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Setting up an independent European commission of inquiry into serious allegations of grave human rights violations

Information report¹

Committee on Legal Affairs and Human Rights

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Summary

Back in 2009, the Parliamentary Assembly agreed to examine the advisability of setting up an independent European commission of inquiry into serious allegations of grave human rights violations (“the Cassese proposal”).

The Committee on Legal Affairs and Human Rights, having balanced the costs and benefits of various options, has expressed its preference for strengthening the Assembly’s own investigatory powers rather than creating a completely new mechanism which would have limited added value with respect to the Council of Europe’s existing human rights monitoring bodies, such as the European Court of Human Rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

According to the Committee on Legal Affairs and Human Rights, the Assembly’s present mechanism of parliamentary rapporteurs, mandated to prepare reports on specific topics, provides – to a certain extent – the possibility to implement certain elements of the Cassese proposal, which should be fed into the ongoing reform process of the Assembly:

- legally clarifying and strengthening, as appropriate, national delegations’ duty to co-operate with Assembly rapporteurs;
- clarifying and strengthening, in specific instances, the role of rapporteurs in following up Assembly resolutions and recommendations.

1. Background and procedure to date

1. On 24 June 2009, Mr Antonio Cassese² spoke before the Parliamentary Assembly of the Council of Europe during the debate on the report by the Committee on Legal Affairs and Human Rights entitled “The state of human rights in Europe: the need to eradicate impunity” ([Doc. 11934](#)).

2. In his speech, he made a proposal to set up an “independent European commission of inquiry into serious allegations of grave human rights violations”. The proposal was welcomed by the rapporteur, Ms Herta Däubler-Gmelin (Germany, SOC), and an invitation to examine the advisability of setting up such a commission was included in the Assembly’s resolution and recommendation.³

1. Reference to committee: Bureau decision, Reference 3586 of 26 June 2009. Information report approved by the committee on 8 March 2011.

2. President of the Special Court on Lebanon and former President of the International Criminal Tribunal for the former Yugoslavia.

3. See [Resolution 1675 \(2009\)](#), paragraph 13, and [Recommendation 1876 \(2009\)](#), paragraph 5.



3. The Committee of Ministers, in its reply to the recommendation, adopted on 21 April 2010, stressed the role of the existing Council of Europe monitoring mechanisms, of the Secretary General and of the Commissioner for Human Rights, and saw no need to create an additional structure at this stage.⁴

4. In the Assembly, the proposal gave rise to a reference, by decision of the Bureau,⁵ to the Committee on Legal Affairs and Human Rights, for report. On 11 September 2009, Ms Herta Däubler-Gmelin (Germany, SOC) was appointed rapporteur. After her departure from the Assembly, I was appointed as rapporteur on 26 January 2010.

5. At its meeting on 24 January 2011, the Committee on Legal Affairs and Human Rights authorised me to depart from the usual procedure and to present an information report to the committee, coupled with concrete measures to implement some aspects of the proposal, to be included in the committee's position regarding the ongoing consultation process on the reform of the Assembly.

6. As you will see, I do not support the proposal to create a totally new instrument, which I consider as unrealistic in the present circumstances. In order to be faithful to my mandate as rapporteur, I have nevertheless prepared a presentation and analysis of Mr Cassese's proposal in some detail, which is appended to this memorandum. I have drawn some conclusions as regards the feasibility of certain elements of the proposal, together with practical suggestions as to their implementation as part of the reform package for the Assembly that is currently under discussion and to which the Bureau has invited all committees to contribute.

2. Conclusion: preference for strengthening the Assembly's own investigatory tools

7. I have taken a constructive approach vis-à-vis the Cassese proposal all along. In the appended presentation, I have described its potential added value and the different options for its implementation in the most objective manner possible. I have also presented the as yet unresolved issues of potential overlap with existing mechanisms both within the Council of Europe and outside, in particular in the framework of the United Nations.

8. Balancing costs and benefits of the various options open to the Assembly, I have come to the conclusion that at this time of severe budgetary constraints at the Council of Europe and in all its member states, the difficulties involved in creating a completely new investigatory mechanism are simply too great. The value added by the creation of an additional investigatory body would be very limited, also in view of the risk of undermining the Council of Europe's successful existing monitoring bodies such as the European Court of Human Rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

9. In view of the prevailing political and budgetary climate, the Assembly should avoid making itself dependent on decisions to be taken by the Committee of Ministers. Instead, I suggest that the Assembly should make use of its own powers of self-organisation in order to realise by its own means the greatest possible part of Antonio Cassese's proposals.

10. The most promising angle for such a pragmatic approach, in view of the above, would be to strengthen the Assembly's own investigative powers, namely the power of its rapporteurs to make inquiries into allegations of serious human rights violations. The ongoing consultation process on the Assembly's reform provides an excellent opportunity to take the necessary steps, including ones that would require changes in the Assembly's Rules of Procedure.

