



INTERNATIONAL  
COMMISSION  
OF JURISTS



*Ending Torture. Seeking Justice for Survivors*

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

**Committee of Experts on Impunity (DH-I)**

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

*September 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 the final meeting of the Working Group. Notwithstanding the considerable progress made to date in the drafting of the Guidelines, the organisations hope that they can be further strengthened in the course of this meeting, to add the greatest possible value to the fight against impunity.

The organisations have also made suggestions for additional references in the Guidelines' reference texts, in a separate paper.

## **Preamble**

### **Paragraph (h)**

The ICJ, Amnesty International, REDRESS and FIDH welcome the support expressed by the Council of Europe's Steering Committee for Human Rights (CDDH) for the inclusion of the reference to the UN Set of Principles for the Protection and Promotion of Human

Rights Through Action to Combat Impunity,<sup>1</sup> in the Preamble to the Draft Guidelines<sup>2</sup>, given the significance of these standards. As set out in Guideline II(6), the draft Guidelines are to be seen in the wider international law context in which they will be applied. We consider that it should thus be uncontroversial to cite these standards which indeed were “borne in mind” by members of the DH-I in the drafting process. We therefore urge the DH-I to ensure that the reference to the UN Principles remains in the text.

### **Paragraph (i)**

The organisations also welcome the support expressed by the CDDH for the retention of the reference to the UN Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in the Preamble to the Guidelines.<sup>3</sup>

**We also recommend that the DH-I strengthen this paragraph concerning the right to an effective remedy by adding references to Article 2 of the International Covenant on Civil and Political Rights and Article 8 of the Universal Declaration of Human Rights, both of which set out the guarantee of the right to a remedy.**

### **Paragraph (j)**

**We recommend the addition of a reference to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power**, which is a standard adopted by the General Assembly of the UN in 1985<sup>4</sup>, and which continues to provide useful guidance on the issues of the rights of victims of human rights violations.

## **Guideline I: The need to combat impunity**

The ICJ, Amnesty International, REDRESS and FIDH propose that an additional clause be added to the description of impunity which refers to the obligation to provide reparations. Reparations are widely recognised as an essential element of establishing accountability for violations of human rights, including in these Guidelines (see Guideline XIX *infra*), the Court’s caselaw<sup>5</sup> and international standards<sup>6</sup>, and it is

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<sup>1</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

<sup>2</sup> See CDDH Report of 70th meeting, 15-18 June 2010, CDDH (2010) 010, at paragraph 43.

<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> Adopted by UN General Assembly Resolution A/RES/40/34, 29 November 1985

<sup>5</sup> *Aksoy v Turkey* Application no. 21987/93, para.98; *Mentes v Turkey* Application no.23186/94, Judgment of the Grand Chamber of 28 November 1997, para.89. Although the Court, in awarding just satisfaction, has made awards primarily in the form of compensation, it has also 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, 21 January 2001), *Assanidze v Georgia* Application no.71503/01, judgment (merits and just satisfaction), 8 April 2004)

<sup>6</sup> See e.g. UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity which define impunity as “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings

appropriate that this be acknowledged in the description. 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.

**In particular, we urge the DH-I to add the following words at the end para.1: “or where the victims of such violations do not receive adequate reparations.”**

**As amended paragraph I(1) would then read:**

These Guidelines address the problem of impunity in respect of serious human rights violations. Impunity arises where those responsible for acts that amount to serious human rights violations are not brought to account **or the victims do not receive adequate reparations.**

**Guideline II.1: International Co-operation**

**The ICJ, Amnesty International, REDRESS and FIDH support the retention of a reference to the Guideline on International Co-operation which currently appears in square brackets in para.II.1.** The cross reference to the Guideline on international co-operation in this paragraph clarifies that under international law states retain certain specific responsibilities beyond their territorial jurisdiction, to take action to combat impunity. To omit the reference could mislead authorities seeking guidance into thinking that obligations exist exclusively in relation to serious human rights violations committed within the state’s territorial jurisdiction.

