



International Commission of Jurists and Amnesty International

Response to the First Draft of the Guidelines of the Committee of Ministers of the Council of Europe on Impunity

March 2010

General comments: the Guidelines in context

The International Commission of Jurists and Amnesty International welcome the initiative of the Committee of Ministers to prepare guidelines on the obligations of Council of Europe Member States to prevent and counter impunity. The initiative is important, first because it responds to real problems of impunity in Europe, as identified in judgments of the Court as well as the recent report of the Parliamentary Assembly of the Council of Europe (PACE).¹ Second, the Guidelines could play an important role in analysing and providing practical guidance on the international law principles as they apply to European states in preventing and countering impunity.

The ICJ and Amnesty International welcome in particular the detailed provisions in the 29 January 2010 draft of the Guidelines² on the duty of states to investigate and prosecute serious human rights violations; the incorporation of provisions, consistent with international law, relating to command responsibility and the prohibition of the defence of superior orders; and the provisions recognising certain rights of victims.

The Guidelines which the experts have been mandated to draft are an instrument of the Council of Europe and as such should draw in particular on the rich jurisprudence of the European Court of Human Rights on issues of accountability, investigation and reparation. **The ICJ and Amnesty International consider that they must also take account of the wider international law context in which they will be applied.**

International law relating to impunity, accountability and reparations for serious violations of human rights has undergone significant evolution in recent years, including through the development of international criminal law in the ad hoc tribunals, and in the Rome Statute of the International Criminal Court, in new United Nations treaties, in particular the International Convention for the Protection of All Persons from Enforced

¹ The State of human rights in Europe: the need to eradicate impunity, Report of the Committee on Legal Affairs and Human Rights, Rapporteur, Mrs Herta Daubler-Gmelin, 3 June 2009, Doc.11934

² The text of the draft is set out in Council of Europe document DH-I(2010)001, 29 January 2010.

Disappearances, and in the development of the UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (the UN Impunity Principles)³ and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (The UN Reparation Principles).⁴

These developments must also inform the elaboration of the Guidelines. As the European Court itself has said, the Convention cannot be interpreted in a vacuum, but must be applied having regard to both its special character as a human rights treaty, and having regard to, and taking into account, relevant rules of international law.⁵ For reasons of coherence as well as practical utility, the Guidelines should reflect the full range of international legal obligations assumed by Council of Europe Member States, in the Council of Europe, in the United Nations, and in other international fora. It should be uncontroversial, for example, for the guidelines to draw on obligations under the UN Convention against Torture, to which all Council of Europe member states are party. Principles of customary international law, likewise binding on all Council of Europe Member States, should also be reflected. The Committee of Ministers' principles will serve European public authorities best if they accurately reflect the full range of international legal obligations that apply to Member States of the Council of Europe. **At a minimum at least some of these standards should be expressed, including in the Preamble, in or after paragraph g.**

Commentary on the 29 January 2010 draft of the Guidelines

The ICJ and Amnesty International's recommendations and proposals for amendments or additions to the draft Guidelines are set out below in **bold text**, with reference to particular paragraphs.

A. The need to combat impunity

Para.A.I: Definition of impunity

The ICJ and Amnesty International welcome the reference to the situations in which impunity may prevail, which will be helpful for public authorities to understand the kind of situations where impunity may be an issue. **However this list should be augmented, to make clear that impunity does not only concern obvious cases such as unlawful killings by the security forces, but also actions that may take place in the private sphere such as rape, domestic violence, trafficking, or persecution on grounds of**

³ E/CN.4/2005/102/Add.1, 8 February 2005, recommended by Commission on Human Rights Resolution E/CN.4/RES/2005/81 of 21 April 2005

⁴ Adopted by Commission on Human Rights resolution E/CN.4/RES/2005/35, 19 April 2005 and by General Assembly Resolution A/RES/60/147, 16 December 2005

⁵ *Al-Adsani v UK*, Application No.35763/97, Judgment of 21 November 2001, para.56. This reflects the Vienna Convention on the Law of Treaties, Article 31.3.c of which states that in the interpretation of a treaty, account is to be taken of "any relevant rules of international law applicable in the relations between the parties."

race. The ICJ and Amnesty International also consider that **there should also be a reference to counter-terrorism operations**, which have raised significant impunity concerns both within and outside the Council of Europe region. In augmenting the list of problems of impunity, the Committee could in particular draw on examples provided by the recent PACE report on impunity.

Impunity may arise from the failure by states to hold accountable not only individuals but also **other non-state actors such as corporations** **States have positive obligations to protect against violations by corporate actors as well as by individuals.** Serious problems of impunity have, for example, arisen in relation to actions of private military security companies.⁶ **The ICJ and Amnesty International recommend that in addition to “individuals” the text should therefore also refer to other legal entities.**⁷

Para.A.II: Causes of Impunity

The ICJ and Amnesty International recommend that **there should also be a reference here to discriminatory attitudes** (which may be a cause of impunity for crimes against women, crimes against people based on their real or perceived sexual orientation or gender identity, crimes against people with disabilities, or against racial, religious or ethnic groups, amongst others). There should also be a reference **to corruption which the PACE report on impunity identified as a cause of impunity in Europe.**⁸

B. Scope of the Guidelines

Para. B.I: Jurisdiction

The ICJ and Amnesty International consider that **the jurisdictional limitation in Para.B.1 should not be presented as absolute, but should be read in conjunction with the duty of international co-operation to counter impunity, set out in Part IV.** The Guidelines should take into account that, under existing treaties and customary international law, States have a range of obligations in relation to accountability for serious violations of human rights, which extend outside their territorial jurisdiction. These include obligations to establish jurisdiction over crimes amounting to serious

⁶ On the positive obligations to protect against the acts of private military and security companies, see the “Montreux document” on International Legal Obligations Relating to Private Military and Security Companies, A/63/467-S/2008/636, Part One para.A.4 PACE Recommendation 1858 (2009), <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/EREC1858.htm>. This document was elaborated and endorsed by States, including a significant number of Council of Europe States.