11. In my view, the Assembly's existing mechanism of parliamentary rapporteurs mandated to prepare reports on specific topics provides the most promising opportunity for implementing key elements of Mr Antonio Cassese's proposal. After all, a number of reports presented by our distinguished colleagues in the past, for example those by Mr Dick Marty on CIA renditions and secret detentions, on organ trafficking in Kosovo⁶ and on the situation in the North Caucasus, those by Mr Christos Pourgourides on the disappearances in Belarus and on the "spy cases" in the Russian Federation, those by Mr Rudolf Bindig on the human rights situation in Chechnya, by Ms Sabine Leutheusser-Schnarrenberger on the Gongadze case in Ukraine, or by Mr Paul Flynn on the handling of the "swine flu" pandemic, have already fulfilled many of the goals pursued by the Cassese proposal. These reports have also given the Assembly, and the Council of

4. See Assembly [Doc. 12212](#) (reply of the Committee of Ministers to [Recommendation 1876 \(2009\)](#)).

5. Reference 3586 of 26 June 2009.

6. All reference to Kosovo in this text, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

Europe as a whole, a high degree of visibility and credibility as “Europe’s top human rights watchdog” – in the words of the *Washington Post*. We should build on these achievements and further improve this important tool.

12. There are two possibilities in particular that we could pursue simultaneously, by feeding them into the reform process as part of our committee’s input that the Bureau has asked us to transmit to the Ad hoc Committee on the Reform of the Parliamentary Assembly by April 2011:

12.1. Legally clarifying and strengthening, as appropriate, the national delegations’ duty to co-operate with the Assembly’s rapporteurs The committee could request the Ad hoc Committee on the Reform of the Parliamentary Assembly to request the Committee on Rules of Procedure, Immunities and Institutional Affairs to assess the feasibility from a statutory point of view of including in the Assembly’s Rules of Procedure a provision specifying the national delegations’ duty to co-operate with the Assembly’s rapporteurs, including a duty to assist in the organisation of fact-finding missions, appointments with the competent state authorities at the appropriate level, access to official documents, and the opportunity to meet with representatives of civil society and witnesses. Depending on the above-mentioned statutory assessment, persistent failure to co-operate with a duly mandated rapporteur of the Assembly could also be included in the list of reasons for the challenge of credentials or the reconsideration of previously ratified credentials on substantive grounds (Rules 8 and 9).

12.2. Clarifying and strengthening, in appropriate cases, the role of the rapporteurs in following up the Assembly’s resolutions and recommendations The Rules of Procedure could also be completed so as to clarify and further strengthen the rapporteurs’ role in following up the implementation of the Assembly’s resolutions and recommendations. The credibility of the Assembly’s resolutions and recommendations could benefit from improved follow-up, which has been identified in the reform discussions as one of the Assembly’s weak points. The Rules could make it clear that in appropriate cases, as determined by the relevant committee in agreement with the Bureau, the rapporteur continues to be mandated beyond the adoption of the resolution and/or recommendation by the Assembly to co-operate with all relevant national and international actors, including law enforcement bodies, in order to assist in the implementation of the Assembly’s texts after their adoption, and to report back to the Assembly as needed on the follow-up activities and the progress achieved or obstacles encountered.

13. Last but not least, all rapporteurs should continue to benefit from the professional secretariat support provided by the existing competent committee secretariats, under the authority of the Assembly’s Secretary General. If a rapporteur requires particular resources (in terms of staff or logistics) in order to successfully cope with a particularly difficult, wide-ranging or otherwise challenging mandate, it will be up to the Secretary General of the Assembly to make the necessary arrangements.

Appendix

1. Presentation and assessment of Mr Antonio Cassese's proposal

In order to deal effectively with serious and mass violations of international human rights and humanitarian law,⁷ individual criminal responsibility is more efficient than state responsibility in preventing future violations and relieving the suffering of victims. In reply to the question "How are we to make procedures to establish the criminal responsibility of the perpetrators of such violations more effective?", Mr Cassese developed the idea of setting up an international non-judicial supervisory mechanism, namely an independent European commission of inquiry.

1.1 Why an international non-judicial mechanism?

The idea is based on three basic postulates:

- First of all, states are always reluctant to subject illegal actions by their nationals to an international court;
- Secondly, fact-finding missions are much more easily accepted by states, as they consider that they encroach less on their sovereign rights;
- Thirdly, when an international judicial-type mechanism is established, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), proceedings are often extremely long.

