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The state of human rights in Europe: the need to eradicate impunity

Report¹

Committee on Legal Affairs and Human Rights

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Summary

The Committee on Legal Affairs and Human Rights insists that all perpetrators of serious human rights violations must be held to account for their actions, including the instigators and organisers of such crimes.

The committee considers the fight against the impunity of perpetrators of serious human rights violations as a priority for the Council of Europe and all national and international law enforcement bodies. Impunity must be eradicated both as a matter of individual justice and as a deterrent with respect to future human rights violations.

Such crimes take many shapes and forms, including large-scale violations of human rights in conflict situations, killings of journalists, human rights defenders and witnesses by "unknown perpetrators", abuse committed by police officers and prison guards covered by colleagues, and different types of hate crimes whose authors profit from lax law enforcement by biased officials or judges.

The Committee of Ministers of the Council of Europe is urged to intensify its work on elaborating guidelines on the fight against impunity, drawing in particular from the case law of the European Court of Human Rights, from its own work on execution of judgments and the pertinent resolutions and recommendations of the Parliamentary Assembly.

1. Reference to committee: Bureau decision of 9 January 2009.



Contents	Page
A. Draft resolution	3
B. Draft recommendation	5
C. Explanatory memorandum by Mrs Herta Däubler-Gmelin	6
1. Introduction	6
1.1. Proceedings to date	6
1.2. Definition of “impunity”	6
1.3. Importance of the need to eradicate impunity	6
1.4. Categories of impunity – A diagnostic framework	7
2. Different categories of impunity and adapted strategies for their eradication	7
2.1. The state refusing to recognise its obligations	7
2.2. The state seeking to justify its (acknowledged) participation in human rights violations	8
2.3. The state denying its participation in human rights violations (recognised as such in principle) whilst there is evidence of state agents as perpetrators on a widespread scale	8
2.4. Perpetrators have a link with state agents, but are not necessarily state agents themselves ...	12
2.5. Violations committed by individual state agents, covered up by “colleagues” or by institutional negligence	13
2.6. Individual violations committed by non-state actors; institutional failure to hold perpetrators responsible	15
2.7. Impunity ... extended to international actors?	17
3. Conclusions	18

A. Draft resolution

1. The Parliamentary Assembly insists that all perpetrators of serious human rights violations must be held to account for their actions.
2. This shall also apply to the instigators and organisers of such crimes, as recently affirmed by the Assembly in [Resolution 1645 \(2009\)](#) with respect to the Gongadze case.
3. The Assembly further recalls that it is internationally recognised since the Nuremberg and Tokyo trials, held in the wake of the Second World War, that in cases of serious human rights violations, the following of superior orders or instructions is not a valid excuse.
4. Consequently, the European Court of Human Rights (the Court), in cases concerning the killings of refugees at the Berlin Wall, upheld condemnations both of GDR politburo members responsible for the order to shoot and of border guards executing the order.
5. Impunity for perpetrators of serious human rights violations occurs in member and observer states of the Council of Europe, in different shapes and forms:
 - 5.1. The most serious cases involve wide-spread abuses committed by the security forces in conflict situations. The cases of the Court concerning the conflicts in Northern Ireland, south-eastern Turkey and the Chechen Republic of the Russian Federation, finding widespread violations of Article 2 of the European Convention on Human Rights (right to life) in the form of, *inter alia*, indiscriminate use of force, enforced disappearance, torture or inhuman and degrading treatment of prisoners provide shocking examples of such abuses in Europe. The Court has frequently found that the investigation into such abuses was plainly insufficient.
 - 5.2. Insufficient investigations are also the cause of impunity in cases in which state agents are suspected of having ordered or otherwise instigated or covered up crimes committed by non-state agents. This may be the case regarding numerous killings of journalists and human rights activists by “unknown perpetrators”.
 - 5.3. Crimes such as the reckless or negligent killing or ill-treatment of detainees by rogue members of the security forces are often not properly investigated and prosecuted because of a culture of ill-conceived solidarity among colleagues. The Court has repeatedly been obliged to find violations of the Convention in the face of the complete passivity or exaggerated leniency of the law enforcement authorities and the courts faced with such cases. In this context, the Assembly recalls its Resolution 1742 (2006) deploring the unacceptable tolerance in the military of many countries of “hazing” practices that grossly violate human dignity and sometimes even the right to life of young soldiers.
 - 5.4. Other types of crimes, though definitely committed by non-state actors, without any involvement of the authorities, need to be addressed as impunity issues because of the passive or overly lenient attitude of the members of the law enforcement bodies dealing with these cases, motivated by racism, anti-Semitism, xenophobia, Islamophobia, homophobia, sexism or other forms of intolerance:
 - 5.4.1. Violence against foreigners or even just foreign-looking persons on grounds of racism and xenophobia is on the rise in many member states, exacerbated by the current economic crisis. Police either fail to intervene to protect victims or even participate themselves in acts of aggression, intimidation and denigration.
 - 5.4.2. The Roma population in many European countries is particularly victimised by such unacceptable behaviour.
 - 5.4.3. The spectre of anti-Semitism has shown its ugly face again in a number of countries, including in a novel form that is on the increase since the recent aggravation of the conflict in the Middle East and consists in extremists expressing their hatred against Israel by violence against local Jewish people.
 - 5.4.4. Violence motivated by homophobia is also all too often tolerated or even encouraged by complacent or homophobic members of the law enforcement bodies and of the judiciary.
 - 5.4.5. Violence against women and so-called honour crimes (see [Resolutions 1662 \(2009\)](#), [1635 \(2008\)](#) and [1327 \(2003\)](#) and [Recommendations 1868 \(2009\)](#) and [1847 \(2008\)](#)) are often not prosecuted with the required severity because of sexist attitudes of the police, prosecutors or judges or because of their archaic cultural attitudes that place values such as the honour of the family or the children’s duty of obedience above the right to individual liberty or even the right to life.

5.4.6. Corruption, both in the public and in the private sectors, is widespread and remains largely unpunished; it undermines the rule of law and presents a serious risk for the prosperity of our countries and their democratic institutions.

5.5. Last but not least, international actors such as members of the military participating in peacekeeping operations are even less accountable for their actions than their colleagues acting in their own countries due to the lack of access of victims of possible violations to national or international legal remedies.

6. The Assembly considers the fight against the impunity of perpetrators of serious human rights violations as a priority for the Council of Europe and all national and international law enforcement bodies. Impunity must be eradicated both as a matter of individual justice and as a deterrent with respect to future human rights violations.

7. The Assembly commends the European Court of Human Rights for the extensive case law it has developed on impunity, in particular by imposing on member states the positive obligation to investigate serious human rights violations and to hold their perpetrators to account.

8. The full and speedy execution of the Court's judgments in cases of impunity is the key to fighting this scourge in Council of Europe member states.

8.1. When the Court has found a failure to investigate effectively, the execution of the judgment cannot be limited to the payment of the pecuniary compensation fixed by the Court. Proper investigations must still be carried out and general measures taken to address the underlying causes of the violation.

8.2. The Assembly and its members in their national parliaments have an important role to play in securing the speedy execution of the Court's judgments.

8.3. The Assembly commends the Committee of Ministers for having consistently noted that there is a continuing obligation to conduct effective investigations inasmuch as procedural violations of Article 2 have been found by the Court. The application of these same rules to all states, without double standards, is of particular importance.

8.4. The timely communication by the Court to the states concerned of applications alleging a failure to investigate sends an important message to the competent authorities giving them the opportunity to carry out investigative acts before evidence is irretrievably lost.

9. The Assembly therefore urges all member and observer states to make the fight against impunity a priority, by:

9.1. clearly stating at the highest political level that serious human rights violations committed, aided or abetted by state agents will not be tolerated in any circumstances;

9.2. granting their law enforcement bodies the resources they need in order to effectively investigate human rights violations committed by non-state actors;

9.3. stamping out unacceptable prejudices and cultural attitudes among members of the law enforcement bodies leading to wide-spread impunity of violence against women, honour crimes, and crimes motivated by racism, anti-Semitism, xenophobia, Islamophobia, homophobia, sexism or other forms of intolerance;

9.4. implementing the Assembly's earlier resolutions and recommendations covering various impunity issues.

10. The Assembly urges the Committee of Ministers of the Council of Europe to speed up and intensify its work on elaborating Guidelines on the fight against impunity, drawing from the case law of the European Court of Human Rights, from its own work on execution of judgments, the pertinent resolutions and recommendations of the Assembly and the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as well as from the work of the United Nations and relevant non-governmental organisations on this subject.

11. The Assembly also invites the European Court of Human Rights to continue making the fight against impunity a priority.

