



International Commission of Jurists and Amnesty International

Committee of Experts on Impunity (DH-I)

Draft Guidelines of the Committee of Ministers of the Council of Europe on Impunity

May 2010

Introduction

The International Commission of Jurists (ICJ) and Amnesty International welcome the opportunity to comment on the second draft of the Guidelines of the Committee of Ministers of the Council of Europe on impunity set out in DH-I(2010)005 . We consider that the current draft reflects considerable progress towards strong and effective guidelines on this topic, but we recommend that a number of changes be made to ensure that the Guidelines will be consistent with current international law and standards.

We consider that the current draft of the Guidelines sets out important principles, in particular on: the duty of states to investigate and prosecute serious human rights violations; command responsibility and the prohibition of the defence of superior orders; international co-operation to combat impunity; and on the right to an effective remedy and to reparation. We consider that these principles are important to the victims of all human rights violations, not only victims of serious violations of human rights. The ICJ and Amnesty International also welcome the references to the UN Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (the UN Impunity Principles) and the UN 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) in the preamble to the draft Guidelines, as we consider that the Guidelines should draw not only on the rich jurisprudence of the European Court of Human Rights on issues of accountability, investigation and reparation, but that they must also take account of the wider international law context in which they will be applied.

II. Scope of the Guidelines

II.1 Jurisdiction

The ICJ and Amnesty International consider that the jurisdictional limitation in Para.B.1 should not be presented as absolute, but rather should be read in conjunction with the duty of international co-operation to counter impunity. The ICJ and Amnesty International therefore recommend that a cross reference to para.XV is inserted in para.II.1. We recommend that the following words be added at the end of Para.II.2:

“as defined by the European Court of Human Rights , and in light of duties of international co-operation set out in para.XV.”

II.3: Serious human rights violations

The ICJ and Amnesty International support the current definition of the scope of application of the Guidelines with reference to acts amounting to serious human rights violations under the European Convention on Human Rights that by their nature impose a positive obligation on the State to criminalise and to enforce the criminal law. Jurisprudence of the European Court of Human Rights identifies such positive obligations in relation to certain violations of Articles 2¹, 3², 4,³ 5⁴, 8⁵ and 14⁶. Limitation of the definition of serious human rights violations to violations of Articles 2, 3, 4, 5 of the ECHR would therefore be unduly restrictive. Furthermore, 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,⁷ 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, although the Guidelines are not expressly designed to address the obligations of states under international criminal law and international humanitarian law, they should be consistent to the greatest extent possible with obligations to counter impunity for crimes against humanity, war crimes and other grave breaches of international

¹ *Oneriyildiz v Turkey*, para.96, finding a duty to enforce the criminal law in Article 2 cases, since, “national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts.”

² *MC v Bulgaria* Application no.39272/98, para.153.

³ *Rantsev v Cyprus and Russia*, para.285; *Siliadin v France*, Application No.73316/01 para.89

⁴ *Kurt v Turkey* Application no.15/1997/799/1002

⁵ *X and Y v Netherlands*, Application no. 8978/80; *Stubbings v UK*, Application no.36-37/1995/542-543/628-629.

⁶ *Nachova v Bulgaria* Applications nos. 43577/98 and 43579/98, Judgment of the Grand Chamber, 6 July 2005.

⁷ *Mentes v Turkey* Application no.23186/94, Judgment of the Grand Chamber of 28 November 1997, para.89.

humanitarian law.⁸ 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 or 5 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.

