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Domestic Investigation and Prosecution of Atrocities Committed during Military Operations: The Impact of Judgments of the European Court of Human Rights

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The undeniable impact of the European Convention on Human Rights on the legal systems – and the wider society – of Member States of the Council of Europe would not have been possible without its unique monitoring system, centred around the European Court of Human Rights and the Committee of Ministers of the Council of Europe. The present article assesses the extent to which the European Court's judgments that have found violations of the procedural obligations under Articles 2 and 3 of the Convention to investigate unlawful killings, disappearances, acts of torture or other ill-treatment have, in fact, led to an improvement in the capability of the domestic legal systems of states parties to ensure accountability for such abuses. On the basis of four case studies, it is concluded that the European Court's judgments, coupled with the supervisory powers of the Committee of Ministers, have the potential to make a very great impact on the capability of domestic legal systems to deal with gross violations of fundamental human rights, and have led to clear and positive changes within the domestic legal systems of respondent states. Nevertheless, this is by no means always the case, and it is suggested that, in order for the Convention system to achieve its full potential in the most politically charged cases, the European Court should adopt a more proactive approach to its remedial powers by ordering specific remedial measures, to include in particular the opening or reopening of investigations.

Keywords: European Court of Human Rights, mass atrocities, effective investigation, right to life, military operations

1. Introduction

Ever since its adoption in the aftermath of the Second World War, the European Convention on Human Rights[1] has been a force for change in all European states. The undeniable impact of the Convention upon the domestic legal systems – and wider society – of the contracting states would not have been possible without the unique monitoring system centred around the European Court of Human Rights (the European Court, the ECtHR, or the Court) and the Committee of Ministers (CoM) of the Council of Europe (CoE).

While the impact of the European Court's jurisprudence in some areas is readily apparent and uncontroversial, the assessment of that impact in other contexts is more problematic. This article aims to assess whether, and, if so, to what extent, the Court's judgments have led to an

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[1] European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222 (ECHR or the Convention).

improvement in the capability of the domestic legal systems of respondent states to ensure accountability for serious human rights abuses.[2] In particular, it focuses on the impact of judgments relating to serious violations of the right to life and the prohibition of torture and other ill-treatment committed in the context of an armed conflict, belligerent occupation and, more generally, military operations carried out either within the respondent state's own territory or abroad.[3]

The European Court may be seised of applications relating to the commission of atrocities in the course of military operations in three principal ways. First, where the Convention is applicable,[4] a state party will be responsible for any direct violation of the substantive protections enshrined in the ECHR committed by its armed forces – most notably the obligations contained in Articles 2 and 3, protecting, respectively, the right to life and the right to be free from torture and other ill-treatment.[5] The second scenario, which is of particular relevance for present purposes, is that in which a breach of the Convention is alleged to have occurred as a result of the state's failure to take adequate steps to bring those responsible for unlawful killings or other atrocities – whether state agents or private actors – to justice. Finally, one step removed, the Court may be seised of cases concerning the compliance of domestic war crimes trials with the fair trial standards enshrined in Article 6 ECHR and the principles of legality and non-retroactivity of criminal sanctions under Article 7.[6]

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[2] This article relies largely on the findings, updated in the light of subsequent events, of research carried out by the author in the context of the DOMAC project. For a more extensive discussion of the case studies presented in Section 4 below, see Silvia Borelli (with Sandra Lyngdorf), 'The Impact of the Jurisprudence of the European Court of Human Rights on the Domestic Investigation of Serious Human Rights Violations by State Agents', DOMAC, May 2010, DOMAC/7, http://www.domac.is/media/domac-skjol/DOMAC_7-ECHR-SB.pdf.

[3] Throughout the article the shorthand 'military operations' will be used in a broad sense as including, unless otherwise specified, situations of armed conflict (whether international or non-international); belligerent occupation; domestic anti-terrorism operations carried out by the armed forces or other security forces; and multinational military operations carried out under the auspices of international organisations. The focus on military operations (broadly defined) is justified by the fact that, although large-scale and systematic human rights violations may, of course, occur outside the context of military activities, there are no decisions of the European Court relating to mass atrocities committed outside the context of 'military operations' as defined above.

[4] As to the extraterritorial applicability of the ECHR where a state's forces act abroad, and the circumstances in which the armed forces of a state will be held to exercise 'jurisdiction' within the meaning of ECHR art 1, such that some or all of the substantive obligations apply, see Section 4.3 below.

[5] The state's armed forces constitute organs of the state within the meaning of the rule reflected in the International Law Commission's (ILC) Articles on State Responsibility, art 4, and, on that basis, their actions and omissions are directly attributable to the state, even if they are contrary to instructions or in excess of authority: see ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) UN Doc A/56/10 (2001), arts 4 and 7. For the application of the principle by the International Court of Justice (ICJ) see, eg, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* Judgment [2005] ICJ Rep 168, [213]–[214], in particular the ICJ's observation that '[t]he conduct of individual soldiers and officers of the [Ugandan Peoples' Defence Forces] is to be considered as the conduct of a State organ. In the Court's view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda': ibid [213].

[6] On alleged violations of ECHR arts 6 and 7 in the context of war crimes trials in Bosnia and Herzegovina, see *Maktouf and Damjanovic v Bosnia and Herzegovina* App Nos 2312/08 and 34179/08 (ECtHR [GC], 18 July 2013). For discussion of earlier domestic and ECHR practice, see Silvia Borelli, 'The Impact of the European Convention on Human Rights in the Context of War Crimes Trials in Bosnia and Herzegovina', DOMAC, November 2009, DOMAC/5, http://www.domac.is/reports. On alleged violations of art 7 arising from prosecutions

This article focuses on the second scenario mentioned above, with a view to assessing how judgments in which the European Court has identified violations of Articles 2 and/or 3 ECHR as a result of the failure of the domestic authorities to ensure accountability for serious human rights abuses committed in the context of military operations have resulted in an improvement in the domestic capability of the respondent state to investigate and prosecute those abuses.

Following this introduction, Section 2 provides a brief overview of the most important aspects of the procedural obligations which the European Court has read into Articles 2 and 3 ECHR and which are most directly relevant to ensuring the effective investigation and prosecution of mass atrocities at the domestic level; Section 3 proceeds to examine the way in which the Court has interpreted the scope of those obligations in situations of military operations. Section 4 then discusses, through analysis of four case studies, some situations in which the Court has repeatedly found violations of the obligation to investigate mass atrocities, in order to illustrate the varying degree of impact which decisions of the European Court may have upon domestic legal systems. Section 5 attempts to identify the reasons that underlie the limited impact of the judgments of the Court in some cases and makes some tentative suggestions as to possible steps which may be taken so as to ensure greater impact of the Court's judgments in the future. Section 6 concludes.

2. THE PROCEDURAL OBLIGATIONS OF INVESTIGATION AND PROSECUTION UNDER ARTICLES 2 AND 3 ECHR

In terms of the impact of decisions of the European Court on the ability of states parties to the ECHR to ensure accountability for serious human rights violations, the most obvious area of interest is the complex and detailed doctrine of positive obligations which the Court has elaborated under Articles 2 and 3 ECHR.[7] Given that the various nuances of the Court's jurisprudence relating to the obligations of investigation under Article 2 of the Convention are applicable, *mutatis mutandis*, to the investigation required under Article 3 in relation to allegations of torture,[8] for the sake of simplicity this section will focus principally on the Court's case law under Article 2 ECHR.

Commenting on the scope of the obligation to 'protect life by law' enshrined in Article 2, the European Court has noted[9] that this obligation imposes

for war crimes and/or crimes against humanity under subsequently passed laws, see *Korbely v Hungary* App No 9174/02 (ECtHR [GC], 19 September 2008); *Kononov v Latvia* App No 36376/04 (ECtHR [GC], 17 May 2010).

[7] To the extent that the ECtHR has pronounced on 'direct' state responsibility for violation of arts 2 and 3 (ie substantive violations of the right to life and the prohibition of torture committed by state agents), that case law is of far more limited interest and relevance for domestic prosecutions precisely because it concerns the responsibility of the state for serious violation of the most fundamental human rights, and is therefore of little relevance to questions of individual criminal responsibility.

[8] See, eg, *Mikheyev v Russia* App No 77617/01 (ECtHR, 26 January 2006), paras 107–10.

[9] *Makaratzis v Greece* App No 50385/99 (ECtHR, 20 December 2004), para 57. See also *Osman v United Kingdom* App No 23452/94 (ECtHR [GC], 28 October 1998), para 115. In relation to art 3 see, eg, *Giuliani and Gaggio v Italy* App No 23458/02 (ECtHR [GC], 24 March 2011), para 209.

> a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.

Accordingly, Article 2 ECHR has implications both in terms of ensuring that effective penalties are provided for by domestic law, and that they are in fact applied in practice, including through the investigation of any credible allegation of unlawful deprivation of life, and the initiation of prosecutions where justified by the results of the investigation.[10] Assuming that the domestic legal system contains provisions that adequately criminalise gross human rights violations and that a functioning law enforcement and judicial system is in place, the most important obligations for the purposes of effective repression of such conduct are the procedural obligations concerning investigation.[11]

Although an obligation to conduct an effective investigation is not expressly set out in the text of Article 2, ever since the first case concerning an alleged violation of the right to life, the European Court has held that Article 2 requires an investigation to be carried out into any incident resulting in the violent death of an individual.[12] In the formulation which the Court has used largely unchanged since its decision in *McCann v United Kingdom*,[13] the obligation to protect the right to life[14]

> requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force … The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.

The obligation to carry out an effective investigation into the circumstances surrounding a violent death is of particular relevance in cases concerning alleged unlawful deprivation of life by the state since, as noted by the Court, 'a general legal prohibition of arbitrary killing by the agent

[10] *Öneryildiz v Turkey* App No 48939/99 (ECtHR [GC], 30 November 2004), paras 95–96; see also *Ali and Ayşe Duran v Turkey* App No 42942/02 (ECtHR, 8 April 2008), para 61: '[w]hile there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow life-endangering offences and grave attacks on physical and moral integrity to go unpunished'.

[11] For discussion of the relevance of the procedural obligations of investigation under ECHR arts 2 and 3 in the context of international criminal procedure, see Harmen van der Wilt and Sandra Lyngdorf, 'Procedural Obligations under the European Convention on Human Rights: Useful Guidelines for the Assessment of "Unwillingness" and "Inability" in the Context of the Complementarity Principle' (2009) 9 *International Criminal Law Review* 39, 50–61.

[12] The scope of application of the obligation of investigation has been extended by the Court in subsequent cases to cover situations of enforced disappearance (see n 17) and situations where the victim did not die, but had been subjected to conduct which, by its very nature, had put his or her life at risk: see, eg, *Makaratzis v Greece* (n 9), in particular at paras 49–55.

[13] See *McCann and Others v United Kingdom* App No 18984/91 (ECtHR, 27 September 1995), para 161.

[14] *Nachova and Others v Bulgaria* App Nos 43577/98 and 43579/98 (ECtHR [GC], 6 July 2005), paras 110–13 (internal references omitted). See also, eg, *Kaya v Turkey* App No 22729/93 (ECtHR, 19 February 1998), para 86.

of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities'.[15]

However, the obligation to investigate suspicious deaths is by no means limited to those cases where it has been established, or it appears, that a killing was committed by state agents; it also extends to killings by third parties.[16] Further, the obligation in question arises not only in circumstances where it has been conclusively established that an individual has been killed, but also 'upon proof of an arguable claim that an individual who was last seen in the custody of the State, subsequently disappears in a context which might be considered life-threatening'.[17]

In order to be regarded as 'effective', an investigation into cases of violent death or disappearance must be 'adequate'– that is, capable of establishing the cause of death and of identifying the individual or individuals responsible.[18] Further, the investigation must be capable of leading to a determination of whether the force used in the particular case was or was not 'absolutely necessary' for one of the reasons listed in Article 2(2).[19] The European Court has also frequently reiterated that, for an investigation to be effective, the investigating authorities should be independent, and that 'independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms'.[20]

In addition, it is clear from the Court's case law that, whenever the national authorities are informed or become aware of facts potentially suggesting that an unlawful deprivation of life has occurred, they must *promptly* carry out an investigation.[21] In this regard, the authorities are not permitted to await a specific and/or formal request from the victim or his or her relatives to open an investigation; rather, they are required to act promptly and of their own initiative upon receiving information giving rise to a credible suspicion of death.[22]

As has been consistently underlined by the European Court, the obligation to identify the individuals responsible for an alleged violation of Article 2 is an obligation of means and not of result;[23] consequently, the fact that, in the specific circumstances of a given case, the investigation does not in fact result in the identification and/or punishment of the individual responsible