**Guideline II.3: Definition of serious human rights violations**

The ICJ, Amnesty International REDRESS and FIDH remain concerned that as worded the definition of “serious human rights violations” is exclusive to the articles listed, and therefore does not provide for the possibility of applying the Guidelines to serious violations of other Convention rights. The principle of progressive development of the Convention rights<sup>7</sup> has led to particularly significant recent developments in relation to these duties, for example in relation to Articles 4 and 14 ECHR,<sup>8</sup> and it is not unlikely that these obligations could be applied to other Convention rights, or aspects of them. A non-exhaustive list would take account of the potential for the Court’s jurisprudence to develop regarding duties to enact criminal law provisions 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>9</sup> so that particularly grave

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since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”

<sup>7</sup> *Selmouni v France* Application no.25803/94, Judgment of the Grand Chamber of 28 July 1999.

<sup>8</sup> *Nachhova v Bulgaria* Applications nos. 43577/98 and 43579/98, Judgment of the Grand Chamber, 6 July 2005; *Rantsev v Cyprus and Russia* Application no. 25965/04, Judgment of 7 January 2010.

<sup>9</sup> *Mentes v Turkey* Application no.23186/94, Judgment of the Grand Chamber of 28 November 1997, para.89.

violations of a range of articles may require investigation leading to the engagement of criminal accountability of those responsible.

In addition, a more open formula would reflect the Court's existing jurisprudence, which establishes that a duty to investigate arises under Article 14, read in conjunction with other rights where this duty exists. In *Nachova v Bulgaria*,<sup>10</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>11</sup>

**The ICJ, Amnesty International, REDRESS and FIDH therefore urge the DH-I to amend Guideline II.3 as follows:**

For the purposes of these Guidelines, "serious human rights violations" concern those acts in respect of which States have an obligation under the ECHR, in light of the Court's case-law, to enact criminal law provisions. Such obligations arise **notably** in the context of the right to life (Article 2 ECHR), the prohibition of torture and inhuman and degrading treatment or punishment (Article 3 ECHR), the prohibition of forced labour and slavery (Article 4 ECHR) and with regard to certain aspects of the right to liberty and security (Article 5 § 1 ECHR) and the right to a private and family life (Article 8 ECHR). Not all violations of these articles will necessarily reach the threshold.

**Guideline II.4: Cross-reference to superior responsibility**

**The ICJ, Amnesty International, REDRESS and FIDH support the retention of the text in square brackets**, as clarification that perpetrators of serious violations of human rights include those who fall within the principle of command or superior responsibility, addressed in more detail in Guideline XVI.

**Guideline II.5: Definition of victim**

The ICJ, Amnesty International, REDRESS and FIDH consider that the definition of "victims" is a vital element of the Guidelines. The definition in the Guidelines should not be more restrictive than that used in other Council of Europe and UN formulations, including the Council of Europe Recommendation of the Committee of Ministers to

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<sup>10</sup> Applications nos. 43577/98 and 43579/98, Judgment of the Grand Chamber, 6 July 2005.

<sup>11</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."

Member States on assistance to crime victims;<sup>12</sup> the Council of Europe Guidelines for the Protection of Victims of Terrorist Acts; the United Nations Declaration of Basic Principles of Justice for Victims of Crime; the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; and the International Criminal Court Rules of Procedure and Evidence.

**ICJ, Amnesty International, REDRESS and FIDH strongly oppose the proposal set out in square brackets in the first sentence to change the standard formulation “who have suffered harm” (used in all the above standards) to “it is established to have suffered harm.”** Neither other Council of Europe nor UN standards (cited above) nor the jurisprudence of the European Court of Human Rights (“the Court”) impose any such limitation on the right of a person claiming to be either a direct or indirect victim of a violation of human rights to which the duty to investigate applies.<sup>13</sup> The addition of “it is established to” implies that victims would need to go through a process before they could be classified as victims and entitled to exercise their rights. This could result in individuals facing additional procedural obstacles in seeking justice, lead to improper treatment of those who have suffered human rights violations and ultimately undermine the purpose of the Guidelines. To fully clarify this issue, **we urge the inclusion of the final sentence of the Guideline, which currently appears in square brackets.** We consider that the retention of the final sentence in the formulation of the definition should be uncontroversial as it has been already accepted by the Member States of the Council of Europe in the Council of Europe Guidelines on the Protection of Victims of Terrorist Acts as well as in the above-cited UN standards.