There is particularly clear case law on the positive obligation to apply and enforce criminal law in relation to at least two types of violations of Article 8 ECHR rights: sexual abuse, and the destruction of homes and property. In *X and Y v Netherlands* the Court found that sexual abuse that violates rights to physical integrity under Article 8 ECHR (as distinct from rape or equivalent abuse which would violate Article 3 ECHR) requires the application and enforcement of the criminal law since in such a case “fundamental values and essential aspects of private life are at stake”, and “[e]ffective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions.”⁹ In *MC v Bulgaria*,¹⁰ 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.¹¹ In *Mentes v Turkey*¹² the Grand Chamber found that the destruction of homes or property by agents of the State, in violation of Article 8, required “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.”¹³

The Court’s jurisprudence also establishes that a duty to investigate and to enforce criminal law arises under Article 14, read in conjunction with other rights where this duty exists. In *Nachova v Bulgaria*,¹⁴ the Grand Chamber found that a duty to investigate possible links between racist attitudes and an act of violence existed both as an aspect of

⁸ Under the UN Principles for the Protection and Promotion of human rights through action to combat impunity, “serious crimes under international law” are 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.

⁹ Application no. 8978/80. See also *Stubbings v UK*, Application no.36-37/1995/542-543/628-629, para. 64: “Sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives” In the instant case it was found that the criminal law provision made was sufficient to satisfy Article 8.

¹⁰ Application no.39272/98.

¹¹ 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.

¹² Application no.58/1996/677/867, Judgment of 28 November 1997.

¹³ *Ibid* para.89.

¹⁴ Applications nos. 43577/98 and 43579/98, Judgment of the Grand Chamber, 6 July 2005.

procedural obligations under Article 2 *and* under Article 14 read in conjunction with Article 2.¹⁵

It is also worth noting that the UN Impunity Principles define their scope in part with reference to the duty to criminalise. The Principles apply to “serious crimes under international law” described as including “violations of internationally protected human rights that are crimes under international law *and /or which international law requires States to penalize*, such as torture, enforced disappearance, extrajudicial execution, and slavery”¹⁶ (*emphasis added*).

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. The Guidelines would benefit from an illustrative – but not exclusive - list of the substance of the acts for which impunity must be prevented under the ECHR.

The ICJ and Amnesty International, therefore, propose that a new sentence be added in para.II.3:

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

II .5 Definition of Victim

The ICJ and Amnesty International recognise the importance of defining victims within the Guidelines. Paragraph II.5 currently proposes two definitions that will be considered at the next meeting. Our organisations strongly prefer the Secretariat’s alternative proposal which is closer to the definitions applied in international standards. The definition should also be expanded to:

- Expressly list other recognised forms of harm in addition to physical and mental injury, including: emotional suffering or economic loss. These forms of harm are

¹⁵ *Nachova v Bulgaria*, Chamber Judgment (quoted with approval by Grand Chamber para.160): “Compliance with the State's positive obligations under Article 2 of the Convention requires that the domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another, irrespective of the victim's racial or ethnic origin.” Grand Chamber Judgment para.161: “The Grand Chamber would add that the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination.”

¹⁶ UN Impunity Principles, Para.B.

expressly recognised in Principle 1 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Principle 8 of the UN Reparations Principles and Recommendation of the Committee of Ministers to member states on assistance to crime victims (Rec 8, 2006) and; Article 1 of the European Union Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA)

- Include within the definition “persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.” Such persons are recognised in Principle 2 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and Principle 8 of the UN Reparations Principles.
- Expressly state that a person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim. This principle is stated expressly in Principle 2 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Principle 9 of the UN Reparations Principles and Principle 2 of the Council of Europe’s Guidelines on Victims of Terrorism.

The definition would therefore read as follows:

“In the Guidelines, the term “victims” refers to natural persons who have suffered harm, including physical or mental injury, **emotional suffering or economic loss** caused by a serious human rights violation. The term “victims” also includes, where appropriate, the immediate family or dependants of the direct victims **and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim. ”**

V. Safeguards to protect persons deprived of their liberty from serious human rights violations

Para.2: Custody records

As custody records can be an effective safeguard against other forms of serious human rights violations, including torture and other ill-treatment, violations of the right to life, as well against enforced disappearance, the ICJ and Amnesty International recommend that paragraph V(2) be amended by replacing the words “enforced disappearances” with the words “**serious human rights violations**”.

