Building free of torture and impunity societies in Western Balkans

YIHR Montenegro

ARCT The Albanian Rehabilitation Centre for Trauma & Torture QSHRT Qendra Shqiptare e Rehabilitimit të Traumës dhe Torturës

YIHR Serbia

irct International Rehabilitation Council for Torture Victims

MANUAL FOR FIGHTING IMPUNITY FOR TORTURE AND OTHER HUMAN RIGHTS VIOLATIONS

Building free of torture and impunity societies in Western Balkans
An EU-funded project

Youth Initiative for Human Rights (MNE), Albanian Rehabilitation Centre for Trauma and Torture (ARCT), Youth Initiative for Human Rights (SRB)

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I PREFACE

This Manual is a part of the regional project: "Building societies free of torture and impunity in the Western Balkans" which is being implemented by the Youth Initiative for Human Rights ((YIHR), the member of Civic Alliance)) as the leading partner, and the following partners: the Youth Initiative for Human Rights Serbia (YIHR SR), the Rehabilitation Centre For Trauma And Torture from Albania (ARCT) and the International Rehabilitation Council for Torture Victims from Denmark (IRCT). The project is funded by the European Union and will be implemented from November 2013 to September 2016.

The aim of the project is to contribute to torture-free society through the activities of civil society which are directed against torture and other cruel, inhuman or degrading treatment or punishment and through promotion of the international standards, the Optional Protocol to the Convention against Torture (OPCAT) [1] in particular. The specific objective is to improve access to adequate legal services and expertise for the risk category of prisoners in order to achieve significant changes of detention practices of public officials. The project envisaged, inter alia, the activities of exploration and documentation of cases of torture, inhumane and inhuman treatment or punishment and the provision of legal aid to convicted persons.

Namely, helping the victims of torture to obtain a remedy is at the core of our organizations' missions to contribute to a worldwide fight against the crime of torture. Since our establishment, we have been approached by a number of torture survivors or groups on their behalf and have worked to make contact with the relevant authorities and to build relationships with practitioners. Because of the expertise we had developed, we have been able to promote human dignity in prisons through the elimination of torture and inhuman treatment of vulnerable persons in custody, especially those belonging to marginalized social groups in Montenegro, Serbia and Albania.

Alongside out attempts to promote human rights of persons in custody, we also conducted trainings for prison staff as well as medical staff in the prisons and for students of law and medicine within this project. We also implemented the study visits in order to strengthen the capacities of NGOs in this area through the exchange of experiences based upon a strong regional approach.

This manual represents a strong component of a multi-country package of materials dedicated to regional approaches towards eradication of torture, better access to justice and greater fight against impunity and neglect. It is designed to a) complement the current local engagement of human rights defenders and NGOs in providing legal services for the victims of human rights violations, b) provide the basis for detention monitoring and court representation training programs for human rights defenders, c) shape different strategies for NGOs and human rights defenders to fight impunity, such as advocacy, trial monitoring and strategic litigation. It may also provide useful information to other organizations and human rights monitors in the region who may find themselves asked to advise torture victims or pursue cases on their behalf. Finally, it can serve to lawyers, legal practitioners and legislators to highlight potential problem areas and make a point of comparison for other legal systems in the region.

We would like to thank the many people who have contributed to our work over the past years and from whose abundant experiences this Manual draws. We also look forward to receiving feedback from those who will use it in their future work.

1 Available at: http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx

II INTRODUCTION

Impunity arises from the states' failure to meet their obligations to investigate human rights violations and take appropriate measures towards perpetrators, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; as well as to provide victims with effective remedies and reparations for the injuries suffered. Also, the states have the obligation to ensure the inalienable right of the victims and the public to know the truth about violations as well as to take other necessary steps to prevent a recurrence of violations.

Despite these obligations, in numerous countries, the most serious crimes remain unpunished. The victims dare not to speak out; the perpetrators are either not pursued or cannot be found; the authorities lack the will or the means to ensure justice. Impunity holds disastrous consequences: it allows the perpetrators to think that they will not have to face the consequences of their actions; it ignores the distress of the victims and serves to perpetuate crime. Impunity also weakens state institutions, denies fundamental human values and debases the whole of humanity.

Nonetheless, the international community has stepped up its efforts to fight against impunity, including through complementarity and collaboration between international jurisdictions and national jurisdictions. The categories of crimes under international law have emerged from international tribunals starting with the Nuremberg Charter which referred to persons accused of crimes against peace, war crimes and crimes against humanity. In 1993 and 1994, two ad hoc tribunals were set up to try the serious crimes committed in the former Yugoslavia (ICTY) and Rwanda (ICTR). In 2002, the United Nations established the Special Tribunal for Sierra Leone. The Rome Statute of the International Criminal Court (ICC) came into force on July 1, 2002. The crimes over which the ICC have jurisdiction and which are set out in the Rome Statute include the crimes of genocide, war crimes and crimes against humanity, all of which include torture.

However, the jurisdiction of the ad hoc tribunals remained limited in terms of time and geographic reach. As regards the ICC, it is only called on to try the tip of the iceberg of the serious crimes of international humanitarian law. Indeed, the Rome Statute of the ICC confines its jurisdiction to crimes committed since its entry into force, to cases referred to it by the UN Security Council, as well as crimes either committed on the territory of states that are a party to the Rome Statute or by a national of those states which have recognized the jurisdiction of ICC. Furthermore, the latter provision is only valid in instances where the states competent to judge the crimes do not try the perpetrators themselves.[2] In those cases, each jurisdiction acts as a court of the international community when deciding upon serious crimes of international humanitarian law.

The globalization of criminal justice is not, however, limited to the establishment of new international institutions. It also manifests itself in certain spectacular applications of international law, particularly through the case-law. An increasing number of trials based on universal jurisdiction are conducted in several states, mainly spurred by the victims and NGOs. Judges are becoming more aware of the role they can and must play to fight impunity. Through UN based mechanisms, the European Court of Human Rights[3] and European acquis communittaire, legal jurisprudence and international principles can be of tremendous benefit for the overall fight against impunity and for the victims especially.