1.2 What prerogatives would such a commission of inquiry have?

- *Terms of reference:* The commission would be responsible for rapidly ascertaining whether the acts complained of (torture, genocide, crime against humanity, terrorism) have indeed been committed and to submit its conclusions/observations/recommendations to the state concerned.
- *Type of referral:* Cases should be submitted to the commission of inquiry by the victim or by the state on whose territory the acts were committed, or else by the state of nationality of the victims.
- *A legally non-binding mechanism:* Such a procedure would be much more acceptable to states if the commission's conclusions were not legally binding.
- *Public/confidential nature of the procedure:* The conclusions could be transmitted confidentially to the state concerned, a short summary being sent to the applicants. On the other hand, the commission would be authorised to disclose its conclusions if the state failed to comply with them.
- *Composition:* The commission should be made up of independent experts of excellent reputation and high moral authority, as this would lend its conclusions sufficient weight to trigger criminal proceedings at the national level.
- *Added value of such a mechanism:* Such a commission of inquiry would work in parallel to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). It would have a broader scope and work to establish facts relating to any allegation of blatant and systematic violation of human rights in Europe, but it would act solely at the request of the alleged victims or the state concerned.

2. Different existing forms of non-judicial⁸ international commissions of inquiry

2.1 In the United Nations context

2.1.1 Temporary independent commissions of inquiry under the umbrella of the United Nations

These commissions of inquiry, which are often set up selectively and temporarily under strong political pressure, usually comprise several independent experts and have specific, narrowly defined terms of reference and variable powers of investigation (on-the-spot visits in agreement with the state concerned, hearings of witnesses and public officials, transmission of case files and items of evidence, etc.).

7. In particular, such atrocities as torture, crimes against humanity, genocide, war crimes and terrorism, which I consider as international crimes.

Recent examples: “Cassese” Commission on Darfur/Sudan;⁹ “Richard Goldstone” Commission¹⁰ on the military operations conducted in Gaza before, during and after the period from 27 December 2008 to 18 January 2009; Independent international commission of inquiry on the incidents on board the Mavi Marmara flotilla.¹¹

2.1.2 “Special procedures” of the Human Rights Council (and the former Commission of Human Rights)¹²

Special procedures are represented either by an individual (“Special Rapporteur”, “Special Representative of the Secretary General”, “Representative of the Secretary General”, or “independent expert”) or by a working group, which usually comprises five members (one for each region of the world). The special procedure mandates are prepared and defined under the resolution which instigates them. Mandate holders serve on an individual basis and receive no remuneration or financial compensation. Mandate holders also conduct country visits (in agreement with the state concerned) in order to investigate the human rights situation at the national level. Some countries have issued a “standing invitation” for special procedures, which means that they are, in principle, prepared to receive all mandate holders. After the visit, a mission report is drawn up setting out conclusions and recommendations. A “code of conduct” and “special procedures manual” setting out guidelines and working methods for mandate holders were adopted in 2008.

2.1.3 Inquiry mechanisms in cases of enforced disappearances

– UN Working Group on Enforced disappearance¹³

This group has the main (humanitarian) task of helping the families of disappeared persons to ascertain the fate and current location of the disappeared persons (it has no jurisdiction to establish responsibility in specific cases of disappearances or other human rights violations committed at the time of disappearance) by maintaining links with the families of disappeared persons and the relevant governments. It may also receive and consider individual communications regarding disappearances and prepare recommendations. It is also responsible for supervising progress made by states in honouring their obligations under the 1992 Declaration on enforced disappearance and assist governments in implementing them, *inter alia* by means of on-the-spot visits.

– The monitoring mechanism of the International Convention on the Protection of All Persons from Enforced Disappearance of 20 December 2006: the Committee on Enforced Disappearance¹⁴

8. This document will concentrate on non-judicial investigatory bodies. Consequently, inquiries carried out in the framework of the Organization of American States since 1961 by its two judicial and quasi-judicial supervisory bodies (the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights, respectively) have been left to one side. For further details, see:

www.corteidh.or.cr/index.cfm?CFID=956868&CFTOKEN=83407944; www.cidh.oas.org/visitas.eng.htm.

9. On 18 September 2004, acting under Chapter VII of the Charter of the United Nations, the Security Council adopted **Resolution 1564 (2004)** urging the Secretary General to set up rapidly an international Commission of Inquiry in order immediately to investigate the information on violations of international humanitarian law and international instruments relating to human rights by all parties in Darfur, and also to determine whether acts of genocide had been committed and identify the perpetrators of these violations in order to ensure that those responsible were brought to justice. See the report prepared by this commission: www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WPS%20S%202005%2060.pdf.

10. On 3 April 2009, the President of the United Nations Human Rights Council set up the Fact-Finding Mission on the Gaza Conflict, mandated to “investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 to 18 January 2009, whether before, during or after”. See resolution:

www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48_ADVANCE1.pdf.

