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Ending Torture. Seeking Justice for Survivors

**International Commission of Jurists, Amnesty International, the Redress Trust, and
the International Federation for Human Rights**

Steering Committee on Human Rights (CDDH)

**Draft Guidelines of the Committee of Ministers of the Council of Europe on
Eradicating Impunity for Serious Human Rights Violations**

October 2010

Introduction

The International Commission of Jurists (ICJ), Amnesty International, the Redress Trust (REDRESS) and the International Federation for Human Rights (FIDH) welcome this opportunity to comment on the Draft Guidelines on Eradicating Impunity for Serious Human Rights Violations, in advance of their presentation to the Steering Committee on Human Rights (CDDH).

The organisations believe that the Guidelines have the potential to contribute to preventing and combating impunity in the Council of Europe region. The serious problems of impunity which exist in Europe, which have been documented in reports of NGOs, including those party to this submission, as well as of the Parliamentary Assembly of the Council of Europe (PACE), testify to the need for clear and stringent guidance for national authorities, which can help to ensure that human rights violations amounting to serious crimes are fairly, effectively and consistently investigated and prosecuted and that victims receive appropriate reparations.

The organisations welcome the considerable progress made throughout the drafting of the Guidelines, notably the inclusion of victims' right to reparation and the requirement for States to ensure that people carrying out arrests, using force or questioning can be identified in any subsequent disciplinary or criminal proceeding. We regret, however, that the Guidelines, in their current form, do not fully reflect the full range of

international legal obligations by Council of Europe Member States on issues such as immunities, obligations to establish jurisdiction over serious human rights violations, or the duty to cooperate with international tribunals and courts. In particular, we consider that Council of Europe and other international standards require strengthening of the Guidelines in two respects. These relate, first, to the treatment of the related issues of command responsibility and superior orders; and second, to the problems of impunity caused by amnesties, time-bars and pardons. The ICJ, Amnesty International, REDRESS and FIDH are concerned that if the weakness of the Guidelines on these two points is not addressed, the efficacy of the Guidelines in combating impunity will be undermined.

Subject to these amendments, the organisations urge the CDDH to endorse the Guidelines, and to encourage Member States to take measures to translate and disseminate the Guidelines, and to initiate training, review of national guidance and other measures necessary to ensure their effective implementation.

Guideline XIII: Responsibility of subordinates

The ICJ, Amnesty International, Redress and FIDH are particularly concerned that as a result of decisions taken on Guideline XIII at the last meeting of the expert group, the Guidelines' treatment of the related issues of command responsibility and the defence of superior orders is incomplete and therefore misleading.

The final meeting of the expert group decided not to retain the first paragraph of Guideline XIII, previously in square brackets, which dealt with the responsibility of superiors. However, it agreed to retain the complementary provision on the prohibition of reliance on superior orders. This was placed under a new heading, "Responsibility of Subordinates".

ICJ, Amnesty International, REDRESS and FIDH urge the CDDH to restore the paragraph on the responsibility of superiors, alongside the current paragraph on the prohibition of reliance on superior orders. Disregard of these two key principles regularly leads to impunity at the national level. It is important that the Guidelines do not give the misleading impression that accountability for serious human rights violations should be upheld against subordinates, but not against superiors. In this regard, we do not consider that it is not appropriate to include a separate guideline on the responsibility of subordinates, without any corresponding reference to the responsibility of superiors.

We therefore suggest the inclusion of a new paragraph in Guideline XIII to the following effect:

“The fact that violations have been committed by a subordinate does not exempt that subordinate’s superiors from responsibility, in particular criminal responsibility, if they knew or should have known of those acts but failed to take reasonable and necessary measures to prevent them and to submit the matter to the competent authority for investigation and prosecution.”

This language is consistent with the definition of “perpetrators” in Guideline II (4)¹ and with paragraph 2 of the Assembly’s Resolution 1675(2009)² as well as with the approach taken by the drafters of the UN Set of Principles for the Protection and Promotion of Human Rights through Action to End Impunity.

In the alternative, if the CDDH decides not to include reference to command responsibility, then, in order to avoid presenting a distorted picture of the responsibility of superiors and subordinates, the current reference to superior orders should be moved to become a second paragraph to Guideline X, under the general heading of Sentencing. That second paragraph could read:

While the following of superior orders or instructions may not serve as a circumstance precluding accountability for serious human rights violations, it may have a bearing on punishment.

Guideline XVII: Restrictions and Limitations

The current text of Guideline XVII addresses the problem of restrictions and limitations on investigation and prosecution in very general terms that do not make clear to non-specialists the kinds of restrictions and limitations which may lead to impunity, or the circumstances in which they will be illegitimate. This is particularly unfortunate, since European Court jurisprudence contains clear and specific principles on, in particular, the application of amnesties, time-bars and pardons to crimes which amount to serious violations of human rights. The Court has repeatedly affirmed that such measures are not permissible in regard to crimes that violate article 3 ECHR.³ In *Yeter v Turkey*, it held “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.”⁴ Several international standards provide that amnesties⁵ and time bars⁶ shall not apply to torture or other ill-treatment, and other

¹ Guideline II (4) states “In the Guidelines, the term “perpetrators” refers to those having committed, or otherwise being responsible for acts or omissions amounting to serious human rights violations.”

² Assembly Resolution 1675 (2009) on “The state of human rights in Europe: the need to eradicate impunity”, underscored the importance that all perpetrators of serious human rights violations must be held to account for their actions, the Parliamentary Assembly stated that: “2. This shall also apply to the instigators and organisers of such crimes, as recently affirmed by the Assembly in Resolution 1645 (2009) with respect to the Gongadze case.”

³ *Abdulsamet Yaman v Turkey*, Application no. 32446/96, Judgment of 2 November 2004 para.38, para.55-60. See also *Ali and Ayse Duran v Turkey* Application no.42942/02, Judgment of 8 April 2008; *Yeter v Turkey* Application no. 33750/03, Judgment of 13 January 2009, para.70; *Ould Dah v France*, Application no. 13113/03, Decision on the admissibility, 30 March 2009.

⁴ op cit, para.70.

⁵ 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

standards impose restrictions on their application to other serious violations of human rights.⁷

This jurisprudence had previously been addressed by a sentence retained in square brackets in earlier drafts of Guideline XVII, which made particular reference to amnesties, pardons and time-bars. The sentence was deleted following discussion at the last meeting of the expert group. Given however that opinion on this point, both in the expert group and in the CDDH, has been very finely balanced,⁸ it merits further attention by the CDDH at this meeting, in the interests of providing accurate and effective guidance, in accordance with the jurisprudence of the European Court.

The ICJ, Amnesty International, REDRESS and FIDH therefore urge that Guideline XVII be amended to insert an additional sentence referring to amnesties, pardons and time-bars, reflecting that although such limitations are problematic in relation to all violations of human rights, that they should not be applied to the most serious human rights violations, such as torture, that amount to crimes under international law.

The organisations propose that an additional sentence in Guideline XVII should read:

“In particular, amnesties, pardons and time bars should not impede the prosecution of alleged perpetrators of serious violations of human rights or the imposition of appropriate sanctions, and should not apply to acts amounting to torture or inhuman or degrading treatment or punishment, or other crimes under international law.”

compensation and such full rehabilitation as may be possible.” See 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.

⁶ See ICTY, *Prosecutor v Furundzija*, holding that “torture may not be covered by a statute of limitations”; The UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law provides in Principle IV that: “Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.”

⁷ 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 imprescriptable.”

⁸ Steering Committee on Human Rights, Report of the 70th Meeting, 15-18 June 2010, CDDH(2010)010, para.43.