As amended this paragraph would read:

“States should take effective measures to safeguard against the risk of ~~enforced disappearances~~ **serious human rights violations** such as ~~by the~~ keeping of “custody

records” concerning the date, time and location of detainees, as well as the grounds for the detention and the name of the persons effecting it.”

Paragraph V(3) identification of officials carrying out arrests or questioning

Amnesty International research indicates that the identification of law enforcement officials carrying out arrests and interrogations is also hindered when means of identification of individual officials is either absent or concealed. Therefore, we recommend that the following be added to paragraph V(3): **“and officers carrying out arrests, using force against an individual as well as those present during interrogations should, at all times, have some form of identification visibly displayed.”**

VI: The Duty to Investigate

The ICJ and Amnesty International propose some drafting amendments to ensure that, for the avoidance of doubt, the requirement of effectiveness is consistently stipulated in relation to each Convention article, in accordance with the Court’s case law. Therefore, we recommend the following additions to the bullet points, set out in bold type :

- Bullet point 1, Article 2 “The obligation to protect the right to life requires that there should be an **effective** official investigation when individuals have been killed, whether by State agents or private persons”.
- Bullet point 3, Article 4: “The prohibition of forced labour and slavery entails a procedural obligation to **investigate carry out an effective investigation into** situations of potential trafficking in human beings.”
- Bullet point 4, Article 5: “Procedural safeguards derived from the right to liberty and security require that States must conduct **effective** investigations into arguable claims that a person has been deprived of his or her liberty and has not been seen since.”

IX: Criteria for an effective investigation

Questions were raised at the second meeting of DH-I concerning the criteria for independence of the investigation, and in particular whether the investigation was required to be independent both hierarchically and institutionally. **The ICJ and Amnesty International consider that the current wording referring to the need for both hierarchical and institutional independence should be retained.** Reference to both these elements of independence is supported by the caselaw of the European Court of Human Rights, which establishes that “not only a lack of hierarchical or institutional connection but also a practical independence” is required to fulfil the duty to investigate.¹⁷ In several cases, it has been held that the investigation of a violation by members of the same police force as those under investigation, even where it was

¹⁷ *Ramsahai v Netherlands* Application no. 52391/99 Para.325.

supervised by an independent authority, failed to meet the standard of independence necessary for an effective investigation.¹⁸

X. Involvement of victims in the investigation

In the last sentence of paragraph 7 it is suggested that a reference is inserted to cases involving violence against children, who may also require particular measures in the course of an investigation of prosecution. This is acknowledged, for example, by Article 68.1 of the Rome Statute of the International Criminal Court, which deals with protection of the victims and witnesses and their participation in the proceedings, and states that:

“The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including ... the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

The last sentence of paragraph 7 would therefore read:

“Those measures may include particular means of investigation, protection and assistance, in order to guarantee the security and dignity of the persons concerned, in cases **where people face threats to their lives or in cases involving sexual violence or violence against children.**”

XI. Prosecutions

In Para.2, the ICJ and Amnesty International suggest insertion of a cross-reference to the sections on effective investigation and involvement of victims in sections IX and X, in particular to put beyond doubt that the essential elements of an effective investigation include the involvement of direct or indirect victims. The sentence would therefore read: “The essential requirements for an effective investigation **as set out in sections IX and X**, also apply at the prosecution stage.”

XII. Court Proceedings

The ICJ and Amnesty International consider that the text in square brackets in paragraph 1 of section XII should be retained. The duty to support the independence of judges and prosecutors is supported by recommendations of the Committee of Ministers as well as UN Principles.

¹⁸ *Jordan v UK* para.120; *McKerr v UK*, Application no. 28883/95 para.128; *Ramasahai v Netherlands* op cit para.337; *Bati v Turkey*. Application no.33097/96, para.135.