[15] See *McCann v United Kingdom* (n 13) para 161. As to the position under art 3, see, eg, *Assenov and Others v Bulgaria* App No 24760/94 (ECtHR, 28 October 1998), para 102; *Labita v Italy* App No 26772/95 (ECtHR [GC], 6 April 2000), para 131.
[16] See, eg, *Ergi v Turkey* App No 23818/94 (ECtHR, 28 July 1998), para 82; *Cyprus v Turkey* App No 25781/94 (ECtHR [GC], 10 May 2001), para 131.
[17] *Cyprus v Turkey*, ibid para 132.
[18] See, eg, *Ramsahai and Others v The Netherlands* App No 52391/99 (ECtHR [GC], 15 May 2007), para 324.
[19] See, eg, *Oğur v Turkey* App No 21594/93 (ECtHR [GC], 20 May 1999), para 88.
[20] See, eg, *Mikheyev v Russia* (n 8) para 110.
[21] See, eg, *Yaşa v Turkey* App No 22495/93 (ECtHR, 2 September 1998), paras 102–04; *Çakıcı v Turkey* App No 23657/94 (ECtHR [GC], 8 July 1999), paras 80, 87 and 106; *Tanrıkulu v Turkey* App No 23763/94 (ECtHR [GC], 8 July 1999), para 109.
[22] See, eg, *Yaşa v Turkey*, ibid para 100: 'Nor is the issue of whether members of the deceased's family or others have lodged a formal complaint about the killing with the competent investigatory authorities decisive … the mere fact that the authorities were informed of the murder … gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation'.
[23] See, eg, *Isayeva, Yusupova and Bazayeva v Russia* App No 57947/00 (ECtHR, 24 February 2005), para 211; *Mikheyev v Russia* (n 8) para 107.

does not per se amount to a violation of the positive obligation incumbent on the state. Nevertheless, the requirements enunciated in the Court's jurisprudence are stringent, and in effect require a minimum quality of the investigation; in particular, the authorities are required to take all reasonable steps available to them to secure the evidence concerning the incident in question, including 'eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death'.[24] Any deficiency in the investigation which diminishes its ability to establish the cause of death or to identify the individual responsible will risk falling foul of the requirement that an investigation be effective.[25] As regards the potential ability of the investigation to produce an appropriate result, the requirements of promptness in the initiation of the investigation and reasonable expedition in its execution are also crucial.[26]

Finally, the European Court has consistently held that the relevant domestic rules and procedures must ensure 'a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory'.[27] This element of the requirement of an effective investigation has been developed in particular so as to ensure the participation of victims, or family members of the deceased, in the investigation. In that regard, the Court has specified that 'the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests'[28] and that, at a minimum, 'the complainant must be afforded effective access to the investigatory procedure'.[29] In any case, there must be the opportunity for the victim or his or her next-of-kin to apply for judicial review of a decision not to prosecute; this in turn may imply a requirement for the prosecutor to give adequate reasons for such a decision.[30]

3. Investigative Obligations in the Context of Military Operations

The starting point of the European Court's approach in cases concerning abuses committed in the context of military operations – including extraterritorial military action to which the Convention is applicable[31] – is that the existence of an armed conflict or a situation of military occupation does not in and of itself exempt states parties to the ECHR from the procedural obligations of

[24] *Kelly and Others v United Kingdom* App No 30054/96 (ECtHR, 4 May 2001), para 96; see also *Salman v Turkey* App No 21986/93 (ECtHR, 27 June 2000), para 106; *Tanrıkulu v Turkey* (n 21) paras 104–09; *Gül v Turkey* App No 22676/93 (ECtHR, 14 December 2000), para 89; *Mikheyev v Russia* (n 8) para 108.

[25] See, eg, the Northern Irish cases concerning the inability of inquests to compel members of the security forces directly involved in the use of lethal force to give evidence: *McKerr and Others v United Kingdom* App No 28883/95 (ECtHR, 4 May 2001), para 144; *Jordan v United Kingdom* App No 24746/94 (ECtHR, 4 May 2001), para 127.

[26] See, eg, *Kelly v United Kingdom* (n 24) para 97. See also *Yaşa v Turkey* (n 21) paras 102–04.

[27] See, eg, *McKerr v United Kingdom* (n 25) para 115; *Jordan v United Kingdom* (n 25) para 108.

[28] *McKerr v United Kingdom*, ibid para 115; *Jordan v United Kingdom*, ibid para 109.

[29] See, eg, *Batı and Others v Turkey* App Nos 33097/96 and 57834/00 (ECtHR, 3 June 2004), para 137.

[30] *Jordan v United Kingdom* (n 25) paras 123–24.

[31] For discussion of the question of applicability of the ECHR to extraterritorial military operations, see Section 4.3 below.

investigation under Articles 2 and 3.[32] That much is clear from the statement of the Court in *Ergi v Turkey* – a case relating to the killing of a Kurdish girl by members of the Turkish security forces in the context of an operation aimed at capturing members of the Kurdish Workers' Party (PKK) – that 'neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted'.[33]

Nevertheless, the European Court has subsequently further elucidated the scope of the procedural obligation of investigation in a military context and has accepted that this obligation must be applied in a realistic and pragmatic way, taking into account the exigencies of the situation and the exceptional circumstances in which the authorities have to operate. Most recently, in *Al-Skeini v United Kingdom*, the Court, having reiterated that the investigative obligations under Article 2 continued to apply 'in difficult security conditions, including in a context of armed conflict',[34] recognised that, in assessing compliance with Article 2 of the investigations carried out into the deaths of civilians in occupied Iraq, it had to take as its starting point 'the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war',[35] and further noted that 'in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators'.[36]

The fact that the European Court accepts that the obligation needs to be applied 'realistically', does not, however, detract from the requirement that the investigation should comply, as far as practicable, with the standards of efficiency, promptness and independence which are required by Article 2. Certain of the requirements of an effective investigation may be applied with more flexibility because of the circumstances in which the authorities have to operate: for instance, the Court has accepted that the possibility of immediate collection of evidence, autopsies and the availability of forensic experts could be more limited than is normally the case in a domestic setting.[37] It is clear, however, that the core aspects of an effective investigation must be guaranteed in all cases. In particular, the independence of the investigation, in both a formal and a practical sense, must also be fully guaranteed in relation to deaths occurring in a military context[38] and requires that 'the investigating authority [is], and [is] seen to be, operationally independent of the military chain of command'.[39]

[32] By contrast to other international instruments for the protection of human rights, the fact that the ECHR is fully applicable, subject to any permissible derogation, in times of armed conflict emerges clearly from the text of ECHR, art 15(1), which allows states to derogate from some Convention rights '[i]n time of war or other public emergency'.
[33] *Ergi v Turkey* (n 16) para 82.
[34] *Al-Skeini v United Kingdom* App No 55721/07 (ECtHR, 7 July 2011), para 164.
[35] ibid para 168.
[36] ibid.
[37] ibid.
[38] ibid para 169.
[39] ibid para 169.

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Further requirements that remain crucial in all cases are those concerning the promptness and expedition of the investigation;[40] the need for the authorities to investigate *proprio motu* any allegations of abuse without waiting for the victims or their relatives to make a formal complaint;[41] and the requirement to ensure that the victims or their relatives have access to the case file and are able to challenge any prosecutorial or judicial decision to close the investigation or discontinue proceedings.[42] Finally, the Court has made clear that the existence of procedural obstacles to the investigation or prosecution of members of the military or security forces will normally result in a breach of the procedural obligations under Articles 2 and 3.[43]

4. CASE STUDIES

Over the years, the European Court has been faced with applications arising out of a number of situations of armed conflict, occupation and military operations *lato sensu* where large-scale and serious violations of human rights have been committed. This section provides an overview of the way in which the Court has applied the obligations of investigation in four selected situations, and of the individual and general measures adopted by the relevant states in response to the Court's judgments.[44] Those accounts provide the base for discussion of the extent to which the Court's judgments have had any appreciable impact on the ability of the respondent states to undertake Convention-compliant investigations into serious abuses.

[40] See, eg, *Isayeva, Yusupova and Bazayeva v Russia* (n 23), in which the ECtHR, having reiterated that 'in order to maintain public confidence in adherence to the rule of law and to prevent any appearance of collusion or tolerance of unlawful acts, it is essential to carry out a prompt investigation' (para 212), criticised the considerable delay on the part of the Russian authorities in opening an investigation into the killing by Russian armed forces of civilians who were trying to leave Grozny through a humanitarian corridor, as well as the serious and unexplained failures to act on the part of the investigating authorities once an investigation had been commenced (paras 214–25).

[41] See, eg, ibid para 209.

[42] See, again, ibid, in particular para 213. In response to the Russian government's argument that this aspect of the investigation had been undermined by the applicants' failure to appear before the authorities or to leave a contact address, the Court took account of the circumstances of the applicants, including their mental state, and held that, in the circumstances, the feelings of insecurity and vulnerability of the applicants, who had been forced to flee from Grozny to escape from serious attacks on the city, outweighed their failure to communicate their addresses to the authorities (ibid para 224).

[43] See Section 4.2 below.

[44] The distinction between individual and general measures is well-established in the practice of the CoM and appears in a number of judgments of the ECtHR (see, eg, *Rumpf v Germany* App No 46344/06 (ECtHR, 2 September 2010), para 59). Individual measures are aimed at ensuring reparation for the violation identified by the Court in the specific case. Although this may also be one of the functions of general measures, the CoM has for some time recognised that an additional function of the adoption of general measures is to avoid the occurrence of similar violations in the future. For instance, it is significant that Rule 6(2)(b)(ii) of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments (adopted at the 964th meeting of the Ministers' Deputies on 10 May 2006) places the preventative aspect of general measures first, providing that the CoM may request information from the relevant state both as to individual measures and as to whether 'general measures have been adopted, *preventing new violations similar to that or those found* or putting an end to continuing violations' (emphasis added). For a synthetic overview of the supervision of the execution of judgments by the CoM, see http://www.coe.int/t/dghl/monitoring/execution/Presentation/Pres_Exec_en.asp.

The following situations are considered by way of case studies: (i) the non-international armed conflict in Chechnya in 1999 to 2001 and the subsequent counter-terrorism operations carried out by the Russian armed forces in the region; (ii) the operations by Turkish security forces against the PKK in south-east Turkey in the 1990s; (iii) the invasion of Iraq in March 2003 and the subsequent occupation by the Coalition forces, and (iv) the historical cases of disappearances in Northern Cyprus.

4.1 CHECHNYA

The flow of judgments from the European Court arising out of the so-called Second Chechen War, which raged between 1999 and 2001, and the Russian 'counter-terrorism' operations in the North Caucasus in the following years, continue to chronicle instances of the enforced disappearance of civilians, extrajudicial killings, and acts of torture and ill-treatment.

By March 2013, the European Court had issued over 170 judgments concerning abuses perpetrated by the Russian security forces in Chechnya. In many of these cases, the Court was able to conclude on the basis of the available evidence that state forces were responsible for the unlawful killings, disappearances and torture or ill-treatment of the applicants' relatives.[45] The findings in relation to the substantive violations of Article 2 committed by the Russian security forces and military are of particular importance insofar as they clarify the scope and relevance of ECHR standards on the right to life in the context of a non-international armed conflict.[46] For present purposes, however, it is the findings relating to the procedural obligations of investigation and prosecution under Articles 2 and 3 ECHR which are particularly relevant. In this latter regard, whether or not it also found that the responsibility of Russia was directly engaged by virtue of the actions of its servicemen, in all of the Chechen cases the Court has found violations of the procedural obligations of investigation under Article 2. Common flaws identified by the Court include the failure to carry out investigations with sufficient expedition (if at all); the failure to obtain and preserve vital evidence or to record testimony; the fact that prosecutors often closed cases on insufficient grounds, having inadequately investigated the possible involvement of the federal forces; and, in most cases, the lack of independence of the investigating authorities.[47]

[45] For an excellent overview of the relevant case law up to 2008, see Philip Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' (2008) 6 *European Human Rights Law Review* 732; see also the judgments discussed by Human Rights Watch in 'Justice for Chechnya: The European Court of Human Rights Rules against Russia', July 2007, http://www.hrw.org/sites/default/files/related_material/justice_for_chechnya_2.pdf.

[46] See, eg, the discussion of the necessity and proportionality of the armed forces used by Russian troops in *Isayeva, Yusupova and Bazayeva v Russia* (n 23) paras 174–200. On the characterisation of the situation as an internal armed conflict and for commentary on the approach of the ECtHR, see William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *European Journal of International Law* 741; see also Leach (n 45) 733–34.

[47] For detailed discussion of the findings of the European Court in the Chechen cases, see the case study in Borelli (n 2) Annex, Ch 2; see further Leach (n 45), and the discussion by Human Rights Watch (n 45).

When one looks at the results of the implementation of the European Court's judgments, and the measures adopted by Russia, the assessment of the impact of the Chechen cases is decidedly mixed.

