



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

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

#### **Steering Committee for Human Rights**

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#### **Introduction**

The International Commission of Jurists (ICJ) and Amnesty International welcome the opportunity to comment on the draft the Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations, set out in DH-I(2010)008. We consider that the current draft reflects considerable progress towards strong guidelines on this topic. In these comments, we highlight key issues which remain unresolved or on which we retain concerns as to consistency with international law and standards.

The ICJ and Amnesty International 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.

## Definition of 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 2<sup>1</sup>, 3<sup>2</sup>, 4,<sup>3</sup> 5<sup>4</sup>, 8<sup>5</sup> and 14<sup>6</sup>.

The ICJ and Amnesty International welcome the decision, at the last meeting of the Committee of Experts on Impunity, to include reference to Article 8 ECHR in the definition of serious human rights violations. 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 deliberate 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.”<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> In *Mentes v Turkey*<sup>10</sup> 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

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<sup>1</sup> *Oneryildiz 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.”

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

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

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

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

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

<sup>7</sup> 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.

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

investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure.”<sup>11</sup>

The ICJ and Amnesty International remain concerned however that the definition of serious human rights violations is exclusive to the articles listed, and therefore does not allow for the possibility of applying the Guidelines to the most serious violations of other Convention rights. We would favour an inclusive formulation which prefaced this list of rights by “notably ...” given in particular that the Court’s existing jurisprudence establishes that duties to enforce the criminal law and to investigate arises under Article 14, read in conjunction with other rights where this duty exists. In *Nachova v Bulgaria*,<sup>12</sup> 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 procedural obligations under Article 2 and under Article 14 read in conjunction with Article 2.<sup>13</sup>

An inclusive list would also take account of the potential for the Court’s jurisprudence to develop regarding duties to apply the criminal law and to investigate violations of other Convention rights. 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,<sup>14</sup> so that particularly grave violations of a range of articles may require investigation leading to the engagement of criminal accountability of those responsible.

### **Definition of Victim**

The ICJ and Amnesty International support inclusion of the text in square brackets in para. II.5. The principle 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 is stated expressly in Principle 2 of the Council of Europe’s Guidelines on Victims of Terrorism<sup>15</sup>

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<sup>11</sup> *Ibid* para.89.

<sup>12</sup> Applications nos. 43577/98 and 43579/98, Judgment of the Grand Chamber, 6 July 2005.

<sup>13</sup> *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.”

<sup>14</sup> *Mentes v Turkey* Application no.23186/94, Judgment of the Grand Chamber of 28 November 1997, para.89.

<sup>15</sup> Adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers’ Deputies

as well as in Principle 2 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>16</sup> and Principle 9 of the UN Reparations Principles.<sup>17</sup>

## **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 declarations<sup>18</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>19</sup> or victim,<sup>20</sup> universal jurisdiction, the obligation to extradite or prosecute (*aut dedere aut judicare*) in respect of such offences,<sup>21</sup> subject to human rights safeguards, and obligations to provide mutual legal assistance in criminal and civil proceedings in other States.<sup>22</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>23</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>24</sup> **Furthermore, the European Court of Human Rights has recognised that there are in some circumstances obligations of mutual legal**

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<sup>16</sup> Adopted by the UN General Assembly A/RES/40/34 29 November 1985

<sup>17</sup> 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 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>18</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>19</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>20</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>21</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>22</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>23</sup> Rome Statute of the International Criminal Court, Article 86.

<sup>24</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.

**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>25</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 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 (Resolution 827 (1993)) and Rwanda (Resolution 955 (1994)) calling on states to cooperate.

### **Command and Superior Responsibility**

The ICJ and Amnesty International strongly welcome the provisions on command responsibility currently in square brackets in paragraph XVI.1 and on the prohibition of superior orders as a defence in XVI.2. We support their retention in the Guidelines, given the regrettable armed conflicts in the region, which have resulted in serious human rights violations in which the issues of command and superior responsibility have arisen and have been addressed by national and international and courts alike.<sup>26</sup> It is important that the Guidelines, in paragraph XVI.1, should reflect the strict standards of command and superior responsibility in international law found in Articles 87<sup>27</sup> and 86(2)<sup>28</sup>

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<sup>25</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 . . . ”

<sup>26</sup> See for example, International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Ljube Boskoski and Johan Tarculovski*, 19 May 2010

[http://www.icty.org/x/cases/boskoski\\_tarculovski/acjug/en/100519\\_summary.pdf](http://www.icty.org/x/cases/boskoski_tarculovski/acjug/en/100519_summary.pdf)

<sup>27</sup> Art.87 states: “1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol. 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol. 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.”

<sup>28</sup> Art 86.2 states: “The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if

respectively of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Article 6 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind.<sup>29</sup>

## **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 para.XVII on restrictions and limitations.**

### *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>30</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>31</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.

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they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”

<sup>29</sup> Draft Code of Crimes, art. 6 (Responsibility of superiors): “The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.”

<sup>30</sup> *Abdulsamet Yaman v Turkey* Application no. 32446/96, Judgment of 2 November 2004 para.38, para.59-60.

<sup>31</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 imprescriptable.”

## *Amnesties and pardons*

The European Court has also made clear in the context of Article 3 ECHR that amnesties are not permitted.<sup>32</sup> In *Yeter v Turkey*<sup>33</sup> 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*<sup>34</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>35</sup> 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.

## *Immunities*

The ICJ and Amnesty International would recommend reconsideration by the CDDH of its guidance<sup>36</sup> that the Guidelines should not cover the law of State immunity. The ICJ and Amnesty International consider that it would be artificial if the guidelines 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.”<sup>37</sup> In the view of the ICJ and Amnesty International, similar guidance should be included in these Guidelines.

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<sup>32</sup> *Abdulsamet Yaman v Turkey*, op cit para.55.

<sup>33</sup> Application no. 33750/03, Judgment of 13 January 2009, para.70.

<sup>34</sup> Application no.42942/02, Judgment of 8 April 2008

<sup>35</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 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.

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

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