⁷ See generally, ICJ, Corporate Complicity and Legal Accountability, Volume 2: Criminal Law and International Crimes, Chapter 9.

⁸ See PACE report on Impunity, paras.56-58 See also Guidelines on the protection of LGBT persons from discrimination, adopted by the CDDH,

violations of human rights, including on the basis of the nationality of the perpetrator,⁹ obligations of quasi-universal jurisdiction, such as where there is an obligation to extradite or prosecute in respect of such offences,¹⁰ and obligations to provide mutual legal assistance in criminal and civil proceedings in other States.¹¹ In addition, states have obligations to co-operate with international tribunals, including with the International Criminal Court under the Rome Statute of International Criminal Court.¹² Where there are gross or systematic violations of human rights that are norms of *jus cogens*, states have obligations not to recognise or provide aid or assistance in the violations and to take co-operative steps to bring such situations to an end.¹³ Furthermore, the European Court of Human Rights has recognised that there are in some circumstances obligations of mutual legal assistance regarding a violation of human rights or an investigation into a violation of human rights which has taken place in another Council of Europe Member State.¹⁴

The ICJ and Amnesty International therefore recommend that, at a minimum, a cross reference to Part IV is inserted in para.B.I.

Para. B.II: Legal Persons

As mentioned above, **the text of this paragraph should for the avoidance of doubt refer not only to “individuals” but also to other legal entities**, since positive obligations to protect apply not only to individuals but also other non-state actors such as companies.

Paras.B.III and B.IV: Definition of Serious Human Rights Violations

The ICJ and Amnesty International are concerned that the definition of serious human rights violations as limited to violations of Articles 2, 3, 4 and in some cases Article 5.1 of the ECHR is unduly restrictive. It is certainly the case that the wide scope, in particular, of Article 3 ECHR as applied by the Court, covers a range of serious violations of human rights for which international human rights law requires criminal liability to be imposed. Nevertheless, some acts amounting to the most serious violations

⁹ See for example, Council of Europe Convention on Action Against Trafficking in Human Beings, Article 31.1.d; Council of Europe Convention on the Prevention of Terrorism, Article 14.1.c; Convention Against Torture, Article 5.1.2, Convention on Enforced Disappearances Article 9.1b.

¹⁰ Council of Europe Trafficking Convention Article 31.3; Council of Europe Convention on the Prevention of Terrorism Article 14.3; Convention Against Torture Article 5.2, Convention on Enforced Disappearances, Article 13.4

¹¹ Convention on the Prevention of Terrorism Article 17; Convention Against Torture Article 9; Convention on Enforced Disappearances Article 14); Supplementary Convention on the Abolition of Slavery, the Slave trade and Institutions and Practices Similar to Slavery, 1956, Article 8.

¹² Rome Statute of the International Criminal Court, Article 86

¹³ Articles 40 and 41, International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, vol. II (Part Two); International Court of Justice, *Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004

¹⁴ *Rantsev v Cyprus and Russia* Application no. 25965/04, Judgment of 7 January 2010

of at least Articles 8 and 14 would also require effective investigation and the imposition of criminal accountability.

Although the Guidelines are not designed to address the obligations of States under International Criminal Law and International Humanitarian Law, they should cohere to the greatest extent possible with obligations to counter impunity for crimes against humanity, war crimes and other grave breaches of international humanitarian law.¹⁵ The Rome Statute of the ICC, in Article 7, defines crimes against humanity as including several crimes not clearly encompassed within Articles 2,3,4 ECHR, including for example deportation or forcible transfer of population and persecution of a group on political, racial, national, ethnic, cultural, religious, gender or other grounds.

Under Article 13 ECHR, from which the duty to investigate is partly derived, the nature and gravity of the violation determine the type of remedy that will be considered effective in practice as well as in law,¹⁶ so that particularly grave violations of a range of articles may require investigation leading to the engagement of criminal accountability of those responsible. **In addition to acts falling within the scope of Articles 2 and 3 ECHR, the ICJ and Amnesty International consider that the Guidelines should leave open the possibility that the most serious violations of all rights protected by the European Convention on Human Rights should be within the scope of the Guidelines. At a minimum, acts amounting to violations of the following articles should be included in the scope of the Guidelines.**

- **Article 5 ECHR.** Regarding the scope of application of the Guidelines to Article 5.1, this should encompass situations of secret or other arbitrary detention where there is a risk of enforced disappearance (by either State or non-State actors acting with the authorisation, support or acquiescence of the state)¹⁷ as well as wrongful detention by private actors including kidnapping and hostage taking. The ICJ and Amnesty International note that, in relation to the most serious violations of Article 5, in particular where there is a risk of enforced disappearance, the European Court of

¹⁵ Under the UN Principles for the Protection and Promotion of human rights through action to combat impunity, “serious crimes under international law” is defined to include grave breaches of the Geneva Conventions as well as other serious violations of international humanitarian law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalise, such as torture, enforced disappearance, extrajudicial execution, and slavery.

¹⁶ *Mentes v Turkey* Application no.23186/94, Judgment of the Grand Chamber of 28 November 1997, para.89

¹⁷ *Kurt v Turkey* Application no.15/1997/799/1002, Judgment of 25 May 1998 para.124: “The Court emphasises in this respect that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.” *Orhan v Turkey Application no25656/94, Judgment of 18 June 2002* ; *Cicek v Turkey* Application no.25704/94, Judgment of 27 February 2001, para.167; See also, The Venice Commission for Democracy through Law, 17 March 2006, Opinion No 363.2005, para.53.