2 National courts may still bring a prosecution where an international tribunal has decided not to proceed.

3 The European Court has highlighted that the European Convention is a "living instrument" and must be interpreted "in the light of present day conditions"(Tyrer v. UK (1979-80) 2 EHRR 1).

III METHODOLOGY

This Manual aims to provide legal practitioners and NGOs with a comprehensive reference tool to provide sound advice, assistance and representation to people who were victims of torture and degrading and inhuman treatment, with specific emphasis on the role and responsibilities of legal aid providers during investigation, arrest, pre-trial detention, bail hearings, trials, appeals, and other proceedings brought to ensure that the human rights of crime victims are protected.

The Manual contains generic principles as well as specific guidelines and instructions for lawyers and legal providers for assisting women and other vulnerable and socially marginalized groups, such as children, young people, the elderly, persons with disabilities, persons living with HIV/AIDS, persons with physical and mental disabilities, persons suffering from serious illnesses, asylum seekers and refugees, internally displaced persons, and foreign nationals who might be involved with the justice system either as accused persons or victims. Additionally, the Manual is to prompt the readers to address the obstacles that they perceive to be currently preventing implementation of specific provisions of the law, and to encourage them to evaluate these obstacles in the light of the domestic procedures.

The objectives this Manual seeks to achieve are the following:

- Give an overview of the principles and definitions which are relevant for fighting impunity for human rights violations, with special reference to torture
- Examine potential strategies of human rights defenders and NGOs to assist the fight against impunity in their countries and beyond, including potential litigation and advocacy strategies;
- Explore potential for using the experiences and advantages of the trial observations, with a focus on the lessons learnt from the relevant Strasbourg Court's cases;

The Manual draws upon experiences and expertise of the partnering organizations in providing legal aid to the victims of crime, assisting the prosecution of the public officials and civil servants involved in torture and ill-treatment cases, as well as upon the jurisprudence of the European Court of Human Rights, where possible.

IV PRINCIPLES AND DEFINITIONS

A. Impunity[4]

International human rights law imposes a duty on states to investigate and prosecute violations committed within their jurisdictions. However, all too often, violators are not brought to justice and victims of torture and other violations are left without a remedy. "Impunity" means the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their formal prosecution and, if found guilty, sentencing to appropriate penalties and making reparations to their victims.

B. Serious crimes under international law

The scope of serious crimes under international law extends beyond the limits of the territories where they are committed. This imposes a challenge for the public conscience as those who commit these crimes are regarded as being enemies of all mankind (hostes humani generis). However, the question of what constitutes the very scope of law with which international criminal law is concerned is not definitively settled. The Statutes of the ICC, ICTY, ICTR and other international tribunals, which are complementary to national criminal jurisdictions, tends to focus exclusively on the three core categories of crimes: crimes against humanity, genocide and war crimes, [5] which are almost invariably prosecuted in the context of an armed conflict. For the purpose of this manual, the meaning of „serious violations of human rights and international humanitarian law" includes, in particular, crimes against humanity, genocide, torture, extrajudicial executions and forced disappearances (hereinafter „serious crimes"). This scope may also include the crime of aggression.

Within this context, the obligation to repress serious crimes and fight impunity is a peremptory norm (jus cogens[6]) of international law which forms part of the fight for international justice and constitutes responsibility for the entire international community, based on the international law. The absolute prohibition on torture has also become a norm of customary international law. States are under a duty to comply with customary international law irrespective of whether they are party to any conventions which include the norm. There are, however, certain institutes that may affect the fight against crimes under international law, including the institutes of extradition, immunity (both immunity ratione personae and ratione materiae) and amnesty and should be taken into account as such. [7]

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4 Definition used according to Updated Set of principles for the protection and promotion of human rights through action to combat impunity.

5 International humanitarian law is generally understood to cover two bodies of law: first, 'Geneva Law', which derives from a range of Geneva Conventions dating back to 1864, but in particular the Geneva Conventions of 1949 and their Additional Protocols of 1977; and which seeks to ameliorate the suffering of those not directly involved in combat; and second, 'Hague Law', which derives mainly from a number of the Hague Conventions, particularly those of 1899 and 1907, as well as Additional Protocol I of 1977; and which seeks to regulate the means and methods by which war is conducted.

6 Certain internationally recognized rights are regarded as so fundamental that they have achieved the status of jus cogens. The term is defined in the 1969 Vienna Convention on the Law of Treaties as a peremptory norm of general international law ... [that is] accepted and recognized by the international community of States as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

7 The UN Human Rights Committee262 stated in its general comment on Article 7 of the International Covenant on Civil and Political Rights that, with regard to torture: "Amnesties 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".

C. Access to justice and victims' rights

Access to justice is more than improving an individual's access to courts or guaranteeing legal representation. It is rather defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice in compliance with human rights standards. There is no access to justice where citizens (especially marginalized groups) fear the system and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system. Access to justice, therefore, involves normative legal protection, legal awareness, legal aid, adjudication, enforcement and civil society oversight. This means that these rights may never be compromised and that all final judgments concerning these rights must be executed.

Fighting against impunity and for international justice in the context of access to justice implies the existence of recourses and effective strategies associated with the victims (direct and indirect), with a view to defend their rights. These rights include:(a) the right to know the truth about serious crimes; (b) the right to obtain justice, notably, the right to: 1) obtain the prosecution and trial by a criminal jurisdiction of the presumed perpetrators of the serious crimes; 2) obtain adequate redress for the damages suffered; 3) have access, if necessary, to administrative bodies.
Article 13 of the European Convention also provides that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority". This stance of the Court has been affirmed in the case Askoy v. Turkey, stating that the "nature of the right safeguarded under Article 3 has implications for Article 13. As regards Article 13, where an individual has an arguable claim that he has been tortured 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."[8]

The Torture Convention (CAT) also stipulates, in Article 14, that: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible" (this article referes to the means of both criminal and civil justice). The right to an effective civil remedy is also provided for under Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR).