Recommendation No.R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges states in Principle I paragraph 1 that “all necessary measures should be taken to respect, protect and promote the independence of judges.”¹⁹ Recommendation No.R (2000) 19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system, states in paragraph 11 that “States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability.” The recommendation recognises that in some Member States, the office of the public prosecutor is subordinate to or part of the executive, and sets out a number of safeguards which should be in place to ensure that in such circumstances there is not undue interference with the prosecutorial function (para.13). The UN Guidelines on the Role of Prosecutors²⁰ also provide that “States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability” (para.4).

XIII. Sentences

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 Convention²¹ and Council of Europe and other international treaties recognise the need for effective, proportionate, dissuasive sentences,²² commensurate with the gravity of the crimes concerned.²³ It is suggested that this provision would be strengthened by a reference to the idea of proportionality in sentencing, so that the sentence would conclude: “...effective, appropriate **and proportionate.**”

XV: International Co-operation

The ICJ and Amnesty International welcome the inclusion of a section on international co-operation in the draft Guidelines. This section largely reflects the duty to co-operate in bringing to justice those responsible for crimes involving serious violations of human rights, recognised both in instruments of the Council of Europe, and in other international declarations²⁴ and treaties, as well as customary international law. These include obligations to establish jurisdiction over crimes amounting to serious violations of human

¹⁹ See also UN Basic Principles on the Independence of the Judiciary, Principles, 1, 2 and 4.

²⁰ Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 1990.

²¹ *Okkali v Turkey* App no.52067/99, para.76; *Nikolova and Velichkova v Bulgaria* App no.7888/03.

²² 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.

²³ Convention Against Torture, Article 4.

²⁴ Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by General Assembly resolution 3074 (XXVIII) of 3 December 1973.

rights, including on the basis of the nationality of the perpetrator,²⁵ or victim,²⁶ universal jurisdiction, the obligation to extradite or prosecute (*aut dedere aut judicare*) in respect of such offences,²⁷ subject to human rights safeguards, and obligations to provide mutual legal assistance in criminal and civil proceedings in other States.²⁸ No state should permit a person suspected of a crime under international law to have a safe haven from extradition or prosecution. States have obligations to co-operate with international tribunals, including with the International Criminal Court under the Rome Statute of the International Criminal Court.²⁹ In addition, 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.³⁰ 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.**³¹

In the view of the ICJ and Amnesty International, this section of 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 calling for state cooperation, such as the resolutions establishing the International Criminal Tribunals for the former Yugoslavia

²⁵ 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.

²⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 5(1)(c); International Convention for the Protection of All Persons from Enforced Disappearance, Article 9(1)(c).

²⁷ 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.

²⁸ 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.

²⁹ Rome Statute of the International Criminal Court, Article 86.

³⁰ 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.

³¹ *Ransteve* case, op cit Para.289: “ 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 . . . ”

(Resolution 827 (1993)) and Rwanda (Resolution 955 (1994)) calling on states to cooperate.

Whilst welcoming the treatment of international co-operation in the Guidance, however, **the ICJ and Amnesty International consider it important that it should include a “saver” clause in accordance with the ECHR caselaw³² that states must not engage in international co-operation where doing so would expose a person to a real risk of torture or other ill-treatment, a flagrant denial of justice or other serious violation of human rights.** Where a state must therefore refuse extradition or other transfer request, it should exercise its own jurisdiction, or extradite to another appropriate state able and willing to investigate and prosecute in compliance with human rights standards.

It is therefore proposed that section XV should read:

“In conformity with their obligations under international law, States must engage in international cooperation to bring to justice those responsible for serious human rights violations, notably with regard to mutual legal assistance and extradition or transfer, except where doing so would expose a person to a real risk of torture or other ill-treatment, a flagrant denial of justice or other serious violation of human rights. States should make every effort to cooperate with investigations and prosecutions by international criminal tribunals, including where they have international law obligations to do so.”