B. Draft recommendation

1. The Parliamentary Assembly, referring to its Resolution ... (2009), considers the eradication of impunity for perpetrators, instigators and organisers of serious human rights violations as a priority for Council of Europe action, as a matter of individual justice, deterrence and upholding the rule of law.
2. The Assembly therefore welcomes the follow-up already given by the Committee of Ministers to its [Recommendation 1791 \(2007\)](#) on the state of human rights and democracy in Europe and invites the Committee to speed up and intensify its work on elaborating Council of Europe guidelines on human rights and the fight against impunity. These guidelines should:
 - 2.1. draw from the case law of the European Court of Human Rights, from the work of the Committee of Ministers on execution of judgments, the pertinent resolutions and recommendations of the Assembly and the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as well as from the work of the United Nations and relevant non-governmental organisations on this subject;
 - 2.2. clearly state that immunity of international actors for serious human rights violations, in particular violations of non-derogable rights such as the right to life, is unacceptable;
 - 2.3. specify which measures shall be taken and remedies made available at national and international levels to tackle all forms of impunity.
3. As regards the Committee of Ministers' role of supervising the execution of the judgments of the European Court of Human Rights by member states, the Assembly welcomes that the Committee of Ministers has consistently noted that there is a continuing obligation to conduct effective investigations inasmuch as procedural violations of Article 2 have been found by the Court. The application of these same rules to all states, without double standards, is of particular importance.

C. Explanatory memorandum by Mrs Herta Däubler-Gmelin

1. Introduction

1.1. Proceedings to date

1. The Committee on Legal Affairs and Human Rights suggested “the need to eradicate impunity” as the main topic for the debate on the state of human rights in Europe scheduled for the June 2009 part-session, in line with the priorities defined in [Resolution 1547 \(2007\)](#) and [Recommendation 1791 \(2007\)](#), based on the 2007 report on the “State of human rights in Europe” by Mr Christos Pourgourides (Cyprus, EPP/CD).² The Assembly’s Bureau accepted this proposal at its meeting on 9 January 2009 in Barcelona, on the basis of an outline report submitted by the committee,³ which had decided to propose this theme and appointed its chairperson, Mrs Herta Däubler-Gmelin (Germany, SOC), as rapporteur at its meeting on 10 and 11 November 2008 in Moscow.

2. On 23 March 2009, the committee, in co-operation with the German Bundestag’s Committee on Human Rights and Humanitarian Aid, held a major conference in Berlin on this topic, bringing together eminent experts in the field from many countries.⁴

1.2. Definition of “impunity”

3. “Impunity” can be defined as the absence of punishment or sanction for an act that is recognised as reprehensible by the law of the land. For the purposes of this report, the definition can be further narrowed down to include only such cases in which public officials are at least suspected to be involved either in the reprehensible act itself or in the failure of the competent authorities to hold the author of such an act to account.

4. It was in the case of *Yaşa v. Turkey*⁵ that this concept appeared for the first time in the case law of the European Court of Human Rights. The case concerned the climate of violence that reigned in south-east Turkey in the 1990s. The Court emphasised that the political context at the time “cannot relieve the authorities of their obligations under Article 2 to carry out an investigation, as otherwise that would exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle”.

1.3. Importance of the need to eradicate impunity

5. Impunity is the contrary of the rule of law, a concept which underlies the entire system of the European Convention on Human Rights (hereinafter: ECHR) for the protection of human rights in Europe. Impunity is lawlessness, or “legal nihilism”⁶ which must be replaced by accountability of the state and its agents for their actions and omissions.

6. The element of deterrence is highlighted in the Preamble to the Statute of Rome establishing the International Criminal Court, which calls “to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community] and thus to contribute to the prevention of such crimes”.

2. See [Doc. 11202](#); paragraph 13 of [Resolution 1547 \(2007\)](#) on the state of human rights and democracy in Europe specifies: “Impunity, even for [the] most serious human rights violations, has not been eradicated in Europe. Impunity needs to be rooted out by prompt, thorough and impartial investigations and prosecutions.” Paragraph 4 of [Assembly Recommendation 1791 \(2007\)](#), on the same subject, states that “Impunity is a major threat to the rule of law in Europe. Therefore, the Assembly recommends that the Committee of Ministers envisage, in particular, the preparation of a set of guidelines ... drawing from, *inter alia*, the case law of the European Court of Human Rights, the work of the CPT and that of the United Nations on this issue.”

3. Document AS/Jur(2009)05.

4. See Assembly press release on the conference summarising contributions (“Don’t let them get away with it”, at http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4505).

5. 2 September 1998, paragraph 104, *Reports* 1998-VI.

6. A term used by Russian President Dmitry Medvedev to underscore the need for further reforms to strengthen the rule of law in the Russian Federation; see, for example, the *Washington Post*, 28 July 2008 (www.washingtonpost.com/wp-dyn/content/article/2008/07/27/AR2008072701168.html), and the *Independent*, 8 May 2008 (www.independent.co.uk/news/world/europe/medvedev-sworn-in-but-putin-still-holds-power-in-russia-822832.html).

7. Impunity for the perpetrators of serious human rights violations also inflicts additional suffering on victims and their families. The European Court of Human Rights has recognised that this can amount to torture or inhuman and degrading treatment for example of family members of a victim of enforced disappearance, within the meaning of Article 3 of the ECHR.⁷ Impunity also encourages new violations and undermines public trust in the rule of law, thus endangering the very foundations of democracy.

8. Impunity must therefore be eradicated both as a matter of justice for the victims, of prevention of new violations by deterrence, and of upholding the rule of law.

1.4. Categories of impunity – A diagnostic framework

9. In order to suggest the most appropriate solutions, it is important to identify precisely the nature of what has gone wrong. I will avail myself of the “diagnostic framework” presented by Françoise Hampson at the above-mentioned Berlin conference, which, with some adjustments, will also serve as a structure for the presentation of this report. The following categories of impunity can thus be distinguished:

- the state denies the applicability of human rights norms or that they cover the act/omission in question (for example, “honour killings” in some legal cultures; death penalty);
- the state acknowledges its participation in a human rights violation but seeks to justify it (for example, the US practice of extraordinary rendition);⁸
- the state acknowledges the applicability of human rights norms, but denies participation, whilst there is evidence of state agents as perpetrators on a widespread scale and across a range of violations; problem concerning all or only part of the state territory;
- perpetrators have a link with state agents, but are not necessarily state agents themselves;
- individual violations are committed by individual state agents, covered up by “colleagues” or by institutional negligence (for example, police violence, “hazing” in the armed forces);
- individual violations are committed by non-state actors; institutional failure to hold perpetrators responsible (for example, xenophobic, anti-Semitic, homophobic violence; violence against women; so-called “honour crimes”);
- impunity is extended to international actors (immunity)?

2. Different categories of impunity and adapted strategies for their eradication

2.1. The state refusing to recognise its obligations

10. In some cases, states are either unwilling or incapable of recognising that they are under an international obligation to stamp out certain practices. For example, within certain legal cultures, “honour crimes” (motivated by the desire to uphold the “honour” of a family)⁹ are not recognised as a violation of law, or only as very minor offences. Also, a number of countries (China, Iran, Saudi Arabia, but also Council of Europe observer states Japan and the United States, and Belarus whose special guest status has been suspended) still execute the death penalty, which is considered a human rights violation by the Parliamentary Assembly and the Council of Europe as a whole.¹⁰

11. Until there is case law of an international court or another authoritative condemnation of such a practice at the international level, states can claim that they were not aware that the practice is a violation of their international human rights obligations. The right strategy for overcoming these practices is therefore awareness raising, at the international level and nationally, with the help of local allies. The report under preparation by Mrs Renate Wohlwend (Liechtenstein, EPP/CD) on abolition of the death penalty in Council of Europe observer states is expected to make a contribution in this respect.

7. See, for example, *Gongadze v. Ukraine*, judgment of 8 November 2005 (Application No. 34056/02), paragraphs 184-186.

8. See the two reports by Mr Dick Marty (Switzerland, ALDE) on secret detentions and illegal transfers of detainees involving Council of Europe member states ([Doc. 11302 rev.](#) and addendum (2007) and [Doc. 10957](#) (2006)).

9. See Recommendation 1327 (2003) on so-called “honour crimes” (rapporteur: Renate Wohlwend, Liechtenstein, EPP/CD).

10. See paragraph 1 of Recommendation 1760 (2006) on the position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty (rapporteur: Renate Wohlwend).

2.2. The state seeking to justify its (acknowledged) participation in human rights violations

12. This is the case of the “war on terror”, in which some states set out to justify practices that violate human rights as required for the higher goal of stamping out terrorism. The Assembly’s reports on renditions and secret detentions¹¹ and, more recently, the report of the International Commission of Jurists’ Eminent Jurists Panel¹² have provided numerous examples of state practices that clearly violate human rights, such as different forms of torture, abductions and secret detentions. These are in part simply denied by the states concerned, but in part also acknowledged and defended as necessary for the achievement of the higher goal of defeating terrorism or protecting the lives of potential victims of terrorism.