11. Commission made up of high-level experts appointed by the President of the Human Rights Council; see www2.ohchr.org/english/bodies/hrcouncil/docs/14session/RES.14.1_AEV.pdf.

12. “Special procedures” is the usual term for the mechanisms put in place by the Commission of Human Rights and taken over by the Human Rights Council, dealing with the specific situation of a country or thematic questions throughout the world. There are currently 30 thematic mandates and eight country mandates. The High Commissioner for Human Rights places staff, logistical aid and an investigatory department at the disposal of these mechanisms in order to help them in their duties. The special procedures mandates generally instruct those concerned to examine, supervise, advise and report on human rights situations in specific countries or territories, in the case of country mandates, or on serious phenomena of human rights violations worldwide, in the case of thematic mandates. The special procedures may involve several types of activities, including dealing with individual complaints, conducting surveys, providing advice on technical co-operation at national level, and carrying out general promotional activities.

13. www2.ohchr.org/english/issues/disappear/procedures.htm#1.

The committee, which comprises 10 independent experts sitting on an individual basis and elected by the states parties, in addition to the traditional monitoring functions (considering reports submitted by states parties, issuing observations and recommendations) and quasi-judicial duties (considering individual or inter-state communications) also has powers of investigation (questioning).

It may also, under an emergency procedure, accept from anyone with a legitimate interest a request for urgent action to seek and locate a disappeared person, and may transmit to the state concerned a request to “take all the necessary measures, including interim measures, to locate and protect the person concerned in accordance with this convention”. This is rather similar to the interim measures which the European Court of Human Rights can issue (Rule 39 of the Rules of Court).

The committee may conduct on-the-spot visits (in agreement with the state concerned) in the event of a serious infringement of the convention, communicating its observations and recommendations to the state, without any restrictions relating to confidentiality.

Lastly, the committee may issue urgent appeals to the General Assembly of the United Nations if it receives information to the effect that enforced disappearances are occurring in a general or systematic manner throughout the territory of one of the states parties.

2.2 Inquiries under international humanitarian law

Lastly, alongside the indefatigable and remarkable humanitarian work of the International Red Cross in the context of armed conflicts and post-conflict situations,¹⁵ Article 90 of the Additional Protocol to the 1949 Geneva Conventions provides for the setting up of an International Fact-Finding Commission with a view to preserving the safeguards granted to the victims of armed conflicts. Officially inaugurated in 1991, the commission is a permanent international body primarily mandated to investigate any alleged infringement or serious violation of international humanitarian law. It has fifteen members serving on an individual basis, elected by the states which have recognised its jurisdiction. Despite the fact that 71 states from all the continents have already recognised its jurisdiction, the commission has not yet received a mandate to inquire.¹⁶

2.3 European Union and Russia/Georgia conflict

On 2 December 2008, the Council of the European Union set up an independent international fact-finding mission on the conflict in Georgia,¹⁷ geared to investigating the origins and development of the conflict in Georgia, including in the light of international humanitarian law and human rights, and the allegations that had emerged in this context. The results of the inquiry were presented to the parties to the conflict, and to the Council, the Organization for Security and Co-operation in Europe (OSCE) and the United Nations, in the form of a report.¹⁸ This was the first such mission of inquiry in the history of the European Union.

2.4 Non-governmental organisations (NGOs)

Innumerable investigatory missions are regularly conducted by larger NGOs with the requisite logistical and financial resources (Amnesty International, Human Rights Watch, International Federation for Human Rights (FIDH) and Memorial). The missions are often assigned to lawyers or high-level independent experts. We might mention, in this context, the “Guidelines on International Human Rights Fact-Finding Visits” and Reports (the Lund-London Guidelines) of June 2009,¹⁹ which are geared to improving the accuracy, objectivity, transparency and credibility of human rights inquiries, and are primarily intended for NGOs.

14. To date, 83 countries have signed the convention and 19 have ratified it (including four Council of Europe member states), although 20 ratifications are required for the effective entry into force of this treaty.

15. See, in the European context, the work conducted in Kosovo and the North and South Caucasus: [Resolution 1739 \(2010\)](#) and [Recommendation 1923 \(2010\)](#) on the situation in Kosovo and the role of the Council of Europe; see [Resolution 1738 \(2010\)](#) and [Recommendation 1922 \(2010\)](#); [Resolution 1553 \(2007\)](#) and [Recommendation 1797 \(2007\)](#) on missing persons in Armenia, Azerbaijan and Georgia from the conflicts over the regions of Nagorno-Karabakh, Abkhazia and South Ossetia.

16. www.ihffc.org.

17. www.ceiig.ch/Report.html.

18. www.ceiig.ch/pdf/IIFMCG_Volume_I.pdf.

19. www.factfindingguidelines.org/guidelines.html.

