵ Ibid.

¹¹³⁶ Ibid.

¹¹³⁷ Further information as to the ongoing investigations and court proceedings had been provided by the Government in preparation for both the 1065th meeting on 15-16 September 2009 and the 1072nd meeting on 1-3 December 2009; on both occasions, the the Committee had postponed its consideration to future meetings: see CoE doc. CM/Del/OJ/DH(2009)1065 section4.2 publicE, 30 September 2009 and CoE doc. CM/Del/OJ/DH(2009)1072 section4.2 publicE, 21 December 2009.

¹¹³⁸ CoE doc. CM/Inf/DH(2008)2 rev. (above n. 1121); see also “Annotated Agenda and Decisions, 1078th (DH) Meeting, 2-4 March 2010”, CoE doc. CM/Del/OJ/DH(2010)1078 section 4.2 publicE, 18 March 2010.

¹¹³⁹ Ibid.

¹¹⁴⁰ Ibid.

¹¹⁴¹ Ibid.

¹¹⁴² *Brecknell v. United Kingdom* (App. No. 32457/04), ECHR 27 November 2007; *Reavey v. United Kingdom* (App. No. 34640/04), ECHR 27 November 2007; *McCartney v. United Kingdom* (App. No. 34575/04), ECHR 27 November 2007; *McGrath v. United Kingdom* (App. No. 34651/04), ECHR 27 November 2007; *O’Dowd v. United Kingdom* (App. No. 34622/04), ECHR 27 November 2007.

(RUC) in the initial stages of the investigation into the allegations, but otherwise dismissed the claims under Article 2.¹¹⁴³

In December 2008, the Committee of Ministers considered the information provided by the United Kingdom Government. The United Kingdom argued that the Court had found a violation in the cases on the basis of the lack of independence of the Royal Ulster Constabulary in the early stages of the investigations, although it had found no such lack of independence on the part of the Police Service for Northern Ireland (PSNI) which had subsequently replaced it and taken over the investigations. Given that the Royal Ulster Constabulary no longer existed, the PSNI had been accepted by the Court to be institutionally distinct and there had been no complaints as to the independence of the later portions of the investigation (including by the HET), it was argued that no additional general or individual measures were required.¹¹⁴⁴

The Committee of Ministers accepted the arguments made by the United Kingdom; by a resolution adopted in Resolution DH (2009) 19, it concluded its consideration of the supervision of the execution of the judgments.¹¹⁴⁵

5.6 Measures adopted consequent upon findings of violation of Article 3

The treatment of detainees by the United Kingdom security forces in the context of the Troubles was the subject of one of the relatively rare inter-State complaints brought before the Strasbourg institutions.¹¹⁴⁶ In 1971 the Government of the Republic of Ireland brought a case against the United Kingdom alleging a number of violations of the European Convention as a result of the actions initially taken in confronting the worsening situation in Northern Ireland. The principal complaint by the Irish government related to the interrogation methods used by the United Kingdom security forces and centred around the practice of use of the so-called “Five Techniques”, consisting of a combination of wall-standing, hooding, exposure to a continuous loud hissing noise, sleep deprivation and deprivation of food and drink.¹¹⁴⁷ Allegations were also made in relation to other specific instances of physical ill-treatment of particular individuals on specified occasions.

¹¹⁴³ Cf. the decision in *Hackett v. United Kingdom* (App. No. 34698/04), ECHR 10 May 2005, in which the investigations into newly uncovered allegations of involvement of the security forces in the death of the applicant’s husband were still ongoing at the time of the application; the Court observed that there was no reason to doubt the independence of the external investigating officer and concluded that the application was manifestly ill-founded as being premature.

¹¹⁴⁴ Committee of Ministers, Resolution CM/ResDH(2009)19, adopted at the 1043rd meeting on 2-4 December 2008, Appendix; see CoE doc. CM/Del/Dec(2008)1043volresE, 9 January 2009

¹¹⁴⁵ *Ibid.*,

¹¹⁴⁶ *Ireland v. United Kingdom* (above n. 295).