Human Rights (ECtHR) applies the same principles of the obligation to protect and to investigate, as apply under Articles 2 and 3.

- **Article 8 ECHR.** Under the Convention caselaw, obligations to investigate and to impose criminal sanctions may arise under Article 8. In *Mentes v Turkey*¹⁸ the Grand Chamber found this to be the case in relation to the destruction of homes or property in violation of Article 8. It held that “where an individual has an arguable claim that his or her home and possessions have been purposely destroyed by agents of the State, the notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure.”¹⁹ Furthermore, in *MC v Bulgaria*,²⁰ in the context of a prosecution for rape, the Court found a positive obligation under Article 8 as well as Article 3 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.²¹
- **Article 14 ECHR.** Acts violating Article 14 read in conjunction with at least Articles 2,3,4 and 5 should be included within the scope of the Guidelines. The Court’s jurisprudence establishes that a duty to investigate arises under Article 14, read in conjunction with other rights where this duty exists. In *Natchova v Bulgaria*,²² it found that “In order to maintain public confidence in their law enforcement machinery, Contracting States must ensure that in the investigation of incidents involving the use of force a distinction is made both in their legal systems and in practice between cases of excessive use of force and of racist killing.” The Grand Chamber found that a duty to investigate possible links between racist attitudes and an act of violence existed as both as an aspect of procedural obligations under Article 2 and under Article 14 read in conjunction with Article 2.²³

Therefore the ICJ and Amnesty International consider that an appropriate wording for para.B.III (also replacing B.IV) would be as follows: “For the purposes of these Guidelines, “serious human rights violations” concern the most serious violations of the Convention rights that give rise to criminal responsibility, including but not limited to violations of the right to life (Article 2 ECHR); the prohibition of torture and inhuman and degrading treatment and punishment (Article 3 ECHR); the prohibition of forced labour and slavery (Article 4 ECHR); the right to liberty and security of the person (Article 5 ECHR); in particular regarding enforced

¹⁸ Application no.58/1996/677/867, Judgment of 28 November 1997

¹⁹ *ibid* para.89

²⁰ Application no.39272/98

²¹ para.153 See further the judgment of the ICTY in *Prosecutor v Kupreskic*, 14 January 2001, where it was recognised that comprehensive destruction of homes and property may constitute a crime against humanity of persecution, if there is the requisite intent.

²² Applications nos. 43577/98 and 43579/98, Judgment of the Grand Chamber, 6 July 2005 chamber judgment in para.158, endorsed by the Grand Chamber in para 160 of its judgment.

²³ para.161

disappearances or wrongful detentions by private actors; the right to respect for private and family life (Article 8 ECHR); and the prohibition on discrimination (Article 14 ECHR).”

The ICJ and Amnesty International also consider that the scope of the Guidelines would be clearer to non-specialists **if the content of the rights within its scope was briefly explained.** According to the European Court’s jurisprudence, the range of conduct for which investigation and accountability is required by Articles 2,3,4 and 5 is wide, including rape and serious sexual assault, serious physical abuse, enforced disappearances, negligence in hazardous activities, and at least some of the most serious forms of discrimination. However, the full range of this conduct is not clear from the current text of the guidelines. **The Guidelines would benefit from an illustrative list of the substance of the acts for which impunity must be prevented under the ECHR articles.**

Para.B. V: Legal Persons

In order to ensure full and effective protection against impunity, the ICJ and Amnesty International recommend that, in accordance with general principles of criminal law, **“perpetrators” should refer not only to persons having committed acts or omissions but also to those who have planned, ordered, solicited, induced or otherwise aided and abetted such acts.**²⁴

Para.B. VI: International Organisations

Although the Guidelines are addressed to Member States, it is essential that they do not authorise a significant gap in accountability for serious human rights violations in Europe, by sanctioning impunity for those who act on behalf of international organisations. It should be noted that the need for accountability for the actions of officials of international organisations was a key issue of impunity highlighted by the recent PACE report on impunity.²⁵

The Guidelines must not exclude from their scope the acts of officials of international organisations where those acts give rise to State responsibility to prevent, investigate and provide reparations. Where for example the acts of a State agent are attributable to an international organisation, the State on whose territory the act takes place retains its positive obligations to take steps to prevent serious violations of human rights, including through effective enforcement of the criminal law, and to investigate. In accordance with the Court’s jurisprudence, where acts are carried out on behalf of an international organisation or implementing obligations that it imposes, then so long as the international organisation provides equivalent human rights protection to that of the Convention, there is a rebuttable presumption that the acts are compatible with

²⁴ Rome Statute of the International Criminal Court Article 25.3.

²⁵ op cit

Convention rights.²⁶ However any such mechanism must be effective, and where the protection it offers is manifestly deficient – for example where it allows impunity – then the state retains responsibility. **The ICJ and Amnesty International therefore recommend that the exclusion of international organisations be removed from the draft.**

C. Preventing Impunity

I. Practical measures to prevent impunity

An essential preventative mechanism which should be mentioned in this section of the Guidelines is the preservation of records and evidence linked to violations of human rights and the need for safeguards against their destruction. Both the European Convention jurisprudence, and the UN impunity principles,²⁷ recognise the importance of preservation of records as a means of preventing impunity. **The Guidelines should further refer to the need for facilitation of access to relevant records by courts and other mechanisms of inquiry,²⁸ and by victims and their families.²⁹** Laws and processes on disclosure of information should take full account of the need to ensure accountability for serious violations of human rights and should not permit blanket secrecy in relation to such acts. Clear provision for such access is an essential preventive mechanism, so that perpetrators are aware that records of their crimes will not be protected by rules of secrecy and confidentiality.

II. Legislative measures to prevent impunity

Para. C.II.1: Effective law enforcement

The ICJ and Amnesty International propose that this text should be strengthened to reflect the obligation to put in place criminal laws “backed up by an effective law enforcement machinery, applied by police, prosecutors and the courts in a way that is consistent and non-discriminatory.”