D. Right to reparation

The right to reparations is elaborated in the United Nations' 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, in particular Principles 15 - 24, and the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principles 31 - 34. The Basic Principles and Guidelines (2005)[9] affirm the importance of addressing the question of remedies and reparation for the above mentioned victims in a systematic and thorough way at both national and international levels, whilst recommending that the "states should take those principles into account and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general."

The right to reparations is further affirmed by a wide range of provisions in international treaties such as Article 2 (3), 9 (5) and 14 (6) of the International Covenant on Civil and Political Rights as well as in Articles 5 (5), and Articles 13 and 41 of the European Convention on Human Rights. The European Convention on the Compensation of Victims of Violent Crime of 24 November 1983 and

8 The absence of such an investigation, notably by the Prosecutor, entails a violation of Article 13.
9 Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

the Recommendation of the Council of Europe's Committee of Ministers to member states on assistance to crime victims of 14 June 2006 also regulate the protection and fulfillment of the right to reparation for the victims of crime.
However, the attitudes of judges of the European Court of Human Rights in Strasbourg are such that they do not accept the compensation for damage in civil proceedings to be regarded as an effective legal remedy for complaints, under the substantive aspect of the Article 3 of the Convention: "If the authorities could confine their reaction to incidents of willful police ill-treatment to the mere payment of compensation, while not doing enough in the prosecution and punishment of those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity and the general legal prohibitions of killing and torture and inhuman and degrading treatment, despite their fundamental importance, would be ineffective in practice" (see, inter alia, Nikolova and Velichkova v. Bulgaria, no. 7888/03, § 55, 20 December 2007 and the cases cited therein).

The judges Işıl Karakaş, András Sajó and Egidijus Kūris gave a separate opinion in the judgement Milić and Nikezić v. Montenegro and they pointed out this issue in paragraphs 74 and 75 of the judgement. In paragraph 74 of the judgment, it is stated that "Even assuming that a compensation claim in civil proceedings may be regarded as an effective domestic remedy for complaints under the substantive aspect of Article 3 of the Convention, the Court notes that the applicants in the present case have exhausted that remedy proposed by the Government, whose objection in that regard must therefore be dismissed." In paragraph 75 of the cited judgment, it is further stated that: "In any event, and quite apart from the issue as to whether the domestic courts' findings were sufficient in terms of acknowledgement of a violation, the Court is of the opinion that the compensation of EUR 1,500 awarded to each applicant in respect of non-pecuniary damage, in the present case, cannot be considered an appropriate redress for the violation..."

E. Universal jurisdiction

International law imposes a duty on states to do their part to combat impunity. However, an international crime represents an offence that requires international cooperation for its prosecution and therefore involves more than one domestic jurisdiction. National courts may, and increasingly do, hear cases against torturers who come within their jurisdiction on the basis of the principle of the universal jurisdiction. It derives from a need for international attention to address the weakness of national enforcement mechanisms to obtain judgments against parties that reside and have assets outside the jurisdiction.

"Universal jurisdiction" [10] is the right of a state to institute legal proceedings and to prosecute the presumed perpetrator of an offence, irrespective of the place where the said offence was committed, the nationality or the place of residence of the presumed offender or the victim. It allows the state and international organizations to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accused's nationality, country of residence, or any other relation with the prosecuting entity. The rationale behind it is based on the notion that 'certain crimes are so harmful to international interests that states are obliged to bring proceedings against the perpetrator". It is important to emphasize that this jurisdiction is exercisable in accordance with the rules of fair trial, regardless of whether or not the presumed perpetrator is present on the territory of the state, and it applies for the serious crimes under international law.

10 The preamble to the ICC Statute contains the universal jurisdiction principle: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".

V KEY STRATEGIES AND GUIDELINES FOR FIGHTING IMPUNITY

a) Confronting the Obstacles to full Implementation of the laws

Ignorance about the law, human rights, and the criminal justice system is a major problem in defending human rights in many countries. People who do not know their legal rights are unable to enforce them and are subject to abuse in the criminal justice system, particularly the vulnerable groups such as children, young people, women and refugees.

Police, prosecutors, judges, and defense attorneys are all basic components of the justice system and they should all become more aware of the key provisions of the criminal law and procedures. Corrupt practice may also recur, thereby confusing the path between awareness of the law and its full implementation. Defense attorneys and human rights practitioners have a strong interest in seeing the laws implemented.

Lack of respect for the written law is the primary obstacle for human rights practitioners who wish to protect their client's rights and provide an adequate defense. The effectiveness of nearly all of the defense attorneys' tools depends upon the predictability and accountability created by strict adherence to the penal and procedure code. Therefore, training human rights practitioners to address the divergence between, on the one hand, the legal system created by the codes and, on the other hand, actual practice, is the most promising means to close that gap and can be successfully used by NGOs and human rights defenders' groups to support education on impunity and human rights issues.

Developing a thorough understanding of this particular manner in which current circumstances impede steps towards implementation of the written law is essential. The potential for the development of a greater understanding of human rights in Montenegro, Albania and Serbia has been significantly enhanced through the implementation of the European Convention on Human Rights and the accepting of the jurisdiction of the European Court of Human Rights. With such enhanced understanding of human rights, practitioners and human rights defenders can work together to develop specific strategies to alter circumstances with their cases. Only by directly confronting the assumption that nothing can be done, is it possible to build a new consensus that improvements in the implementation of the law are possible.

b) Empowering NGOs to affirm justice to victims

The active involvement of civil society associations and organizations is essential to ensure continuing progress towards the fulfillment of international human rights. NGOs – among others – assists states to ensure full respect for human rights, fundamental freedoms, democracy and the rule of law. The knowledge of NGOs and institutions about international human rights instruments and possible avenues for their implementation is, therefore, an important precondition to combat impunity. The provisions of the International Covenant on Civil and Political Rights, the Convention against Torture and the International Convention on Enforced Disappearances are some of the international instruments of particular relevance which NGOs and human rights defenders must get acquainted with. The UN's Updated Set of Principles to Combat Impunity[11] also represents a strong instrument for streamlining the fight against impunity in accordance with the relevant international standards. Some of the broad themes included in the Updated Principles to Combat Impunity are the victims' inalienable right to know the truth, the duty to preserve memory, the right to justice, the right to reparation and the right to guarantees of non-recurrence of the violations in question. It also sets forth the principles which refer to the guarantees of independence, impartiality and competence of the truth commissions set out to fight impunity and regulates the preservation of and access to archives bearing witness to violations.