¹¹⁴⁷ For the Court’s description of the “Five Techniques”, see *ibid.*, § 96.

The Commission concluded that the use of the Five Techniques amounted to torture,¹¹⁴⁸ in addition to finding that there had been specific instances of inhuman treatment at particular detention centres.¹¹⁴⁹ Given the acceptance by the United Kingdom of the findings of the Commission that there had been violations of Article 3,¹¹⁵⁰ the United Kingdom argued that the proceedings before the European Court were moot and the Court should abstain from ruling on those issues.¹¹⁵¹

The European Court rejected those arguments and held that it was required to examine the merits of the claims, discussing in detail the allegations made by the Republic of Ireland under Article 3. Although the United Kingdom did not seek to contest the Commission's finding that there had been violations of Article 3, nor the specific conclusion that the use of the Five Techniques amounted to torture,¹¹⁵² nevertheless, the Court, reversing the decision of the Commission, held that the use of the Five Techniques did not constitute torture, but amounted only to "a practice of inhuman and degrading treatment",¹¹⁵³ on the basis that the techniques "did not occasion suffering of the particular intensity and cruelty implied by the word torture".¹¹⁵⁴ The Court concluded that although there had been a "discreditable and reprehensible" practice of ill-treatment of detainees at one of the detention centres, although it found that the practice did not rise to the level of inhuman or degrading treatment.¹¹⁵⁵

A peculiarity of the *Ireland v. United Kingdom* case is that, following a pair of public inquiries,¹¹⁵⁶ the United Kingdom had already changed its policy so as to categorically outlaw use of the Five Techniques in 1972, well before the case was heard on the merits by the Commission;¹¹⁵⁷ further, in 1977, in the course of the hearing before the Court, the

¹¹⁴⁸ *Ireland v. United Kingdom* (App. No. 5310/71), Commission Decision of 25 January 1976, *Series B, No. 23-I* (1976), p. 402; and see the *dispositif*, p. 490.

¹¹⁴⁹ *Ireland v. United Kingdom* (App. No. 5310/71), Commission Decision of 25 January 1976, *Series B, No. 23-I*, pp. 409-457; and see the *dispositif*, pp. 490-491.

¹¹⁵⁰ *Ireland v. United Kingdom* (above n. 295), §§ 147, 152, 165.

¹¹⁵¹ *Ibid.*, §§ 152-155.

¹¹⁵² *Ibid.*, §§ 147, 152, 165.

¹¹⁵³ *Ibid.*, §§ 167 and 168.

¹¹⁵⁴ *Ibid.*, § 167.

¹¹⁵⁵ *Ibid.*, §§ 180-181.

¹¹⁵⁶ See Report of the enquiry into allegations against the security forces of physical brutality in Northern Ireland arising out of events on the 9th August, 1971; Cmnd. 4832, November 1971 [Compton Report], and Report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism, Cmnd. 4901 March 1972 [Parker Report]). The Majority Report of the Parker Report expressed the view "that some if not all the techniques in question would constitute criminal assaults and might also give rise to civil proceedings under English law", although it refrained from expressing any view as to the position under the law of Northern Ireland, in light of pending claims (*ibid.*, § 2); the Majority Report also expressed the view that the use of the Five Techniques might in some circumstances be morally justifiable, depending on the intensity with which they were applied, and the provision of effective safeguards against excessive use. (*ibid.*, §§ 27-34); in particular the majority expressed the view, *inter alia*, that the Armed Forces should never use the Five Techniques except upon the express authority of a UK Minister.

¹¹⁵⁷ See the Statement made by the Prime Minister on 2 March 1972, reproduced in *Ireland v. United Kingdom* (above n. 295), at § 101; see also the account of the Compton and Parker reports: *ibid.*, at §§ 99-100.