In addition it is recommended that the **reference in para II 1 to the rights listed in para Part B III should be omitted, unless such list is expanded as recommended above.**

²⁶ *Behrami v France, Saramati v France, Germany and Norway*, Judgment of the Grand Chamber of 2 May 2007, Application nos.71412/01, 78166/01, para.145; *Bosphorus Hava v Ireland*, Application no.45036, Judgment of the Grand Chamber, 30 June 2005

²⁷ The UN Principles state that “technical measures and penalties should be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of violations of human rights and /or humanitarian law”. (Principle 14)

²⁸ UN impunity principles, principle 16

²⁹ UN impunity principles, principle 15

Para.C.II.2 Protection of Victims

Given the importance of protection of victims in relation to disciplinary as well as criminal proceedings, **it is recommended that the need for safeguards to ensure that victims are not dissuaded from lodging complaints (and that they are protected from reprisals when they do so) is separated out from the issue of disciplinary proceedings in para.C II 2.** The text would therefore read: “2. In addition to criminal proceedings, States should provide for the possibility of disciplinary proceedings against officials. 2A. States should provide for safeguards for alleged victims to ensure that they are not dissuaded from lodging complaints and that they are protected from reprisals when they do so.”

Para.C.II.3: Loopholes and Gaps

The ICJ and Amnesty International consider that in order for this paragraph to provide effective guidance, it should enumerate some of the gaps which most commonly contribute to impunity. It should at least provide signposts to the explanatory notes, where more detailed explanation of the permissible limits can be provided. The ICJ and Amnesty International therefore recommend that the paragraph read **“States should ensure that their legislative framework contains no loopholes or gaps which contribute to impunity, including those that may be caused by amnesties, statutes of limitations or immunities, inappropriate application of state secrecy laws, or limitations on extradition or mutual legal assistance inconsistent with respect for human rights.”**

D. Determining facts, responsibility and consequences of violations

D. I. The duty to investigate

As a general comment on the structure of this section, it might be clearer and more concise to **address the duty to investigate in relation to all acts within the scope of the Guidelines, in a single paragraph, rather than individually in relation to each right.** An alternative wording could be as follows:

“The obligation to protect against serious violations of human rights requires that there be some form of effective and independent official investigation in cases of serious human rights violations by both State agents and private actors, within the scope of the Guidelines. This duty has an absolute character.”

D.I.1. The right to life (Article 2 ECHR)

Although the required elements of an Article 2–compliant investigation are set out in more detail in the following section, the ICJ and Amnesty International consider this general statement should not give the impression that all that is required is “some form of” official investigation. **It should state the need for “some form of effective and independent official investigation.”**

This paragraph should also reflect the fact that the duty to investigate applies not only to killings, but to suspicious deaths that are not obviously killings,³⁰ for example suicides in custody. Such deaths may be relevant for the purposes of the Guidelines, where for example a suicide in custody is a result of serious negligence or malicious action of a prison official that is sufficiently grave as to amount to a criminal offence. **Therefore, the paragraph should refer to “killings involving the use of force as well as other suspicious deaths including killings in disputed circumstances.”**

Para.D.I.2. Freedom from Torture and Inhuman or Degrading Treatment or Punishment (Article 3 ECHR)

The reference in the second sentence of paragraph 2 to preventive access to a lawyer, relatives, medical attention and the courts might be more appropriately included in the section on prevention. **In any case, in addition to a doctor of choice, this provision should also refer to a lawyer “of his or her own choosing” in accordance with rights under Article 6 ECHR.**

Consistent with the paragraph on investigations related to Article 2, **this paragraph should also affirm the absolute nature of the duty to investigate in regard to Article 3 rights.**

D.I.3. The right to liberty and security of the person (Article 5 ECHR)

At present this paragraph refers only to the positive obligation to protect under Article 5, not to the duty to investigate. However, as noted above in our comments on Section BII and IV, the European Court of Human Rights has also consistently held that in cases of risk of enforced disappearance there is an Article 5.1 duty to conduct a prompt and effective investigation, similar to the duty to investigate under Articles 2 and 3.³¹ **This paragraph should adopt the same format as the previous two, stating “[t]he same procedural obligation applies under Article 5.1 in cases where there is a risk of enforced disappearance or abduction.” It should also state the absolute nature of the duty to investigate in regard to Article 5 ECHR.**

Articles 4, 8 and 14 ECHR

If the current format of this section is retained, there should also be paragraphs on Article 4, 8 and 14 ECHR. The Court in *Rantsev v Cyprus and Russia*³² has recently emphasised the positive obligations of both prevention and investigation that arise under Article 4. The nature of the Article 4 obligation to investigate follows closely the equivalent obligations under Articles 2 and 3, and draws on the jurisprudence developed in relation to those articles. The Court stated:

³⁰ *Oneryildiz v Turkey op cit; McGlinchey v UK* Application no.50390/99 Judgment of 29 April 2003

³¹ *Kurt v Turkey op cit para.124. Orhan v Turkey ; Cicek v Turkey para.164; Timurtas v Turkey*, Application no 23531/94, Judgment of 13 June 2000, para.103; See also, The Venice Commission for Democracy through Law, 17 March 2006, Opinion No 363.2005, para.53. See also Convention on Enforced Disappearances, Article 12.

³² Application no. 25965/04, Judgment of 7 January 2010.

“Like Articles 2 and 3, Article 4 also entails a procedural obligation to investigate situations of potential trafficking. The requirement to investigate does not depend on a complaint from the victim or next-of-kin: once the matter has come to the attention of the authorities they must act of their own motion ... For an investigation to be effective, it must be independent from those implicated in the events. It must also be capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. A requirement of promptness and reasonable expedition is implicit in all cases but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency. The victim or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests.”