**The ICJ, Amnesty International, REDRESS and FIDH also recommend that the definition expressly recognise those “who have suffered harm in intervening to assist victims in distress or to prevent victimisation.”** This would be consistent with the definitions in both the United Nations standards above. We encourage the DH-I to reconsider this issue.

The ICJ, Amnesty International, REDRESS and FIDH therefore recommend that the definition of victims which is set out in the draft Guidelines read as follows:

1. In the Guidelines, the term “victims” refers to natural persons ~~{who/it is established}~~ **to 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 victim **as well as those 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

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<sup>12</sup> Rec(2006)8, adopted on 14 June 2006. The recommendation defines “victim” as follows: “1.1 Victim means a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by acts or omissions that are in violation of the criminal law of a member state. The term victim also includes, where appropriate, the immediate family or dependants of the direct victim.”

<sup>13</sup> *Jordan v UK*, Application no.24746/94, para.109; *Gulec v Turkey* Application no. 21593/93 para.82; *Ogur v Turkey* Application no. 21594/93 para.92.

is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.}

### **Guideline III.5: measures to encourage reporting**

The ICJ, Amnesty International, REDRESS and FIDH propose an **additional sentence to this paragraph: “They should take measures to ensure that those who report such violations are protected from harassment and reprisals.”**

This reflects positive obligations under the ECHR to take measures to protect those who the authorities know or ought to know are at particular risk of loss of life or violation of physical integrity,<sup>14</sup> including for reporting serious violations of human rights. It also reflects Article 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that “Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

### **Guideline V.4: Identification of officials**

The ICJ, Amnesty International, REDRESS and FIDH welcome the principle in Guideline V. that States must ensure that officials involved in arrests or interrogations can be identified in any later criminal investigations. Amnesty International’s research has also underscored the importance of identification of law enforcement officials who use force and the importance of ensuring that identification is possible in the context of disciplinary proceedings. The organisations therefore recommend that Guideline be amended as follows:

States must ensure that officials carrying out arrests, ~~or~~ interrogations **or using force** can be identified in any later criminal or **disciplinary** investigations .

### **Guideline VI: Duty to investigate**

For clarity, it is proposed that **the phrase “serious ill-treatment” be replaced with “torture or other inhuman or degrading treatment or punishment”**, as this is the more precise and commonly used legal standard.

### **Guideline IX. Criteria for an effective investigation**

#### *Adequacy*

The last sentence of this paragraph aims to state, in non-legal terms, the principle that the obligation to investigate is not an obligation of result but one of means. However, the current very summary wording does not fully express the nature of the duty to ensure an

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<sup>14</sup> *Osman v UK*, Application no. 23452/94, Judgement of the Grand Chamber, 28 October 1998

adequate investigation.<sup>15</sup> We therefore **propose that the wording of the last sentence be amended to read “This does not create an obligation on states to ensure that the investigation leads to a particular result, but rather requires that the authorities take all reasonable steps available to them to secure the evidence concerning the incident, including forensic evidence, witness testimony, and where appropriate, an autopsy”**.