With regard to the *individual measures* that would have been required in order to give effect to the Court's judgments, the overall picture is undoubtedly negative. Several years after the first judgment in which the European Court found a violation of the procedural head of Article 2 as a result of the lack of an effective investigation, the Russian authorities' record in ensuring effective investigation of those abuses (let alone any prosecutions or even convictions) remains woeful.[48] While, in its communications with the CoM, Russia has attributed the dearth of prosecutions to the absence of incriminating evidence – which could be as a result of the significant lapse of time since the offences occurred and which has obstructed the conduct of thorough investigations[49] – international human rights organisations operating in Russia have pointed out that investigations leading to successful prosecutions were regularly conducted into offences committed by non-state agents during the same period.[50]

The continued failure of the Russian authorities to investigate abuses committed by the security forces in Chechnya was harshly criticised by the European Court in 2010 in the case of *Abuyeva v Russia*.[51] The case concerned the bombardment in 2000 by the Russian military of the village of Katyr-Yurt in Chechnya, in which 29 of the applicants' relatives had died. The same incident had already been the subject of examination in 2005 in *Isayeva v Russia*, in which the Court had found, inter alia, a violation of Article 2 on the basis of the ineffective investigation by the Russian authorities.[52]

In *Abuyeva*, in addition to finding a substantive violation of the right to life,[53] the Court found a further violation of Article 2 insofar as the subsequent domestic investigations into the events had been grossly ineffective.[54] Having emphasised that the continuing failure to conduct an

[48] See, inter alia, Human Rights Watch, "Who Will Tell Me What Happened to My Son?": Russia's Implementation of European Court of Human Rights Judgments on Chechnya', 27 September 2009, 2, http://www.hrw.org/en/reports/2009/09/28/who-will-tell-me-what-happened-my-son, reporting that the relevant Russian authorities had 'flatly contested several of the European Court's judgments apparently in order to justify closing investigations and refusing to bring charges against perpetrators. This has occurred even in cases in which those responsible or their superiors are known and named in European Court judgments, or could readily be known'. See also Human Rights Watch, 'Russia: Making Justice Count in Chechnya', November 2011, http://www.hrw.org/sites/default/files/related_material/2011_Russia_ECtHRImplementation.pdf; Human Rights Watch, 'World Report 2011: Russia', January 2011, particularly 3–4, http://www.hrw.org/en/world-report-2011/russia. It should be noted, however, that there are some isolated cases in which the reopening of investigations following the judgments of the European Court has resulted in the identification of particular service personnel and even the arrest of one of the alleged perpetrators in one case: see CoM, Interim Resolution CM/ResDH(2011)292, 2 December 2011, para 1.

[49] See, eg, the Communication submitted by Russia to the CoM in February 2011: 'Documents Distributed at the 1108th (DH) Meeting, 8–10 March 2011', CoE Doc DH-DD(2011)130E, 25 February 2011.

[50] See the Communication submitted by the Russian Justice Initiative (RJI) to the CoM in June 2011: 'Documents Distributed at the 1115th (DH) Meeting, 7–8 June 2011', CoE Doc DH-DD(2011)422E, 1 June 2011), para 18.

[51] *Abuyeva and Others v Russia* App No 27065/05 (ECtHR, 2 December 2010).

[52] *Isayeva v Russia* App No 57950/00 (ECtHR, 24 February 2005).

[53] *Abuyeva v Russia* (n 51) paras 196–203.

[54] ibid paras 204–07.

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effective investigation was despite the fact that in *Isayeva* the Court had urged the Russian authorities to establish responsibility for the killings,[55] the Court took the rare step of expressly stating that, since Russia had 'manifestly disregarded the specific findings of a binding judgment concerning the ineffectiveness of the investigation',[56] it was 'inevitable that a new independent investigation should take place'.[57]

Notwithstanding the emphatic reiteration by the European Court of the obligation to investigate, it appears that, up to the present time, the incidents at issue in *Abuyeva* and *Isayeva* have not been adequately investigated. In December 2011, the CoM noted[58] that

> in the vast majority of cases, it has not yet been possible to achieve conclusive results and to identify and to ensure the accountability of those responsible, even in cases where key elements have been established with sufficient clarity in the course of domestic investigations, including evidence implicating particular servicemen or military units in the events.

Although few concrete measures resulting in the investigation of those responsible for the specific incidents at issue in the Chechen judgments appear to have been taken, the picture is slightly more positive if one considers the *general measures* adopted and their potential to improve the effectiveness of the investigation and prosecution of abuses committed by the security forces in the future. Over the last decade, Russia has taken a number of legislative and institutional steps which are purportedly aimed at remedying the defects in the investigative procedures identified by the European Court in the Chechen cases. Those steps include: (i) the implementation of institutional reforms aimed at ensuring the independence of the investigative authorities and ensuring prosecutorial control over investigations;[59] (ii) the creation of a unified register of kidnapped or missing persons, which is regularly compared with lists of detained or convicted persons;[60] and (iii) the establishment of the Special Investigative Unit (SIU) within the Investigative Committee of the Russian Federation for the Chechen Republic. The SIU appears to be modelled to some extent on the Historical Enquiries Team (HET), a special independent

[55] ibid paras 207–08.
[56] ibid para 241.
[57] ibid para 243.
[58] See CoM, Interim Resolution CM/ResDH(2011)292, 2 December 2011, para 1; cf *Abuyeva v Russia* (n 51) para 242. In September 2012, the CoM noted that a new third investigation had been carried out by the Russian authorities following the *Abuyeva* judgment and that the decision to close this investigation had recently been quashed with the case sent back for additional investigations: CM/Del/Dec(2012)1150/19, 26 September 2012, para 10. The CoM called upon the Russian authorities to ensure that this additional investigation will eventually address all the shortcomings repeatedly identified by the European Court and invited them to provide detailed information to enable the CoM to ascertain that this investigation has effectively paid due regard to all of the Court's conclusions (ibid para 11).
[59] Department for the Execution of Judgments, 'Action of the Security Forces in the Chechen Republic of the Russian Federation: General Measures to Comply with the Judgments of the European Court of Human Rights', CoE Doc CM/Inf/DH(2008)33, 11 September 2008, paras 77–80.
[60] Department for the Execution of Judgments, 'Violations of the ECHR in the Chechen Republic: Russia's Compliance with the European Court's judgments', CoE Doc CM/Inf/DH(2006)32 rev 2, 12 June 2007, para 74.

investigative unit set up by the United Kingdom (UK) in 2005 with power to reinvestigate historical unresolved cases arising out of the Troubles in Northern Ireland.[61]

In 2009, the CoM – whilst welcoming the establishment of the SIU and the measures aimed at increasing the effectiveness of the prosecutors' control over investigations and at improving the efficiency of judicial review – noted that 'the efficiency of those measures would very much depend on the progress achieved by the Special Investigative Unit in dealing with concrete cases'.[62] The CoM accordingly invited the Russian government to provide regular updates on the progress made by the SIU.[63]

In the intervening years human rights non-governmental organisations (NGOs) have challenged the effectiveness of the SIU, suggesting that it lacks the necessary powers to fulfil its role properly and its competence to investigate crimes committed by the military is limited.[64] Moreover, it appears that the workings of the Investigative Committee for the Chechen Republic are undermined by the lack of cooperation on the part of the Ministry of Interior and the police.[65] The lack of any clear results in terms of investigations in the historic cases which have been the subject of judgments of the Court, discussed above, appears to lend support to the criticisms as to the effectiveness of the SIU levelled by NGOs.

A further illustration of the limited practical impact of some of the measures relied upon by Russia is evident in the position it has taken in relation to the problem – identified by the European Court in a number of the Chechen cases – of the inability of victims or their relatives to challenge decisions by the prosecution to discontinue proceedings.[66] In its dialogue with the CoM, the Russian government has indicated that several measures have been adopted in order to improve the procedural position of victims and their relatives. Specifically, with regard to the inability to challenge decisions to discontinue proceedings, Russia has insisted that this has been addressed by the adoption of the 2002 Code of Criminal Procedure (CCP); according to the Russian government, Article 125 CCP provides a means by which decisions to close investigations and discontinue proceedings may be challenged.[67] Nevertheless, despite the

[61] Department for the Execution of Judgments, 'Action of the Security Forces in the Chechen Republic of the Russian Federation: General Measures to Comply with the Judgments of the European Court of Human Rights', CoE Doc CM/Inf/DH(2010)26, 27 May 2010, paras 7–19; cf ibid paras 20–26 for the assessment of the Department for the Execution of Judgments. On the HET, as well as the Iraqi Historic Allegations Team (IHAT) created more recently by the UK in order to examine allegations of violations in Iraq, see Section 4.3 below.

[62] See CoM, Decision CM/Inf/DH(2009)32, 5 June 2009, paras 1–3, quote from para 3.

[63] ibid para 3.

[64] See RJI Communication (n 50) paras 12–14.

[65] ibid para 15; see also Human Rights Watch, 'Joint Letter to President Medvedev regarding Human Rights Situation in the North Caucasus', 20 April 2011, http://www.hrw.org/en/news/2011/04/20/russia-joint-letter-president-medvedev-regarding-human-rights-situation-north-caucas.

[66] See, eg, *Zubayrayev v Russia* App No 67797/01 (ECtHR, 10 January 2008), para 100; *Lyanova and Aliyeva v Russia* App Nos 12713/02 and 28440/03 (ECtHR, 2 October 2008), para 107; *Imakayeva v Russia* App No 7615/02 (ECtHR, 9 November 2006), para 84; *Bazorkina v Russia* App No 69481/01 (ECtHR, 27 July 2006), paras 84, 165; *Akhiyadova v Russia* App No 32059/02 (ECtHR, 3 July 2008), para 78; *Sangariyeva and Others v Russia* App No 1839/04 (ECtHR, 29 May 2008), para 82.

[67] Art 125 CCP was in fact already in force when the investigations at issue in some of the European Court's judgments were closed, but the domestic courts nevertheless rejected applications by relatives of the victims, principally

government's attempts to present Article 125 CCP as an effective remedy against decisions to discontinue proceedings, and the apparent acceptance by the European Court that in principle this might be so,[68] it is relatively clear that this provision does not in practice provide an adequate response to the problems identified by the Court in the Chechen judgments. This was confirmed recently in a study submitted by two human rights organisations to the CoM in April 2013, which analysed attempts by the relatives of victims in some of the Chechen cases to make use of Article 125 CCP and concluded[69] that

> none of the applicants … obtained any substantive outcome through recourse to the Article 125 CCP procedure in the areas of obtaining access to case materials, challenging the legal basis for classifying case materials, or challenging the effectiveness of the investigation.

In conclusion, while some of the measures adopted in execution of the Chechen judgments have the potential to ensure more effective and independent investigations into abuses committed by the armed forces, their practical result as regards the historic incidents which formed the subject-matter of the original judgments has been extremely limited. Those responsible – at all levels – for the killings and abuses underlying those cases largely remain unpunished. The obvious risk of impunity is compounded by concerns that, despite assurances to the contrary by the Russian government,[70] should prosecutions ever be brought, statutes of limitation may be applied by the domestic courts.[71] In addition, the effects of non-compliance are more pervasive, insofar as 'Russia's failure to fully implement the judgments of the Court on applications from Chechnya contributes to the climate of impunity both in the Republic and in the North Caucasus region as a whole'.[72]

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because they had not been granted victim status in the proceedings. According to the Russian government, this obstacle has now been removed with the adoption, on 10 February 2009, of a ruling in which the Supreme Court of the Russian Federation laid down guidelines on the application of art 125, noting, inter alia, that the exercise of the remedy was not contingent upon the formal procedural status of the party in criminal proceedings: see Department for the Execution of Judgments, 27 May 2010 (n 61) paras 58–59). In 2010, following the Supreme Court judgment mentioned above, the Department for the Execution of Judgments of the CoM suggested that, although art 125 CCP was not designed for 'a situation of general breakdown of all public institutions or to combat general unwillingness or incapacity of the authorities to carry out the investigations' (ibid para 66), it was possible that the attitude of the authorities had changed so that art 125 could now constitute an effective remedy, and requested the Russian government to provide further information as to its application in the Chechen cases (ibid paras 64–75).

[68] See, eg, *Nasipova and Khamzatova v Russia* App No 32382/05 (ECtHR, 2 September 2010), in which the European Court appears to have accepted that the procedure under CCP art 125 constitutes a remedy which, in principle, should be exhausted and that it would be for the applicants to demonstrate that in the circumstances the remedy would have been ineffective. For critical commentary, see Jessica Gavron, 'The Exhaustion of Domestic Remedies in Russia: The ECtHR's Approach to Art. 125 of the Code of Criminal Procedure', *EHRAC Bulletin*, 2011, issue 16, 5, http://ehracmos.memo.ru/files/Bulletin16Eng.pdf.

[69] See 'Submission from NGOs Russian Justice Initiative and the Centre of Assistance to International Protection to the Committee of Ministers of the Council of Europe concerning the Functioning of the Russian Code of Criminal Procedure in Implementation of Judgments from the *Khashiyev* and *Akayeva Group*', 18 April 2013, http://www.srji.org/files/Implementation/18%20April%202013%20SUB%20COM.pdf.

[70] See CoE Doc DH-DD(2011)977E, 17 November 2011.

[71] ibid paras 31–34.

[72] Parliamentary Assembly of the Council of Europe, Committee on the Honouring of Obligations and Commitments by Member States, 'The Honouring of Obligations and Commitments by the Russian Federation –

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4.2 SOUTH-EAST TURKEY

The jurisprudence of the European Court in dealing with the serious human rights abuses committed in south-east Turkey in the context of the struggle between the Turkish security forces and the PKK provides a further informative case study of the potential impact of the Court's judgments, while also illustrating some of their limitations.

Turkey recognised the right of individual petition to the European Court in 1987, the year in which it also formally applied to join the European Communities. The deterioration of the human rights situation in south-east Turkey from the beginning of the 1990s led to a rapid increase in the number of applications filed with the Court by civilians alleging serious violations of human rights committed by the security forces.[73] Indeed, in the absence of any meaningful attempt by the domestic courts to ensure that those responsible for the abuses were held accountable, the European Court was seen by many Kurds as the only possible effective forum.