Attorney-General of the United Kingdom made a solemn undertaking on behalf of the United Kingdom that the Five Techniques would not “in any circumstances be reintroduced as an aid to interrogation.”¹¹⁵⁸ In addition, as noted by the Court itself, by the time of judgment the United Kingdom had in any case:

[...] taken various measures designed to prevent the recurrence of the events complained of and to afford reparation for their consequences. For example, it has issued to the police and the army instructions and directives on the arrest, interrogation and treatment of persons in custody, reinforced the procedures for investigating complaints, appointed commissions of enquiry and paid or offered compensation in many cases.¹¹⁵⁹

As the Court had also noted earlier in its judgment, in the period from the start of internment on 9 August 1971 to 30 November 1974, over 1105 complaints alleging assault and ill-treatment had been made against the Royal Ulster Constabulary, producing 23 prosecutions and 7 convictions.¹¹⁶⁰ As regards the Army, 1,268 complaints in respect of assaults or shootings had been received and 1078 cases of alleged assault had been submitted to the Director of Public Prosecutions. By January 1975, directions to prosecute had been given in 86 of the 1038 cases which had been investigated by that time. In total, between April 1972 and the end of January 1977, 218 prosecutions of members of the security forces for assault had been commenced, resulting in the conviction of 155 persons.¹¹⁶¹

The Republic of Ireland had requested that the Court make a consequential order in relation to the violations of Article 3, requiring the United Kingdom to “proceed as appropriate, under the criminal law of the United Kingdom and the relevant disciplinary code, against those members of the security forces who have committed acts in breach of Article 3 [...] and against those who condoned or tolerated them”.¹¹⁶² In that regard, the Court concluded very briefly that it had no power to direct the United Kingdom to institute criminal or disciplinary proceedings, although it expressly abstained from expressing a view on the wider question of whether its functions might extend, in certain circumstances, to addressing consequential orders to States parties.¹¹⁶³

¹¹⁵⁸ For the text, see *ibid.*, § 157.

¹¹⁵⁹ *Ibid.*, § 153; and see §§ 99-100, 107, 110-111, 116-118, 121-122, 124, 128-130, 132, 135-139 and 142-143)

¹¹⁶⁰ *Ibid.*, § 140.

¹¹⁶¹ *Ibid.*, § 140. See also the figures provided to the Commission: *Ireland v. United Kingdom* (App. No. 5310/71), Commission Decision of 25 January 1976, *Series B, No. 23-I* (1976), at p. 284, as well as the information relating to payment of compensation to individuals and to prosecutions contained in the Counter-Memorial of the United Kingdom Government before the Court (*Series B*, vol. 23-II, pp. 142 and 143, §§ 2.93 and 2.95); and in the submissions during the oral hearings (e.g. *Series B*, vol. 23-II, p. 429 (transcript of oral hearing of 9 February 1977 (Mr S. Silkin, QC AG))).

¹¹⁶² *Ireland v. United Kingdom* (above n. 295), § 186.

¹¹⁶³ *Ibid.*, § 187. Note that, as discussed above in Section 1.2.1, the practice of the Court in relation to the possibility of ordering specific non-monetary measures has evolved somewhat in the years since the decision in *Ireland v. United Kingdom*.

When the case came before the Committee of Ministers, the United Kingdom recalled the various measures which had already been taken in relation to the instances of ill-treatment identified by the Court, including investigations, the payment of compensation to the victims and the renunciation of the use of the Five Techniques; as a consequence, it considered that “the Court’s judgment does not call for any consequential measures to be taken by it in addition to those already taken.”¹¹⁶⁴ That position was accepted by the Committee of Ministers, which therefore concluded its consideration of the matter.¹¹⁶⁵

Whilst the proceedings in *Ireland v. United Kingdom* were pending, a parallel case was brought before the Commission by a group of seven individuals in relation to their alleged physical ill-treatment by the security forces.¹¹⁶⁶ The claims of specific instances of ill-treatment were declared inadmissible by the Commission as regards three of the applicants on the basis that they had not exhausted the domestic remedies available to them in the United Kingdom legal system by bringing civil cases.¹¹⁶⁷ The cases of the other four applicants were likewise declared inadmissible on the basis that, having resorted to the domestic remedies available, their cases had been settled resulting in the payment of compensation; the Commission concluded that as a result they could no longer claim to be victims of the alleged violations.¹¹⁶⁸ The Commission also declared their claim that they had been subjected to an administrative practice contrary to Article 3 inadmissible on the same bases,¹¹⁶⁹ as well as rejecting a separate request made by the applicants for declaratory relief that they had been treated in violation of Article 3.¹¹⁷⁰ A number of other subsequent claims in relation to other alleged instances of ill-treatment at the hands of the security services were dismissed on similar grounds.¹¹⁷¹