As described above (regarding para.BII), the Court has also recognised obligations of investigation in relation to Article 8³³ and Article 14³⁴ ECHR. The ICJ and Amnesty International therefore recommend that **the duty to investigate in relation to Articles 4, 8 and 14 should be described in this section.**

D. II. Criteria for an effective investigation

Thoroughness. The need for a comprehensive scope of the investigation would benefit from further elaboration. **It should be noted here that the investigation, to be effective, must address all the relevant background circumstances – not just be narrowly focussed on the immediate cause³⁵ capable of identifying any systematic failures that led to the violation³⁶ and providing effective remedies and restitution to the victim.³⁷**

Public Scrutiny. At the end of the first sentence under “public scrutiny” should be added “to maintain public confidence in the authorities’ adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts.”³⁸

D. IV. International Cooperation

As noted above in relation to section B.I, the duty to co-operate in bringing to justice those responsible for crimes involving serious violations of human rights is recognised both in instruments of the Council of Europe, and in other international treaties. Such obligations include duties to prosecute or extradite, to provide mutual legal assistance, to exercise universal jurisdiction over serious human rights violations amounting to crimes under international law and to take co-operative steps to end gross or systematic

³³ *Mentes v Turkey*, op cit

³⁴ *Natchova v Bulgaria*, op cit

³⁵ *McCann v UK*, Application no.18984/91, Judgment of the Grand Chamber of 27 September 1995; *Rantsev v Cyprus and Russia* op cit para.234

³⁶ *McCann v UK*, op cit.

³⁷ *Aydin v Turkey* (1997) 25 EHRR 251; This is reflected in the Convention Against Torture (CAT) Articles 5, 6, 12 and 13; and under the ICCPR: HRC, General Comment 31, CCPR/C/21/Rev.1/Add.13.

³⁸ *Natchova v Bulgaria* op cit para 119

violations of norms of *jus cogens*, such as the prohibitions on torture or enforced disappearances.

The Guidelines should also recognise that states should cooperate with investigations and prosecutions by international criminal tribunals noting that in some circumstances they are obliged to do so - where they have treaty obligations to the specific court (states parties to the Rome Statute) or where the United Nations Security Council has issued a Resolution under Chapter VII (such as the case of the International Criminal Court's investigation in Darfur (Resolution 1593 (2005)) and the resolutions establishing the International Criminal Tribunals for the former Yugoslavia (Resolution 827 (1993)) and Rwanda (Resolution 955 (1994)) calling on states to cooperate.

The European Court has also recognised that the duty to investigate requires in certain cases that states both request mutual legal assistance, and provide it to facilitate an investigation in another state. In *Rantsev v Cyprus and Russia*,³⁹ the Court held that:

“ In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories. Such a duty is in keeping with the objectives of the member States, as expressed in the preamble to the Palermo Protocol, to adopt a comprehensive international approach to trafficking in the countries of origin, transit and destination It is also consistent with international agreements on mutual legal assistance in which the respondent States participate in the present case”⁴⁰

In addition to the current statement of general principle, the ICJ and Amnesty International recommend that the international cooperation section should provide for:

- **the duty to either prosecute or extradite those suspected of human rights violations amounting to crimes under international law unless there is a real risk that the person will be subjected to torture or other ill-treatment, a flagrant denial of justice or the death penalty ;**
- **the duty to provide mutual legal assistance to investigations and prosecutions for violations amounting to crimes under international law in other states, unless doing so would expose a person to a real risk of torture or other ill-treatment, a flagrant denial of justice or the death penalty, or other serious violation of human rights;**
- **the principle that states should put in place mechanisms to enable their courts to exercise universal jurisdiction over violations of human rights amounting to crimes under international law;**
- **the principle that states should co-operate with international tribunals in the investigation and prosecution of conduct of serious violations amounting to crimes under international law.**

³⁹ op cit paras 241, 245 and 289

⁴⁰ *Rantsev* case, op cit Para. 289

D. VII The duty to prosecute

This section should be strengthened to reflect the positive obligations on states to enforce the criminal law through the entire criminal justice process, including investigation and trial. Although there is no right to have a particular person prosecuted or convicted,⁴¹ the Court has held that States have a duty to ensure the deterrent function of the criminal law and maintain public confidence in the rule of law, through prosecutions for crimes that are appropriate to the gravity of the human rights violations involved, as well as appropriate penalties.⁴² Therefore the Court has held that, in certain circumstances, “the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2.”⁴³ The prosecuting authorities and courts must be shown to have given sufficient scrutiny to the case to ensure that the preventive and deterrent function of the criminal law is upheld.⁴⁴

These obligations are reflected in obligations of States under other international treaties, which impose obligations of prosecution or extradition in respect of particular crimes involving serious violations of human rights, including torture, enforced disappearance, crimes of terrorism and trafficking.⁴⁵

The ICJ and Amnesty International recommend that the text be amended to read: “Investigations must be capable of leading to effective criminal justice proceedings against those responsible. Although there is no right to secure the prosecution or conviction of a particular person, prosecuting authorities and courts must take the necessary steps to hold criminally responsible those that have committed crimes involving serious violations of human rights.”

Jurisdiction of Military Courts

The Guidelines should uphold the principle that offences related to violations of human rights, including torture, enforced disappearances, unlawful killings or other serious violations of human rights, should always be tried by the civilian courts, even where they also amount to military offences, as stipulated by several international declarations, as well as by statements of the UN Human Rights Committee and Committee Against

⁴¹ *Oneryildiz v Turkey* op cit para.96

⁴² *Oneryildiz v Turkey* op cit para.117; *Boudayeva v Russia* para.143; *MC v Bulgaria*: Application no. 39272/98, Judgment of 4 December 2003, para.153. *Yeter v Turkey*, Application no.33750/03, Judgment of 13 January 2009, op cit para.71

⁴³ *Oneryildiz v Turkey*, op cit para.95

⁴⁴ *ibid* para.96

⁴⁵ Council of Europe Trafficking Convention Article 31.3; Council of Europe Convention on the Prevention of Terrorism Article 14.3; Convention on Enforced Disappearances, Article 6, Article 13.2; Convention Against Torture Article 5.2. See also UN Impunity principles: “States shall ... take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.”