The judgments of the European Court dealing with the events of those years evidence a prolonged and widespread pattern of serious human rights abuses committed by both sides in the conflict, including extrajudicial killings, enforced disappearances, and the widespread use of torture and other ill-treatment.[74] In addition to those substantive violations, the judgments in question disclose numerous significant shortcomings in the investigations of abuses allegedly committed by members of the security forces.[75] Of particular relevance are omissions and flaws in relation to the collection and preservation of evidence by the police and prosecution authorities,[76] failings related to the promptness of investigations, and problems

Explanatory Memorandum by Mr Frunda and Mr Gross, Co-rapporteurs, Doc 13018, 14 September 2012, para 407, http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=18998&lang=EN.

[73] Although violent disturbances between the security forces and the PKK had been ongoing in south-east Turkey since the early 1980s, they intensified substantially in the 1990s, when military counter-insurgency operations and guerrilla warfare by PKK members, coupled with the reaction of the Turkish government, resulted in widespread loss of civilian lives, disappearances and abuses in the region. Following the arrest in 1999 of the PKK leader, Abdullah Öcalan, the human rights situation in south-east Turkey saw a progressive improvement; the legacy of the abuses committed in the 1990s, however, still remains. According to official estimates, by 2008 the armed struggle between the military and the PKK had resulted in an estimated 44,000 deaths of military personnel, PKK members, and civilians: see Human Rights Watch, 'Time for Justice: Ending Impunity for Killings and Disappearances in 1990s Turkey', September 2012, http://www.hrw.org/sites/default/files/reports/turkey0912ForUpload.pdf. On the conflict, see Murat Somer, 'Turkey's Kurdish Conflict: Changing Context, and Domestic and Regional Implications' (2004) 58 *Middle East Journal* 235.

[74] For discussion of the range of violations identified by the ECtHR, see Interim Resolution CM/ResDH(2008)69, 'Actions of the Security Forces in Turkey: Progress Achieved and Outstanding Issues', adopted by the CoM at the 1035th meeting on 18 September 2008.

[75] See, eg, *Çakıcı v Turkey* (n 21); *Ertak v Turkey* App No 20764/92 (ECtHR, 9 May 2000); *Timurtaş v Turkey* App No 23531/94 (ECtHR, 13 June 2000); and *Taş v Turkey* App No 24396/94 (ECtHR, 14 November 2000).

[76] For instance, the Court criticised (i) the failure of the prosecution to take statements from key witnesses (see, eg, *Şemsi Önen v Turkey* App No 22876/93 (ECtHR, 14 May 2002), para 88); (ii) the inadequate questioning of police officers, members of the security forces and other officials (see, eg, *Aktaş v Turkey* App No 24351/94 (ECtHR, 24 April 2003), para 306); (iii) the lack of adequate inspection of the crime scene (see, eg, *Yasin Ateş v Turkey* App No 30949/96 (ECtHR, 31 May 2005), para 96); and (iv) the fact that autopsies had been carried out improperly (see, eg, *Salman v Turkey* (n 24) para 106).

associated with requirements of administrative authorisation for the prosecution of state officials.[77]

As with the Chechen cases, an assessment of the actual impact of the judgments (and of the ensuing dialogue between the CoM and Turkey) in relation to domestic investigations and prosecutions of abuses allegedly committed by members of the security forces reveals that the results are decidedly mixed. As regards *individual measures*, in particular the reopening of those investigations which had been found by the European Court to be defective, it appears from the information provided by Turkey to the CoM that in not one single case has an investigation carried out following a judgment of the Court led to the prosecution of members of the security forces.[78]

With regard to *general measures*, it is important to note that determining the real impact of the Court's judgments upon the ability of the Turkish authorities to prosecute abuses committed by the security forces is somewhat difficult because of the presence of other factors which have created pressure for change. In particular, the Turkish government, in its submissions to the CoM, has presented some general measures as having been taken pursuant to the Court's judgments; however, an additional factor – if not, indeed, the predominant factor – for the adoption of those measures would appear to be the requirements imposed as a condition of opening talks in relation to Turkey's accession to the EU.[79] In that context, the most relevant step taken in order to ensure the effectiveness of investigations is undoubtedly the adoption in 2005 of a new Code of Criminal Procedure, which it was intended should be compliant with the ECHR.[80]

As to other measures, which are more clearly attributable to judgments of the European Court, in response to the Court's criticism of the limited effectiveness of investigations and the repeated calls for action by the CoM in that regard, the Turkish government has indicated that the Ministry

[77] Despite the fact that under Turkish law prosecutors are under a duty to investigate allegations of serious offences which come to their attention, at the time of the events discussed in the judgments relating to the PKK conflict, it was for the relevant local administrative council (for the district or for the province, depending on the suspect's status) to conduct the preliminary investigation and decide whether to prosecute if the suspect was a civil servant and the offence was committed in the performance of his/her duties; the relevant legal/administrative framework is described, eg, in *Yaşa v Turkey* (n 21) para 49. The ECtHR found that procedure to be incompatible with the obligation of effective investigation in over fifty cases, in which it held that the preliminary investigations carried out by the administrative councils for the purpose of granting authorisation could not be seen to be independent since they were chaired by the governors, or their deputies, and made up of local representatives of the executive, who were hierarchically dependent on the governors. See, eg, *Güleç v Turkey* App No 21593/93 (ECtHR, 27 July 1998), para 80; *Oğur v Turkey* (n 19), para 91; *Yöyler v Turkey* App No 26973/95 (ECtHR, 24 July 2003), para 93; *Kurnaz and Others v Turkey* App No 36672/97 (ECtHR, 24 July 2007), para 62.

[78] See http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp.

[79] With a view to fulfilling the criteria for eventual EU membership, the Justice and Development Party (*Adalet ve Kalkınma Parti* or AKP) government, which assumed power in 2002, instituted an ambitious programme of legal reforms. These reforms were introduced mainly in the form of large mixed reform packages, known as 'EU Harmonisation Packages', and involved changes to a variety of laws in different areas. On the EU accession process and its impact on the domestic protection of human rights in Turkey see, eg, Kivanç Ulusoy, 'Turkey's Reform Efforts Reconsidered' (2007) 14 *Democratization* 472; Marlies Casier, 'Contesting the "Truth" of Turkey's Human Rights Situation: State-Association Interactions in and outside the Southeast' (2009) 10 *European Journal of Turkish Studies*, http://ejts.revues.org/4190?&id=4190.

[80] Criminal Procedure Code (*Ceza Muhakemesi Kanunu*), Law No 5271, 4 December 2004, entered into force 1 June 2005 (unofficial English translation of selected articles available at http://legislationline.org/documents/action/popup/id/8976).

of Justice has issued a number of circulars to draw the attention of judges and public prosecutors to newly enacted legislation giving direct effect to the Convention in the Turkish legal system and recalling Turkey's obligations flowing from the Convention.[81] One of the circulars, in addition to containing a general exhortation that all investigations be carried out speedily and effectively in compliance with the requirements of the Convention, also addressed the specific shortcomings identified by the European Court with regard to the collection and preservation of evidence.[82] The circulars have also emphasised that investigations into killings where the perpetrator is unknown are to be carried out rapidly and effectively, taking into account the requirements of the Convention, and that the investigation of such crimes should be carried out in coordination with the security forces.[83]

As for the procedural obstacles to the prosecution of civil servants, including members of the security forces, in 1999 the CoM called upon the Turkish authorities to rapidly complete reform of the system for criminal proceedings brought against members of the security forces, in particular by abolishing the special powers of the local administrative councils in relation to such proceedings.[84] The requirement of the authorisation of criminal investigations initiated against members of the security forces in cases of alleged torture or ill-treatment was abolished in 2003.[85] As for other offences, the Turkish government has stressed that, in line with the requirements of the Convention, criminal investigations into all violations of the Convention (unlawful killings, destruction of property, and so on) by members of the security forces are similarly no longer subject to administrative authorisation.[86] The government has also stated that it has encouraged the developing practice of administrative courts of quashing administrative decisions that refused to indict members of the security forces for other unlawful actions, such as unintentional homicide, causing bodily harm, causing death in traffic accidents and the burning of houses.[87] However, the accuracy of

[81] See Interim Resolution CM/ResDH(2005)43, adopted by the CoM on 7 June 2005 at the 928th Meeting of the Ministers' Deputies, Appendix 1, para 19; Interim Resolution CM/ResDH(2008)69 (n 74) Appendix I, para C(4). For access (in Turkish only) to all the circulars issued by the Ministry of Justice since 1 January 2006, see http://www.adalet.govtr/duyurular/genelgeler/genelgeler.html.

[82] See Interim Resolution CM/ResDH(2008)69 (n 74) Appendix I, para C(4). In particular, the circular alluded to problems relating to discrepancies in autopsy reports, the absence of photographic records of autopsies and the fact that decisions not to prosecute were being issued by public prosecutors without the necessary investigation as to the facts having been carried out. They also added that all necessary evidence should be collected from the scene of the crime and should be carefully retained, and that the rules on ballistic examinations, autopsy reports and identification of bodies should be followed strictly. With regard to the promptness and expedition of the investigation, the circulars specified that the investigations were to be carried out directly by public prosecutors, who should examine the investigation files at regular intervals and do their utmost to ensure that the perpetrators were found quickly and, in any case, within the limitation period.

[83] See Interim Resolution CM/ResDH(2008)69 (n 74) Appendix I, para C(4); see also Department for the Execution of Judgments, 'Actions of Security Forces in Turkey: Progress Achieved and Outstanding Issues', CoE Doc CM/Inf/DH(2006)24 rev 2, 10 October 2007.

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

[85] See the information provided by Turkey, summarised in Interim Resolution CM/ResDH(2005)43 (n 81), Appendix I, para 20.

[86] ibid.

[87] ibid para 21.

the account given by the Turkish government remains open to doubt; the CoM has noted that, although there are some instances of prosecution of serious crimes other than torture and ill-treatment that were commenced without administrative authorisation being sought, the 2003 amendment relied upon by the government appears to have lifted the authorisation requirement *only* with respect to allegations of torture and ill-treatment.[88] The CoM has called upon Turkey to take measures to remove any ambiguity in this respect,[89] and also noted that the highest ranking members of the security forces remain subject to the special prosecution procedures applicable to judges.[90]

The concern remains that, although the various measures formally adopted by Turkey objectively are laudable and there appear to have been some positive developments since 2009,[91] the legislation and guidance aimed at improving the effectiveness of investigations is not consistently and fully followed and applied in practice. As a result, there is concern that the concrete impact of the measures adopted, measured in terms of the actual ability of the Turkish legal system to prosecute and punish abuses committed by members of the security forces, is, in fact, far less than might appear.[92]

4.3 ACTIONS OF UK TROOPS IN SOUTHERN IRAQ

In the years since the invasion of Iraq by a US-led coalition on 19 March 2003, the European Court has been seised with a number of applications concerning alleged unlawful killings, acts of torture and other ill-treatment committed by members of the Coalition Forces, as well as allegations of violations of the right to personal liberty protected under Article 5 ECHR.[93] The judgments of the European Court in these cases are of importance not only because of their substantive findings as to the scope of the duty to investigate, but also (and particularly) insofar as they have clarified the logically prior question of whether, and in what circumstances,

[88] Interim Resolution CM/ResDH(2008)69 (n 74) para E.
[89] ibid.
[90] ibid.
[91] See, eg, Human Rights Watch (n 73).
[92] The problems in this regard are best illustrated by monitoring carried out by NGOs. See, eg, Human Rights Watch, 'Closing Ranks against Accountability: Barriers to Tackling Police Violence in Turkey', 5 December 2008, http://www.hrw.org/en/reports/2008/12/05/closing-ranks-against-accountability-0. Although the cases analysed by Human Rights Watch do not concern abuses perpetrated by members of the security forces in south-east Turkey, given the general applicability of the circulars invoked by the Turkish government in its dialogue with the CoM, they may be regarded as constituting a fairly reliable indicator of the impact in practice of the circulars. Similar concerns are reflected in the comments by the Committee against Torture on the latest Turkish periodic report to the Committee: see 'Concluding Observations of the Committee against Torture: Turkey', 19 November 2010, CAT/C/TUR/CO/3, in particular 3–5. See also European Commission against Racism and Intolerance (ECRI), 'Fourth Report on Turkey', CoE Doc CRI(2011)5, 8 November 2011, paras 162–68.
[93] In addition to *Al-Skeini v United Kingdom* (n 34) and *Al-Jedda v United Kingdom* (n 107) discussed below, other cases have concerned the transfer of detainees to the Iraqi authorities in situations where they risked being subjected to capital punishment (*Al-Saadoon and Mufdhi v United Kingdom* App No 61498/08 (ECtHR, 3 June 2009; 2 March 2010). On the invasion and the subsequent occupation of Iraq by the Coalition Forces and subsequent developments, see *Al-Skeini v United Kingdom* (n 34) paras 9–24.

the Convention – including the duty to investigate abuses – applies in the context of military operations abroad.