3. The Council of Europe context

The Council of Europe already has considerable experience of investigatory missions. Apart from its judicial organ, the European Court of Human Rights,²⁰ the Organisation has several other mechanisms capable of conducting various types of inquiries, including:

3.1 Parliamentary Assembly of the Council of Europe

The Parliamentary Assembly of the Council of Europe, its political statutory organ, has sent many rapporteurs to areas in which serious large-scale human rights violations have been perpetrated, including:

- in Armenia, Azerbaijan and Georgia where people disappeared during the conflicts over the regions of Nagorno-Karabakh, Abkhazia and South Ossetia;²¹
- following the recent conflict between Georgia and Russia;²²
- the Balkans where people disappeared during armed conflicts or internal violence;²³
- the human rights situation in the North Caucasus region (particularly the Chechen Republic);²⁴
- Cyprus;²⁵
- Kosovo.²⁶

Parliamentary rapporteurs may visit the region in question and the state(s) concerned are duty-bound to cooperate in the organisation of fact-finding visits. Rapporteurs are elected by the competent committee seized for report by the Assembly on the basis of motions for a resolution or a recommendation tabled by at least 20 parliamentarians from at least five different national delegations. They are assisted by the respective committee secretariats. The level of co-operation from the states in question is generally satisfactory, given that the procedure is not, in principle, confidential. However, the rapporteurs are free to protect their sources if necessary.²⁷

The Committee on Legal Affairs and Human Rights has also set up an ad hoc sub-committee responsible for investigating the disappearance of four opposition figures in Belarus. The sub-committee, which was chaired by Mr Sergei Kovalev (Russia, ALDE), was unable to visit Belarus owing to lack of co-operation by the authorities, but it did hear a number of witnesses in Strasbourg. It placed the information it gleaned at the disposal of the rapporteur subsequently appointed, Mr Christos Pourgourides (Cyprus, EPP/CD), who was able to complete the inquiry also because the authorities initially co-operated with him by allowing him access to key suspects and witnesses. In 2004, Mr Pourgourides presented his report to the Assembly, setting out serious accusations against leading representatives of the Belarusian authorities, including the former Minister of the Interior, Mr Sivakov, and the former Head of the Presidential Administration and Prosecutor General, Mr Sheyman.²⁸

20. According to Article A1 of the Rules of Court, the Court may, of its own motion, conduct investigations on the ground in examining any application submitted to it. Furthermore, Article 39 of the rules allows the Court, either at the request of a party or of any other person concerned, or of its own motion, to indicate to the parties any interim measure which it considers should be adopted in the interests of the parties. The Court may request information on the implementation of the interim measures it has indicated. Moreover, the need for interim measures was highlighted in the case *Magomed Magomadov v. Russia*: see footnote 51 in *Doc. 10679* on enforced disappearances.

21. See [Resolution 1553 \(2007\)](#) and [Recommendation 1797 \(2007\)](#) on missing persons in Armenia, Azerbaijan and Georgia from the conflicts over the regions of Nagorno-Karabakh, Abkhazia and South Ossetia.

22. See [Resolution 1664 \(2009\)](#) and [Recommendation 1869 \(2009\)](#) on the humanitarian consequences of the war between Georgia and Russia: follow-up to [Resolution 1648 \(2009\)](#).

23. See [Resolution 1414 \(2004\)](#) and [Recommendation 1685 \(2004\)](#) on persons unaccounted for as a result of armed conflicts or internal violence in the Balkans.

24. [Resolution 1738 \(2010\)](#) and [Recommendation 1922 \(2010\)](#) on legal remedies for human rights violations in the North Caucasus region.

25. [Resolution 1628 \(2008\)](#) on the situation in Cyprus.

26. [Resolution 1782 \(2011\)](#) on investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo.

27. The rapporteur on alleged secret detentions and unlawful transfers of detainees, Mr Dick Marty (Switzerland, ALDE) requested and obtained express permission from the Committee on Legal Affairs and Human Rights to preserve the anonymity of his sources where necessary. The same rapporteur has undertaken, with the committee's approval, to protect his sources on the organ trafficking allegations in Kosovo.

28. See [Resolution 1371 \(2004\)](#) and [Recommendation 1667 \(2004\)](#).

This instrument has some weaknesses and shortcomings:

- The workload and political pressure are sometimes excessive and difficult to manage by a single parliamentary rapporteur when the issues at stake are particularly complex and sensitive.²⁹ This also applies to the relevant committee secretariat, which may be overpowered by the demands placed on its resources for this type of investigatory mission.
- From a legal point of view, when an Assembly rapporteur conducts an inquiry, he or she lacks legally binding investigatory powers (particularly as regards calling and interrogating witnesses, sanctioning any refusal to testify, etc.), which can hamper inquiries.
- Once the report is adopted by the Plenary Assembly or by the Standing Committee, the rapporteur's mandate is technically exhausted. Whilst some committees have in the past authorised rapporteurs to engage in some follow-up work regarding the implementation of the Assembly's conclusions,³⁰ the follow-up of the Assembly's findings could benefit from some further clarification.