11 Available at:http://www.impunitywatch.org/docs/UN_Updated_Principles_to_Combat_Impunity.pdf

Because of their knowledge and experience related to access to justice and human rights, NGOs, legal professionals and journalists are well positioned to play an important role in bringing key human rights violations and a pattern of impunity to the attention of a state. Public denunciation of human rights violations and impunity for such acts can often play a useful and constructive role in influencing the actions by the state authorities. Nonetheless, they can bring an added value to these actions, by involving torture survivors on whose behalf they act. Experience has shown that the intervention of torture survivors, as well as NGOs, can often provide the critical momentum without which a criminal prosecution would not be commenced. In addition, the pursuit of those involved in their torture often provides an incentive for torture survivors to try to obtain justice which may then help them proceed with their lives. The knowledge that their torturer is close by is likely to put the memories of the events and their effects at the forefront of the mind of any survivor. However, in order to be able to count on the survivors' support, human rights defenders and NGOs need to invest efforts in empowering them and preparing them for the potential litigation, including tailored-made legal counseling, support and psychological/medical assistance, depending on the level of trauma the victims have faced.

c) Assisting criminal prosecution of public officials involved in torture and ill-treatment and the essence of the ability for punishment

The general legal prohibition of killing, torture, and inhuman and degrading treatment is often ineffective in practice. Therefore, there is a need for NGOs to constantly point at the danger of impunity, if the authorities limit their response to police custody and prison ill-treatment to the mere payment of compensation for the damage suffered and if the authorities are not making sufficient efforts in the criminal prosecution and punishment of responsible public officials. Hereby, it should be kept in mind that the offence of torture is focused on those people in positions of public authority who abuse their power and noted that the Article 1 of the Torture Convention provides that the role of public authorities should not be considered narrowly when acts of torture have been committed. It states that the act must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity". Treatment will only constitute torture if the perpetrators deliberately intended to cause it. [12]

There are many ways in which NGOs and human rights defenders can assist the criminal prosecution of the public officials involved in torture and ill-treatment and bring about the essence of the ability for punishment. The identification and punishment of any alleged perpetrator brings out the essence of the purpose of punishment, and NGOs must constantly put pressure on the authorities to carry out urgent, impartial and effective criminal proceedings in all allegations of torture, ill-treatment and inhuman treatment or punishment. The role of NGOs and human rights defenders in initiating and assisting criminal prosecution of those accused of torture and ill-treatment is most important in the context of a) advocating for the conduct of effective investigations by the state, b) collecting evidences to underpin criminal charges against perpetrators, c) pursuing the cases on behalf of the victims and/or providing them with necessary legal aid and support during and after the prosecution and the trial.

However, it may be questioned why NGOs should consider legal involvement on behalf of torture survivors in criminal prosecutions when, unless proceeding with a private prosecution, the case will be handled by the State Prosecution. An expressed concern was whether such organizations would always be able to produce evidence in a form which would be admissible in the court. However, the practical experiences prove that pursuit of such cases requires an active involvement of other parties with a legitimate interest in bringing the individuals concerned to justice. It's also been proven that the role played by NGOs in compiling information, ensuring that offences are quickly brought to the attention of the appropriate authorities, and assisting the gathering of evidence by the police is an important one.

12 See Ireland v. UK, (1979-80) 2 EHRR 25, para. 162.

Additionally, NGOs may facilitate the involvement of the survivors who often have useful information to impart over and above their role as a witness to the crime. There are, in particular, three occasions during a criminal investigation when information provided by torture survivors may be vital if the prosecution is to proceed. The first such occasion is at the point when the identity of a person suspected of being involved in acts of torture is brought to the attention of the authorities. It is almost invariably that either the survivors of torture or NGOs bring the torturer's presence in the jurisdiction to the attention of the police. Secondly, once an arrest has been made, torture survivors and NGOs are often able to provide valuable information to proceed with a prosecution. Thirdly, the evidence that torture survivors provide is likely to be crucial at the point when the case is placed before the court.

d) Trial monitoring

Despite a relatively limited case-law related to torture and ill-treatment, NGOs should invest efforts to conduct monitoring of trials involving public officials suspected of committing torture, ill-treatment and inhuman treatment or punishment. The reason for this lies in the fact that trial observations provide NGOs with insightful findings and evidence basis which may greatly underpin their advocacy action and improve the quality of their free legal aid services intended at victims of human rights violations. However, there are some guidelines that should be undertaken by both monitors and sending organisations prior to commencing a trial observation in order to ensure the objectivity of trial monitoring and, consequently, responsiveness of key stakeholders towards its key findings and recommendations.

Knowing that the effectiveness of any trial observation depends directly upon the quality of the research and preparation that is undertaken in its advance of it, thorough practical preparations should be conducted before trial observations. The objectives of the trial monitoring and the mandate of monitors need to be pre-defined in order to have an effective and efficient trial monitoring process. A careful selection of cases to be monitored should be conducted. This is likely to depend upon the NGO's field of activity, its priorities and the interest that it has in a particular case. Monitors need to have adequate knowledge capacity about fair trial standards in order to be able to monitor the administration of criminal justice and advocate changes. This includes the previous researches conducted by monitors where possible, including the collection of information about domestic law and procedures, applicable international law as well as previous fact-finding and trial observation missions in the country. The monitoring itself should always be guided by the principles of objectivity, transparency and non-intervention in the trial process. This means that monitors should always refrain from interrupting the court proceedings and should focus on the procedural aspects of the trial, rather than on the merits of the court decision.