Applicants in cases concerning abuses allegedly committed in Iraq by members of the armed forces of European states have been faced with two principal preliminary obstacles: (i) establishing that the ECHR was applicable to the actions which took place in that extraterritorial context, and (ii) the question of whether acts carried out by troops contributed by European states in the context of UN-authorised military operations were to be attributed to their home state or the United Nations (UN).

The question of the extraterritorial reach of the Convention, the meaning of the notion of 'jurisdiction' under Article 1, and the less than clear approach of the European Court to that issue – epitomised by the admissibility decision of the Grand Chamber in *Banković v Belgium*[94] – have been the object of much academic and judicial debate and this is not the place to enter into the details.[95] What is noteworthy for present purposes is that, in its 2011 judgment in *Al-Skeini v United Kingdom*,[96] which concerned the killing of Iraqi civilians by members of UK armed forces in southern Iraq, the Court finally dispelled some of the lingering doubts as to the applicability of the Convention to armed conflict/occupation outside the territory of the relevant state, and outside the *espace juridique* of the member states of the CoE.[97]

In *Al-Skeini*, the Grand Chamber was confronted with the United Kingdom's objection that the acts in issue had taken place outside the UK's jurisdiction for the purpose of Article 1 ECHR and therefore the Convention was not applicable. The sole exception, according to the UK government, was the killing of the sixth applicant's son, which had occurred in a British military prison, over which it was admitted that the UK did exercise jurisdiction.

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[94] *Banković and Others v Belgium and 16 Other NATO Countries* App No 52207/99 (ECtHR, Decision, 12 December 2001). For commentary on the case, see n 97.

[95] The literature on the question of the extraterritorial application of the Convention and other human rights treaties is far too vast to broach here; in addition to the sources cited at n 97 see, eg, Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 *American Journal of International Law* 119; Michal Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (2005) 52 *Netherlands International Law Review* 349; Barbara Miltner, 'Revisiting Extraterritoriality after *Al-Skeini*: The ECHR and its Lessons' (2012) 33 *Michigan Journal of International Law* 693; see also the contributions in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

[96] *Al-Skeini v United Kingdom* (n 34). The case was brought by the relatives of six Iraqi civilians killed by British troops during the occupation of Iraq; one of the victims, Baha Mousa, had died in a UK detention facility in Iraq; the other five victims had been killed by British troops on patrol in Basra. In 2007, the majority of the House of Lords had held that Mr Mousa was within the UK's art 1 jurisdiction, but that the five individuals killed outside the UK detention facilities had not been within UK jurisdiction and therefore the ECHR did not apply to their cases: see *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26.

[97] On the infamous notion of *espace juridique* elaborated by the ECtHR in *Banković* see, inter alia, Ralph Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action?' (2005) 10 *European Human Rights Law Review* 116; Matthew Happold, '*Banković v Belgium* and the Territorial Scope of the European Convention on Human Rights' (2003) 3 *European Human Rights Law Review* 77; Richard Lawson, 'Life after *Banković*: On the Extraterritorial Application of the European Convention on Human Rights' in Coomans and Kamminga (eds) (n 95) 131; Philip Leach, 'The British Military in Iraq: The Applicability of the *Espace Juridique* Doctrine under the European Convention on Human Rights' (2005) *Public Law* 448.

The Grand Chamber reiterated that the exercise of extraterritorial jurisdiction by contracting states is 'exceptional'; it then proceeded to set out a 'spatial' test for the exercise of jurisdiction: namely, that an ECHR contracting state is deemed to exercise its 'jurisdiction' for the purpose of Article 1 ECHR whenever it has 'effective overall control' of an area outside its territory.[98] This ground of jurisdiction, also referred to as the 'territorial' basis of jurisdiction, is uncontroversial and is well-established in the case law of the European Court.

More controversial is the question of the applicability of the Convention to the extraterritorial actions of a state which does not exercise 'effective overall control' over the area in which the actions in question are carried out. In this regard, the Grand Chamber in *Al-Skeini*, relying on its previous case law as to the 'personal' model of jurisdiction (also sometimes referred to as the 'state agent authority' model), reiterated that 'in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction'.[99] The Grand Chamber went on to explain that what was 'decisive' in such cases was 'the exercise of physical power and control over the person in question'.[100]

It should also be noted that the Grand Chamber held that when the jurisdiction of the state was exercised through 'personal' control and authority over an individual, the Convention rights could be 'divided and tailored' in the sense that the state was not required to guarantee to the individual in question the entire range of Convention rights but only those rights 'that are relevant to the situation of that individual'.[101]

This, as acknowledged by the European Court, marks a change from the approach previously adopted in *Banković*, in which the Court had expressly held that rights under the ECHR could not be 'divided and tailored' depending on the degree of control exercised extraterritorially by the agents of the state.[102] While the new approach may have important repercussions in relation to the applicability of some of the rights protected under the Convention in an extraterritorial context, with specific regard to the procedural obligations of investigation and prosecution deriving from Articles 2 and 3 ECHR, it is clear that those obligations are applicable whether jurisdiction is held to be exercised by the state for the purposes of Article 1 on the basis of either the territorial or the personal model.

Applying those principles to the situation in Iraq at the relevant time, the European Court found[103] that, in the exceptional circumstances deriving from the UK's assumption of authority

[98] *Loizidou v Turkey* App No 15318/89 (ECtHR, 23 February 1995; 28 November 1996).
[99] *Al-Skeini v United Kingdom* (n 34) para 136.
[100] ibid.
[101] ibid para 137.
[102] See *Banković* (n 94) para 75.
[103] *Al-Skeini v United Kingdom* (n 34) para 149. The formulation used by the ECtHR, and particularly the reference to the 'exceptional circumstances' of the UK presence and mandate in southern Iraq in the relevant period have led some commentators to suggest that the Court in *Al-Skeini* has in fact developed an intermediary model for jurisdiction, incorporating elements of both the spatial test and the personal test (ie that the victims were deemed to have been within UK jurisdiction on the basis that UK troops exercised personal control over them in the wider context of also exercising some public powers in Iraq). See, in this sense, Marko Milanović, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23 *European Journal of International Law* 121.

and responsibility for security in southern Iraq as an occupying power from 1 May 2003 to 28 June 2004, the UK,

> through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.

The further preliminary question of the applicability of the ECHR to the actions of a contracting state's armed forces operating in the context of a multilateral military operation carried out under the auspices (or with the authorisation) of the United Nations (UN) is also particularly relevant for present purposes if one takes account of the fact that, in recent years, a number of military operations involving the participation of European states have been undertaken pursuant to authorisation by the UN Security Council.

In the joined cases of *Behrami and Saramati* – which concerned the responsibility of European troop-contributing states for alleged violations of the Convention committed in the context of UN-mandated peace support operations in Kosovo – the European Court adopted a narrow and much criticised approach to the question of attribution of conduct carried out in the context of UN or UN-authorised missions.[104] Having found that the UN exercised 'ultimate authority and control' over the troops contributed by member states, the Court concluded that their actions were attributable to the UN and not to the individual troop-contributing state.[105] On that basis, the European Court found that it did not have jurisdiction to hear the claims as the applications were inadmissible *ratione personae*.[106]

The question of the applicability of the ECHR to the conduct of the military forces of European states acting abroad pursuant to UN Security Council authorisation came before the Court again in *Al-Jedda v United Kingdom*, a case concerning alleged violations of Article 5 ECHR committed by UK forces in Iraq.[107] In rejecting the UK government's *Behrami*-style argument – that following the adoption of Security Council Resolution 1511 authorising the presence

[104] *Behrami and Behrami v France* and *Saramati v France, Germany and Norway* App Nos 71412/01 and 78166/01 (ECtHR, 2 May 2007). The two cases concerned the actions of the Kosovo Force (KFOR), the multinational peacekeeping force established by Security Council Resolution 1244(1999) and of the United Nations Interim Administration Mission in Kosovo (UNMIK). In *Behrami and Behrami v France*, it was claimed that the failure by French KFOR troops operating in the municipality of Mitrovica to mark and/or defuse an undetonated cluster bomb, which had then caused the death of one of the applicant's children and had seriously injured the other, had amounted to a breach of ECHR art 2. In *Saramati v France, Germany and Norway*, the applicant claimed that his arrest and detention by KFOR had breached his rights under ECHR arts 5 and 6. For eloquent criticism of the European Court's decision, see Marko Milanović and Tatjana Papić, 'As Bad as it Gets: The European Court of Human Rights's *Behrami* and *Saramati* Decision and General International Law' (2009) 58 *International and Comparative Law Quarterly* 267. For commentary, see also Kjetil Mujezinović Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test' (2008) 19 *European Journal of International Law* 509.

[105] *Behrami v France* (n 104) paras 132–41 (on the attribution of KFOR actions) and paras 142–43 (on UNMIK).

[106] ibid paras 144–52.

[107] *Al-Jedda v United Kingdom* App No 27021/08 (ECtHR, 7 July 2011).

of the Multi-National Force in Iraq, the actions of UK troops on the ground were not to be attributed to the UK but to the UN – the Court noted[108] that it could not be considered that

> as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations.

Adopting the test set out by the International Law Commission in what is now Article 7 of its draft Articles on the Responsibility of International Organisations (DARIO)[109] – namely that the conduct of an organ of a state placed at the disposal of an international organisation is attributable under international law to that organisation if the organisation exercises *effective control* over that conduct – the Court held that the Security Council 'had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force'.[110] Accordingly, the Court concluded that the applicant's detention was not attributable to the United Nations but, rather, to the UK and the Convention was therefore applicable *ratione personae*.[111]

Although not concerning violations of Articles 2 and/or 3, the decision in *Al-Jedda* is important because it demonstrates clearly that the obligations arising from the Convention, including the investigative obligations under Articles 2 and 3, may apply even where the troops of a European state act abroad pursuant to a UN authorisation.

Once the obstacles relating to extraterritoriality and attribution are out of the way, there can be no doubt that killings and other serious human rights violations allegedly committed by the armed forces of states party to the ECHR need to be investigated in conformity with the standards enunciated by the European Court in its case law, albeit that (as discussed above), as was made clear by the Court in *Al-Skeini*, the particular application of those standards may require some adaptation to the particular circumstances which characterise the situation.

The application of those standards to the facts of *Al-Skeini* was relatively straightforward. In particular, before the European Court, the UK government itself had accepted that, provided that the ECHR was found to be applicable, the investigations carried out into the deaths of three of the applicants' relatives had fallen short of the standards required by Article 2, in particular because the investigations had been carried out by the commanding officer of the soldiers involved.[112] With regard to the complaints by the remaining two applicants of violation of the procedural

[108] ibid para 80. On the possibility of multiple attribution, see ILC, Draft Articles on the Responsibility of International Organizations and Commentaries, 8 August 2011, UN Doc A/66/10, para 88; Introductory Commentary to Pt One, Ch II, para (4): 'Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization'.

[109] See DARIO, ibid art 7.

[110] *Al-Jedda v United Kingdom* (n 107) para 84.

[111] ibid.

[112] *Al-Skeini v United Kingdom* (n 34) para 153.

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aspect of Article 2,[113] the UK argued that the duty to investigate independently, promptly and effectively had been met by the military justice system.[114]

Relying upon its jurisprudence in the Chechen and PKK cases, the European Court, as noted above, reiterated that the Article 2 obligation of investigation applied equally in difficult security conditions, including during an armed conflict;[115] it stressed that, while some of the requirements of an effective investigation could be applied in a more flexible way in circumstances of 'generalized violence, armed conflict or insurgency',[116] the authorities still had to take 'all reasonable steps … to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life'.[117] Applying these principles to the investigations carried out into the deaths of the applicants' relatives, the Court found that those investigations had not complied with the requirements of Article 2, particularly insofar as the requirement of independence was concerned. This had obviously been the case with those investigations which had been conducted entirely within the military chain of command,[118] but was also held to be so for those investigations which had been conducted by the Royal Military Police, whose Special Investigation Branch was held not, at the relevant time, to have been operationally independent of the military chain of command.[119] In addition, with regard to the investigation into the death of the son of one of the applicants, the Court found that the unexplained delay between the death and the court martial of the soldiers allegedly responsible had seriously undermined the effectiveness of the investigation, and that the narrow focus of the criminal proceedings had been inadequate to satisfy the requirements of Article 2.[120]

The impact of the European Court's judgments concerning the investigation of abuses committed by UK troops abroad is manifest. That impact is evident from both the almost immediate change in policy, resulting in modifications to existing institutions and procedures (including the creation of the Iraq Historic Allegations Team (IHAT) and the Iraq Historic Allegations Panel (IHAP)), which followed soon after the judgment in *Al-Skeini*,[121] and the readiness of the

[113] The sixth applicant, the father of Baha Mousa, had accepted, in the light of the public inquiry into the circumstances of Mr Mousa's death set up by the UK government in 2008 – which, by that stage, was nearing completion – that he was no longer a victim of any breach of the procedural obligation under ECHR art 2: ibid para 176. For the report of the Baha Mousa inquiry see 'The Baha Mousa Public Inquiry Report (Chairman: Sir William Gage)' (3 vols), The Stationery Office, HC 1452-I/III, 8 September 2011, http://www.bahamousainquiry.org/report/index.htm.