It is difficult to ascertain whether and what proportion of police officers or soldiers were in fact prosecuted for application of the Five Techniques, as opposed to other forms of assault and/or ill-treatment of detainees; the prosecution statistics relied upon by the United Kingdom government before the Court did not distinguish between prosecutions

¹¹⁶⁴ Committee of Ministers, Resolution DH(78)35, 27 June 1978 (Appendix: Summary of Information Provided by the United Kingdom).

¹¹⁶⁵ Committee of Ministers, Resolution DH(78)35, 27 June 1978.

¹¹⁶⁶ *Donnelly and Others v. United Kingdom* (above n. 309).

¹¹⁶⁷ *Ibid.*, at pp. 87-88.

¹¹⁶⁸ *Ibid.* Note however, that under the modern practice of the Court, it is unlikely that an applicant would now be held to have lost his or her victim status in relation to an alleged violation of Art. 3 merely because he or she had settled a civil claim for compensation. For further discussion, see above, Section 1.2.4.

¹¹⁶⁹ *Donnelly and Others v. United Kingdom* (above n. 309), at pp. 87-88

¹¹⁷⁰ *Ibid.*, at p. 85.

¹¹⁷¹ See e.g. *X v. United Kingdom* (App. No. 8462/78), ECommHR, decision of 8 July 1980, *D.R.*, vol. 20, p. 184 (failure to exhaust domestic remedies in relation to allegations of ill-treatment by the police, where civil proceedings were still pending). See also *Adams v. United Kingdom* (App. No. 25526/94), ECommHR, decision of 29 June 1998, where the applicant’s application, alleging *inter alia* a breach of Art. 3 as a result of his treatment by the security forces, was struck out of the list by the Commission on the basis that the applicant had received judgment in his favour in a civil action for assault before the domestic courts, and, further, that he had failed to prosecute his application before the Commission.

for assault or other offences as a result of use of the Five Techniques and prosecutions for other ill-treatment of detainees. The position of the United Kingdom was that all instances of ill-treatment were illegal, and that the officers involved were subject to prosecution for assault, actual bodily harm or grievous bodily harm. In addition, the Court appears not to have enquired into the extent to which the particular documented instances of use of the Five Techniques had in fact resulted in prosecution of those responsible. Further, there were a large number of cases brought by detainees against the security services alleging assault; the vast majority of these appear to have been settled with the Government making a payment of compensation.¹¹⁷² The result of the fact that most such cases were settled (including, it may be inferred, a number of those cases in which the individual applicant had been subjected to the Five Techniques), was that the United Kingdom was insulated from cases being brought against it in Strasbourg, given that, on the approach of the Commission at that time,¹¹⁷³ any such claim could be met with the response that the applicant could no longer claim to be a victim.

Finally, although dealing with the obligations of the authorities to prevent the infliction of inhuman and degrading treatment by private parties, rather than by State agents the decision of the House of Lords in *E v Chief Constable of the Royal Ulster Constabulary*¹¹⁷⁴ is nevertheless of some interest. The case concerned sectarian tensions in Ardoyne, resulting in demonstrations and attempted violence against Catholic schoolchildren and parents whose normal route to school took them through a predominantly Protestant enclave. Although initially the police prohibited use of the normal route and enforced a diversion, subsequently the approach adopted was to create a safe corridor for the children and their parents using riot police and police and military vehicles on either side of the road; the protests grew increasingly hostile and violent, and a number of police officers and soldiers were injured. The applicant, the mother of one of the children, alleged that the police should have taken stronger action to prevent the children from being exposed to the terrifying experience, and argued, inter alia, that the police authorities had therefore breached their obligations under Article 3 of the Convention, as applicable by virtue of the Human Rights Act 1998. It was conceded by the police and the government that some of the conduct of the protesters was sufficiently extreme to amount to inhuman or degrading treatment. However, a unanimous House of Lords held that although Article 3 imposed an absolute prohibition of the infliction of torture and cruel and inhuman treatment, the positive obligation of