3.2 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The CPT is a non-judicial, preventive, convention-based mechanism that was set up to protect prisoners and detainees. It is made up of independent and impartial experts appointed by the Committee of Ministers in light of a recommendation by the Bureau of the Assembly, itself advised by the Committee on Legal Affairs and Human Rights and its Sub-Committee on Human Rights. The CPT mechanism is based on a system of *in situ* visits which comprises several strands:

- While the CPT is required to notify the state concerned of its intention to carry out a visit, it does not have to specify the timing of the visit, which, in exceptional cases, can even take place immediately after the notification. Government objections as to the timing or venue of a visit are only possible on a limited number of grounds (national defence or public security, serious public disorder, a person's state of health or an urgent interrogation under current investigations into a serious criminal offence).
- Access to places of detention is unlimited. Delegation members can interview detainees in private and are free to enter into contact with any individuals likely to be able to provide information.
- The recommendations which the CPT may formulate on the basis of findings made during its visit are set out in a report addressed to the state concerned.
- Co-operation with the national authorities is central to the CPT's terms of reference, since its goal is to protect persons deprived of their liberty rather than to condemn states for abuses. The CPT therefore meets in private sessions and its reports are strictly confidential. Nevertheless, if a country fails to co-operate or refuses to improve the situation in the light of the CPT's recommendations, the latter may decide, on a qualified majority, to make a public statement.³¹

29. See the Assembly's work on alleged secret detentions and unlawful inter-state transfers of detainees ([Resolutions 1507 \(2006\)](#) and [1562 \(2007\)](#) and [Recommendations 1754 \(2006\)](#) and [1801 \(2007\)](#)) and on the human rights situation in North Caucasus (see above) in particular.

30. For example, at its meeting on 25 January 2011, the Committee on Legal Affairs and Human Rights authorised Mr Dick Marty, rapporteur on the investigation of allegations of inhuman treatment of people and illicit organ trafficking in Kosovo, to co-operate with EULEX or any other bodies tasked with carrying out the follow-up investigations requested by the Assembly; similarly, Mr Christos Pourgourides, rapporteur on disappearances in Belarus, was authorised to co-operate with the International Parliamentary Union, whose Committee on the Protection of the Rights of Parliamentarians investigated one of the disappearances cases, whose victim had been a member of the Belarusian Parliament.

31. The CPT's public statements are governed by Article 10.2 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which stipulates that "if the Party fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two thirds of its members to make a public statement on the matter". The CPT has had recourse to such statements in the cases of Russia (see public statements of 10 July 2007 (www.cpt.coe.int/documents/rus/2007-17-inf-eng.htm), 13 March 2007

(www.cpt.coe.int/documents/rus/2003-33-inf-eng.htm) and 10 July 2001 (www.cpt.coe.int/documents/rus/2003-33-inf-eng.pdf), and concerning the situation in the Chechen Republic, Turkey (CPT/Inf (96) 34, CPT/Inf (93) 1) and Greece (CPT/Inf(2011)10).

3.3 The Council of Europe Commissioner for Human Rights

The Office of the Commissioner for Human Rights is a non-judicial institution with broad, flexible terms of reference enabling it to conduct a variety of tasks (country visits, thematic recommendations, awareness raising and promotion of human rights and good offices³²). As the Steering Committee for Human Rights (CDDH) points out, the Commissioner can “conduct fact-finding missions in situations of serious violations of human rights (in connection with enforced disappearances) and formulate recommendations accordingly. Such a mechanism would be flexible, given the nature of the Commissioner’s terms of reference, and would permit rapid reaction to increasing cases of enforced disappearances in a given area. It would therefore be particularly well-suited to cases of enforced disappearances and could usefully complement the Court’s judicial action”.³³ However, the Commissioner’s terms of reference do not, in principle, permit him to deal with individual cases, apart from his specific mandate to protect human rights defenders. Furthermore, in pursuance of the new Article 36, paragraph 3, of the European Convention on Human Rights on third-party intervention, the Commissioner, intervening at the public hearing in the case of *M.S.S. v. Belgium and Greece*, pointed out that he intended using such powers of intervention exclusively in cases liable to have an impact on all member states.³⁴

4. Issues to be considered in connection with the “Cassese proposal”

4.1 Mission/terms of reference

Under the Cassese proposal, the commission would seem to have jurisdiction only in respect of serious, blatant and systematic violations of human rights, such as would constitute international crimes (torture, genocide, crime against humanity, terrorism). In international law, some grave violations of human rights and humanitarian law may constitute international crimes, most of which are codified in the Statute of the International Criminal Court³⁵ (in particular war crimes, crimes against humanity and genocide), and which involve the individual criminal responsibility of their perpetrators.