The proposed amended paragraph would therefore read:

The investigation must be capable of leading to the identification and punishment of those responsible. ~~This does not mean that this result should be guaranteed, but the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident.~~ **This does not create an obligation on states to ensure that the investigation leads to a particular result, but rather requires that the authorities take all reasonable steps available to them to secure the evidence concerning the incident, including forensic evidence, witness testimony, and where appropriate, an autopsy.**

### *Thoroughness*

**The organisations urge the DH-I to add the following phrase at the end of the first sentence: “including any racist or other discriminatory motivation.”** This addresses the ruling of the Court in *Nachova v Bulgaria*, that an obligation may arise under Article 14 in conjunction with Article 2 to investigate possible links between racist attitudes and killings or other violent incidents.<sup>16</sup>

As amended the paragraph would read:

The investigation should be comprehensive in scope and address all of the relevant background circumstances, **including any racist or other discriminatory motivation**. It should be capable of identifying any systematic failures that led to the violation. This requires the taking of all reasonable steps to secure relevant evidence such as identifying and interviewing the alleged victims, suspects and eyewitnesses; examination of the scene of the alleged violation for material evidence; as well as gathering forensic and medical evidence by competent specialists. The evidence should be assessed in a thorough, consistent and objective manner.

### **Guideline X, Paragraph 1: Participation of victims**

**We urge that the phrase in the first sentence of para.1, “in accordance with relevant procedures under national law” be deleted.** This clause could misleadingly suggest that the obligation to ensure participation of victims is limited by the provision made by national procedures. To the contrary, while the Court has accepted that the rights of participation of victims may be realised by different means in different national

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<sup>15</sup> See e.g. *Jordan v UK*, Application no. 24746/94, para.107

<sup>16</sup> *Nachova v Bulgaria*, Applications nos. 43577/98 and 43579/98, Judgment of the Grand Chamber, 6 July 2005 para 160-161.

systems, and has not prescribed any one particular procedure<sup>17</sup> it has required the modification of national procedures where they fail to provide for adequate participation of victims.<sup>18</sup>

The amended paragraph would read:

States should ensure that victims may participate in the investigation and the proceedings to the extent necessary to safeguard their legitimate interests ~~in accordance with the relevant procedures under national law~~. States should address the interest of victims to know the truth about the circumstances of a serious human rights violation.

### **Guideline X para.7: Protection measures**

The ICJ, Amnesty International, REDRESS and FIDH propose two amendments to para.7 to clarify that the obligation to put in place protection measures applies throughout the investigation process. **In the second sentence, after “dissuaded by other means” we propose to insert “from complaining or pursuing their complaints or”. We also propose that the text be amended to make clear that the measures of protection and assistance should be made available to persons who complain, including victims and witnesses, “before, during or after the investigation process.”**

**As amended the paragraph would read:**

7. States should ensure that, at all stages of the proceedings when necessary, protection measures are put in place for the physical and psychological integrity of victims and witnesses. States must ensure that victims and witnesses are not intimidated, subject to reprisals or dissuaded by other means **from complaining or pursuing their complaints or** participating in the proceedings. Those measures may include particular means of investigation, protection and assistance **before, during or after the investigation process**, in order to guarantee the security and dignity of the persons concerned.

### **Guideline XII, paragraph 1: safeguards for prosecutors and judges**

The ICJ, Amnesty International, REDRESS and FIDH support recognition in the Guidelines of the need to put in place safeguards to protect prosecutors and judges in the performance of their duties. Such safeguards to protect Judges and Prosecutors are set out in the United Nations Basic Principles on the Independence of the Judiciary and the United Nations Guidelines on the Role of Prosecutors (Guideline 4). However, it is important to note and to ensure that the Guidelines accurately clarify that these safeguards do not provide absolute immunity. (See Guidelines 16-20 of the United Nations Principles on the Independence of the Judiciary<sup>19</sup> and Guideline 4 of the UN

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<sup>17</sup> *McKerr v UK*, Application no. 28883/95, para.159

<sup>18</sup> *Ogur v Turkey*, Application no. 21594/93 para.92; *McKerr v UK* paras.148, 159.