[114] *Al-Skeini v United Kingdom* (n 34) para 153. In particular, the UK government had argued that the investigation had been carried out by the Special Investigation Branch of the Royal Military Police, who were institutionally independent of the armed forces, and that the role of the military chain of command in notifying the Royal Military Police of an incident requiring an investigation did not mean that the investigations lacked independence.

[115] ibid para 164.

[116] ibid.

[117] ibid.

[118] ibid para 171.

[119] ibid para 172.

[120] ibid para 174.

[121] For discussion of the original mandate, composition and status of the two bodies, see *R (Mousa) v Secretary of State for Defence* [2011] EWCA Civ 1334, paras 19–39. The IHAT appears to be modelled largely upon the Historical Enquiries Team (HET) set up in 2005 in order to give effect to the findings of the ECtHR in cases relating to the ineffective investigation of killings in Northern Ireland during the Troubles (1968–98). Although the CoM appeared to accept that the setting up and activities of the HET constituted an appropriate method to give

English courts to scrutinise those new institutions and procedures against the principles enunciated by the Court.

In 2010, Iraqi nationals who claimed they had been ill-treated by British soldiers brought proceedings before the English courts seeking to force the Secretary of State to initiate a public inquiry. To that end, they claimed that the measures ordered by the Secretary of State by way of investigation of the allegations of ill-treatment – consisting of the creation of the IHAT and IHAP – had not complied with the requirements of Article 3 ECHR.[122] Following the judgment of the Court of Appeal delivered in November 2011 – which held that the investigation had not been sufficiently independent because of a lack of institutional independence of the IHAT from the military chain of command[123] – the Secretary of State reconstituted the investigation in an attempt to take account of the shortcomings identified.

Subsequently, in 2013, a further challenge against the revised mechanism for investigation was brought by the relatives of individuals killed by British troops in Iraq and other Iraqi citizens who claimed they had been ill-treated by British soldiers.[124] The Divisional Court held that although, as a result of the steps taken by the Secretary of State, the IHAT as reconstituted was sufficiently independent,[125] it was not sufficient to discharge the United Kingdom's obligations under Article 2 ECHR to carry out effective investigations. That conclusion was dictated by the consideration that, in light of the judgments of the European Court which had found that the ECHR extended to a number of situations in which killings or other abuses had allegedly been committed by UK servicemen in Iraq between 2003 and 2009, the duty of investigation incumbent upon the UK government was 'unprecedented'.[126] According to the Divisional Court, the IHAT was not an appropriate institution to discharge that duty in an effective way as required by Article 2 ECHR,[127] and[128]

> the task of investigating and inquiring into the very large number of deaths occurring at many different times and in different locations requires a new approach if it is to be achieved in a timely, cost-effective and proportionate manner that discharges the very important investigative duties imposed upon the State.

effect to the ECtHR's judgments, and closed its examination of the cases in 2009, a recent report by the British body charged with oversight of UK policing identifies a number of very serious shortcomings in relation to the way in which the HET has investigated killings that implicated state involvement. See Her Majesty's Inspectorate of Constabularies, 'Inspection of the Police Service of Northern Ireland Historical Enquiries Team', 3 July 2013, www.hmic.gov.uk. For discussion of the Historical Enquiries Team and other measures adopted by the UK in response to the Court's judgments relating to the Troubles in Northern Ireland, see the case study in Borelli (n 2) Annex, Ch 5.

[122] *R (Mousa) v Secretary of State for Defence* [2010] EWHC 3304 (Admin) paras 1–3.

[123] *R (Mousa) v Secretary of State for Defence* (n 121) paras 34–38.

[124] *R (Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin).

[125] ibid paras 108–25.

[126] ibid paras 2–6 and 130.

[127] ibid paras 178–97. The Divisional Court found that IHAT inquiries fell short of the requirements of art 2 as, inter alia, the IHAT was not structured in a way which allowed it to take prompt and effective decisions as to the prosecution of individuals allegedly responsible for the killing of Iraqi civilians; the inquiry was not accessible to the public, nor to the family of the victim; nor was it able to examine systemic abuses and the type of training and instructions received by UK soldiers.

[128] ibid para 6.

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Nevertheless, the Divisional Court refused to disturb the Secretary of State's refusal to order a public inquiry into the deaths,[129] which had been one of the applicants' principal aims in bringing the litigation, and expressed the view, by way of guidance, that one way in which to create a mechanism that would be compliant with the UK's obligations under Article 2 would be to create a system based on the domestic scheme of coroner's inquests.[130]

In the case of the United Kingdom, the requirements deriving from the European Court's jurisprudence have undoubtedly had a major impact on the investigation and prosecution of abuses in Iraq, even if the story is evidently not yet over. The requirements of an effective investigation are recognised and carefully applied by the domestic courts, and the government has taken steps in an attempt to comply with its obligations under the Convention, first by creating the IHAT, and then by reconstituting it in order to comply with the criticisms identified by the Court of Appeal in 2011; further modifications are to be expected in the light of the most recent decision.

4.4 The Investigation of Historic Abuses: The Case of Northern Cyprus

One final example which is worth mentioning is that of the judgments of the European Court in relation to historic cases of enforced disappearances in Northern Cyprus.

The inter-communal violence in Cyprus of the early 1960s falls outside the jurisdiction *ratione temporis* of the European Court. The same is true of violations that occurred during the Turkish military intervention in 1974 and, in particular, the instances of alleged enforced disappearances and killings.[131] However, in the 2001 *Cyprus v Turkey* judgment, the Court held that the continued failure of the authorities to investigate alleged disappearances of individuals in life-threatening circumstances in 1974 constituted a continuing violation, in respect of which Turkey was under continuing obligations under the Convention, and over which the Court had jurisdiction.[132] That finding was reiterated, inter alia, in the 2009 judgment in *Varnava v Turkey*, when the Grand Chamber affirmed in strong terms the continued (and continuing) force of the obligation to investigate,[133] and concluded:[134]

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[129] ibid paras 198–211.
[130] ibid paras 213–31.
[131] As to alleged enforced disappearances committed by the Greek-Cypriot side see, eg, *Baybora and Others v Cyprus* App No 77116/01 (ECtHR, 22 October 2002); *Karabardak and Others v Cyprus* App No 76575/01 (ECtHR, 22 October 2002).
[132] *Cyprus v Turkey* (n 16) para 136; the ECtHR had held earlier that it was unable to find a substantive violation of art 2, because it fell outside the scope of the application *ratione temporis* and because of the inconclusive nature of the available evidence: ibid para 130.
[133] *Varnava and Others v Turkey* App Nos 16064 and others (ECtHR [GC], 18 September 2009). The Grand Chamber noted that despite the passage of time, it could not be said that 'there is nothing further that could be done' and that, although '[i]t may be that investigations would prove inconclusive, or insufficient evidence would be available …, that outcome is not inevitable even at this late stage and the respondent Government cannot be absolved from making the requisite efforts' (ibid para 192); in that regard, the Grand Chamber invoked the example of the creation by the UK of the HET and the Serious Crimes Review Team in Northern Ireland, which had been found 'given the time that had elapsed, to have been adequate in the particular circumstances' (ibid).
[134] *Varnava v Turkey*, ibid para 193. On the composition and mandate of the UN Committee on Missing Persons (CMP), see ibid para 85.

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

However, the Grand Chamber indicated[135] that, despite the continuing nature of the obligation to investigate, the possibility for the relatives of missing persons to invoke the Court in relation to the failure to investigate historic disappearances was, in fact, time-limited, and would be rejected as out of time by virtue of the operation of the six-month rule under Article 35(1) ECHR in cases

> where there has been excessive or unexplained delay on the part of applicants once they have, or should have, become aware that no investigation has been instigated or that the investigation has lapsed into inaction or become ineffective and, in any of those eventualities, there is no immediate, realistic prospect of an effective investigation being provided in the future.

The Court went on to set a fixed cut-off for such applications, stating that if ten or more years had passed from the disappearance, then the relatives were required to demonstrate convincingly that there had been continuous and tangible progress in the activities of the relevant domestic authorities which had justified the delay in submitting an application to the European Court.[136]

Applying that approach to the way in which the investigation of the fate of missing persons in Northern Cyprus had developed over the years, the Court noted that, although the circumstances of the international conflict in Cyprus had justified waiting for the results of the UN-driven initiatives for a settlement, it nevertheless should have been clear to the relatives of the missing persons, at least by the end of 1990, that the activities of the UN Committee on Missing Persons (CMP) did not offer any realistic hope of progress in finding the remains of missing persons, or for ascertaining their fate, in the near future.[137] Accordingly, while accepting that the applications before it, which had been filed in January 1990, were admissible *ratione temporis*, the Court sent a clear signal that any applications submitted after mid-1991 would be declared inadmissible.

With regard to the merits of the applicants' complaint under Article 2 in relation to the inadequacy of the investigations, the Grand Chamber reiterated that the CMP was not an adequate substitute for an Article 2-compliant investigation and that Turkey was still in breach of the obligation to investigate.[138] The Grand Chamber refrained, however, from ordering specifically that an investigation should be carried out[139] or that, as requested by the applicants, Turkey

[135] ibid para 165.
[136] ibid para 166.
[137] ibid para 170.
[138] ibid para 189.
[139] ibid para 222.

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should be ordered to pay increasing 'fines' for as long as the failure to ensure an investigation into the disappearance of the applicants' relatives persisted.[140]

Following its decision in *Varnava*, the European Court remains engaged with the situation as the result of its decision in later cases that the obligation to investigate could be re-triggered (and the time for making an application could be reset) as a result of exhumations carried out by the CMP in the years since 2005.

The applicants in *Charalambous and Others v Turkey* filed applications in 2007 complaining of the failure of the authorities of the Turkish Republic of Northern Cyprus (TRNC) to carry out an effective investigation into the deaths of their relatives who had gone missing in 1974 and whose remains had been exhumed by the CMP in the context of an exhumation project on identified burial sites which the Committee had commenced in 2006.

The European Court, adopting the approach foreshadowed in *Varnava*, declared inadmissible as lodged out of time the complaints in relation to the absence of an investigation into the disappearance of the applicants' relatives in 1974.[141] However, in a second decision dealing with complaints of failure to conduct an effective investigation following the exhumation of the bodies of the applicants' relatives, the Court elaborated upon what was to be expected of the authorities in such circumstances. It observed[142] that

> [w]here an investigation into a death has long ended or the incident is far in the past, it is possible that new developments occur such that a fresh obligation to investigate arises, for example, newly-discovered evidence casting doubt on the results of an earlier investigation or trial, or information purportedly casting new light on the circumstances of a death.

The Court went on to make clear that the scope of the new obligation to investigate would vary 'according to the nature of the purported new evidence or information', and emphasised that the expedition required in such cases 'is much different from the standard applicable in recent incidents where time is often of the essence in preserving vital evidence at the scene and questioning witnesses when their memories are fresh and detailed'.[143] The Court also observed that the other requirements of an adequate investigation would similarly vary with the particular circumstances of the case in light of the passage of time, but that this would generally not be the case with regard to the requirement of independence.[144]

Applying those principles to the facts of the case, the Court held that the new evidence, which involved the 'finding of the bodies in a particular location, bearing signs from which the cause of death may be ascertained and allowing the pursuit of leads that might possibly lead to identification of those responsible for the killings', had to be regarded as 'crucial evidence casting new light on the case'; as a result, there arose a procedural obligation under Article 2 requiring an investigative

[140] ibid para 223.
[141] See *Charalambous and Others v Turkey* App No 46744/07 (ECtHR, Decision, 1 June 2010).
[142] *Charalambous and Others v Turkey* App No 46744/07 (ECtHR, Decision, 3 April 2012), para 55.
[143] ibid para 56.
[144] ibid para 57.

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response by the authorities.[145] In that regard, the Court noted that, once the bodies had been identified through the work of the UN CMP, 'it falls to the authorities to uncover, as far as may be practicable and reasonable in the circumstances, the facts surrounding the death and the identities of any persons involved in unlawful acts in that regard with a view to holding them to account'.[146]

On the facts, the Court held that, although investigative steps had been under way since late 2010 and 'no, or little, concrete progress appears to have been made',[147] the lack of progress did not per se indicate a lack of good faith or will on the part of the authorities. On that basis, it accordingly concluded that it was still 'premature' to challenge the response of the TRNC authorities as ineffective, and the applications were dismissed as inadmissible.[148]

In many cases implicating widespread impunity for serious abuses committed by state agents, the adoption of general measures is crucially important. By contrast, in cases involving historical mass atrocities, individual measures are, in effect, the principal measures required in order to comply with a judgment of the European Court. An assessment of the impact of the Court's judgments in relation to the domestic investigations of the abuses committed in 1974 shows that, some twelve years after the rendering of the *Cyprus v Turkey* judgment, and despite the further Grand Chamber judgment in *Varnava*, little has been done in the way of individual measures in order to comply with the judgments of the Court, which clearly implied the need for the reopening of investigations into the disappearances, conducted in a manner consistent with Article 2. Although for a long period there was little movement on the part of either Turkey or the CoM, and both appear to have dug into their respective positions,[149] there appear to be some small and positive signs of change in this respect.[150]

The failure by Turkey to take any meaningful measures other than its participation in the CMP, and its strong opposition to the opening of criminal investigations, was evidently motivated by deeply rooted political reasons related to the historical context of the violations, the continuing international non-recognition of the TRNC and Turkey's continued denial of its responsibility for any atrocities.