However, within the Council of Europe, the definition of what constitutes a “serious violation” of human rights is currently under examination and might provide a basis for the inquiry commission’s terms of reference. Under the authority of the Steering Committee for Human Rights, the Committee of Experts on Impunity is instructed to draw up guidelines against impunity in connection with serious human rights violations, derived in particular from the case law of the European Court of Human Rights and the proceedings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Draft Guidelines on Eradicating Impunity for Serious Human Rights Violations are in the process of being finalised.³⁶ These appear relevant in the present context, since “serious violations” of human rights, within the meaning of the draft, may include:

- extra-judicial killings;
- negligence leading to serious risk to life or health;
- torture or inhuman or degrading treatment by security forces, prison officers or other public officials;
- enforced disappearances;
- kidnapping;
- slavery, forced labour or human trafficking;
- rape or sexual abuse;
- serious physical assault, including that committed in the context of domestic violence;
- the destruction of homes or property.

32. See his action in the conflict between Georgia and Russia (release/exchange of prisoners, efforts to locate missing persons).

33. See the Committee of Ministers’ reply to [Recommendation 1719 \(2005\)](#) on forced disappearances.

34. www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20100901-1/en/.

35. See report of the International Commission of Inquiry on Darfur (footnote 9 above).

36. See [www.coe.int/t/dghl/standardsetting/hrpolicy/dh-i/DH-I\(2010\)12final_guidelinesCDDH.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/dh-i/DH-I(2010)12final_guidelinesCDDH.pdf).

This scheme is fully consistent with [Resolution 1675 \(2009\)](#) and [Recommendation 1876 \(2009\)](#) on the state of human rights in Europe: the need to eradicate impunity; see also [Doc. 11934](#), report of the Committee on Legal Affairs and Human Rights, rapporteur: Ms Herta Däubler-Gmelin.

So as not to overburden the future inquiry commission, it might be necessary in addition to associate with these types of serious violations a quantitative criterion to dispense with isolated cases that should be dealt with exclusively by the courts of the country concerned.

Under the proposal, the commission would only have jurisdiction for the ascertainment of the facts and for their provisional legal classification.

4.2 Structure: a permanent, temporary or ad hoc commission?

The author of the proposal does not specify this. A permanent mechanism would certainly have the advantage of establishing once and for all its mode of operation, its working methods, the duties of states to co-operate and so on, and consequently of having a permanent infrastructure and the requisite resources, which could be speedily marshalled as necessary, thus saving considerable time. A mechanism like this could therefore be at the same time permanent (routine administrative tasks would be expedited by a very limited number of staff) and placed on standby until a specific mandate to inquire is obtained.

4.3 Type of referral

Under the proposal, the commission could receive applications from the victims themselves, or from the state on whose territory the acts were committed, or even by the victims' states of nationality.

Several questions thus arise:

Which connotation should be given to the word "victim"? Would it only mean the immediate victim, the potential victim, the immediate victim *and* persons close to him or her or, exactly as contemplated by Article 24, paragraph 1 of the International Convention for the Protection of All Persons from Enforced Disappearance of 2006, "any individual who has suffered harm as the direct result of an enforced disappearance"?

It should also be foreseen that the commission may act *proprio motu*, or at the request of the Secretary General of the Council of Europe.

What about the admissibility criteria for referral? Would the only criterion indicated by the originator of the proposal (the application must be well founded *a priori*) suffice? Should plaintiffs also be required to lodge their complaints beforehand with the appropriate agencies of the country concerned?

4.4 Powers of investigation

As I see it, the following powers could be envisaged for a commission of this kind:

- a power of inspection *in situ*, on the CPT pattern described above, with generally unlimited access. The institution of "standing letters of invitation" (see above) seems particularly apposite in this context;
- a broad power to summon and question witnesses³⁷ (without state or other interference), possibly with penalties for refusal to testify or for perjury;
- power to obtain disclosure of relevant documents;
- an emergency procedure modelled, in this instance, on the experience of the United Nations Working Group on Enforced or Involuntary Disappearance, and on the new monitoring body of the aforementioned United Nations Convention on Enforced Disappearances (the Committee on Enforced Disappearances);
- a power to order interim measures, not dissimilar to the interim measures under Rule 39 of the Rules of Court, intended to ensure the effectiveness of the investigation in hand.³⁸

One might also consider having the proposed inquiry commission's investigative powers replicate those vested in the "Cassese" Commission on Darfur/Sudan.³⁹

37. In this matter, see "Guidelines on International Human Rights Fact-Finding Visits and Reports", cited in footnote 19, designed to improve accuracy, objectivity, transparency and credibility in human rights fact finding.