Torture.⁴⁶ **The ICJ and Amnesty International recommend that an additional provision should be inserted in this section to the effect that states should ensure that the jurisdiction of military tribunals does not extend to crimes amounting to serious violations of human rights, whether committed by military personnel or by civilians.**

IX. Restrictions and Limitations

The ICJ and Amnesty International are concerned that this section recognises "legitimate restrictions and limitation on investigation and prosecutions" without identifying what such restrictions or limitations would be, or when they would be legitimate, and thus potentially undermines the absolute nature of the duty to investigate the most serious violations of human rights. A broad understanding of permissible restrictions or limitations could be open to abuse, and could facilitate political interference in investigations. **The ICJ and Amnesty International recommend that this sentence be deleted.** Clear explanation on the limitations and restrictions with which this provision is concerned should also be included in the explanatory memorandum.

The ICJ and Amnesty International support the inclusion of the reference to amnesties and time-bars, which currently appears in square brackets in this draft. However, it is recommended that, in order to strengthen this provision, "should" should be amended to "must".

The European Court of Human Rights has found violations of the Convention where time bars, coupled with delays in proceedings, have led to dismissal of prosecutions for treatment amounting to a violation of Article 3, holding that "where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and sentencing are not time-barred."⁴⁷ Other international standards and tribunals also require that in cases

⁴⁶ Draft Principles Governing the Administration of Justice through Military Tribunals, adopted by the Sub-Commission on the Promotion and protection of Human Rights, 52nd session, 2005, Principle 7: "The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel "...; Principle 8:"In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes"; Draft Universal Declaration on the Independence of Justice (the Singhvi Declaration, Principle 5(f)"The jurisdiction of military tribunals shall be confined to military offences. ..."

UN Human Rights Committee, Concluding Observations of the Human Rights Committee on the Democratic Republic of the Congo, UN Doc.CCPR/C/COD/CO/3; UN Committee Against Torture: Conclusions and Recommendations of the Committee against Torture on Guatemala, UN Doc. CAT/C/GTM/CO/4 para.14. The OSCE/DCAF Handbook on Human Rights and Fundamental Principles of Armed Forces, states at p.229that "in instances where civilian and military courts have overlapping jurisdictions, the choice of assuming jurisdiction over a case should lie with the civilian court".

⁴⁷ *Abdulsamet Yaman v Turkey* Application no. 32446/96, Judgment of 2 November 2004 para.38, para.59-60

of serious violations of human rights, time bars should be either removed altogether, or should be proportionate to the gravity of the crime.⁴⁸

The European Court has also made clear in the context of Article 3 ECHR that amnesties or pardons are not permitted.⁴⁹ In *Yeter v Turkey*⁵⁰ the Court found a violation of Article 3 where disciplinary proceedings against accused police officers were terminated due to an amnesty law, and no sanction was therefore imposed. The Court reaffirmed “that when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible” In *Ali and Ayse Duran v Turkey*⁵¹ the Court found that the suspension of a prison sentence involved a partial amnesty leading to the impunity of the perpetrators, and was “a measure which cannot be considered permissible under its jurisprudence since, consequently, the convicted officers enjoyed virtual impunity despite their conviction.”⁵²

The issue of immunities could also be addressed in this paragraph. The Guidelines should recognise that the official status of the perpetrator of a crime under international law – even if acting as a head of state or government - does not exempt him or her from criminal or other responsibility and is not grounds for a reduction of a sentence.⁵³ **It is therefore recommended that the second sentence of the paragraph should read “Amnesties, time-bars and immunities should not impede the prosecution of perpetrators”.**

⁴⁸ See ICTY, *Prosecutor v Furundzija*, holding that “torture may not be covered by a statute of limitations”; UN Human Rights Committee, General Comment No.31, para.18 “unreasonably short periods of statutory limitation in cases where such limitations are applicable” should be removed in respect of torture and cruel, inhuman and degrading treatment; summary and arbitrary killing; and enforced disappearance; Convention on Enforced Disappearances, Article 8, requiring that any statute of limitations apply to crimes of enforced disappearance must be long and proportionate to the gravity of the crime; UN Impunity principles: principle 23: “prescription – of prosecution or penalty – in criminal cases shall not run for such period as no effective remedy is available. Prescription shall not apply to crimes under international law that are by their nature imprescriptable”

⁴⁹ *Abdulsamet Yaman v Turkey*, op cit para.55

⁵⁰ Application no. 33750/03, Judgment of 13 January 2009, para.70.