Nonetheless important, monitoring results should be defined in regular and special reports of NGOs which should emphasize positive developments as well as irregularities and deficiencies of the judicial processes discovered during the trial monitoring, which can affect the maintenance of impunity in practice, or indicate its inefficiency. For example, these can indicate frequent imposition of suspended sentences for police officers and prison staff for ill-treatment and inhuman treatment. Through trial monitoring, NGOs may discover information which may be publicly disclosed and may indicate the case of allowing the public officials, who were found guilty of committing the torture, to escape punishment. They can also indicate the obsolescence of criminal prosecution.

e) Free legal aid provision

The work and persistence of NGOs has significant contribution in the fight against impunity through provision of free legal aid. Bearing in mind that the victims of torture and ill-treatment are usually citizens who have suffered serious violation of human rights and the members of mar-

ginalized social groups, they often do not have adequate legal aid and support. By providing free legal aid services, NGOs can significantly contribute to the punishability i.e. to the criminal proceeding and the determination of responsibility. The legal aid that the civil society organisations may provide includes provision of general legal information, legal advice, documents preparation and submissions, and representations.

YIHRMNE had been providing free legal aid in the Milić/Nikezić v. Montenegro case before the European Court of Human Rights in Strasbourg from its beginning. The judgement that was brought in that case was in favour of the citizens to whom we have provided free legal aid and the thesis that justice is attainable was confirmed, thus representing a great satisfaction for YIHRMNE to have worked on it. Namely, the judgement indicated numerous deficiencies in the functioning of the judicial system in Montenegro, including the violation of the Article 3 of the Convention, as it was determined that the state failed to conduct thorough and independent investigation. We recall that the Basic State Prosecutor's Office dismissed the criminal charges for the criminal offenses of torture and ill-treatment, due to consideration that there had been no significant elements to indicate the existence of the reported criminal offense in the actions of the IECS officials, or any other criminal offense which is prosecutable on an ex officio basis. The judgement also indicated that the decisions of the state prosecutor to suspend the criminal proceeding are not based on the adequate assessment of all the relevant available facts in this case, particularly of those established by the Ombudsman and of the disciplinary proceeding results.

f) Human Rights Advocacy

Human Rights Advocacy has proven to be an efficient strategy for fostering human rights agenda and calling for a greater accountability for human rights violations as well as an important tool for fighting impunity for human rights violations. It helps NGOs promote a deeper understanding of human rights across different multi-stakeholder groups and to foster mutually beneficial relationships with a wide range of policymakers, donors, organizations, media and individuals. Over the years, the Youth Initiative for Human Rights, the Youth Initiative for Human Rights Serbia and the Rehabilitation Centre For Trauma And Torture from Albania have repeatedly brought to the attention of the domestic authorities, international organisations and treaty bodies the ongoing issues of concern that hinder their work in defending human rights, as well as the serious risks that they sometimes face.

Most commonly, NGOs are engaged in alerting the domestic public, state authorities and international organizations, including CPT (European Committee for the Prevention of Torture) and OSCE/ODIHR on the potential and actual cases of torture and ill-treatment, describing the circumstances of each of them, advocating the rights of the victims and insisting on bringing perpetrators to justice. These actions may be undertaken in form of ad hoc actions, when the case appears, or as part of a wider continual advocacy and public awareness generation campaigns.

NGOs may also submit alternative or "shadow" reports to the international treaty bodies, which offer an alternative view of state compliance with treaty obligations. Typically, shadow reports elaborate on information contained in State party reports and provide an alternative analysis. Accredited NGOs can also monitor many of the UN Committees' proceeding as observers (e.g. Committee on the Elimination of Discrimination against Women, etc.). The Universal Human Rights Index,[13] designed for and maintained by the UN Office of the High Commissioner for Human Rights, is designed primarily to facilitate access to human rights documents issued by the UN human rights treaty bodies and can provide NGOs with a new tool for searching the observations and recommendations of these expert bodies.

13 Available at: http://www.universalhumanrightsindex.org/en/index.html

Participating in contribution to the country's Progress Report on EU Integration also opens an important venue for higher NGO influence over the level of respect for human rights in EU-candidate countries. It provides NGOs with an opportunity to bring their perspectives which indicate the state of human rights in their country and to better channel the voices of victims towards the European Commission and the European Parliament. Meetings with representatives of these institutions may also serve to advocate changes before important international actors.

g) Strategic litigation

Strategic litigation is a method that can bring about significant changes in the law, practice or public awareness via taking carefully-selected cases to court. It involves an organisation or an individual taking on a legal case as part of a strategy to achieve broader systemic change as the beneficiaries involved in strategic litigation are often the victims of human rights abuses that are suffered by many other people. The importance of strategic litigation lies in the fact that it may create change either through the success of the action and its impact on law, by setting important legal precedent, or by publicly exposing injustice, raising awareness and generating broader change. It is important that strategic litigation is used as part of a wider campaign, optimally as part of human rights advocacy actions, rather than being conceived as an end in itself.

There are very good reasons for pursuing cases for strategic litigation. Firstly, any brought case is likely to have an impact on the developing law. High profile cases have provided the impetus for both academics and practitioners to scrutinise the law and assess its effectiveness. The experience gained from these cases and the greater incidence of awareness and arrests highlight that these are issues which will not go away by themselves. Moreover, the incidental effects of strategic litigation, such as heightened media coverage and placing an issue in the public forum, can be significant, especially in torture and ill-treatment cases, even if the case itself fails. When considering strategic litigation as a potential strategy for fighting impunity, it will be important to understand what the victims want and what the effect of being involved in such an action will have on them.