Notwithstanding these strong political reasons underlying the non-compliance, the series of judgments adopted by the European Court, accompanied by the continued efforts of the CoM to maintain

[145] ibid para 58. The ECtHR clarified that, even if the mechanism of individual petition by the next-of-kin of victims of past abuses logically only became applicable at the point at which the bodies were identified, this did not mean that the investigative obligation arising from the discovery become operational only at that point, observing that '[i]t cannot be the case that on discovery of mass graves of victims of violence the authorities could remain inactive and claim that no Article 2 obligations arose as the identities of the victims were unknown. That would be a bizarre result' (ibid para 59).

[146] ibid para 60.

[147] ibid para 65.

[148] ibid para 66.

[149] See, eg, the 1092nd meeting, at which the CoM decided merely to 'resume consideration of the item at one of its forthcoming meetings': 'Decisions Adopted at the 1092nd (DH) Meeting, 14–15 September 2010', CoE Doc CM/Del/Dec(2010)1092; see also the earlier CoM, 'Decisions Adopted at the 1086th (DH) Meeting', 1–3 June 2010, CoE Doc CM/Del/Dec(2010)1086/1.

[150] See 'Decisions Adopted at the 1164th (DH) Meeting, 5–7 March 2013', CoE Doc CM/Del/Dec(2013)1164', Case No 29, paras 5–11.

a constructive dialogue, have contributed to results which must broadly be seen as being positive, including notably the continued engagement by Turkey and the authorities of the TRNC with the CMP. Whatever the real reasons underlying that engagement – which include the possibility that it was motivated solely by the desire on the Turkish side to be able to point to at least some action being taken in terms of investigation – it has, in fact, borne fruit in terms of the discovery of new and relevant evidence as a result of the CMP being granted access to sites in the north. In turn, those investigations have at least resulted in clarification of the fate of a small number of missing persons whose remains have been located and identified, and may provide a starting point for new investigations with a view to identifying those responsible.

Concurrently, the European Court is maintaining pressure upon Turkey over the obligation to investigate in order to maintain the momentum which has built up, and to ensure that the fruits of the CMP investigation are not lost or rendered worthless by the further passage of time. The decision in *Charalambous* is a clear example; as noted above, having discussed the investigations started by the TRNC authorities into the circumstances of the deaths of the applicants' relatives, the Court pointed out that the activities of the investigating authorities appeared to present the same flaws, but nevertheless postponed any decision on that point as premature. Nonetheless, in a passage which is in effect a thinly veiled threat as to the position it will adopt if no effective investigative measures are taken in the future, the Court observed[151] that it remained 'too early' for it

> as a supervisory international jurisdiction to reach any findings that the authorities' actions are a mere sham or that there is bad faith, wilful foot-dragging and calculated prevarication involved. Prolonged inactivity and silence by the authorities over a more significant period of time might eventually render such a conclusion possible, but not yet.

5. Improving the Impact of the Court's Decisions

The preceding section demonstrates that, in practice, when it comes to the execution of judgments concerning serious and widespread abuses committed by state agents – which are normally also the most politically charged – there is often a general lack of compliance by the respondent state with some of the remedial obligations arising from the judgments. Although, as discussed in the case studies above, at times states are reluctant to adopt meaningful general measures aimed at preventing further similar violations in the future, the failure to comply is generally more evident with regard to the adoption of individual measures (other than the payment of the sums awarded by the Court by way of compensation). In particular, as the Chechen and Northern Cyprus case studies demonstrate, states appear to be particularly reluctant to rectify the problems identified by the Court and to investigate effectively specific historic incidents with a view to prosecuting the state agents responsible.[152]

[151] *Charalambous* (n 142) para 65.

[152] The refusal by respondent states to adopt any individual measures other than payment of compensation may be compounded by the approach to supervision of execution adopted by the CoM itself. For instance, in relation to cases in the

In the face of such extreme situations of lack of political will, no high hopes should be held that proposed mechanisms, judicial techniques, or even proposed reforms of the Convention monitoring system will bring about a dramatic change in the attitude of recalcitrant states.

As to those suggestions which can be rejected more or less quickly, theoretical analyses of strategies or approaches which are or might be taken by the European Court in order to ensure greater compliance are unlikely to be of any great help as regards the exceptional situations in which atrocities are normally committed. For instance, proposals to engage national judiciaries and co-opt, encourage and/or persuade them to ensure greater implementation of the Convention[153] are likely to be of little utility in situations where resistance to compliance with a judgment of the European Court is so deep-seated, pervasive and motivated by strong political reasons. Similarly, the entire debate as to whether the role of the Court should be reoriented so as to provide constitutional – rather than individual – justice[154] is of little relevance in this regard. To take but one particularly clear example, as noted above, in some of the Chechen cases, reports have surfaced alleging that prosecutors and courts have expressly rejected clear findings of fact by the European Court as to the identity of those responsible, or which would easily have permitted their identification.[155] Regardless of the extent to which the ECHR and the jurisprudence of the European Court are accepted and applied by the domestic courts in other fields or in relation to other issues within the Russian Federation,[156] there is a clear rejection as regards Chechnya.

At least in theory, there exists the possibility of interstate cases being brought under Article 33 of the Convention in relation to widespread situations of violation. In that regard, there would appear to be nothing on the face of Article 33 itself to exclude the possibility of an interstate case being brought in relation to a violation of the obligation under Article 46 to abide by the judgments of the Court as the result of a situation of non-compliance with an earlier judgment.

'*Aksoy* group' – which groups together over 250 judgments and amicable settlements relating to violations by the Turkish security forces in south-east Turkey – in the supervision of the execution of judgments, the relevant Convention organs have largely prioritised the adoption of general measures aimed at improving the quality of investigations, arguably at the expense of individual measures, particularly the possible resumption of criminal investigations. see, eg, the comment by the Department for Execution of Judgments in relation to the measures adopted by Turkey that, in view of the need for general measures to improve investigations, the issue of individual measures has been 'largely integrated into that of general measures'. See https://wcd.coe.int/ViewDoc.jsp?id=1511985&Site=COE, under 'Aksoy'.

[153] See, eg, Laurence Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 *European Journal of International Law* 125, who identifies various aspects of the 'embeddedness' of the Convention as factors which co-opt domestic courts with the aim of ensuring greater compliance with the Convention.

[154] See, eg, Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *Human Rights Law Journal* 161; Luzius Wildhaber, 'The Role of the European Court of Human Rights: An Evaluation' (2004) 8 *Mediterranean Journal of Human Rights* 9; Robert Harmsen, 'The European Court of Human Rights as a "Constitutional Court": Definitional Debates and the Dynamics of Reform', in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition and Human Rights Cultures* (Oxford University Press 2007) 33; Stephen Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 169–74.

[155] See, eg, the comments by the CoM on the Chechen cases reported above, text to n 58.

[156] For a fascinating account of the attitude of the Russian courts and public authorities, see Alexei Trochev, 'All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia' (2009) 17 *Demokratizatsiva: The Journal of Post-Soviet Democratization* 145.

However, to a certain extent, the likelihood that such a step might occur is perhaps plausible only where one or more states have some particular interest in the atrocities in question, as was the case in *Cyprus v Turkey*, although in such circumstances there is greater scope for the respondent state simply to dismiss the action as politically motivated. Conversely, as is demonstrated by the situation in Chechnya, where there is no specifically interested state there may be little appetite among third states to take action.[157] In any case, as *Cyprus v Turkey* also eloquently illustrates, the problem of ensuring compliance may remain also when it comes to interstate judgments.

As regards the possibility of recourse by the CoM to the new non-compliance procedure introduced by Protocol No 14[158] and now codified in Article 46(4) ECHR – which effectively performs a function similar to the type of interstate application canvassed above, while removing the need for individual states to take action – a certain amount of pessimism would similarly seem to be justified as to its effectiveness in practice. After all, as noted above, the judgments of the European Court in *Cyprus v Turkey* and *Varnava* could not have been much clearer short of actually making an order to investigate, and yet Turkey to date has not complied. The use of the new enforcement procedure, as with an interstate case, may have some value insofar as it 'names and shames' recalcitrant states in relation to their non-compliance. However, in cases in which a state has clearly and deliberately avoided taking any meaningful steps to give effect to the original judgment(s), serious doubts remain as to the utility and effectiveness of a further, formal declaration to that effect by the European Court.

Although there remains the 'nuclear' option of suspension of the right of representation and, in the last resort, expulsion of a member state from the CoE in the case of persistent non-compliance,[159] it is self-evident that the suspension or exclusion of a state would almost invariably be counterproductive.[160]

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[157] In its Recommendation 1456, 'Conflict in the Chechen Republic: Implementation by the Russian Federation of Recommendation 1444 (2000)', adopted on 6 April 2000, the Parliamentary Assembly expressed the view that 'substantial grounds for concern exist … that the European Convention on Human Rights is being violated by the Russian authorities in the Chechen Republic both gravely and in a systematic manner'; as a consequence, it appealed to 'to make use of Article 33 as a matter of urgency and to refer to the European Court of Human Rights alleged breaches by the Russian Federation of the provisions of the Convention and its Protocols' (ibid para 18).

[158] Protocol No 14 to the European Convention on Human Rights, amending the control system of the Convention (entered into force 1 June 2010) CETS No 194. For commentary on the modifications introduced by the Protocol, see Stephen Greer, 'Protocol 14 and the Future of the European Court of Human Rights' (2005) *Public Law* 83.

[159] See Statute of the Council of Europe, art 8 (entered into force 3 August 1949) CETS No 001. The CoM implicitly threatened Turkey with exclusion as the result of its non-payment of the sums awarded by way of compensation in *Loizidou v Turkey*: see CoM, Interim Resolution ResDH(2003)174 adopted at the 860th Meeting of the Ministers' Deputies on 12 November 2003, in which the Committee urged Turkey to pay the compensation ordered by the ECtHR within one week and declared its 'resolve to take all adequate measures against Turkey if Turkey fails once more to pay the just satisfaction awarded by the Court to the applicant'. Turkey subsequently paid the sums due on 2 December 2003: see Resolution ResDH(2003)190, adopted at the 862nd Meeting of the Ministers' Deputies on 2 December 2003. In Recommendation 1456 (n 157) the Parliamentary Assembly also recommended to the CoM that should 'substantial, accelerating and demonstrable progress not be made immediately' as regards the human rights situation in Chechnya, the CoM should 'initiate without delay, in accordance with Article 8 of the Statute, the procedure for the suspension of the Russian Federation from its rights of representation in the Council of Europe' (ibid para 24(ii)).

[160] See, eg, Explanatory Report, Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, CETS No 194, para 100, http://conventions.

All of the above matters concern steps that are somewhat extrinsic to the Court itself; however, it is suggested that there is one potential modification to the current practice of the Court which could enhance the impact of judgments relating to mass atrocities and accordingly bring about greater accountability at the domestic level. That modification is the adoption by the Court of a more purposive approach to the scope of its remedial powers.

The European Court has traditionally refrained from ordering specific remedial measures other than the payment of compensation by way of just satisfaction in appropriate cases[161] and rather has generally left to the CoM the task of guiding the respondent state in the choice of the measures to be adopted in order to implement a judgment. The approach currently taken by the Court in relation to compliance with its judgments is encapsulated by its remarks in *Scozzari and Giunta v Italy*, where it observed[162] that, pursuant to Article 46 of the Convention,

> a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.

Despite the statement of principles reported above, the practice of the European Court has, however, recently evolved, at least as regards certain specific types of case. In particular, specific orders have been made for the restitution of property of which the applicant had been wrongfully deprived,[163] the release of individuals wrongfully detained,[164] and requiring the state to secure the applicant's right to a trial within a reasonable time.[165] Less intrusively, the Court has made

coe.int/Treaty/EN/Reports/Html/194.htm. See, in the same sense, Greer (n 154) 155–56, noting that '[t]here is very little the Council of Europe can do with a state persistently in violation, short of suspending its voting rights on the Committee of Ministers or expelling it from the Council altogether, each of which is likely in all but the most extreme circumstances to prove counterproductive'; see also Philip Leach, 'The Effectiveness of the Committee of Ministers in Supervising the Enforcement of Judgments of the European Court of Human Rights' (2005) *Public Law* 443.

[161] In *Ireland v United Kingdom* App No 5310/71 (ECtHR, 18 January 1978) although expressly declining to decide the more general question of 'whether its functions extend, in certain circumstances, to addressing consequential orders to Contracting States', the ECtHR held, in response to the specific request for relief formulated by Ireland, that 'the sanctions available to it do not include the power to direct one of those States to institute criminal or disciplinary proceedings in accordance with its domestic law' (ibid para 187). As to the non-permissibility of the granting of specific declaratory relief, see *Tolstoy Miloslavsky v United Kingdom* App No 18139/91 (ECtHR, 13 July 1995), paras 69–72; *Akdivar and Others v Turkey (Article 50)* App No 21893/93 (ECtHR [GC], 1 April 1998), para 47.