13. The most extreme example is the justification, by senior members of the Bush administration, of the so-called “enhanced interrogation techniques”, which are described in shocking, bureaucratic detail in the internal memoranda made public by President Obama. I should like to commend the new United States President for making these documents public and pledging that such actions shall not be repeated. But I regret that President Obama has at the same time promised to shield the perpetrators of such acts of torture from being held to account. Whilst transparency is a necessary condition to eradicate impunity, the disclosed information must also be acted upon in order to hold to account the direct perpetrators as well as those who ordered and organised the violations. At the latest since the Nuremberg and Tokyo trials in the wake of the Second World War, it has been internationally established that unlawful orders do not exonerate those who execute them. The European Court of Human Rights (the Court) has upheld this position vis-à-vis those who ordered and those who executed the killings of refugees trying to leave the former German Democratic Republic at the Berlin Wall.¹³ Similarly, two successive jury verdicts acquitting a Russian special forces captain for executing a group of Chechen schoolteachers for having allegedly acted upon the order of a superior officer were rightly set aside upon appeal by the prosecution by the Supreme Court of the Russian Federation.¹⁴ The same reasoning applies in my view to those who carried out acts of torture in the “war on terror” and those who formulated and approved the instructions permitting these despicable acts.

14. In such a situation of denial of legal obligations, the right strategy would appear to consist in a combination of engaging in discussions with the decision makers in the states that seek to justify certain human rights violations, and litigation at national and international levels aimed at authoritatively establishing the legal situation, compensating victims and holding perpetrators to account.

2.3. The state denying its participation in human rights violations (recognised as such in principle) whilst there is evidence of state agents as perpetrators on a widespread scale

15. A classic impunity situation arises when the state acknowledges, in principle, the applicability of human rights norms to the actions in question, but denies its participation, whilst there is evidence of state agents as perpetrators on a widespread scale and across a range of violations. Such a situation of mass violations of human rights typically arises in the context of armed conflicts – the context in which the Court’s case law on impunity has been developed, which I should like to recall hereinafter.¹⁵

The Court has criticised: (a) various types of abuses by security forces and (b) the latter’s use of inappropriate methods in carrying out their duties.

11. See [Resolutions 1507 \(2006\)](#) and [1562 \(2007\)](#) and [Recommendations 1754 \(2006\)](#) and [1801 \(2007\)](#) on secret detentions and illegal transfers of detainees involving Council of Europe member states (rapporteur: Dick Marty, Switzerland, ALDE); see also [Resolution 1433 \(2005\)](#) on lawfulness of detentions by the United States in Guantánamo Bay (rapporteur: Kevin McNamara, United Kingdom, SOC).

12. “Assessing damage, urging action”, report of the Eminent Jurists Panel, International Commission of Jurists, February 2009 (link to press release: <http://ejp.icj.org/IMG/PRUN4-5-09.pdf>).

13. See *Streletz, Kessler and Krenz v. Germany*, judgment of 22 March 2001 (Applications Nos. 34044/96, 35532/97 and 44801/98) upholding the conviction by German courts of senior GDR officials and Politburo members responsible for ordering the shootings, sentenced to between five and seven years in prison for incitement to commit intentional homicide, and *K.-H. W. v. Germany*, judgment of 22 March 2001 (Application No. 37201/97) upholding the conviction of a young border guard to one year and ten months (suspended on probation) of juvenile detention for intentional homicide.

14. See [Doc. 10774](#) of 21 December 2005 (“Human rights violations in the Chechen Republic: the Committee of Ministers’ responsibility vis-à-vis the Assembly’s concerns”; rapporteur: Rudolf Bindig, Germany, SOC), paragraph 10; on 14 June 2007, a military court in Rostov-on-Don finally found Captain Eduard Ulman and three subordinates guilty of the 2002 killing of six civilians, including a pregnant woman and a teenager. Ulman and two other servicemen failed to show up in court but were sentenced *in absentia* to fourteen, twelve and eleven years’ imprisonment, respectively. The fourth serviceman, present in court, was jailed for nine years.

15. The following passage is mostly based on the contribution to the Berlin conference by Mr Vincent Berger, juriconsult with the European Court of Human Rights.

2.3.1. Main types of abuses

2.3.1.1. Disappearances and torture

16. The Assembly has produced important work on the topic of enforced disappearances, including a report by Mr Christos Pourgourides (Cyprus, EPP/CD) on high-profile disappearances in Belarus accusing the minister of the interior and the prosecutor general at the time of having masterminded the killings in question and their subsequent cover-up.¹⁶ Whilst the suspects named by the Assembly were struck with targeted sanctions by the Council of the European Union and the United States, they have still not been brought to justice in Belarus, as demanded by the Assembly. The Assembly has also taken a principled stand in support of the adoption of the United Nations Convention for the Protection of All Persons from Enforced Disappearances¹⁷ and covered enforced disappearances issues in a number of reports concerning human rights violations in the Chechen Republic.¹⁸

17. The Court has produced an abundant case law on torture and disappearances. We will therefore merely highlight a few recent cases and the principles that emerge from them, while noting that cases of disappearance and torture generally come under the scope of Articles 2 and 3 of the ECHR.

18. The Court has interpreted the right to life (Article 2 of the ECHR) as imposing on the states an obligation to protect the life of every person within their jurisdiction.¹⁹ This has enabled the Court to bring disappearances within the scope of application of Article 2. Nonetheless, the Court has considered that the disappearance of an individual while in custody was not in itself sufficient to conclude that there has been a violation of Article 2.²⁰ However, it subsequently considered that the disappearance of an individual in south-east Turkey in the climate of violence that prevailed in the 1990s could be regarded as a danger for the life of the individual in question.²¹ It also held that the particular circumstances of detention, unacknowledged by the authorities, could allow for the presumption that the person had died.²² Among recent cases concerning disappearance and torture/inhuman and degrading treatment, it is worth noting, for example, *Abdurzakova and Abdurzakov v. Russia* and *Medova v. Russia* of 15 January 2009 (judgments not yet final), in which the Court concluded that there had been a violation of Article 2, particularly on account of the failure to conduct an effective investigation into the circumstances of the disappearance of the applicants' family members, and a violation of Article 3 on account of the distress and anxiety suffered by the applicants as a result of their relatives' disappearance.

19. In order to prevent abuses, the Court imposes procedural obligations on the contracting states, notably the requirement to conduct an effective investigation. Thus, in the context of Article 2, it is clear that this obligation applies when an individual disappears while he or she is entirely under the responsibility of the security forces.²³ In this respect, the Court has condemned Russia on numerous occasions for various shortcomings in its obligation to conduct effective investigations in Chechen cases. The case of *Gongadze v. Ukraine*²⁴ is also noteworthy. The Court found that there had been a violation of the procedural obligation of Article 2, noting that the state authorities had attached greater importance to demonstrating the non-involvement of senior state figures in the case than to ascertaining the truth about the circumstances surrounding the disappearance and death of the applicant's husband.²⁵

16. See [Resolution 1371 \(2004\)](#) and [Recommendation 1657 \(2004\)](#).

17. See [Resolution 1463 \(2005\)](#) and [Recommendation 1719 \(2005\)](#); rapporteur: Christos Pourgourides (Cyprus, EPP/CD). As a follow-up to the hearing on enforced disappearances by the Sub-Committee on Human Rights in Limassol (Cyprus) in November 2008, another motion was tabled during the April 2009 part-session aimed in particular at supporting the ratification process of this important convention.

18. See [Resolutions 1403 \(2004\)](#) and [1479 \(2006\)](#) and [Recommendations 1600 \(2003\)](#), [1679 \(2004\)](#) and [1733 \(2006\)](#); rapporteur: Rudolf Bindig (Germany, SOC).

19. See *Paul and Audrey Edwards v. the United Kingdom*, Application No. 46477/99, judgment of 14 June 2002, paragraph 54 and following.

20. See *Kurt v. Turkey*, 25 May 1998, paragraphs 107-108, *Reports* 1998-III.

21. See *Ipek v. Turkey*, Application No. 25760/94, paragraph 167, ECHR 2004-II.

22. See *Bazorkina v. Russia*, Application No. 69481/01, 27 July 2006, where it was established that an officer had ordered the execution of an alleged terrorist.

23. See *Nehyet Günay and Others v. Turkey*, Application No. 51210/99, 21 October 2008, which concerned a detainee who fled following an ambush organised by the security forces in which he had been obliged to co-operate.

24. Application No. 34056/02, paragraph 179, ECHR 2005-XI.

25. The *Gongadze* case was also the subject of Assembly Resolution 1645 (2009) and Recommendation 1856 (2009) on the investigation of crimes allegedly committed by high officials during the Kuchma rule in Ukraine: the *Gongadze* case as an emblematic example (rapporteur: Sabine Leutheusser-Schnarrenberger, Germany, ALDE).