<sup>19</sup> Principle 16 of the United Nations Principles on the Independence of the Judiciary states: “Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in

Guidelines on The Role of Prosecutors<sup>20</sup>.) **In line with these standards, we recommend that the last sentence be amended to end “as a result of the exercise of their functions in accordance with international standards of professional responsibility.”**

As amended the paragraph would read:

States should ensure the independence and impartiality of the judiciary in accordance with the principle of separation of powers. Safeguards should be put in place to ensure that prosecutors and judges do not fear dismissal or other reprisals **as a result of the exercise of their functions in accordance with international standards of professional responsibility.**

#### **Guideline XV: International co-operation**

ICJ, Amnesty International, REDRESS and FIDH recognise that international cooperation is a vital element of achieving the Guidelines’ ultimate goal – eradicating impunity for serious human rights violations. In ICJ and Amnesty International’s submission to the Working Group in May, we expressed concern that the provision contained in the earlier draft omitted a number of elements that should be included to guide states fully on their obligations. We therefore welcome new references in the current version to the obligations of states with regards to mutual legal assistance, prosecutions and extraditions. The current draft however continues to omit reference to states’ obligations to cooperate with investigations and prosecutions by international criminal tribunals, including with the International Criminal Court,<sup>21</sup> which play a vital role in combating impunity. **We urge the Working Group to reconsider and address this issue, by the addition of a sentence at the end of para.1 as follows: “States should undertake to co-operate with investigations and prosecutions by international criminal tribunals, including particularly where they have international law obligations to so cooperate.”**

In addition, we urge the Working Group to consider adding language to the new text on mutual legal assistance, prosecutions and extraditions, to ensure that those obligations are exercised consistently with states’ obligations under international human rights law. Doing so would be consistent with Article 5 of the European Convention on the Suppression of Terrorism and paragraph 50 of the Explanatory Report to that treaty.<sup>22</sup> **We**

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accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.” Principles 17-20 establish principles for discipline, suspension and removal of judges.

<sup>20</sup> Guideline 4 of the UN Guidelines on the Role of Prosecutors provides: “4. 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. (emphasis added). Guidelines 21 and 22 establish principles for disciplinary proceedings against prosecutors.

<sup>21</sup> Rome Statute of the International Criminal Court, Article 86.

<sup>22</sup> Article 5 of the European Convention on the Suppression of Terrorism: “Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for

**recommend that the last sentence end: “in a manner consistent with respect for human rights and in good faith.”**

Furthermore, to fully reflect language used in other Council of Europe, UN and international treaty instruments<sup>23</sup>, we urge the DH-I to include in paragraph 1 a reference to states’ obligations to establish jurisdiction over serious human rights violations, including on the basis of the territory where the crime was committed, the nationality of the perpetrator and the victim as well as extraterritorial jurisdiction, including universal jurisdiction, such as where there is an obligation to extradite or prosecute. Such reference would further underline the purpose of the Guidelines and ensure that no state provides a safe haven to alleged perpetrators of serious human rights violations.

We therefore urge the DH-I to amend this Guideline to read:

1. International cooperation plays a significant role in combating impunity. States are encouraged to intensify their cooperation beyond their existing obligations to cooperate in specific ways. States must fulfil their obligations, notably with regard to mutual legal assistance, prosecutions and extraditions, **in a manner consistent with respect for human rights and in good faith. States should ensure that they have jurisdiction over serious human rights violations in accordance with international law and make every effort to co-operate with**

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believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.” Paragraphs 48-50 of the Explanatory Note to this Convention state:

48. Article 5 is intended to emphasise the aim of the Convention which is to assist in the suppression of acts of terrorism where they constitute an attack on the fundamental rights to life and liberty of persons. The Convention is to be interpreted as a means of strengthening the protection of human rights. In conformity with this basic idea, Article 5 ensures that the Convention complies with the requirements of the protection of human rights and fundamental freedoms as they are enshrined in the European Convention of 4 November 1950.

49. One of the purposes of Article 5 is to safeguard the traditional right of asylum. Although in the member States of the Council of Europe of which all but one have ratified the European Convention on Human Rights, the prosecution, punishment or discrimination of a person on account of his race, religion, nationality or political opinion is unlikely to occur, it was deemed appropriate to insert this traditional clause also in this Convention; it is already contained in Article 3.2 of the European Convention on Extradition.

