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Thematic debate on the obligation to investigate violations of Articles 2 and 3 of the European Convention on Human Rights (ECHR) by law enforcement officials

Memorandum prepared by the Department for the Execution of Judgments of the ECHR (Directorate General of Human Rights and the Rule of Law).

The opinions expressed in this document are binding on neither the Committee of Ministers nor the European Court.

Background Document

This document has been prepared by the Secretariat to aid delegations and speakers to prepare for the thematic debate taking place on 12 March 2019.

For each of the sessions and the respective sub-themes, the document sets out non-exhaustively a series of relevant issues and considerations. These are inspired by the Committee of Ministers' experience, gained over many years, in supervising the execution of judgments that bear upon the subject of the 2019 thematic debate.

The document also contains examples drawn from the Committee of Ministers' assessment of situations that may be regarded as illustrations of the steps taken by national authorities to satisfy the procedural requirements of Articles 2 and 3 of the European Convention on Human Rights.

Relevant texts from the Committee of Ministers and other bodies of the Council of Europe are also referenced.

For a useful summary of the pertinent case-law of the European Court of Human Rights, please refer to the *Guide on Article 2 of the European Convention on Human Rights – Right to Life*, published by the Court's Registry.¹

¹ See in particular pages 28-37. The Guide is available on the Court's website: https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf.

SESSION I: ADDRESSING SHORTCOMINGS REVEALED BY THE COURT'S JUDGMENTS:

Where the European Court of Human Rights finds a violation of the procedural aspect of Articles 2 and/or 3 for failure to conduct an adequate investigation into breaches, verified or alleged, of these fundamental rights, this entails an obligation on the respondent State *ex officio* to reopen, resume or continue investigations, and to ensure that they are conducted in a Convention-compliant manner. This is what is generally required to give effect to the European Court's judgment.

➤ Independence of investigations

The Convention requires that investigations be carried out, from the outset, by independent bodies. To meet this requirement, the investigating body must have a sufficient degree of independence – both institutional and practical – from the authorities that are subject to investigation. This implies that the question of independence will have to be considered in the light of the relation between the state agents/authorities allegedly responsible for the events and those who carry out the investigations.

Examples of State practice in this respect that have been noted by the Committee of Ministers include:

- “calling in arrangements” (e.g. serious incidents involving police officers investigated by officers from another police force);
- recourse to special independent investigatory bodies;
- particular arrangements to ensure independence may be required in cases where high level politicians or officials are subject to investigations.

Case examples

❖ *Tsintsabadze v. Georgia (group of cases)*

These cases highlighted the absence, in the period before 2012, of independent investigatory arrangements when state agents, including high level government officials and members of the government, were suspected of grave crimes involving killings and ill-treatment.

Constitutional amendments were adopted in 2018 to provide that the Prosecutor General is no longer nominated by the government but is henceforth elected for a six year term by Parliament on the basis of recommendations from the Prosecutorial Council. In parallel, a State Inspector's Service (SIS) was established to provide an independent investigative mechanism for cases of killings, torture or ill-treatment by law enforcement agents. Inspectors are elected by Parliament for a term of six years, after a thorough pre-selection procedure and are accountable only to Parliament.

❖ *Al Skeini v. the United Kingdom*

The Court in this case found that investigation by the military police into killings allegedly unlawfully caused by army personnel lacked operational independence from the military chain of command of the accused soldiers.

The authorities' response was to establish specialised investigative processes that combined criminal investigations by the Iraq Historic Allegations Team, staffed by Royal Naval Police and civilians (under the judicial oversight of a designated High Court judge) with, in certain cases, an additional inquest-style inquiry by a retired judge.

➤ Speedy intervention of independent investigators

A challenge revealed by a number of cases before the Committee of Ministers was the ability of investigating authorities to react and initiate rapidly the investigation which is vital notably for securing evidence.

Case example

❖ *Ramsahai v. the Netherlands*

The case, which concerned a fatal shooting by a police officer, revealed a problem of excessive delay before the competent independent investigating authority, the State Criminal Investigation Department (the Department), took over the investigation from the local police force to which the alleged perpetrator belonged.

The duty system of the Department was improved in 2004 so that it could reach the scene of an incident on average within an hour or an hour and a half. Furthermore, the Board of Prosecutors General stressed in a 2006 Instruction that regional police forces should immediately report any incident to the Department. Awaiting arrival of investigators from the Department, local police should only take essential urgent measures.

➤ Adequacy and promptness of investigations

It is of paramount concern that investigations are prompt and adequate. They should be capable of leading to the determination of all the relevant facts, as well as the identification and, if appropriate, punishment of those responsible. Among several relevant dimensions the following have attracted particular attention in the context of the execution process.

• Expertise

States must ensure that the authorities tasked with investigating the acts of law enforcement officials, whether part of existing or new specialist bodies, possess the requisite expertise, or have the necessary expertise available to them (scientific or other).