20. With regard to specific measures that could remedy shortcomings in the investigation in cases of missing persons, the Committee of Ministers welcomed, in its interim Resolution ResDH(2007)25, the exhumation and identification programme set up by the Turkish Government in the context of the *Cyprus v. Turkey* case.²⁶ However, it was also emphasised that these measures had not been sufficient. Finally, it should be noted that the state's responsibility may arise even where the state itself is not involved.²⁷

21. As to actions amounting to torture and/or inhuman and degrading treatment committed by state agents, Article 3 imposes a double obligation on states, namely a substantive and a procedural obligation. For the prohibition on torture to be effective in practice, it is essential to carry out a thorough and effective investigation in order to identify and punish those responsible. If this were not the case, it would be possible for state agents to flout the rights of those under their control with virtual impunity.²⁸ Thus, the failure to meet this obligation represents in itself a violation of Article 3 (see *Assenov*, cited above).

22. By way of example, the Court recently found a violation of the substantive and procedural limbs of Article 3 in the case of *Karaduman and Others v. Turkey*.²⁹ The applicants had been placed in police custody as the police suspected them of belonging to an illegal organisation, the Hizbullah (the Party of God). Following questioning in the premises of the security directorate, medical reports noted bruises and injuries on the applicants' bodies, although other reports made no mention of them. The administrative investigation into the circumstances of their detention in police custody was discontinued and the only police officer charged was acquitted by a criminal court. In the absence of a plausible explanation from the government as to the origin of these injuries, the Court considered that there had been a violation of the substantive aspect of Article 3. As to the procedural aspect, the Court held that, in the absence of appropriate medical examinations, the applicants had been deprived of the fundamental guarantees protecting individuals placed in custody. Consequently, the requirement to conduct an investigation had not been met.

23. Finally, the Court has only rarely found the existence of an administrative practice of torture and inhuman and degrading treatment. This was the case, in particular, in *Ireland v. the United Kingdom*,³⁰ in which the Court found that the use of five interrogation techniques by the British police was an "administrative practice" of inhuman and degrading treatment in the context of the Northern Ireland conflict.

2.3.1.2. Destruction of villages

24. Among the examples of executive malfunctioning that may accompany armed conflicts, the Court has denounced the destruction of villages by the security forces in Turkish cases. These actions gave rise to two forms of violation of the Convention. Firstly, the European Court found that the deliberate burning by the security forces of residents' homes in Kurdish villages amounted to inhuman treatment.³¹ Secondly, it found that the Turkish state's efforts to improve the general situation of internally displaced persons following the destruction of their villages had been neither adequate nor effective under Article 1 of Protocol No. 1. In particular, it noted that no practical measures had been taken to facilitate the return of the applicants to their village. In addition, the authorities had not offered them alternative employment or housing. Accordingly, the Court concluded that there had been a violation of Article 1 of Protocol No. 1. Equally, since the applicants had been deprived of access to their homes, there had also been a breach of Article 8 of the Convention.³²

2.3.2. Inappropriateness of the methods used

2.3.2.1. Police and gendarmerie

25. It is the Court's long-established case law that the use of lawful force should not be excessive. In other words, the force used should be strictly proportionate to achieving the authorised aim (*McCann and Others v. the United Kingdom*)³³ concerning persons suspected of wishing to commit an attack, and beaten by the

26. Grand Chamber, Application No. 25781/94, ECHR 2001-IV.

27. See *Osmanoğlu v. Turkey*, Application No. 48804/99, 24 January 2008, which concerned the disappearance of a shopkeeper after he was led from his shop by two unknown men.

28. See *Assenov and Others v. Bulgaria*, 28 October 1998, paragraph 102, *Reports* 1998-VIII, and *Labita v. Italy* (Grand Chamber), Application No. 26772/95, paragraph 131, ECHR 2000-IV.

29. Application No. 8810/03, paragraphs 69 et seq., 17 June 2008.

30. 18 January 1978, Series A No. 25.

31. See *Selçuk and Asker v. Turkey*, 24 April 1998, *Reports* 1998-II, and *Ayder and Others v. Turkey*, Application No. 23656/94, paragraph 110, 8 January 2004.

32. *Doğan and Others v. Turkey*, Applications Nos. 8803-8811/02, 8813/02 and 8815-8819/02, paragraph 154, ECHR 2004-VI; see also the just-satisfaction judgment in this case, 13 July 2006.

33. 27 September 1995, paragraph 149, Series A No. 324.

security forces when arrested). The Court has also criticised the use of a machine gun to disperse demonstrators in the case of *Güleç v. Turkey*.³⁴ In that case, there were insufficient gendarmes present to deal with acts of violence committed by the demonstrators. As a result, the officers called for backup. At least two armoured vehicles were used. The Court noted that the gendarmes used a very powerful weapon because they apparently did not have truncheons, riot shields, water cannons, rubber bullets or tear gas. This shortcoming was all the more unacceptable, in the Court's opinion, in that the county where the events took place was located in a region where a state of emergency had been declared. The Court concluded that the force used to disperse the demonstrators, which had resulted in the death of a 15-year-old pupil, had not been absolutely necessary within the meaning of Article 2.

26. Equally, in the case of *Nachova v. Bulgaria*,³⁵ the Grand Chamber found that the regulations in force had made it possible to send a heavily armed team of servicemen to arrest two men, without prior discussion of the threat that they might represent or clear warning of the need to minimise the risk of loss of life. In the Court's view, the operation had thus been prepared and conducted in breach of the principle of the right to life. The Court also held that the use of potentially fatal force could not be considered "absolutely necessary", given that it was known that the individual to be arrested did not represent any threat to the life or physical integrity of others and was not suspected of having committed a violent crime. Accordingly, it concluded that there had been a violation of the substantive aspect of Article 2.

27. Finally, it is interesting to note that the Court has recently specified that, in the event of uncontested use of fatal force by state agents in situations where they were in control, it is for the respondent state to establish that the force used did not go beyond what was "absolutely necessary" (see *Mansuroğlu v. Turkey*³⁶ concerning the use of fatal force by a special police task force during an anti-PKK operation in a state-of-emergency region).

2.3.2.2. Armed forces

28. The Court has concluded that the methods used by armed forces were disproportionate, notably in the case of *Isayeva and Others v. Russia*.³⁷ This concerned the use of extremely powerful weaponry. According to the conclusions of the internal investigation, 12 S-24 air-to-ground unguided rockets missiles were fired. When one of these rockets explodes, it breaks into several thousand pieces of shrapnel and its impact range exceeds 300 metres. It follows that anyone who was in the area targeted by those strikes at that time was in danger of death. In view of all the circumstances of the case, the Court considered that the military operation in question had not been prepared and conducted with the precautions necessary for the protection of civilian life. It held that Article 2 of the Convention had been breached (see also *Isayeva v. Russia*³⁸ on the use of heavy combat weapons in a residential area without prior evacuation of civilians).

29. Indeed, as the number of judgments relating to Chechnya has grown, the European Court of Human Rights has used increasingly strong language in its rulings against Russia.³⁹ For example, in *Musayev and Others v. Russia* (2007),⁴⁰ which involved a massacre of civilians by Russian forces, the Court deeply regretted that six years after the "cold-blooded execution of more than 50 civilians" in a village outside of Grozny, "no meaningful result whatsoever" had been achieved in the task of identifying and prosecuting the individuals responsible. In its unanimous decision, the seven-judge chamber said that "the astonishing ineffectiveness of the prosecuting authorities in this case could only be qualified as acquiescence in the events".

30. The report by Mr Wolfgang Wodarg (Germany, SOC) on private military and security firms and erosion of the state monopoly on the use of force⁴¹ has shown that a serious impunity risk arises also from the increasing use, in conflict situations, of private companies (mercenaries).

34. 27 July 1998, paragraph 71, *Reports* 1998-IV.

35. 6 July 2005, Applications Nos. 43577/98 and 43579/98.

36. Application No. 43443/98, 26 February 2008.

37. Applications Nos. 57947/00, 57948/00 and 57949/00, 24 February 2005.

38. Application No. 57950/00, 24 February 2005.

39. At the aforementioned conference in Berlin on 23 March 2009, Tanya Lokshina (Human Rights Watch, Moscow) gave an overview of the Court's cases concerning this region, focusing on the need to fully implement these judgments, beyond the payment of the pecuniary compensation fixed by the Court. For a thorough overview of this case law, see Philip Leach, "The Chechen conflict: analysing the oversight of the European Court of Human Rights", *European Human Rights Law Review*, 2008, pp. 732-761.

40. *Musayev and Others v. Russia*, Applications Nos. 57941/00, 58699/00 and 60403/00, judgment of 26 July 2007, paragraph 164.

41. [Doc. 11787](#); see [Recommendation 1858 \(2009\)](#), paragraph 7.