⁵¹ Application no.42942/02, Judgment of 8 April 2008

⁵² para.69; See also ICTY, *Prosecutor v Furundzija* holding that an amnesty law covering jus cogens crimes such as torture “would not be accorded international legal recognition” and the UN Human Rights Committee, General Comment No.20 concerning the prohibition on torture and cruel treatment or punishment, para.15: “Amnesties [in respect of acts of torture] are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”

⁵³ See Principle 27 United Nations Impunity Principles; Article 27 Rome Statute of the International Criminal Court

X. Court proceedings

X.1. Independence of judges and prosecutors

The ICJ and Amnesty International recommend that the text on this important point should be strengthened to take into account the need for active steps to protect the independence of judges and prosecutors. **The final sentence should be amended to read “Safeguards should be put in place to ensure that prosecutors and judges do not fear dismissal or reprisals after taking decisions in such cases. States must also take measures necessary to support the independence of prosecutors and judges and protect them from reprisals.”**⁵⁴

Witness Protection

Although the Guidelines contain important provisions on ensuring protective measures for victims and their families (section E.I.4) and those reporting serious violations of human rights (section C.I.4), the Guidelines do not address the need for effective systems of witness protection which is vital to both efforts to address impunity and the fair trial of the accused. **The ICJ and Amnesty International recommend that a provision be inserted in this section stating that: “States should apply protective measures to ensure that victims and their families are not intimidated or otherwise dissuaded from giving evidence, and do not suffer reprisals as a result of their evidence.”**

XI Commensurate sentences

This section deals with the application of national law on sentencing by the courts, but does not directly address the need for national law and Guidelines on sentencing to enable and ensure sentences which are commensurate with the gravity of crimes amounting to serious violations of human rights. National law may prevent judges from imposing adequate penalties, by prescribing unduly lenient sentences for relevant crimes. The European Court jurisprudence has recognised that unduly lenient or suspended sentences for crimes amounting to serious violations of human rights may lead to impunity in violation of the Convention⁵⁵ and Council of Europe and other international treaties recognise the need for effective, proportionate, dissuasive sentences,⁵⁶ commensurate with the gravity of the crimes concerned.⁵⁷

The ICJ and Amnesty International therefore recommend that the following should be inserted after the first sentence of para.XI.1: “National laws and Guidelines on sentencing should prescribe sentences for crimes amounting to serious violations of

⁵⁴ UN Basic Principles on the Independence of the Judiciary, Articles 2 and 4; UN Guidelines on the Role of Prosecutors Articles 4 and 5.

⁵⁵ *Okkali v Turkey* App no.52067/99, para.76; *Nikolova and Velichkova v Bulgaria* App no.7888/03

⁵⁶ See for example, Council of Europe Convention on the Prevention of Terrorism, Article 11; Council of Europe Convention on Action Against Trafficking in Human Beings, Article 23.

⁵⁷ Convention Against Torture, Article 4

human rights, that are effective, proportionate, dissuasive, and commensurate with the gravity of those crimes.”

E. Reparation

The ICJ and Amnesty International are concerned that this section addresses only two aspects of the right to reparation, compensation and involvement of victims and families in the investigation. **Although these are important aspects, it should also be recognised that the right to a remedy and reparation has a wider scope, and may also include, depending on the circumstances, the right to measures of rehabilitation, satisfaction, restitution and guarantees of non-repetition.**⁵⁸ Under the ECHR, compensation in itself will not amount to an effective remedy where it is not accompanied by measures to ensure that the violation of the Convention rights is not repeated, in compliance with positive obligations of prevention.⁵⁹

Furthermore, although the European Court has made awards primarily in the form of compensation, it would be incorrect to conclude that the practice of the European Court only recognised the right of victims to compensation. The European Court has in a number of cases ordered the restitution of land and/or buildings (*Papamichalopoulos and others v Greece; Brumarescu v Romania*⁶⁰) and restitution through securing the release of a person unlawfully detained (*Assanidze v Georgia*⁶¹). Although the European Court has not expressly ordered rehabilitation to victims, it has awarded compensation for non-pecuniary damage (*Aksoy v Turkey; Mikheyev v Russia*⁶²). Similarly, although the Court has not awarded satisfaction to victims, such as ordering the state to search for the disappeared and to find out the truth about what happened to them, the Court has ordered compensation taking into account that the authorities had failed to do so (*Cicek v Turkey*⁶³). More recently, in the context of the pilot judgment procedure the Court has specifically ordered states to take measures to put an end to systematic violations of the Convention a form of guarantee non-repetition of violations, such as law reform it has highlighted the contribution that certain legislation has contributed to violations (*Broniowski v Poland*⁶⁴) and has specifically ordered states to take measures to put an end to systematic violations of the Convention a form of guarantee non-repetition of

⁵⁸ See, UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in resolution 60/147 of 16 December 2005, paragraphs 15-24; Convention on Enforced Disappearances, Article 24.5.

⁵⁹ *Donnelly v United Kingdom*, Decision of the European Commission on Human Rights, App Nos.5577-5583/72, 15 December 1975

⁶⁰ *Papamichalopoulos and others v Greece* Application no. 14556/89, (Article 50 Chamber judgment on Just Satisfaction, 31 October 1995; *Brumarescu v Romania* Application no. 28342/95, judgment on Just Satisfaction, 23 January 2001;.

⁶¹ Application no. 71503/01, judgment (merits and satisfaction), 8 April 2004.

⁶² *Mikheyev v Russia*, Application no. 77617/01, 26 January 2006

⁶³ *Cicek v Turkey*, Application no. 25704/94, judgment of 27 February 2001 at paragraph 205

⁶⁴ Application no. 31443/96

violations, such as law reform (*Hutten-Czapska v Poland*⁶⁵). The practice of the European Court to award compensation to victims should therefore in no way lead to the conclusion that compensation is the only form of reparation that member states must provide to victims of violations. On the contrary, the establishment of Guidelines which promote states implementing all forms of reparations is entirely consistent with its case law which sanctions states for failing to take such measures.

E.I: Involvement of families in the investigation

The section on the rights of victims and their families in the investigation, should also reflect the right of family members of those who have been killed or disappeared, to be provided with information – including by an effective investigation – as to the fate of the victim. The Court has recognised failure of state authorities to provide such information to family members in cases of disappearance and the uncertainty, doubt and apprehension it causes may amount to a violation of Article 3 ECHR⁶⁶

The ICJ and Amnesty International therefore recommend that an additional sentence be added to affirm that “In cases of death or disappearance, measures should be taken to ensure that, to the extent possible, family members are provided with information regarding the fate of the victim.”