Case example

❖ *Makaratzis v. Greece (group of cases)*

These cases concern, *inter alia*, ill-treatment by the police and failure to investigate whether racist motives on the part of the police may have played a role.

Following the Court's judgments, an expert unit was created within the Ombudsman, acting as an investigating authority into ill-treatment by law enforcement agents, and entrusted with, inter alia, the special competence to examine the existence of racist or other discriminatory motives for ill-treatment. In addition, specialist police services are now dedicated to dealing with complaints of racist violence.

- Powers

The authorities must take all possible steps to secure the evidence concerning the incident and investigators must be granted such powers as are necessary to carry out effective investigations. This may include, for example, obtaining access to restricted areas and classified information, or access to procedures leading to the lifting of parliamentary or other immunities.

Case example

❖ *Association 21 December 1989 v. Romania (group of cases)*

The violations in these cases concern the investigations carried out into violent crackdowns on the demonstrations following the fall of the Communist regime in Romania. Two of the major shortcomings were the lack of co-operation from the authorities involved in the crackdown with the investigators or the destruction of evidence in their possession as well as the classification of information as secret which was essential for the investigation, without proper justification.

Following the Court's judgments, the amended Criminal Code criminalised the refusal by any person to hand over to the investigating authorities evidence requested in the context of a criminal investigation. Also the amended Code of Criminal Procedure allowed the investigating authorities to impose a fine or to conduct search operations at the headquarters of the body that refuses to co-operate. In addition, amendments to the law on classified information ensured that judges and prosecutors have access to such information without prior security clearance.

- Promptness

There is a duty to launch investigations promptly and to conduct them in an expeditious manner. Respecting this obligation may require legislation, the setting of priorities, and/or securing adequate resources.

Case example

❖ *Velikova v. Bulgaria (group of cases)*

Cases in this group concern *inter alia* the problem of excessive length of criminal proceedings into deaths, torture, ill-treatment, excessive use of force, or lack of timely medical assistance during arrest, that occurred in police detention or in penitentiary facilities.

In 2017 the Bulgarian authorities amended the Code of Criminal Procedure, introducing measures to accelerate the investigation phase of criminal proceedings. The provisions allowing the closure of investigations solely on grounds of the passage of time were repealed.

➤ Links between promptness and prescription

A particular challenge in this context is the risk of the potential offences under investigation becoming subject to prescription. This risk may be countered on a case-by-case basis, or addressed at the general level through legislative reform.

In the event of significant delays, it may be necessary to overcome problems arising from the passage of time. Relevant considerations in this regard are the importance of efficient

reporting procedures, the storage of reports relating to investigative acts and the careful safeguarding of the evidence collected.

Case examples

❖ *Cestaro v. Italy*

The case notably concerned the ineffectiveness of investigation into acts of torture by the police due to the fact that the offences with which the perpetrators were charged - wounding, grievous bodily harm - had become statute-barred.

In response a law was adopted in 2017 which introduced the crime of torture into the Criminal Code and provided for a limitation period of a minimum of 12 years for acts of torture perpetrated by public officials. The limitation period may be increased, depending on the circumstances and effects of torture on the victim.

The prescription period that applies depends on the characterisation of the alleged offences. The characterisation given by the investigators may require review (cf. the section on “Independent oversight of investigations”)

❖ *Virabyan v. Armenia (group of cases)*

The case notably related to the closure of investigations into allegations of torture in police custody on the sole ground that the investigators found the alleged offenses time-barred.

In the Virabyan case, the initial decision by investigators not to pursue the suspected perpetrators for reasons of prescription was subsequently reversed. The General Prosecutor’s Office, having regard to the requirements of international law and the case law of the European Court, found that the specific statute of limitations referred to did not apply to torture. Closure decisions are also subject to judicial review.

➤ Victim involvement and public scrutiny

There is a duty to permit the participation of victims (or their relatives, as the case may be) in investigations, to the extent necessary to safeguard their legitimate interests, including the possibility for them to gain access to the investigation file, albeit not automatically to all elements therein. The issue of legal aid may arise in this context. Another issue in this context is the necessity of reasoning decisions to terminate the investigation.

Regarding public scrutiny more generally, the imperatives of securing accountability and of maintaining public confidence in the authorities’ response call for a careful balancing between publicity and confidentiality.

Case example

❖ *Association 21 December 1989 v. Romania (group of cases)*

The violations in these cases concern the criminal investigations carried out since the early 1990s into violent crackdowns on the anti-governmental demonstrations which attended the fall of the Communist regime in Romania. One of the major shortcomings was the failure of the investigators adequately to ensure public scrutiny and the protection of the interests of the victims’ next-of-kin in participating in the investigation.