2.3.3. Spread of methods used in conflict zones to other regions

31. The actions described above are mostly limited to particular parts of the state's territory (for example, south-eastern Turkey, Northern Ireland, or the Chechen Republic of the Russian Federation). But the danger exists that the methods used by the security forces in these regions are "exported" to other parts of the national territory, for example by the transfer or promotion of state agents practising such methods to other regions. Mr Rudolf Bindig, who was the Assembly's rapporteur on the human rights situation in Chechnya for many years, had warned, in his report in 2004 on the human rights situation in the Chechen Republic, that the systematic human rights violations and the "climate of impunity" he had noted in Chechnya threatened to spill over to neighbouring republics in the North Caucasus region of the Russian Federation and beyond.⁴² Whilst the Russian delegation at the time rejected Mr Bindig's analysis, the developments on the ground in the past years have unfortunately proven him right. The situation in Ingushetia has deteriorated dramatically,⁴³ and Dagestan and North Ossetia have also seen violence and counter-violence increase considerably.⁴⁴ Even in the Chechen Republic itself, where the exceptional measures justified by the "counter-terrorist operations" were recently lifted, violence is on the increase again since the beginning of this year.⁴⁵ The situation in the North Caucasus region seems to be a case in point showing that even the most drastic anti-terrorist measures used by the security forces have not succeeded in stamping out the violence – they just seem to have swelled the ranks of desperate young men taking to the mountains to prepare their revenge. It is obvious that the report currently under preparation by Mr Dick Marty (Switzerland, ALDE) on "Legal remedies for human rights violations in the North Caucasus region" is of particular importance. It is therefore regrettable that the rapporteur's fact-finding visit to the region first scheduled for November 2008 and then for May 2009 was recently postponed again.

32. Another geographical zone where war crimes were committed on a massive scale is the territory of the former Federal Republic of Yugoslavia. It was clear from the outset that the International Criminal Tribunal for the former Yugoslavia (ICTY) would only be able to handle the most serious cases concerning the top of the chain of command. As the ICTY's mandate is drawing to an end, care must be taken that there will be no de facto impunity of lower and mid-level commanders and other participants in these atrocities. For this reason, the three reports currently under preparation by the Committee on Legal Affairs and Human Rights – on member states' duty to co-operate in the prosecution of war crimes,⁴⁶ on the protection of witnesses: cornerstone of justice and reconciliation in the Balkans,⁴⁷ and on inhuman treatment of persons and illicit organ trafficking in Kosovo⁴⁸ – are of particular importance for the fight against impunity.

2.4. Perpetrators have a link with state agents, but are not necessarily state agents themselves

33. In another important category of impunity cases, perpetrators have a link with state agents (for example, state agents identify targets or provide protection to the perpetrator), but are not necessarily state agents themselves. This could be the case of numerous killings of journalists and human rights activists by "unknown perpetrators". The recent spate of killings of adversaries of Chechen President Ramzan Kadyrov⁴⁹ is widely thought to fall into this category. Extreme right-wing groups in the Russian Federation are thought to

42. See [Resolution 1403 \(2004\)](#), paragraph 8: "The climate of impunity diagnosed by the Assembly in [Resolution 1323 \(2003\)](#) and [Recommendation 1600 \(2003\)](#) appears to be spreading to Ingushetia, where a number of abuses took place in 2003 and early 2004 that are reminiscent of those taking place in the Chechen Republic and which have remained largely unpunished. The conflict in the North Caucasus appears to be spreading like an epidemic, threatening the rule of law throughout the Russian Federation."

43. See "How the conflict in Ingushetia has unfolded" (HRW, 2008), at: www.hrw.org/reports/2008/russia0608/5.htm; and Memorial: "More kidnappings in Chechnya, more killings in Ingushetia" (*North Caucasus Analysis*, Volume 10, Issue 17, 1 May 2009) at:

www.jamestown.org/programs/ncw/single/?tx_ttnews%5Btt_news%5D=34938&tx_ttnews%5BbackPid%5D=24&cHash=753142046e.

44. See interview with Ekaterina Sokirianskaya, North Caucasus expert at the Russian human rights centre Memorial of 9 December 2008, at: www.peaceinthecaucasus.org/PDF%20and%20Audio%20files/InterviewESDec09_final.pdf.

45. See statistics on the number of violent incidents in the North Caucasian republics published by the Center for Strategic and International Studies on 22 April 2009, available at:

www.csis.org/index.php?option=com_csis_pubs&task=view&id=4045.

46. Rapporteur: Mr Doric (Croatia, EPP/CD).

47. Rapporteur: Mr Gardetto (Monaco, EPP/CD).

48. Rapporteur: Mr Marty (Switzerland, ALDE).

49. See public statement adopted by the Committee on Legal Affairs and Human Rights on 27 January 2009, available at: <http://assembly.coe.int/Main.asp?link=/CommitteeDocs/ComDocMenuJurEN.htm>.

be behind the attack in March 2009 on human rights activist Lev Ponomarev.⁵⁰ Such ultra-nationalist thugs, who also roam the streets in other countries, are thought to act spontaneously at times, but occasionally also upon instigation by and under the protection of certain elements in the security services.⁵¹

34. Mr Holger Haibach (Germany, EPP/CD), in his report on the situation of human rights defenders in Council of Europe member states,⁵² has very rightly called for an end to impunity of those who target human rights defenders. Crimes remaining unpunished against persons whose work consists in protecting others, in addition to their impact on the victims themselves and their families, also have a demoralising effect on all victims of human rights violations: if the defenders can no longer defend themselves, who can still hope to have their rights protected by them?

35. Closely related are the cases of attacks and other forms of pressure on applicants to the European Court of Human Rights, on their relatives and on their lawyers, as described in Mr Christos Pourgourides' (Cyprus, EPP/CD) report on the member states' duty to co-operate with the European Court of Human Rights.⁵³ The Assembly, in its [Resolution 1571 \(2007\)](#),⁵⁴ urgently called on all member states to stamp out such attacks and to hold their perpetrators to account.

36. At the previously-mentioned Berlin conference on impunity,⁵⁵ Mrs Tanya Lokshina (Human Rights Watch), who had just returned from a three-week field trip to Chechnya, found that intimidation of victims of human rights violations and of their lawyers had become so intense in this region that many dare not even complain to the local law enforcement bodies, let alone take their case to the European Court of Human Rights. Such behaviour is an attack on the very foundations of the European system for the protection of human rights, and cannot be tolerated, neither by the states nor by the Court. This is not an acceptable way to reduce the Court's excessive workload!⁵⁶

37. In order to tackle this group of cases, an appropriate strategy could be to try and persuade the "links" within the state security bodies to abandon the perpetrators, by convincing the political leaders that it is in their interest to sever any links to such crimes by clamping down on rogue elements – thus demonstrating for all to see that such elements are indeed "rogues".

2.5. Violations committed by individual state agents, covered up by "colleagues" or by institutional negligence

38. This category of impunity, which potentially concerns all member states of the Council of Europe, typically involves police officers, prison guards, etc. who commit individual acts of violence or otherwise violate human rights in the fulfilment of their duties.⁵⁷ Such abuses are often effectively covered up by colleagues or superiors, or by the generally negligent attitude of the institutions concerned, including, at times, the prosecution services and the courts. Another group of cases belonging to this category is the widespread practice of "hazing" of new recruits resulting in deaths, bodily harm, and desertions, as described in a report on human rights of members of the armed forces prepared for the Assembly by Mr Alexander Arabadjiev (Bulgaria, EPP/CD).⁵⁸ The Court's case law provides ample illustrations of such "institutional negligence", in the form of the passivity of the prosecution service, delays in criminal proceedings, and excessive leniency by judges.⁵⁹

50. See statement of Mrs Leutheusser-Schnarrenberger of 1 April 2009: "Assembly rapporteur shocked by the attack on Lev Ponomarev", at:

http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4527.

51. See *Le Monde Diplomatique* of 23 January 2007 "Qui a tué Hrant Dink?", at: www.monde-diplomatique.fr/carnet/2007-01-23-Qui-a-tue-Hrant-Dink; and Reporters sans Frontières, 27 October 2008, "The accused mastermind's brother now also charged in Dink murder", available at: www.rsf.org/article.php3?id_article=28977.

52. [Doc. 11841](#) (see in particular paragraphs 17-19, 44-49 and 51); see also [Resolution 1660 \(2009\)](#) and [Recommendation 1866 \(2009\)](#).

53. [Doc. 11183 \(2007\)](#).

54. See paragraph 17.3.

55. See paragraph 2 above.

56. A much better way would be the ratification of Protocol No. 14, see Opinion 271 (2009) on Draft Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Assembly on 30 April 2009.

57. See Amnesty International, 2 April 2009, "France – Case studies – Public outrage: police officers above the law in France", AI Index: EUR 21/007/2009 (Public), at: www.amnesty.org/en/library/asset/EUR21/007/2009/en/6f574d80-0710-44ee-b4e2-0ac2afc3c83c/eur210072009en.html;

58. [Doc. 10861 \(2006\)](#); see also [Recommendation 1742 \(2006\)](#).

2.5.1. Passivity on the part of the prosecution service

39. The Court has criticised the failure to prosecute and the prosecution service's passivity in a number of cases, especially *Abdulsamet Yaman v. Turkey*.⁶⁰ The applicant alleged that he had been subjected to torture while in police custody. The Court concluded that there had been a violation of Article 13 of the Convention (right to an effective remedy), noting that, in spite of the applicant's serious allegations, the prosecution service in question had remained totally passive and had not brought proceedings against the perpetrators of the ill-treatment.