Support for victims including victims of gender-based violence

The Guidelines should recognise the need for support for victims of serious violations of human rights in the investigation and criminal justice process, including practical assistance where necessary and protective measures for survivors when they give evidence (including closed sessions, video-link evidence).

The Guidelines should also recognise the specific challenges facing survivors of gender-based violence, including crimes of sexual violence, before the criminal justice system.

The Guidelines should recognise the need for additional measures to protect the safety and dignity of such survivors, and should make specific provision for:

- **investigation units specialised in gender-based violence,**
- **expert support persons for survivors during investigation and prosecution;**
- **amendment of rules of procedure and evidence which may lead to traumatisation of survivors of sexual violence (including requirements of corroboration, allowing evidence of previous or post sexual activity, requiring evidence of non-consent).**

⁶⁵ *Hutten-Czapska v. Poland*, Application no. 35014/97

⁶⁶ *Cyprus v Turkey* Application no.25781/94, Judgment of the Grand Chamber, 10 May 2001, para.157; *Kurt v Turkey* Application no.15/1997/799/1002, Judgment of 25 May 1998 para.133. The right of family members to know the truth about the fate of a victim of arbitrary killing or disappearance is also part of the basis of the Article 13 duty to investigate in such cases: *Kurt v Turkey*, op cit paras.135-142. See also the UN Human Rights Council Resolution 9/11 on the Right to Truth

E: II Access to effective remedies

The general statement on the right to an effective remedy in E.II.1 should also include the stipulation, reflected in the EctHR caselaw, that the remedy should be effective in practice as well as in law⁶⁷ and that its exercise must not be unjustifiably hindered by the acts or omissions of State authorities.⁶⁸ The remedy must both deal with the substance of the relevant Convention complaint and grant appropriate relief.⁶⁹

The ICJ and Amnesty International consider that Para.E.II.2 is unduly restrictive, since the right to an effective remedy, including compensation and investigation, applies not only in relation to violations of Articles 2 and 3, but to all violations of substantive Convention rights, including rights under Articles 4, 5, 8 and 14.

Practical measures to ensure access to remedies

In this section, the Guidelines should also provide for practical measures to ensure access to effective remedies for victims and their families, including:

- as a measure of access to an effective remedy, legal aid should be available to victims or their family, as has been recognised by the Court.⁷⁰
- There should be access to information about legal procedures and redress mechanisms in a language that victims can understand⁷¹
- Where special compensation schemes for particular violations of human rights are established, they should be widely publicised.⁷²

Rehabilitation and Restitution

The Guidelines should also state that states should take measures to provide for the rehabilitation of victims,⁷³ (for example, counselling services, medical care, or vocational training) or restitution⁷⁴ (for example, accommodation for persons forcibly dispossessed of their homes). Where appropriate, following serious violations of human rights, such measures could be taken through specifically-established

⁶⁷ *Aksoy v Turkey* Application no.21987/93, Judgment of 18 December 1996, para.95; *Aydin v Turkey* Application no.23178/94, Judgment of 25 September 1997, para.1030

⁶⁸ *ibid.*

⁶⁹ *Mentes v Turkey* op cit para.89

⁷⁰ *Keenan v UK* Application no. 27229/95, Judgment of 3 April 2001, para.129

⁷¹ Council of Europe Convention on Action Against Trafficking in Human Beings, 2005, Article 15.1

⁷² UN impunity principles, Principle 33.

⁷³ Trafficking Convention Article 12.1: “Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery; UN Impunity Principles, Principle 34 identifies rehabilitation as an aspect of reparations. Article 14 CAT sets out the obligation to ensure that victims obtain redress and that they have a right to full and adequate compensation, including the means for as full a rehabilitation as possible. Article 39 of the Convention on the Rights of the Child states that” States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim...”

⁷⁴ Convention on Enforced Disappearances, Article 24.5(a); UN Impunity Principles, principle 34.

reparation schemes.⁷⁵ This would reflect, for example, obligations of Council of Europe Member States under Articles 12 and 15 of the Council of Europe Convention on Action Against Trafficking in Human Beings, 2005, as well as Principle 32 of the UN Impunity Guidelines.

Guarantees of non-repetition

The right to an effective remedy also implies adequate guarantees of non-recurrence of the violation. This is also reflected in the positive obligation of states to protect ECHR rights, where the authorities know or ought to know that an individual is at particular risk.

The Guidelines should set out in section E particular measures which should be taken to ensure non-repetition, including:

- **Ensuring that perpetrators of serious violations of human rights no longer serve in military, security service, or other public authorities; The EctHR has emphasised the importance of suspension from duty of those under suspension or trial, as well as dismissal following conviction;**⁷⁶
- **Where necessary, court orders preventing harassment or attack, or practical measures of security protection for individuals known to be under threat;**⁷⁷
- **Rigorous vetting procedures for public services;**
- **Legislative, administrative and institutional reforms to ensure that the violations of human rights are not repeated.**⁷⁸

Enforcement of judgments

The right to a remedy that is effective in practice also implies effective and prompt enforcement of national court judgments. **The Guidelines should state that national judicial and administrative authorities should take effective measures to enforce judgments and in particular to ensure that awards of compensation are paid promptly and in full.**

⁷⁵ Article 15.4 Trafficking Convention: “Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims...”. Impunity Principles, Principle 32 “reparations may also be provided through programmes, based upon legislative or administrative measures, funded by national or international sources, addressed to individuals and to communities.”

⁷⁶ *Abdulsamet Yaman v Turkey* Application no 32446/96, Judgment of 2 November 2004, para.55; *Yesil and Sevim v Turkey*, Application no.34738/04 Judgment of 5 June 2007

⁷⁷ *Osman v UK*, *op cit*.

⁷⁸ See UN Principles on Reparation and Impunity, principle 23, *Hutten-Czapska v Poland* (*op cit*).