38. See [Resolution 1571 \(2007\)](#) on Council of Europe member states' duty to co-operate with the European Court of Human Rights.

39. See footnote 9 above.

4.5 Public/confidential nature of the procedure

In this respect the Cassese proposal resembles the procedure already established in the CPT. The principle would thus be confidentiality, and publicity would be seen as an exceptional diplomatic means of pressure against a state failing to co-operate or not abiding by the commission's conclusions.⁴⁰

Where would the plaintiff, who would only receive a concise summary of these conclusions, stand in the procedure? What if the plaintiff was a member state?

4.6 Composition

Under the proposal, the commission would be made up of independent experts of irreproachable reputation and high moral authority.

There are in fact several possible choices:

- either a body of reputed experts (judges or prosecutors, legal experts, etc.);⁴¹
- a body with a political hue (composed mainly of parliamentarians);
- a body of composite make-up.

Composition is clearly an important issue. Composite membership may include the following:

The independent experts could be appointed by the President of the Strasbourg Court and the Secretary General of the Council of Europe. They would form a pool of experts from which a choice (of three or five members) could be made for each investigation by the Secretary General in agreement with the President of the Court. Expenditure would only be incurred from the time when the commission was actually engaged on a specific assignment.

5. The difficulties of setting up such a mechanism

5.1 Place in the Council of Europe's institutional structure

The question arises where such a mechanism could be fitted in. The possibilities are manifold and all have both advantages and drawbacks:

- Within or alongside the Parliamentary Assembly or the Committee of Ministers: the shortcoming of either option is a risk of the inquiry commission's being or appearing politicised;
- Attached to the Office of the Commissioner for Human Rights, where the advantage would be the flexibility of the Commissioner's mandate and his statutory independence;
- A commission that would be totally independent, under the umbrella of the Council of Europe but separate from any other bodies of the organisation.

The question of the added value that could accrue from such a commission remains, as the Council of Europe seems far from bereft of workable possibilities for investigation in the field of human rights, on condition that the necessary political resolve is present whenever the need for a specific inquiry becomes evident.⁴² The act of creating an inquiry commission as proposed would provide proof that this resolve did exist, and would obviate the need to drum up the required consensus on each occasion and to improvise the logistical and legal arrangements case by case.

5.2 Article 35, paragraph 2b, of the European Convention on Human Rights

The European Convention on Human Rights, aiming to avoid plurality of international proceedings in the same cases, disables the Court from entertaining an application which has already been examined by an international authority (*Celniku v. Greece*, Application No. 21449/04, judgment of 5 July 2007, paragraph 39).

40. See footnote 31.

41. In that case, then, there arises the question of how to guarantee the members' independence and impartiality (provision of statutory and financial guarantees, swearing an oath, etc.).

42. See footnotes 27 and 28; see also the Secretary General's powers under Article 52 of the European Convention on Human Rights, recently used in connection with the allegations of secret detentions in Council of Europe member states (www.coe.int/T/E/Com/Files/Events/2006-cia).

If the inquiry commission is called on to consider individual complaints, under a procedure of its own (of an adversarial nature) and to deliver conclusions on them possibly leading to a settlement of the dispute, the Court might declare inadmissible an application lodged with it but previously submitted to the commission, in that event regarded as an international agency of investigation or settlement.⁴³ Admittedly this could help relieve the Court's case load but on the other hand would deprive plaintiffs of any remedy in Strasbourg, and that would be inimical to the protection of human rights.

Thus, on the face of it, the equation seems fairly hard to resolve, except perhaps by limiting a future inquiry commission's remit to establishing and assessing the facts on a provisional basis (without making specific and/or final determinations on an application brought by a victim), and likewise limiting the inquiry commission's remit to situations of violations of massive proportions so that it need not rule on individual cases.

5.3 Risks of overlap

- With the CPT where prisoners are concerned, in so far as their situation is problematic in most Council of Europe member states and may be considered a "grave systemic violation";
- With the International Criminal Court (ICC) as regards establishing facts that might constitute international crimes within the meaning of international law, insofar as the country in question is a state party to the ICC.

5.4 Cost of such a new body presenting limited added value to the Organisation at the present time of budgetary restrictions

The questions concern in particular:

- the budgetary share to be borne by the Council of Europe;
- remuneration or financial compensation of members of the inquiry commission;
- provision of logistical support.

43. Here, see in particular *Peraldi v. France* (dec.), Application No. 2095/05, judgment of 7 April 2009, a case in which the Court held that the Working Group on Arbitrary Detention was an international agency of investigation or settlement within the meaning of Article 35, paragraph 2b, of the Convention.