[162] See *Scozzari and Giunta v Italy* App Nos 39221/98 and 41963/98, (ECtHR [GC], 13 July 2000), para 249.

[163] See *Papamichalopoulos and Others v Greece (Article 50)* App No 14556/89 (ECtHR, 31 October 1995), paras 34–39, and para 2 of the *dispositif*; cf *Guiso-Gallisay v Italy (Just Satisfaction)* App No 58858/00 (ECtHR [GC], 22 December 2009), paras 90–96.

[164] See, eg, *Assanidze v Georgia* App No 71503/01 (ECtHR [GC], 8 April 2004), paras 202–03 and para 14(a) of the *dispositif*; and *Ilaşcu and Others v Moldova and Russia* App No 48787/99 (ECtHR [GC], 8 July 2004), para 490 and para 22 of the *dispositif*.

[165] *Lukenda v Slovenia* App No 23032/02 (ECtHR, 6 October 2005), para 5 of the *dispositif*; see also paras 97–98; cf the Partly Dissenting Opinion of Judge Zagrebelsky. See similarly *Burdov v Russia (No 2)* App No 33509/04 (ECtHR [GC], 15 January 2009), para 6 of the *dispositif* (requiring the provision of 'an effective domestic remedy

recommendations in relation, inter alia, to the reopening of proceedings that were in breach of Article 6.[166]

A major factor in this evolution in the remedial practice of the Court has undoubtedly been the introduction of the 'pilot judgments' procedure, as a result of which the Court has found greater confidence in 'recommending' measures which states might take in order to deal with systemic problems giving rise to recurring violations of the Convention.[167] Despite the fact that the judgments in some of the cases discussed in this article undoubtedly disclose systemic (or at least widespread) problems, and resort to the pilot judgment procedure might on its face seem to be an appropriate mechanism, the situation is in practice more complex. In particular, the nature of the majority of cases involving atrocities means that often there will be disputes over key factual issues (for example, the circumstances in which a 'disappeared' person is to be presumed dead, whether state agents or private individuals were responsible, and so on), which renders them unsuitable for the application of the pilot judgment procedure. In addition, the measure required to put an end to the systemic violation is in principle the reopening of investigations or the resumption of criminal proceedings which have been improperly discontinued; such measures are in effect individual measures applicable to each specific case and are different from the general measures typically indicated in pilot judgments.

The fact that the adoption of pilot judgments in the type of case at issue here may not be the most appropriate solution does not mean that the European Court could not adopt a firmer and bolder line when it comes to the exercise of its remedial powers in individual cases. Despite repeated requests for the indication of specific remedial measures by the applicants in cases concerning failure to investigate serious human rights abuses, the Court has so far been reluctant to extend the category of situations in which it is prepared to order specific measures so as to require states to carry out an investigation, or to reopen an investigation which has been prematurely closed. For instance, the applicants in a number of cases concerning abuses perpetrated in Chechnya by members of the Russian security forces have requested the European Court to order that fresh, independent

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or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments'); see also ibid paras 136–41.

[166] *Sejdovic v Italy* App No 56581/00 (ECtHR [GC], 1 March 2006), para 126; cf the Chamber judgment of 10 November 2004, para 55. See also, in this regard, CoM, Recommendation No R (2000) 2 on 'Re-examination or Reopening of Certain Cases at Domestic Level Following Judgments of the European Court of Human Rights', adopted at the 694th meeting of the Ministers' Deputies on 19 January 2000.

[167] Such recommendations were made, eg, in *Broniowski v Poland* App No 31443/96 (ECtHR [GC], 22 June 2004) (provision of a system of compensation). For the impetus for the pilot judgment procedure, see CoM, Resolution CM/ResDH(2004)3 on Judgments Revealing an Underlying Systemic Problem, adopted at the 114th Session on 12 May 2004. For general discussion of the developments in the ECtHR approach to the ordering of specific measures, see Valerio Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the *Assanidze*, *Broniowski* and *Sejdovic* Cases' (2007) 7 *Human Rights Law Review* 396. For general discussion, see Philip Leach, 'Beyond the Bug River: A New Dawn for Redress before the European Court of Human Rights' (2005) *European Human Rights Law Review*, 147; Philip Leach and others, *Responding to Systemic Human Rights Violations. An Analysis of Pilot Judgments of the European Court of Human Rights and Their Impact at National Level* (Intersentia 2010); Philip Leach, Helen Hardman and Svetlana Stephenson, 'Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? *Burdov* and the Failure to Implement Domestic Court Decisions in Russia' (2010) 10 *Human Rights Law Review* 346.

investigations be conducted into the deaths of their relatives.[168] The Court, although not expressly denying that it had power to order the reopening of investigations, noted that the effectiveness of the investigations had been undermined at their early stages by the failure of the domestic authorities to take meaningful investigative measures, and that it was very doubtful that the situation that existed before the breaches could be restored; it concluded that, in the circumstances, it was best to leave it to the respondent state to select the means to be adopted to comply with the judgment.[169]

In *Varnava v Turkey* the Grand Chamber similarly rejected a request by the applicants for a specific order requiring an investigation into the disappearance of their relatives. However, it did so in terms which appear to imply the rejection of any possibility that it had any power to make any order requiring the opening of an investigation. It reiterated the familiar position that 'the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment' and emphasised that 'in these applications it falls to the CoM acting under Article 46 of the Convention to address the issues as to what may be required in practical terms by way of compliance'.[170]

The reluctance of the European Court to expressly order the reopening of investigations appears to be of questionable wisdom. Although the logic of the scheme of the Convention – including, in particular, the division of competences between the Court and the CoM, and the freedom of the state to choose how it complies with a judgment – might appear to dictate that result, that has not prevented the Court from ordering specific measures, or at least strongly recommending the measures to be taken, in other contexts. Conversely, the Court's decisions in *Cyprus v Turkey* and *Varnava* are clear as to the continuing nature of the violation of the Convention as a result of the absence of any investigation into the disappearances. As in other contexts, in *Varnava* it would have been only a small step further to enunciate the consequences for Turkey of that violation by way of an express order in the operative paragraph of the judgment.[171] The appropriateness of such an order prompted Judges Spielmann, Ziemele and Kalaydjieva, in their joint Concurring Opinion, to express the view that the making of such an order would in no way have infringed the division of competences within the CoE.[172]

A notable exception to the general reluctance of the European Court to order the conduct of investigations is its decision in *Abuyeva and Others v Russia*, in which the Court unanimously found[173] that

[168] See, eg, *Kukayev v Russia* App No 29361/02 (ECtHR, 15 November 2007), paras 131–34; *Musayeva v Russia* App No 12703/02 (ECtHR, 3 July 2008), paras 164–66; *Mezhidov v Russia* App No 67326/01 (ECtHR, 25 September 2008), paras 96–99; *Lyanova and Aliyeva v Russia* (n 66) paras 159–60.
[169] See *Kukayev v Russia*, ibid para 134; *Musayeva v Russia*, ibid para 166; *Mezhidov v Russia* ibid para 99; *Lyanova and Aliyeva v Russia* (n 66) para 160.
[170] *Varnava v Turkey* (n 133) para 222.
[171] See, eg, *Ilaşcu v Moldova and Russia* (n 164) para 22 of the *dispositif*: 'the respondent States are to take all necessary measures to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release'.
[172] *Varnava v Turkey* (n 133) Concurring Opinion of Judge Spielmann, joined by Judges Ziemele and Kalaydjieva, para 5.
[173] *Abuyeva v Russia* (n 51) para 243.

> it falls to the Committee of Ministers, acting under Article 46 of the Convention, to address the issue of what – in practical terms – may be required of the respondent Government by way of compliance. However, [the Court] considers it inevitable that a new, independent, investigation should take place. Within these proceedings, the specific measures required of the Russian Federation in order to discharge its obligations under Article 46 of the Convention must be determined in the light of the terms of the Court's judgment in this case, and with due regard to the above conclusions in respect of the failures of the investigation carried out to date.

One of the clear reasons for the different treatment of this case is the 'manifest disregard' on the part of the government of both the *Isayeva* judgment and the repeated requests by the CoM to carry out an effective investigation.[174] It remains to be seen whether this decision signals a broader shift in the Court's approach to non-monetary satisfaction. The need for such a development has already been stressed by a number of authoritative commentators, including the late Professor Antonio Cassese, as the only way of 're-establishing public order' in cases of mass atrocities.[175]

6. CONCLUSIONS

The foregoing analysis demonstrates that the judgments of the European Court are directly relevant to, and have the potential to have a very great impact on, the capability of domestic legal systems to deal with gross violations of fundamental human rights. This is the case for a number of reasons. First, as far as the applicable standards are concerned, the detailed procedural obligations of investigation identified by the Court under Articles 2 and 3 ECHR provide crucially important guidance to domestic authorities in ensuring that domestic legal systems are then able to mount effective prosecutions. Although there may be some doubts as to the precise manner in which they must be adapted and applied to take account of the exigencies of extreme situations – including, for instance, occupation or other military action abroad – the scope and content of the procedural obligations under Articles 2 and 3 are sufficiently clear. The Court's case law provides

[174] ibid paras 238–42. See, in particular, para 241, quoted above, text to n 56.

[175] See Antonio Cassese, 'Strengthening the Role of the European Court of Human Rights', speech before the Parliamentary Assembly of the CoE, 24 June 2009, http://coenews.coe.int/vod/090624_w01_e.wmv. A valuable illustration of the possibility (and the merit) of a different approach is provided by the Inter-American Court of Human Rights. In contrast to the deferential approach of the European Court, the Inter-American Court has had little hesitation in making full use of its remedial powers, in particular by ordering states to adopt remedial measures in conjunction with the payment of compensation. In that regard, the Inter-American Court, from a very early stage in its long history of dealing with cases involving mass atrocities, has expressly ordered states to conduct investigations into the abuses identified and to prosecute and punish those responsible in an appropriate manner. See, inter alia, *Loayza Tamayo v Peru* (1998) Inter-Am Ct HR (Ser C) No 42, para 192(6); *Barrios Altos v Peru* (2001) Inter-Am Ct HR (Ser C) No 75, para 51(5). cf the earlier case of *Velásquez-Rodriguez v Honduras* (1988) Inter-Am Ct HR (Ser C) No 4, in which the Inter-American Court, while emphasising the need for criminal punishment of those responsible for the abuses identified in the case, did not expressly order the domestic authorities to conduct an investigation and prosecution. For discussion, see Thomas W Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 *Columbia Journal of Transnational Law* 351.

a series of key guidance points as to the required status of the investigative authorities and the institutional context in which they should operate, the practical modalities and requirements of an effective investigation, as well as the requirements of transparency and public scrutiny, including the involvement of the victims and their families.

Second, as far as the scope for the European Court to intervene in situations of large-scale human rights violation is concerned, the range of situations to which the Convention is applicable appears now to cover all the principal situations in which serious and widespread abuses are likely to be committed. In particular, following the recent decisions as to the extraterritorial application of the Convention, it is clear that the procedural obligations under Articles 2 and 3 ECHR are, at least potentially, applicable to the conduct of the armed forces of a contracting state acting abroad. Further, it is clear that the Court will, when all other admissibility requirements are met, exercise its jurisdiction to hear claims even where the forces have been contributed to UN-authorised operations. Seen from this perspective, the scope for the impact of the judgments of the Court is therefore extremely far-reaching.

Finally, a consequence of the expansive way in which the CoM and the Court itself have interpreted the obligation under Article 46 ECHR to abide by judgments of the Court – including, in particular, the obligation to adopt the general measures required in order to prevent similar violations in the future – is that those judgments are capable of having an impact far beyond the individual case brought by the individual applicant.

Nevertheless, some of the case studies discussed above – and particularly those concerning Russia and Turkey – show that, in some circumstances, the practical impact of the European Court's judgments on domestic accountability for abuses committed by the armed forces or other security agencies has been extremely limited.

Admittedly, the problems encountered by the organs of the CoE in ensuring compliance in such extreme cases are, in the final analysis, symptomatic of the inherent limitations of the international legal system that result from the more general lack of coercive mechanisms. That said, such considerations in no way constitute a valid reason for the Court to reject out of hand any means available to it by which to enhance the likelihood of effective investigations and prosecutions at the domestic level. In particular, it is suggested that in cases of the type considered in this article, the Court should adopt a bolder approach to remedies and, where appropriate, make specific orders clarifying that what is required is the opening (or reopening) of Convention-compliant investigations and, where appropriate, the prosecution of those identified as suspects. Clearly, if the Court were tomorrow to start ordering the opening or reopening of investigations, this would by no means constitute a panacea, nor solve all of the problems involved in ensuring compliance with its judgments and accountability at the domestic level. As with other proposals, a certain amount of pessimism as to the effects in practice of such a course of action is probably justified. This is particularly the case insofar as a state which is determined to resist investigating an atrocity or prosecuting those responsible is unlikely to be swayed merely by the appearance of a further order in the operative part of a judgment of the European Court. However, the value of such a course of action by the Court is that it would make clear what is already implicit, while at the same time removing

any possibility for argument as to what measures are required of the respondent state. That added clarity would provide a small, yet potentially crucial, measure of assistance to the CoM and other contracting states in exerting greater political pressure upon a recalcitrant state to comply with its obligations under the ECHR.

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