



## **Committee for the Development of Human Rights - DH-DEV**

### **International Commission of Jurists and Amnesty International**

## **Comments on the Draft Guidelines of the Committee of Ministers of the Council of Europe on Impunity**

*April 2010*

### **1. Introduction**

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 European Court of Human Rights as well as the recent report of the Parliamentary Assembly of the Council of Europe (PACE).<sup>1</sup> Second, the Guidelines could play an important role in analysing and providing practical guidance on international law principles as they apply to European states in preventing and countering impunity. Strong guidelines on impunity, effectively implemented in Council of Europe Member States, could have a real impact in preventing impunity, and thereby reducing the numbers of repetitive cases filed with the Court from victims of violations of Convention rights who have been unable to access effective redress domestically.

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 Disappearance, 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)<sup>2</sup> and the UN Basic Principles and Guidelines on the Right to a Remedy and

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<sup>1</sup> 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

<sup>2</sup> 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

Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (The UN Reparation Principles).<sup>3</sup> The ICJ and Amnesty International welcome the references to the UN impunity principles and the UN Reparation Principles in the preamble to the draft guidelines. The Guidelines, as an instrument of the Council of Europe, should draw in particular on the rich jurisprudence of the European Court of Human Rights on issues of accountability, investigation and reparation, but they must also take account of the wider international law context in which they will be applied.

The ICJ and Amnesty International welcome the constructive debate in the first two meetings of the Group of Experts on Impunity, leading to a strong second draft of the guidelines which broadly reflects the jurisprudence of the European Court of Human Rights as well as other international standards.<sup>4</sup> The draft guidelines set 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; on international co-operation to combat impunity; and on the right to an effective remedy and to reparations. The rights to an effective remedy and to reparations are important not only to the victims of serious violations of human rights, but are essential guarantees for the victims of all human rights violations.. Provisions on the scope of application have also been clarified in accordance with the European Court caselaw. This paper sets out some of the main points on which further debate and development of the text is needed. The ICJ and Amnesty International will continue to engage in the work of the Group of Experts on Impunity and will submit further detailed drafting suggestions for the next meeting of the Group.

## **2. Scope of Application of the Guidelines: impunity for serious human rights violations**

The ICJ and Amnesty International welcome the definition of serious human rights violations set out in the current draft, while noting that rights to an effective remedy and reparations also apply to violations of human rights outside of this definition. The definition recognises that impunity may occur in relation to a range of ECHR rights, where the violations are serious, and where there is are obligations under the ECHR to criminalise the conduct concerned, to prevent, and to enforce the criminal law effectively. **It is important that the draft, while recognising that there are particular problems of impunity regarding Articles 2, 3 4 and 5 of the Convention, also acknowledges that impunity does not arise exclusively in regard to these rights alone. This position should be retained, by retaining the word “notably” currently in square brackets in section 11.3.**

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

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<sup>3</sup> 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

<sup>4</sup> Draft Guidelines of the Committee of Minister of the Council of Europe on Impunity,

in practice as well as in law,<sup>5</sup> so that particularly grave violations of a range of articles may require investigation leading to the engagement of criminal accountability of those responsible. Therefore, **under the Convention caselaw, obligations to investigate alleged violations, and to criminalise and apply the criminal law, arise under certain circumstances under Articles 8 and 14, as well as under Articles 2,3,4 and 5.**

In *Mentes v Turkey*,<sup>6</sup> for example, the Grand Chamber found such obligations to arise 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.”<sup>7</sup> In *MC v Bulgaria*,<sup>8</sup> 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.<sup>9</sup>

The Court’s jurisprudence also establishes a duty to investigate under Article 14, read in conjunction with other rights where this duty exists. In *Natchova v Bulgaria*,<sup>10</sup> it found that “[i]n 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.<sup>11</sup>

### 3. 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

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<sup>5</sup> *Mentes v Turkey* Application no.23186/94, Judgment of the Grand Chamber of 28 November 1997, para.89

<sup>6</sup> Application no.58/1996/677/867, Judgment of 28 November 1997

<sup>7</sup> *ibid* para.89

<sup>8</sup> Application no.39272/98

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> para.161

declarations<sup>12</sup> and treaties, as well as customary international law. These include obligations to establish jurisdiction over crimes amounting to serious violations of human rights, including on the basis of the nationality of the perpetrator,<sup>13</sup> or victim,<sup>14</sup> universal jurisdiction, the obligation to extradite or prosecute (*aut dedere aut judicare*) in respect of such offences,<sup>15</sup> subject to human rights safeguards, and obligations to provide mutual legal assistance in criminal and civil proceedings in other States.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.**<sup>19</sup>

**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**

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<sup>12</sup> 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

<sup>13</sup> 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.

<sup>14</sup> 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).

<sup>15</sup> 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

<sup>16</sup> 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.

<sup>17</sup> Rome Statute of the International Criminal Court, Article 86

<sup>18</sup> 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

<sup>19</sup> *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 ....”

**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 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.

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 that states should not engage in international co-operation where doing so would expose a person to the death penalty, 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.**

#### **4. Application of the Guidelines to International Organisations**

In light of the debate at the second meeting of the group of experts on impunity, **the ICJ and Amnesty International consider that DH-DEV and the CDDH should reconsider the guidance provided at previous meetings that the guidelines should not deal with the responsibility of international actors.**

The guidance on this point should be reconsidered first, because, as recognised by the recent PACE report on impunity,<sup>20</sup> 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, the ICJ and Amnesty International consider it 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.

Second, the caselaw 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 the 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

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<sup>20</sup> op cit

to that of the Convention, there is a rebuttable presumption that the acts are compatible with Convention rights.<sup>21</sup> 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 and crucially, 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.**

##### **5. Restrictions and limitations: immunities, amnesties and time bars**

Still under debate in relation to section XVII of the Guidelines, is whether to include references to particular restrictive measures which, to varying degrees, foster impunity, in particular amnesties, pardons and time bars. **The ICJ and Amnesty International consider that, in light of the jurisprudence of the European Court of Human Rights, as well as other international standards, specific reference to these significant barriers to accountability should be included in the guidelines.**

##### ***Immunities***

The ICJ and Amnesty International consider that further consideration should be given by the CDDH and its subsidiary bodies to addressing the issue of immunities as a barrier to accountability. Although the guidance of the CDDH<sup>22</sup> 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

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<sup>21</sup> *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

<sup>22</sup> 69<sup>th</sup> Meeting of the CDDH, 24-27 November 2009, CDDH (2009) 019, para.27.

responsibility and is not grounds for a reduction of sentence.”<sup>23</sup> **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.”<sup>24</sup> 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.<sup>25</sup> **The ICJ and Amnesty International 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.<sup>26</sup> In *Yeter v Turkey*<sup>27</sup> 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*<sup>28</sup> 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.”<sup>29</sup> **Given the very clear European Convention jurisprudence that**

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<sup>23</sup> See Principle 27 United Nations Impunity Principles; Article 27 Rome Statute of the International Criminal Court

<sup>24</sup> *Abdulsamet Yaman v Turkey* Application no. 32446/96, Judgment of 2 November 2004 para.38, para.59-60

<sup>25</sup> 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 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 imprescriptible”

<sup>26</sup> *Abdulsamet Yaman v Turkey*, op cit para.55

<sup>27</sup> Application no. 33750/03, Judgment of 13 January 2009, para.70.

<sup>28</sup> Application no.42942/02, Judgment of 8 April 2008

<sup>29</sup> 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

**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.**

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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 Yuugoslav 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.