50. If, in a given case, the requested State has substantial grounds for believing that the real purpose of an extradition request, made for one of the offences mentioned in Article 1 or 2, is to enable the requesting State to prosecute or punish the person concerned for the political opinions he holds, the requested State may refuse extradition. The same applies where the requested State has substantial grounds for believing that the person’s position may be prejudiced for political or any of the other reasons mentioned in Article 5. This would be the case, for instance, if the person to be extradited would, in the requesting State, be deprived of the rights of defence as they are guaranteed by the European Convention on Human Rights.

<sup>23</sup> See for instance the Council of Europe Convention on the Prevention of Terrorism, Article 14 (3); Council of Europe Trafficking Convention, Article 31.3; UN Convention against Torture, Article 5 (2).

**investigations and prosecutions by international criminal tribunals, including where they have international law obligations to do so.**

2. In extraditing or removing individuals, they must not be exposed to a real risk of torture or other ill-treatment, flagrant denial of justice or the imposition of the death penalty.

#### **Guideline XVI: Command responsibility**

ICJ, Amnesty International REDRESS and FIDH strongly support the inclusion of Guidelines on these two key principles, which regularly lead to impunity at the national level. Recognising that the Working Group continues to work on the wording of the first sentence of paragraph 1, we suggest **the following**: **“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 Guideline II (4) and with paragraph 2 of the Assembly’s Resolution 1675(2009)<sup>24</sup> as well as 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.

#### **Guideline XVII: Restrictions and Limitations**

**The ICJ, Amnesty International, REDRESS and FIDH strongly support the retention of the text in square brackets referring to amnesties, pardons and time-bars; however the organisations consider that it should be further strengthened to reflect the prohibition on such measures with regard to certain of the most serious human rights violations.** The organisations consider reference to these limitations to be essential to provide accurate and effective guidance to counter impunity, in accordance with standards established in the jurisprudence of the Court. Although such limitations are problematic in relation to all violations of human rights, the Guidelines should specify that they should not be applied to the most serious violations that amount to crimes under international law.

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<sup>24</sup> 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.”

The Court has repeatedly affirmed that such measures are not permissible in regard to crimes that violate article 3 ECHR.<sup>25</sup> 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.”<sup>26</sup> Several international standards provide that amnesties<sup>27</sup> and time bars<sup>28</sup> shall not apply to torture or other ill-treatment, and other standards impose restrictions on their application to other serious violations of human rights.<sup>29</sup>

The organisations also welcome the proposal by Switzerland for amendment, which strengthens the current text. An alternative final sentence in this Guideline could read **“In particular, amnesties, pardons and time bars should not unduly impede the prosecution of alleged perpetrators of serious violations of human rights, and should not apply to acts amounting to torture or inhuman or degrading treatment or punishment, or other crimes under international law.”**

### **Guideline XIX: Reparations**

Amnesty International, ICJ, REDRESS and FIDH welcome Guideline XIX setting out victims’ right to reparation, which is affirmed by a wide range of international treaties and Council of Europe instruments, including the European Convention on Human

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<sup>25</sup> *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.

<sup>26</sup> *op cit*, para.70.

<sup>27</sup> 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 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>28</sup> 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.”

<sup>29</sup> 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.”

Rights.<sup>30</sup> However, to further strengthen the relevant Guideline and ensure that victims do indeed have a meaningful access to reparation, we urge the DH-I to add to the current paragraph a sentence setting out that claims for reparation for serious human rights violations must not be subject to a statute of limitations.

The amended Guideline XIX would 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 include measures of rehabilitation, compensation, satisfaction, restitution and guarantees of non- repetition.

**Claims relating to reparations for serious human rights violations shall not be subjected to a statute of limitation.**

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<sup>30</sup> For instance: International Covenant on Civil and Political Rights, Articles 2 (3), 9 (5), 14 (6); ECHR, Articles 5 (5), 13, 41; Council of Europe Convention on Action Against Trafficking in Human Beings, Articles 12.1, 15; Convention on Enforced Disappearances, Article 24.5; Convention on the Rights of the Child, Article 39; UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 14.