2.5.2. Delays in criminal proceedings

40. With regard to the excessive length of criminal proceedings, the Court has examined this question from two main angles: under Article 6 (right to a fair trial) and Articles 2 and 3 of the Convention (right to life and prohibition of torture). The requirements of Article 6 are well known: the length of the proceedings must be reasonable. Furthermore, particular expedition is necessary depending on what is at stake in the proceedings, notably where a detainee's fate is concerned (see *Abdoella v. the Netherlands*).⁶¹ In the case of *Selmouni v. France*,⁶² the Court found that the proceedings, still pending when the case was before the Court, had already lasted more than six years and seven months. Referring to its conclusions as to the admissibility of the complaint under Article 3 and the procedural obligations arising under that article, the Court concluded that the length of the proceedings had been excessive from the perspective of Article 6, paragraph 1.

41. The Court subsequently identified an implicit requirement of promptness arising directly from Articles 2 and 3 of the Convention. It specified that this principle concerned not only the police investigation stage, but also the judicial phase and the criminal proceedings as a whole (see, *mutatis mutandis*, *McKerr*, cited above, and *Fatma Kaçar v. Turkey*).⁶³ Thus, in the case of *Teren Aksakal v. Turkey*,⁶⁴ the Court considered that a duration of twenty-two years for criminal proceedings was, in the absolute, difficult to justify. In this case, the length of proceedings was by no means justified, in spite of the complexity of the domestic legal proceedings arising from the dual systems of military and civil courts with jurisdiction during a state of siege.⁶⁵

42. The Court has also, more specifically, denounced the absence of, or delays in, criminal or disciplinary proceedings in the light of this implicit requirement under Article 2.⁶⁶ In those cases, the Court has acknowledged that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in, or tolerance of, unlawful acts.

43. Equally, the Court has repeatedly criticised delays in criminal prosecution in the context of Article 3, particularly in the above-mentioned *Selmouni* case. During its examination of the exhaustion of domestic remedies, the Court noted that, five years after the facts, no one had been charged, although the police officers accused by the applicant had been identified. It noted that the police officers did not finally appear before a court until almost five years after they had been identified and seven years after the period of police custody in question. Accordingly, the Court concluded that the remedy available to the applicant was not, in this case, an ordinary remedy sufficient to afford him redress for the violation he alleged.

2.5.3. Leniency by judges

44. The Court has also criticised, in the context of Articles 2 and 3, domestic courts which were prepared to allow life-endangering offences or actions contrary to Article 3 to go unpunished, particularly by imposing minimal suspended terms of imprisonment on the officers found responsible. Thus, in the case of *Okkali v.*

59. See, for example, the judgments of the Court in *Labita v. Italy*, judgment of 6 April 2000, Application No. 26772/95, paragraphs 130-136, and *Bati and Others v. Turkey*, judgment of 3 September 2004, Application Nos. 33097 and 57834/00, paragraph 134.

60. Application No. 32446/96, paragraph 57, 2 November 2004.

61. 25 November 1992, Series A No. 24-A.

62. Grand Chamber, No. 25803/94, ECHR 1999-V.

63. Application No. 35838/97, paragraphs 76-79, 15 July 2005.

64. Application No. 51967/99, paragraph 98, ECHR 2007.

65. See also *Vasil Petrov v. Bulgaria*, Application No. 57883/00, paragraphs 79-84, 31 July 2008, with regard to a duration of seven years.

66. See *Yaşa*, cited above, paragraphs 102-104; *Cakıcı*, cited above, paragraphs 80, 87 and 106; *Tanrikulu v. Turkey* (Grand Chamber), Application No. 23763/94, ECHR 1999-I; *Mahmut Kaya v. Turkey*, Application No. 22535/93, paragraphs 106-107, ECHR 2000-III; and *McKerr*, cited above, paragraph 114.

Turkey,⁶⁷ the Turkish courts had reduced the sentences imposed on police officers accused of ill-treatment of a 12-year-old boy, on the ground that they had made “qualified confessions”. They had imposed the minimal suspended sentence of one year’s imprisonment. In the Court’s view, the judges’ decision indicated the exercise of tolerant discretionary power with regard to extremely serious unlawful acts. The criminal system as it had been applied in this case had therefore no dissuasive effect likely to ensure the effective prevention of such acts. Consequently, there had been a violation of Article 3.

45. This case-law approach has been reiterated under Article 2, especially in the *Nikolova and Velichkova v. Bulgaria* judgment.⁶⁸ In this case, the Court noted that although the Bulgarian Criminal Code of 1968 had given the domestic courts the possibility of imposing a sentence of up to twelve years’ imprisonment on guilty police officers, they had imposed only the minimum three-year suspended sentence. In addition, they had never imposed disciplinary sanctions. On the contrary, one of the officers in question had been promoted five years after the opening of the criminal proceedings. The Court held that in those circumstances the state had encouraged a feeling of impunity among police officers and concluded that there had been a violation of Article 2.

46. To overcome impunity in this group of cases, the focus must be on awareness-raising measures within the institutions concerned (police, military, judiciary), combined with clear signals from the very top of the respective hierarchies that such acts will not be tolerated, including exemplary, well-publicised investigations and prosecutions of such offences.

2.6. Individual violations committed by non-state actors; institutional failure to hold perpetrators responsible

47. This group of cases includes those instances of crimes against human rights defenders or journalists in which the involvement of individual state agents as perpetrators (Chapter 2.5 above) or as having a link with the perpetrators (Chapter 2.4 above) is suspected but cannot be established with certainty. The reasons are often similar to those indicated above for the impunity of individual violations committed or instigated and covered up by state agents – the passivity or incompetence of the law enforcement bodies regarding certain types of crime or, more precisely, certain categories of victims.

48. Some types of crimes, though definitely committed by non-state actors, without the involvement of state agents even being suspected, nevertheless deserve to be addressed as impunity issues because of the passive or overly lenient attitude of the law enforcement bodies motivated by racism, anti-Semitism, xenophobia, Islamophobia, homophobia, sexism or other forms of intolerance.

2.6.1. Impunity of crimes motivated by xenophobia, anti-Semitism and homophobia

49. Violence against foreigners or even just foreign-looking persons on grounds of racism and xenophobia is on the rise in many member states, fostered by the current economic crisis. Police either fail to intervene to protect victims or even participate themselves in acts of aggression, intimidation and denigration.

50. The Roma population in many European countries is particularly vulnerable to such behaviour. Mr József Berényi (Slovak Republic, EPP/CD) is currently preparing a separate report on this pressing issue, and the Committee on Legal Affairs and Human Rights held a hearing with Roma representatives at its meeting in Târgu Mureş (Romania) on 18 May 2009. On 4 March 2008, the Court concluded in *Stoica v. Romania*⁶⁹ that there had been a violation of Article 3 and Article 14 in conjunction with Article 3 of the ECHR. In that case, it held that the respondent government had not proved that the incident between the applicant – a Rom – and police officers was other than racially motivated, and the evidence indicated that the police officers’ behaviour was clearly racially motivated. In the *Cobzaru v. Romania* case, the Court reached similar conclusions.⁷⁰

51. The spectre of anti-Semitism has shown its ugly face again in a number of countries, including in a novel form, which is on the increase since the spate of violence in the Middle East, consisting in extremists expressing their hatred against Israel by violence against local Jewish people.⁷¹

67. Application No. 52067/99, paragraph 76, ECHR 2006.

68. Application No. 7888/03, paragraph 63, 20 December 2007.

69. Application No. 42722/02, 4 March 2008.

70. In that case, the Court held that there had been a violation of Article 3 and of Article 14 owing to the Romanian authorities’ failure to look into the possible existence of a racial motive for the maltreatment suffered by the applicant and because of their attitude during the investigations; *Cobzaru v. Romania*, Application No. 48254/99, 26 July 2007.

71. See for example *Le Monde*, 30 April 2009, “Le procès du Gang des Barbares se tiendra à huis clos”, at: www.lemonde.fr/societe/article/2009/04/30/le-proces-du-gang-des-barbares-se-tiendra-a-huis-clos_1187393_3224.html.

52. Violence motivated by homophobia is also all too often tolerated or even encouraged by complacent or homophobic members of the law enforcement bodies and the courts. This topic is part of another separate report under preparation by Mr Andreas Gross (Switzerland, SOC). At its meeting in Berlin on 24 March 2009, the Committee on Legal Affairs and Human Rights heard the testimonies of several LGBT activists giving first-hand evidence of hostile attitudes and even violence of which they had become victims.