However, there are some limitations concerning the strategic litigation. First, it may be costly and put a huge strain on resources. NGOs must also have the human capacity to take on any proposed strategic litigation. It may also result in an unsuccessful applicant having to pay the legal costs of the opposing party. Furthermore, by its nature, litigation is uncertain and therefore does not guarantee a successful outcome for the applicant. Lawyers considering bringing strategic litigation should be aware of regional bodies that can be utilized at a higher level or incorporated into local strategies. Often, however, any effective domestic remedies must be exhausted before taking a complaint to a regional or international forum, including to the European Court of Human Rights. International bodies that receive complaints, such as the treaty bodies, or committees which are established to oversee implementation of the core international human rights treaties, should also be taken into account.[14]

h) Participation in working groups for amending the legislation

NGOs can provide significant contribution through the engagement in working groups for amendment of legislation in the field of human rights and freedoms. Representatives of human rights-based NGOs may act as members of the working groups organized by line ministries on a basis of the laws and bylaws regulating participation of NGO representatives in the working groups established for legislative purpose and may be appointed members of those working groups on the basis of the public call, as it is the practice in Montenegro. Also, those NGOs may provide significant contributions during the public hearings on the proposed draft laws in the field of human rights, which are organized even before being discussed and adopted in final in the Parliament.

14 Note: Before doing so, it is important to check if the relevant state has accepted the jurisdiction of such bodies to receive complaints.

Finally, the human rights organisations also have the possibility to submit the recommendations and explanations to the MPs who vote on laws in the Parliament.

i) Monitoring of institutions wherein persons deprived of liberty are detained/incarcerated

NGOs should monitor the respect of the rights of persons deprived of liberty on a regular and periodical basis in the institutions wherein they are detained or incarcerated. Various forms of contracts and memorandums of cooperation with the institutions in which persons deprived of liberty are detained may define the activities such as: monitoring visits and control of their work in this area. In this way, the direct communication with the persons deprived of liberty and the examination of their rooms enables the representatives of the human rights organizations to discover and further prosecute the facts relating to human rights violations, including those relating to torture and ill-treatment. This type of monitoring by the independent organizations is of great relevance, bearing in mind that the persons deprived of liberty are vulnerable and often unable to submit the facts of the violation of human rights to the public and the institutions. When defining the rules of cooperation with the institutions, it is important to ask for the right to perform interviews with the persons deprived of liberty without the presence of the officials of that institution. In this way, the persons deprived of liberty may disclose information and facts related to human rights violation with no fear, which can be further prosecuted.

j) SOS phone line

The organizations for the protection of human rights should be available to citizens and should communicate with them in a direct manner. One of the ways to obtain direct information is to open the SOS phone line. It is important that the information with the phone number where citizens may report the facts about violations of human rights is as accessible as can be. The information should be published in the media, delivered to the persons deprived of liberty on the printed flyers and given to the institutions wherein these persons are confined, during the monitoring visits.

Eradicating impunity for serious human rights violations

Guidelines and reference texts

Directorate General of Human Rights and Rule of Law
Council of Europe
Strasbourg

Édition française : Eliminer l'impunité pour les violations graves des droits de l'Homme. Lignes directrices et textes de référence

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Eradicating impunity for serious human rights violations

Contents

Eradicating impunity for serious human rights violations

Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies

Preamble

The Committee of Ministers,

Recalling that those responsible for acts amounting to serious human rights violations must be held to account for their actions;

Considering that a lack of accountability encourages repetition of crimes, as perpetrators and others feel free to commit further offences without fear of punishment;

Recalling that impunity for those responsible for acts amounting to serious human rights violations inflicts additional suffering on victims;

Considering that impunity must be fought as a matter of justice for the victims, as a deterrent to prevent new violations, and to uphold the rule of law and public trust in the justice system, including where there is a legacy of serious human rights violations;

Considering the need for states to cooperate at the international level in order to put an end to impunity;

Reaffirming that it is an important goal of the Council of Europe to eradicate impunity throughout the continent, as the Parliamentary Assembly recalled in its Recommendation 1876 (2009) on "The state of human rights in Europe: the need to eradicate impunity", and that its action may contribute to worldwide ef-forts against impunity;

Bearing in mind the European Convention on Human Rights (ETS No. 5, hereinafter "the Convention"), in the light of the relevant case-law of the European Court of Human Rights (the Court), as well as the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and other relevant standards established within the framework of the Council of Europe;

Stressing that the full and speedy execution of the judgments of the Court is a key factor in combating impunity;

Bearing in mind the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity of the United Nations Commission on Human Rights;

Recalling the importance of the right to an effective remedy for victims of human rights violations, as contained in numerous international instruments – notably in Article 13 of the Convention, Article 2 of the United Nations International Covenant on Civil and Political Rights and Article 8 of the Universal Declaration on Human Rights – and as reflected in the United Nations General Assembly's 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;

Having regard to the Council of Europe Committee of Ministers Recommenda-tion Rec (2006) 8 to member states on assistance to crime victims of 14 June 2006, and the United Nations General Assembly's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;

Bearing in mind the need to ensure that, when fighting impunity, the fundamen-tal rights of persons accused of serious human rights violations as well as the rule of law are respected;

Adopts the following guidelines and invites member states to implement them effectively and ensure that they are widely disseminated, and where necessary translated, in particular among all authorities responsible for the fight against impunity.

I. The need to combat impunity

1. 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.

2. When it occurs, impunity is caused or facilitated notably by the lack of diligent reaction of institutions or state agents to serious human rights violations. In these circumstances, faults might be observed within state institutions as well as at each stage of the judicial or administrative proceedings.

3. States are to combat impunity as a matter of justice for the victims, as a de-terrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system.

II. Scope of the guidelines

1. These guidelines deal with impunity for acts or omissions that amount to se-rious human rights violations and which occur within the jurisdiction of the state concerned.

2. They are addressed to states, and cover the acts or omissions of states, including those carried out through their agents. They also cover states' obligations under the Convention to take positive action in respect of non-state actors.

3. For the purposes of these guidelines, "serious human rights violations" concern those acts in respect of which states have an obligation under the Con-vention, and in the light of the Court's case-law, to enact criminal law provisions. Such obligations arise in the context of the right to life (Article 2 of the Convention), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention), the prohibition of forced labour and slavery (Article 4 of the Convention) and with regard to certain aspects of the right to liberty and security (Article 5, paragraph 1, of the Convention) and of the right to respect for private

and family life (Article 8 of the Convention). Not all violations of these articles will necessarily reach this threshold.