To make good this shortcoming, in the context of new investigations, progress updates are regularly published on the website of the Public Prosecutor's Office. In addition, there has been increased engagement with applicants, and an intention to hear all injured parties again as the new investigation progresses.

➤ Securing evidence, issues regarding witnesses

The taking of testimony from witnesses who are particularly vulnerable, such as victims of torture, young persons or members of minority groups, may require special safeguards. Depending on the context, other forms of protection may also be relevant, e.g. witness protection programmes or whistle-blower protection.

An investigation may have to contend with the fact that witnesses, or other items of evidence, are located abroad. In this context, the issue of international cooperation may arise, taking the form of special treaty commitments or other predetermined procedures aimed at ensuring that the investigation is not hindered for this reason.

Case example

❖ *Velikova v. Bulgaria (group of cases)*

These cases concerned ineffective investigations into violations of Articles 2 and 3 in the context of police detention or imprisonment.

As regards the major measures adopted the Ministry of Justice issued an internal order aiming notably at allowing the detainee to request a forensic examination and obliging medical professionals to inform the Prosecutor's Office directly about injuries that occurred during a person's detention by the police or in prison.

❖ *Kaverzin v. Ukraine (group of cases)*

These cases concern, *inter alia*, ineffective investigations into violations of Article 3 in the context of police detention.

The new Code of Criminal Procedure has introduced fundamental safeguards against abuse and ill-treatment on arrest and in detention, including proper recording of detention, access to medical examination, and the introduction of "custody officers" in police stations whose main function is to independently monitor the protection of fundamental rights of detainees.

➤ Investigating special motives of crimes

Special care should be taken when investigating crime to explore possible racist or other discriminatory motives. Other motives, such as those behind attacks on journalists or other media actors, may call for a specific response. Ensuring that such motives are adequately investigated may also require amendments to relevant criminal laws.

Case examples

❖ *Gongadze v. Ukraine*

This case relates to the absence of adequate police responses to death threats made to a journalist. The key aspect that remains under the Committee of Ministers' supervision is the

protection of journalists' safety, notably through (i) measures taken to improve the independence and effectiveness of investigations into crimes against journalists, and (ii) measures to ensure that journalists have immediate access to protective measures in the light of the Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors.

The responses to date include ongoing work to strengthen the legislative and institutional framework intended to enhance the safety of journalists, and notably measures to improve the independence and effectiveness of investigations, domestic training and dissemination activities. The Criminal Code was amended, introducing new provisions specifically targeting crimes against journalists and journalistic activities. This protection is also being extended to other media actors.

❖ *Nachova v. Bulgaria*

The case involved the absence of effective investigations into possible racist motives (prejudice against Roma²) behind the actions of the military police

In order to create a better legal basis for investigations into racist motives, in June 2011 an amendment to the Criminal Code introduced aggravated qualifications for murder and bodily harm committed with racist or xenophobic motives.

SESSION II: INDEPENDENT OVERSIGHT OF INVESTIGATIONS

➤ The oversight role of independent bodies

Bearing in mind the diversity of national legal systems and the varying roles of the relevant institutions, the following may be of greater or lesser relevance to individual States.

- The investigative guidance and oversight by the prosecution authorities.
- The role of investigating judges.
- The role of other State bodies, for example the courts or national human rights institution/ombudsperson.
- The possible role of the national parliament or a parliamentary structure.

Case examples

❖ *El-Masri v. "The former Yugoslav Republic of Macedonia"*

This case concerns the applicant's ill-treatment in the context of a secret CIA rendition.

A review body within the Ombudsman's Office, including independent members from civil society, was created. Its task is to monitor and review the procedures aimed at investigating and holding accountable law enforcement agents for any wrongdoing amounting to ill-treatment.

² The term "Roma and Travellers" is used at the Council of Europe to encompass the wide diversity of the groups covered by the work of the Council of Europe in this field: on the one hand a) Roma, Sinti/Manush, Calé, Kaale, Romanichals, Boyash/Rudari; b) Balkan Egyptians (Egyptians and Ashkali); c) Eastern groups (Dom, Lom and Abdal); and, on the other hand, groups such as Travellers, Yenish, and the populations designated under the administrative term "*Gens du voyage*", as well as persons who identify themselves as Gypsies. The present is an explanatory footnote, not a definition of Roma and/or Travellers.

❖ *Holodenko v. Latvia (group of cases)*

This group of cases included the finding that investigations into allegations of abuses by the police had been conducted by the same administrative entities as were responsible for the police officers in question.

In 2015 the Latvian authorities created a new entity, the Internal Security Bureau, responsible for conducting all investigations into allegations concerning the police and prison officials. In order to ensure its proper functioning it is supervised notably by the Public Prosecutor's Office that is independent both of Parliament and government.