2.6.2. Impunity of violence against women and so-called “honour crimes”

53. Violence against women and so-called “honour crimes” are often not prosecuted with the required severity because of the sexist attitudes of the police, prosecutors or judges dealing with these cases or because of their archaic cultural attitudes that place values such as the honour of the family or the children’s duty of obedience above the right of individual liberty or even the right to life. In some legal systems, crimes motivated by the protection of “honour” are still punished less severely than similar crimes with other motives. In so far as legislation to this effect still exists, it must urgently be abolished. Where unacceptable outcomes are favoured by court practice, judicial actors must be convinced in an open public dialogue that such attitudes cannot be justified, not even by well-meaning, but misguided “tolerance” for different cultural attitudes and backgrounds.⁷²

54. The Court has deduced from Article 3 of the Convention (prohibition of torture) a positive obligation to punish rape and to investigate instances of rape. Thus, in the case of *M.C. v. Bulgaria*,⁷³ the Court examined, in particular, whether Bulgarian legislation and practice, which required proof of active resistance by the victim in order to launch a prosecution, had such significant flaws as to amount to a breach of the respondent state’s positive obligations under Articles 3 and 8. The Court acknowledged that victims of sexual abuse – in particular, girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear further violence on the part of the perpetrator. Having regard to contemporary standards and trends in this area, the Court reiterated that member states’ positive obligations under Articles 3 and 8 of the Convention were to be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, even if the victim had provided no physical resistance.⁷⁴ The Court found violations of Articles 3 and 8 in this case.

55. “Femicides”, violence against women and so-called “honour crimes” were recently the subject of separate reports of the Parliamentary Assembly by Mrs Lydie Err (Luxembourg, SOC), Mr José Mendes Bota (Portugal, EPP/CD) and Mrs Ann Cryer (United Kingdom, SOC).⁷⁵ At the aforementioned conference on impunity in Berlin,⁷⁶ Professor Beate Rudolf gave a short overview of the present situation regarding this category of impunity cases.

2.6.3. Impunity of corruption

56. Finally, this category of impunity includes cases of corruption in which perpetrators (whether they are public officials or private individuals, including senior executives of private companies) often remain unpunished because of institutional weaknesses both within the law enforcement agencies, who sorely lack sufficiently qualified staff in adequate numbers and in private and public enterprises, in which compliance procedures remain weak.

57. At the Berlin conference, Ms Monica Macovei, former Minister of Justice of Romania, and Mr Mark Livschitz, a lawyer specialising in corporate corruption and compliance strategies, made presentations giving concrete examples of such abuses and pointing out systemic weaknesses.⁷⁷ In their view, perpetrators of serious and very damaging acts of corruption enjoy almost complete impunity.⁷⁸ The small number of cases

72. See for example NZZ, 7 February 2008, “Scharia-Justiz für britische Muslime?”.

73. Application No. 39272/98, ECHR 2003-XII.

74. See also *X and Y v. the Netherlands* (26 March 1985, paragraphs 27 et seq., Series A No. 91) concerning a mentally handicapped girl subjected to sexual abuse in a home for disabled children, while she was still a minor but had reached the age at which sexual relations with an adult were legally permitted. The Dutch legislation did not provide for the possibility of criminal proceedings by such persons’ legal representatives in such a situation. The Court concluded that “Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated”.

75. See [Resolutions 1654 \(2009\)](#), [1635 \(2008\)](#) and [1327 \(2003\)](#) and [Recommendation 1847 \(2008\)](#).

76. Paragraph 2 above.

77. See presentation of Dr Livschitz at the conference in Berlin on 23 March 2009 (paragraph 2).

78. Mr Frunda (Romania, EPP/CD) pointed out that recently adopted changes to the Romanian criminal code have improved the situation in his country and that further proposals are currently under examination in parliament.

that are actually prosecuted and condemned represent only the tip of the iceberg. The legal framework as well as the resources available to investigators and prosecutors are woefully inadequate – and I tend to share the point of view of the experts that this may well not be so by accident.

58. Corruption, both in the public and in the private sectors, exists in all member states, albeit not to the same degree. It undermines the rule of law and presents a serious threat to our countries' democratic institutions and their prosperity. The Council of Europe's Group of States against Corruption (GRECO)⁷⁹ makes an important contribution to the fight against this scourge. The report currently under preparation in the Assembly by Mr Pieter Omtzigt (Netherlands, EPP/CD) on the protection of "whistle-blowers" will make another contribution: improved protection for insiders who have the courage to expose wrongdoings may increase the chances to hold to account the authors of such wrongdoings. Finally, the report under preparation by Mr Kimmo Sasi (Finland, EPP/CD) on corruption in the judiciary will draw attention to a particularly dangerous form of corruption, which puts into question the very existence of the rule of law.

2.7. Impunity ... extended to international actors?

59. The role of international actors is on the increase worldwide. In crisis regions, international peacekeepers (and sometimes "peace-makers"), mandated by the United Nations Security Council or not, are carrying out important tasks. These are entrusted to soldiers, police officers or bureaucrats put at the disposal of the international mission by states, and who are as a rule no better and no worse than soldiers, police officers and bureaucrats at home. Some of them commit mistakes, even crimes, which have victims that deserve justice. So far, this is almost impossible, as in addition to the factors which contribute to impunity at the national level, international actors also benefit from privileges and immunities preventing them and their superior national and international authorities from being held responsible.

60. The cases of *Bankovic* and *Behrami* decided by the Court show that there is still a long way to go until international actors are held to account even in the same imperfect way as national ones. The *Bankovic* case⁸⁰ concerned the 1999 bombing by NATO of the RTS (Radio Televizije Srbije) headquarters in Belgrade.⁸¹ The Court found the application inadmissible because Serbia, at the time, was not a party to the ECHR, and the NATO countries participating in the bombing campaign did not extend their jurisdiction over this country by the mere fact of participating in the bombing campaign. The Court thus distinguishes the use of air power from military occupation by ground forces: in the cases of *Loizidou v. Turkey*⁸² and *Ilascu v. Russia and Moldova*,⁸³ the Court had held Turkey and Russia responsible for violations of the Convention committed by the internationally unrecognised authorities of northern Cyprus and Transnistria respectively.

61. In the case of *Behrami*,⁸⁴ children were killed playing with unexploded ordnance in Kosovo and the applicants alleged that this was due to the negligence of KFOR soldiers, who were responsible for demining the area. The Court found that the actions of KFOR had to be attributed to the United Nations, under whose mandate KFOR acted, so that the states whose soldiers were deployed in Kosovo could not be held responsible. The same reasoning was applied in the related case of *Saramati*, who had complained about unlawful detention and unfair trial by KFOR officials.⁸⁵

62. Recent judgments of the European Court of Justice in Luxembourg⁸⁶ seem to indicate that there is a growing awareness for the need to hold international actors to account in the same way as national ones, for the sake of protecting individuals who might otherwise find themselves devoid of all legal remedies,⁸⁷ a development which Mr Dick Marty has warmly welcomed in his report on United Nations Security Council and European Union anti-terror blacklists.⁸⁸

79. See www.coe.int/t/dghl/monitoring/greco/default_EN.asp?

80. *Bankovic and Others v. Belgium* and 16 other contracting states (Application No. 52207/99), admissibility decision of 19 December 2001.

81. See Amnesty International, statement of 23 April 2009: "Serbia: impunity for NATO – ten years after Operation Allied Force", at: www.amnesty.org/en/for-media/press-releases/serbia-impunity-nato-%E2%80%93-ten-years-after-operation-allied-force-20090423.

82. *Loizidou v. Turkey*, Application No. 15318/89, judgment of 18 December 1996.

83. *Ilascu and Others v. Moldova and Russia*, Application No. 48787/99, judgment of 8 July 2004.

84. *Behrami and Behrami v. France*, Application No. 71412/01, admissibility decision of 31 May 2007.

85. *Saramati v. France, Germany and Norway*, Application No. 78166/01, admissibility decision of 31 May 2007.

86. See, in particular, the *Kadi and Al Barakaat* case (judgment of the European Court of Justice in Joined Cases C-402/05 P and C-415/05, *P. Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*), 3 September 2008 at: <http://curia.europa.eu/en/actu/communiqués/cp08/aff/cp080060en.pdf>.

63. Rather than making it even more difficult to hold perpetrators of human rights violations responsible where these occur during operations under international mandate, the international community should set a positive example of transparency and accountability.⁸⁹

64. This topic should also be addressed in more depth by a future, separate report of the Assembly, which should also address issues related to state immunity.⁹⁰

3. Conclusions

65. It is clear that impunity, in all forms and shapes, must be eradicated in all member states of the Council of Europe, as a matter of individual justice, deterrence and the preservation of the rule of law.

66. Several speakers at the Berlin conference, including Mr Luis Moreno-Ocampo, the Prosecutor of the International Criminal Court (ICC), have emphasised the importance of international justice for the fight against impunity, and the need for international courts and tribunals to be supported by states in manifold ways – by executing arrest warrants, protecting and providing access to witnesses and other evidence, and by enacting laws providing for the extraterritorial jurisdiction of national courts in order to allow the ICC to act in accordance with its subsidiary mandate. The principle of universal jurisdiction has very recently been strengthened again by a judgment of the European Court of Human Rights upholding a French judgment condemning a Mauritanian for acts of torture committed in his country, which had decreed an amnesty covering his case.⁹¹ Resolution 1644 (2009) on co-operation with the International Criminal Court (ICC) and its universality⁹² has summed up the action required from member states in this respect – first and foremost, for all those who have not yet done so, to ratify the Statute of Rome, and to enact the necessary legislation to implement the Statute of Rome in domestic law.