4. In the guidelines, the term "perpetrators" refers to those responsible for acts or omissions amounting to serious human rights violations.

5. In the guidelines, the term "victim" refers to a natural person who has suf-fered harm, including physical or mental injury, emotional suffering or eco-nomic loss, caused by a serious human rights violation. The term "victim" may also include, where appropriate, the immediate family or dependants of the direct victim. A person shall be considered a victim regardless of wheth-er the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

6. These guidelines complement and do not replace other standards relating to impunity. In particular, they neither replicate nor qualify the obligations and responsibilities of states under international law, including international hu-manitarian law and international criminal law, nor are they intended to re-solve questions as to the relationship between international human rights law and other rules of international law. Nothing in these guidelines prevents states from establishing or maintaining stronger or broader measures to fight impunity.

III. General measures for the prevention of impunity

1. In order to avoid loopholes or legal gaps contributing to impunity,

- States should take all necessary measures to comply with their obligations under the Con-vention to adopt criminal law provisions to effectively punish serious human rights violations through adequate penalties. These provi-sions should be applied by the appropriate executive and judicial authorities in a coherent and non-discriminatory manner.

- States should provide for the possibility of disciplinary proceedings against state officials.

- In the same manner, states should provide a mechanism involving criminal and disciplinary measures in order to sanction behaviour and practice within state authorities which lead to impunity for serious human rights violations.

2. States – including their officials and representatives – should publicly con-demn serious human rights violations.

3. States should elaborate policies and take practical measures to prevent and combat an in-stitutional culture within their authorities which promotes im-punity. Such measures should include:

- promoting a culture of respect for human rights and systematic work for the implementation of human rights at the national level;

- establishing or reinforcing appropriate training and control mechanisms;

- introducing anti-corruption policies;

- making the relevant authorities aware of their obligations, including taking necessary measures, with regard to preventing impunity, and establishing appropriate sanctions for the failure to uphold those obligations;

- conducting a policy of zero-tolerance of serious human rights violations;

- providing information to the public concerning violations and the authorities' response to these violations;

- preserving archives and facilitating appropriate access to them through applicable mechanisms.

4. States should establish and publicise clear procedures for reporting allegations of serious human rights violations, both within their authorities and for the general public. States should ensure that such reports are received and effectively dealt with by the competent authorities.

5. States should take measures to encourage reporting by those who are aware of serious human rights violations. They should, where appropriate, take measures to ensure that those who report such violations are protected from any harassment and reprisals.

6. States should establish plans and policies to counter discrimination that may lead to serious human rights violations and to impunity for such acts and their recurrence.

7. States should also establish mechanisms to ensure the integrity and account-ability of their agents. States should remove from office individuals who have been found, by a competent authority, to be responsible for serious human rights violations or for furthering or tolerating impunity, or adopt other appropriate disciplinary measures. States should notably develop and institutionalise codes of conduct.

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

1. States must provide adequate guarantees to persons deprived of their liberty by a public authority, in order to prevent any unlawful detention or ill-treatment, and ensure that any unlawful detention or ill-treatment does not go un-punished. In particular, persons deprived of their liberty should be provided with the following guarantees:

- the right to inform, or to have informed, a third party of his or her choice of their deprivation of liberty, their location and of any transfers;

- the right to have access to a lawyer;

- the right to have access to a medical doctor.

Persons deprived of their liberty should be expressly informed without delay about all their rights, including those listed above. Any possibility for the au-thorities to delay the exercise of one of these rights, in order to protect the interests of justice or public order, should be clearly defined by law, and its application should be strictly limited in time and subject to appropriate pro-cedural safeguards.

2. In addition to the rights listed above, persons deprived of their liberty are en-titled to take court proceedings through which the lawfulness of their deten-tion shall be speedily decided and release ordered if that detention is not lawful. Persons arrested or detained in relation to the commission of an of-fence must be brought promptly before a judge, and they have the right to receive a trial within a reasonable time or to be released pending trial, in accordance with the Court's case-law.

3. States should take effective measures to safeguard against the risk of serious human rights violations by the keeping of records concerning the date, time and location of persons deprived of their liberty, as well as other relevant information concerning the deprivation of liberty.

4. States must ensure that officials carrying out arrests or interrogations or using force can be identified in any subsequent criminal or disciplinary in-vestigations or proceedings.

V. The duty to investigate

1. Combating impunity requires that there be an effective investigation in cases of serious human rights violations. This duty has an absolute character.

The right to life (Article 2 of the Convention)

The obligation to protect the right to life requires INTER ALIA that there should be an effective investigation when individuals have been killed, whether by state agents or private persons, and in all cases of suspicious death. This duty also arises in situations in which it is uncertain whether or not the victim has died, and there is reason to believe the circumstances are suspicious, such as in case of enforced disappearances.

The prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention)

States are under a procedural obligation arising under Article 3 of the Conven-tion to carry out an effective investigation into credible claims that a person has been seriously ill-treated, or when the authorities have reasonable grounds to suspect that such treatment has occurred.

The prohibition of slavery and forced labour (Article 4 of the Convention)

The prohibition of slavery and forced labour entails a procedural obligation to carry out an effective investigation into situations of potential trafficking in hu-man beings.

The right to liberty and security (Article 5 of the Convention)

Procedural safeguards derived INTER ALIA from the right to liberty and security require that states must conduct effective investigations into credible claims that a person has been deprived of his or her liberty and has not been seen since.

The right to respect for private and family life (Article 8 of the Convention)

States have a duty to effectively investigate credible claims of serious viola-tions of the rights enshrined in Article 8 of the Convention where the nature and gravity of the alleged violation so requires, in accordance with the case-law of the European Court of Human Rights.

2. Where an arguable claim is made, or the authorities have reasonable grounds to suspect that a serious human rights violation has occurred, the authorities must commence an investigation on their own initiative.

3. The fact that the victim wishes not to lodge an official complaint, later with-draws such a complaint or decides to discontinue the proceedings does not absolve the authorities from their obligation to carry out an effective inves-tigation, if there are reasons to believe that a serious human rights violation has occurred.