XVI.2: Command and Superior Responsibility

The ICJ and Amnesty International strongly welcome the decision to include provisions on command responsibility in paragraph XVI.1 and on the prohibition of superior orders as a defence in XVI.2. However, the current wording falls short of international law and standards concerning command and superior responsibility in a number of respects. For example, it is limited to command responsibility and does not expressly include superior responsibility. It also does not make clear that commanders and superiors are responsible for their failure to exercise control over their subordinates when they failed to submit the matter to the competent authorities for investigation and prosecution. A revised paragraph XVI.1 should reflect the strict standards of command and superior responsibility in international law found in Articles 86 (2) and 87 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),³³ Article 6 of the International Law Commission’s 1996 Draft Code of Crimes against the Peace and Security of Mankind³⁴ and Article 28 of the Rome Statute,³⁵ which itself falls short of other international law in some respects. The

³² *Saadi v Italy*, Application No. 37201/06; *Chahal v UK* Application no.22414/93

³³ Protocol I, art. 86 (2) (Failure to act) and art.(Duty of commanders).

³⁴ Draft Code of Crimes, art. 6 (Responsibility of superiors)

³⁵ Rome Statute of the International Criminal Court, art. 28 (Responsibility of commanders and other superiors). This article largely reflects customary international law, but falls short by articulating a lesser

organisations also note that the prohibition of superior orders as a defence used by subordinates is a separate issue from command and superior responsibility which defines the responsibility of commanders and superiors. It is, therefore, recommended to establish a separate section under the heading of “superior orders” using the same text already set out in XVI.2.

XVII: Restrictions and limitations

The ICJ and Amnesty International consider that, in light of the jurisprudence of the European Court of Human Rights, as well as other international law and standards, specific reference to amnesties, pardons, immunities and time bars, which represent significant barriers to accountability for serious violations of human rights, should be included in the Guidelines.

Immunities

Although the guidance of the CDDH³⁶ has been that the Guidelines should not cover the law of State immunity, it would be artificial if they were to omit any reference to immunity, which in practice can form such a significant bar to accountability. The UN Impunity Principles recognised, in Principle 27 (a) that “the official status of the perpetrator of a crime under international law – even if acting as head of State or Government – does not exempt him or her from criminal or other responsibility and is not grounds for a reduction of sentence.”³⁷ In the view of the ICJ and Amnesty International, similar guidance should be included in these Guidelines.

Time bars

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.”³⁸ Other international standards and tribunals also require that in cases of serious violations of human rights, time bars should be either removed altogether, or should be proportionate to the gravity of the crime.³⁹ The ICJ and Amnesty International

standard of criminal responsibility for civilian superiors and applies only in trials in the International Criminal Court.

³⁶ 69th Meeting of the CDDH, 24-27 November 2009, CDDH (2009) 019, para.27.

³⁷ See Principle 27 United Nations Impunity Principles; Article 27 Rome Statute of the International Criminal Court.

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

³⁹ 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 Disappearance, 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

consider that there should be no statute of limitations for serious violations of human rights which amount to crimes under international law.

Amnesties and pardons

The European Court has also made clear in the context of Article 3 ECHR that amnesties are not permitted.⁴⁰ In *Yeter v Turkey*⁴¹ the Court found a violation of Article 3 where disciplinary proceedings against accused police officers were terminated due to an amnesty law, and therefore no sanction was 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*⁴² 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.”⁴³ Given the very clear European Convention jurisprudence that amnesties may lead to impunity in violation of the Convention, the Guidelines should provide that amnesties should not be applied to serious violations of human rights, including those amounting to crimes under international law. Similarly pardons which prevent a judicial determination of guilt or innocence, a determination of the truth about what occurred or full reparations for victims, should not be applied to such crimes.

The ICJ and Amnesty International propose that the part of para.XVII currently in square brackets should be modified to read:

“Amnesties, pardons and time bars should not be applied to impede prosecutions for serious violations of human rights or thorough official explanation of the circumstances of a given case. The official status of a perpetrator should not exempt him or her from criminal or other responsibility and should not be grounds for a reduction of sentence.”

XIX. Reparation

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.”

⁴⁰ *Abdulsamet Yaman v Turkey*, op cit para.55.

⁴¹ Application no. 33750/03, Judgment of 13 January 2009, para.70.