¹¹⁷² See e.g. the statistics quoted by the European Commission in *Donnelly and Others v. United Kingdom* (above n. 309), at p.65, according to which out of 231 cases alleging assault by the security forces started between 9 August 1971 and 30 September 1975, only 11 had gone to trial, the remainder having been settled.

¹¹⁷³ See the discussion of the decision of the Commission in *Donnelly and Others v. United Kingdom* above (text accompanying nn. 1166-1169).

¹¹⁷⁴ *E v Chief Constable of the Royal Ulster Constabulary and another (Northern Ireland Human Rights Commission intervening)* [2008] UKHL 66; [2008] 3 WLR 1208

prevention imposed by Article 3 was not likewise absolute in relation to the conduct of private individuals who were not under the direct control of the authorities; the State and its emanations were only required to do what could be reasonably expected of them to prevent the infliction of inhuman or degrading treatment by third parties.¹¹⁷⁵ On the facts, the House of Lords refused to hold that, in the wider context of community tensions, the course of action taken by the police could be said to have been unreasonable or disproportionate. It was therefore held that they had fulfilled their obligations under Article 3 of the Convention.¹¹⁷⁶

5.7 Conclusions as to compliance and impact

As a general matter, there has been more or less substantial compliance by the United Kingdom with the judgments of the Court. As a consequence of the various cases relating to the adequacy and effectiveness of investigations into alleged violations of the right to life, the United Kingdom has amended many pieces of both primary and secondary legislation, in particular relating to matters of procedure, as well as reforming certain institutions (including in particular the system of inquests/Coroner's courts, and the system for internal police investigations in Northern Ireland).

The interaction of the Court and the United Kingdom as a result of the cases relating to the conflict in Northern Ireland has thus had a major impact on the United Kingdom legal system, in particular as a consequence of the multiple measures taken by way of compliance with the more recent judgments of the Court in the *McKerr* group of cases. Although those cases relate to killings which are more or less historically remote, the general measures adopted by way of compliance ensure that for the future police investigations into killings by the security services are prompt, independent and efficient; further, the position of the families of victims in terms of involvement in the process of inquests before Coroner's Courts has been vastly improved.

Whether or not the investigations in relation to the historical cases will in fact result in any prosecutions is perhaps open to question; the events in question are now receding into the past, with all that this implies in terms of preservation of evidence and the availability of witnesses. As a consequence, there may well be slim prospects of securing convictions for historical incidents, despite the strength and innovation of the Court's rulings. Nevertheless, although in individual cases, prosecution and convictions are unlikely to be forthcoming, the prospects for effective investigation and prosecutions in relation to any death at the hands of the police or security force are much brighter for the future.

¹¹⁷⁵ *Ibid.*, at [10] (per Baroness Hale); [44]-[49] (per Lord Carswell).

¹¹⁷⁶ *Ibid.*, at [13]-[14] (per Baroness Hale); [57]-[62] (per Lord Carswell).

So far as the violations relating to Article 3 are concerned, it is particularly striking that the United Kingdom had already adopted measures to put an end to the violations within a very short period after the events themselves, and well in advance of the eventual finding of a violation by the Court in *Ireland v. United Kingdom*. As a consequence, the Committee of Ministers was able to conclude its examination of compliance with the judgment after only one meeting. The impact of that episode lies not so much in the formal material changes made to domestic law (in fact, no amendments to the relevant criminal legislation were necessary), but rather the impact at the policy level that ill-treatment of detainees was not permissible. That shift in policy continues to resonate down until the present day.