➤ Independent complaints mechanisms

The domestic system must ensure the availability of an independent mechanism to deal with complaints about the conduct of an investigation. The investigatory bodies must therefore give reasoned decisions for their acts so as to allow adequate oversight. Relevant points here are:

- The scope of possible judicial review, including for example whether the courts or other independent bodies have sufficient powers to indicate necessary steps to the investigative authorities.

Case example

❖ *Gharibashvili v. Georgia (group of cases)*

This group of cases concern the lack of effective investigations into assault or into allegations of ill-treatment during arrest or in custody.

A prosecutor's decision to terminate an investigation is subject to an appeal within the prosecutor's service. Judicial review is also available in cases involving allegations of grave crimes.

- The scope of review and powers of ombudspersons or other independent national investigative/supervisory institutions investigating complaints.

Case example

❖ *Makaratzis v. Greece (group of cases)*

These cases notably raise issues of the effectiveness of the administrative/disciplinary investigations into the use of potentially lethal force and ill-treatment by law enforcement agents.

In response to the judgments, a dedicated investigative and oversight mechanism, attached to the Ombudsman's Office, was established.

- Ensuring adequate resources of ombudspersons and other independent national investigative/supervisory institutions.

SESSION III: REPARATION FOR VICTIMS

The different forms of redress cited below may usefully supplement the obligation to reopen/resume/continue investigations, including in situations where this obligation cannot be successfully met.

- Financial compensation for the victim or the next of kin, covering the pecuniary and non-pecuniary damage caused by the violation of human rights.

Case example

- ❖ *Taraburca v. Republic of Moldova (group of cases)*

These cases concern, *inter alia*, lack of effective remedies for ill-treatment inflicted by law enforcement agents during the 2009 mass riots.

A special government committee was set up and awarded compensation to, among others, civilian victims involved in the above events. These awards were not considered as a substitution for or an equivalent of any compensation for pecuniary or non-pecuniary damages that could be afforded to the victims by the domestic courts.

- ❖ *Aksoy v. Turkey (group of cases)*

These cases concern, *inter alia*, shortcomings in granting adequate reparation to victims of anti-terror operations or acts of security forces in the 1990s.

Following the Court's judgments, the availability of compensation through administrative court proceedings, based on the State's strict liability for pecuniary and other damages, caused as a result of terrorist activities and anti-terrorist operations, was supplemented by a special "Law on Compensation" introducing the possibility to obtain such compensation directly from the administration (with a possibility of judicial review).

- Formal apology issued by the authorities

Case examples

- ❖ *El-Masri v. "The former Yugoslav Republic of Macedonia"*

This case concerns the applicant's ill-treatment by state agents in the context of CIA renditions and the lack of an effective remedy in respect of the applicant's complaints.

In 2018, following the absence of results of the criminal investigations and the prescription of any possible crime committed, the Minister of Foreign Affairs issued a written apology to the applicant, expressing on behalf of the government notably sincere apologies and unreserved regrets for the distress caused and to adhere to the policy of zero tolerance to human rights violations, including but not limited to the acts of torture and other forms of ill-treatment.

- ❖ *Taraburca v. Republic of Moldova (group of cases)*

These cases concern, *inter alia*, lack of effective remedies for ill-treatment inflicted by law enforcement agents during the 2009 mass riots.

Following the above events the government and the Parliament expressed their regrets about the inappropriate reactions of the law enforcement bodies and the judiciary. They acknowledged that the judicial system had collapsed after the above events and expressed their political will for an urgent reform of the entire judicial sector. Furthermore, the authorities reiterated their duty to take concrete measures to fight torture and other forms of ill-treatment.

- Action to ensure the establishment of the direct victims' fate and establish the truth, whether taken:
 - Through special independent bodies, or
 - Through ordinary investigative efforts, including overcoming obstacles linked with prescription.

REFERENCE TEXTS

- **Committee of Ministers**

Recommendation Rec(2001)10 of the Committee of Ministers to member States on the European Code of Police Ethics

[Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations](#)

Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities

- **Commissioner for Human Rights**

[Opinion concerning independent and effective determination of complaints against the police, CommDH\(2009\)4](#)

- **Consultative Council of European Prosecutors (CCPE)**

[Opinion No. 9\(2014\) on European norms and principles concerning prosecutors](#)

[Opinion No. 10\(2015\) on the role of prosecutors in criminal investigations](#)

[Opinion 12\(2017\) on the role of prosecutors in relation to the right of victims and witnesses in criminal proceedings](#)

- **European Committee for the Prevention of Torture (CPT)**

[Combating Impunity, Extract from the 14th General Report of the CPT, 2004, CPT/Inf\(2004\)28-part](#)

[Complaints Mechanisms, Extract from the 27th General Report of the CPT, 2018, CPT/Inf\(2018\)4-part](#)

- **European Commission against Racism and Intolerance (ECRI)**

[General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing, 29 June 2007](#)