⁴² Application no.42942/02, Judgment of 8 April 2008

⁴³ 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.” See also Concluding Observations of the Committee Against Torture, The Former Yugoslav Republic of Macedonia, CAT/C/MKD/CO/2, 21 May 2008, para.5: the State party should ensure that serious violations of international human rights and humanitarian law are not included in any amnesty and are thoroughly investigated and, if appropriate, prosecuted and sanctioned.

The ICJ and Amnesty International welcome the current text of section XIX, which reflects European Convention jurisprudence and international standards on the right to an effective remedy and reparations.⁴⁴ 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.⁴⁵ **For clarity, it is suggested that the last sentence of para.2 should be moved to the end of paragraph 1, since it concerns the right to reparations more broadly, rather than the right to compensation. The text of para.1 should read**

”States should take necessary measures to establish accessible and effective mechanisms which ensure that victims of serious human rights violations receive prompt and adequate reparation for the harm suffered. This may ~~also~~ include measures of **compensation**, rehabilitation, satisfaction, restitution and guarantees of non-repetition.”

Application of the Guidelines to International Organisations

The question of the application of the guidelines was considered by DH-DEV at its last meeting and may require further consideration by the CDDH at its meeting in June, in light of the guidance previously provided by it, that the Guidelines should not deal with the responsibility of international actors. The ICJ and Amnesty International welcome the fact that the current text of the guidelines contains no specific exclusion of international organisations. As recognised by the recent PACE report on impunity,⁴⁶ the need for accountability for the actions of officials of international organisations is a key issue of impunity in Europe. Although the Guidelines are addressed to Member States, it is essential that they do not authorise a significant gap in accountability for serious human

⁴⁴ 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. Although the European Court has made awards primarily in the form of compensation, it has in a number of cases ordered the restitution of land and/or buildings and restitution through securing the release of a person unlawfully detained: *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) *Assanidze v Georgia* Application no. 71503/01, judgment (merits and satisfaction), 8 April 2004. 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* Application no. 77617/01, 26 January 2006. 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* Application no. 31443/96) 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 violations, such as law reform (*Hutten-Czapska v Poland* *Hutten-Czapska v. Poland*, Application no. 35014/97).

⁴⁵ *Donnelly v United Kingdom*, Decision of the European Commission on Human Rights, App Nos.5577-5583/72, 15 December 1975.

⁴⁶ op cit.

rights violations in Europe, by sanctioning impunity for those who act on behalf of international organisations.

The case law of the ECtHR establishes the responsibility of member states to hold officials of international organisations accountable for serious violations of human rights, on the same basis as other actors. 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 for violations of human rights. 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 criminal law, and to investigate. The guidelines should make clear that when the organisation or its officials, employees or other agents are accused of crimes under international law that the organisation has the right and duty to waive any claim of immunity. In accordance with the Court's jurisprudence, where acts are carried out on behalf of an international organisation or implement 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 Convention rights.⁴⁷ 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.

Finally, as discussed at the previous meeting of the working group, the envisaged accession of the European Union to the ECHR following the coming into force of Protocol 14 ECHR in June 2010, means that at least one international organisation will be subject to obligations under the ECHR equivalent to those of Council of Europe Member States, a situation which should be reflected in the guidelines. Again, the need for the responsibilities of the EU, as a Contracting Party to the ECHR, to fall within the scope of the guidelines, is underlined by practical considerations, as the EU takes on increasing roles in human rights sensitive situations where issues of impunity may arise, including peacekeeping and border security, and in the context of the EULEX mission in Kosovo, functions of policing, administration of justice and customs control.

In light of these significant considerations, the ICJ and Amnesty International consider that **the guidelines should contain no exclusion of the responsibility of international organisations, but should rely in this regard on the general rule that the scope of the guidelines should be commensurate with the scope of application of the European Convention on Human Rights. Explanation of the considerations mentioned above should be included in the explanatory notes.**

⁴⁷ *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.