67. As we have seen, different groups of cases of impunity require different responses. But all have in common that there is clear case law of the European Court of Human Rights, which recognises impunity of perpetrators of serious human rights violations as a clear violation of the European Convention on Human Rights.

68. The key to developing a strategy to eradicate impunity is therefore the full implementation of the Court's judgments in this field. This will be an important issue that the Assembly's rapporteur on execution of the Court's judgments, Mr Christos Pourgourides (Cyprus, EPP/CD), will address in his ongoing work. It would seem obvious, for example, that in a case in which the Court has found a violation of the right to life (Article 2 of the ECHR) in the form of a failure to investigate an extra-judicial killing or an enforced disappearance, the execution of the judgment cannot be limited to the payment of the pecuniary compensation the Court has fixed. A proper investigation must still be carried out and the perpetrators held to account; and general measures must be taken in order to avoid that similar violations occur in the future because of the same structural defects that had caused the violation at issue. I am convinced that, if all the Court's judgments on impunity cases were properly executed in this spirit, we would come close to eradicating impunity for good.

69. Of course, the quality of the execution process depends very much on the clarity of the Court's judgments themselves, in which there should be no room for any defeatism regarding the likelihood of the execution of the one or the other aspect of a judgment.⁹³

87. See Amnesty International, public statement of 23 March 2009, AI Index: EUR 70/005/2009 ("Hearing into deaths in Kosovo could find UN accountable") with an instructive report on the cases of two young men killed during a demonstration in 2007 when Romanian UNMIK police fired rubber bullets at demonstrators and whose relatives are finding it exceedingly difficult to obtain any form of redress.

88. See Doc. 11454 addendum of 22 January 2008, paragraph 12, welcoming the fresh conclusions of the ECJ's Advocate General prefiguring the *Kadi and Al Barakaat* judgment.

89. See M. Milanovic and T. Papic, "As bad as it gets: the European Court of Human Rights's *Behrami and Saramati* decision and general international law", *International and Comparative Law Quarterly*, Vol. 58, April 2009, pp. 267-296.

90. See *Al-Asani v. the United Kingdom*, Application No. 35763/97, Grand Chamber judgment of 21 November 2001; see also the proposals made by the Secretary General of the Council of Europe on 30 June 2006 (SG(2006)01) on the "Follow-up to the Secretary General's reports under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies" (paragraph 2, third bullet point: "the need to ensure that the rules on state immunity do not lead to impunity for perpetrators of serious human rights violations", and paragraphs 15-21).

91. See *Le Monde* of 1 April 2009: "La Cour européenne consacre le principe de la compétence universelle".

92. See Doc. 11722 (2009); rapporteur: Mrs Däubler-Gmelin (Germany, SOC).

93. See *Kukayev v. Russia*, judgment of 15 November 2007, paragraph 134: "It is therefore very doubtful that the situation before the breach could be restored".

70. Sustainable success of the execution process also depends on the consistency of the Committee of Ministers' approach, which must be the same for all member states, excluding all double standards. In this context, we can in fact commend the Committee of Ministers for having consistently noted that there is a continuing obligation to conduct effective investigations inasmuch as procedural violations of Article 2 have been found by the Court.⁹⁴ This is a logical application of the principle of subsidiarity: it is the member states which are best equipped to carry out effective investigations, not the Court or the Committee of Ministers. It would be excellent if this practice could be further developed, for example by the Committee of Ministers establishing that a judgment of the European Court of Human Rights finding an investigation ineffective shall be treated as a new fact within the meaning of Article 4, paragraph 2, of Protocol No. 7 (right not to be tried or punished twice – *ne bis in idem*), thus permitting the retrial of a person acquitted as a result of fundamentally flawed investigations or proceedings.

71. In this context, I should also like to stress that work on execution of judgments in Article 2 cases involving lack of investigation would greatly benefit if as little time as possible were to pass between the killing or disappearance and the judgment of the Court, as for obvious reasons, evidence tends to be more difficult to come by over time. The mere communication of an application to the national authorities by the Court, with appropriate questions as to investigative actions taken to date, has been known to trigger a spate of activity within the law enforcement agencies eager to avoid embarrassing findings by the Court. Sending such a signal to the national authorities at an early stage, which is possible under the Court's rules,⁹⁵ ought to be part of the Court's priorities, especially in cases that are emblematic for a large number of potential victims, who are feeling threatened in the same way as the victim in the case at issue and are keenly watching the reaction of the international instances, including the Court (for example other journalists in the *Gongadze* and *Politkovskaya* cases).

72. As the Assembly's main proposal, I should like to suggest that the Assembly reiterate its invitation to the Committee of Ministers to elaborate guidelines on the fight against impunity, drawing from the case law of the European Court of Human Rights, the Committee of Ministers' own work on execution of judgments, the pertinent resolutions and recommendations of the Assembly and the work of the CPT, as well as from the work of the United Nations and relevant non-governmental organisations. These guidelines must also make it clear that immunity of international actors for serious human rights violations, in particular violations of non-derogable rights, such as the right to life, is unacceptable, and specify which measures shall be taken and remedies made available at national and international levels to tackle impunity.

Reporting committee: Committee on Legal Affairs and Human Rights.

Reference to committee: Bureau decision of 9 January 2009.

Draft resolution and draft recommendation unanimously adopted by the committee on 19 May 2009.

Members of the committee: Mrs Herta **Däubler-Gmelin** (Chairperson), Mr Christos Pourgourides, Mr Pietro Marcenaro, Mr Rafael Huseynov (Vice-Chairpersons), Mr José Luis Arnaut, Mrs Meritxell Batet **Lamaña**, Mrs Marie-Louise Bemelmans-Videc, Mrs Anna Benaki, Mr Petru **Călian**, Mr Erol Aslan Cebeci, Mrs Ingrida Circene, Mrs Ann Clwyd, Mrs Alma Čolo, Mr Joe Costello, Mrs Lydie Err, Mr Renato Farina, Mr Valeriy Fedorov, Mr Joseph Fenech Adami, Mrs Mirjana **Ferić-Vac**, Mr György **Frunđa**, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mrs Svetlana Goryacheva, Mrs Carina Hägg, Mr Holger Haibach, Mrs Gultakin Hajibayli, Mr Serhiy **Holovaty**, Mr Johannes Hübner, Mr Michel Hunault, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Željko Ivanji, Mrs Iglia Ivanova, Mrs Kateřina Jacques, Mr András **Kelemen**, Mrs Kateřina Konečná, Mr Franz Eduard Kühnel, Mr Eduard Kukan (alternate: Mr József **Berényi**), Mrs Darja Lavtižar-Bebler, Mrs Sabine Leutheusser-Schnarrenberger, Mr Aleksei Lotman, Mr Humfrey Malins, Mr Andrija Mandić, Mr Alberto Martins, Mr Dick Marty (alternate: Mr Andreas **Gross**), Mrs Ermira Mehmeti, Mr Morten Messerschmidt, Mr Akaki Minashvili, Mr Philippe Monfils, Mr **Alejandro Muñoz Alonso** (alternate: Mr **Agustín Conde Bajén**), Mr Felix Müri, Mr Philippe Nachbar, Mr Adrian **Năstase**, Mr Valery Parfenov, Mrs Maria Postoico, Mrs Marietta **de Pourbaix-Lundin**, Mr Valeriy Pysarenko, Mr Janusz **Rachoń**, Mrs Marie-Line Reynaud, Mr François Rochebloine, Mr Paul Rowen, Mr Armen Rustamyan, Mr Kimmo Sasi, Mr Ellert Schram, Mr Dimitrios Stamatias, Mr Fiorenzo Stolfi, Mr Christoph Strässer, Lord John **Tomlinson**, Mr Tuğrul **Türkeş**, Mrs Özlem Türköne, Mr Viktor Tykhonov (alternate: Mr Ivan **Popescu**), Mr Øyvind Vaksdal, Mr Giuseppe Valentino, Mr Hugo Vandenberghe, Mr Egidijus Vareikis, Mr Luigi Vitali, Mr Klaas **de Vries**, Mrs Nataša Vučković, Mr Dimitry Vyatkin, Mrs Renate **Wohwend**, Mr **Jordi Xuclà i Costa**.

94. Interim Resolution CM/ResDH(2009)44 concerning the action of the security forces in Northern Ireland (case of *McKerr v. the United Kingdom* and five similar cases).

95. See Rules 40 and 41 of the Rules of the Court.

Doc. 11934 Report

NB: The names of the members who took part in the meeting are printed in **bold**.

Secretariat of the committee: Mr Drzemczewski, Mr Schirmer, Ms Heurtin.