4. A decision either to refuse to initiate or to terminate investigations may be taken only by an independent and competent authority in accordance with the criteria of an effective investigation as set out in Guideline VI. They should be duly reasoned.

5. Such decisions must be subject to appropriate scrutiny and be generally challengeable by means of a judicial process.

VI. Criteria for an effective investigation

In order for an investigation to be effective, it should respect the following es-sential requirements:

Adequacy

The investigation must be capable of leading to the identification and punishment of those responsible. This does not create an obligation on states to ensure that the investigation leads to a particular result, but the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident.

Thoroughness

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; and the gathering of forensic and medical evidence by com-petent specialists. The evidence should be assessed in a thorough, consistent and objective manner.

Impartiality and independence

Persons responsible for carrying out the investigation must be impartial and independent from those implicated in the events. This requires that the authorities which are implicated in the events can neither lead the taking of evidence nor the preliminary investigation; in particular, the investigators cannot be part of the same unit as the officials who are the subject of the investigation.

Promptness

The investigation must be commenced with sufficient promptness in order to obtain the best possible amount and quality of evidence available. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities may generally be regarded as essential in maintaining public confidence in the maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. The investigation must be completed within a reasonable time and, in all cases, be conducted with all necessary diligence.

Public scrutiny

There should be a sufficient element of public scrutiny of the investigation or its results to secure accountability, to maintain public confidence in the authorities' adherence to the rule of law and

to prevent any appearance of collusion in or tolerance of unlawful acts. Public scrutiny should not endanger the aims of the investigation and the fundamental rights of the parties.

VII. Involvement of victims in the investigation

1. States should ensure that victims may participate in the investigation and the proceedings to the extent necessary to safeguard their legitimate interests through relevant procedures under national law.

2. States have to ensure that victims may, to the extent necessary to safeguard their legitimate interests, receive information regarding the follow-up and outcome of their complaints, the progress of the investigation and the pros-ecution, the execution of judicial decisions and all measures taken concern-ing reparation for damage caused to the victims.

3. In cases of suspicious death or enforced disappearances, states must, to the extent possible, provide information regarding the fate of the person con-cerned to his or her family.

4. Victims may be given the opportunity to indicate that they do not wish to re-ceive such information.

5. Where participation in proceedings as parties is provided for in domestic law, states should ensure that appropriate public legal assistance and advice be provided to victims, as far as necessary for their participation in the pro-ceedings.

6. States should ensure that, at all stages of the proceedings when necessary, protection measures are put in place for the physical and psychological in-tegrity of victims and witnesses. States should ensure that victims and wit-nesses are not intimidated, subject to reprisals or dissuaded by other means from complaining or pursuing their complaints or participating in the pro-ceedings. 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.

VIII. Prosecutions

1. States have a duty to prosecute where the outcome of an investigation war-rants this. Although there is no right guaranteeing the prosecution or convic-tion of a particular person, prosecuting authorities must, where the facts warrant this, take the necessary steps to bring those who have committed se-rious human rights violations to justice.

2. The essential requirements for an effective investigation as set out in Guide-lines V and VI also apply at the prosecution stage.

IX. Court proceedings

1. States should ensure the independence and impartiality of the judiciary in accordance with the principle of separation of powers.

2. Safeguards should be put in place to ensure that lawyers, prosecutors and judges do not fear reprisals for exercising their functions.

3. Proceedings should be concluded within a reasonable time. States should ensure that the necessary means are at the disposal of the judicial and inves-tigative authorities to this end.

4. Persons accused of having committed serious human rights violations have the right to a fair and public hearing within a reasonable time by an inde-pendent and impartial tribunal established by law.

X. Sentences

While respecting the independence of the courts, when serious human rights violations have been proven, the imposition of a suitable penalty should follow. The sentences which are handed out should be effective, proportionate and ap-propriate to the offence committed.

XI. Implementation of domestic court judgments

Domestic court judgments should be fully and speedily executed by the competent authorities.

XII. International co-operation

International co-operation plays a significant role in combating impunity. In order to prevent and eradicate impunity, states must fulfil their obligations, nota-bly with regard to mutual legal assistance, prosecutions and extraditions, in a manner consistent with respect for human rights, including the principle of "non-refoulement", and in good faith. To that end, states are encouraged to intensify their cooperation beyond their existing obligations.

XIII. Accountability of subordinates

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

XIV. Restrictions and limitations

States should support, by all possible means, the investigation of serious human rights violations and the prosecution of alleged perpetrators. Legitimate restrictions and limitations on investigations and prosecutions should be restricted to the minimum necessary to achieve their aim.

XV. Non-judicial mechanisms

States should also consider establishing non-judicial mechanisms such as parliamentary or other public inquiries, ombudspersons, independent commissions and mediation as useful complementary procedures to the domestic judicial remedies guaranteed under the Convention.

XVI. Reparation

States should take all appropriate measures to establish accessible and effective mechanisms which ensure that victims of serious human rights violations re-ceive prompt and adequate reparation for the harm suffered. This may include measures of rehabilitation, compensation, satisfaction, restitution and guaran-tees of non-repetition.

Eradicating impunity for serious human rights violations

Reference texts

Preliminary note

This document was prepared by the Secretariat, in co-operation with the Chairman of the Committee of Experts on Impunity (DH-I).

Aim of the guidelines

The guidelines concentrate on the accountability of perpetrators for serious human rights violations. They are meant mainly as a guidance on the exten-sive case-law the European Court of Human Rights has developed on the fight against impunity, in particular by imposing on member states of the Council of Europe the obligation to investigate serious human rights viola-tions and to hold their perpetrators to account, as well as to provide an effec-tive remedy for the victims of those violations.

Legal basis

The specific relevance of the European Convention on Human Rights (here-after "the Convention") should be recalled. The Convention and the case-law of the European Court of Human Rights (hereafter "the Court") are a primary source for defining guidelines on the fight against impunity. Other relevant sources such as the reports of the Committee for the Prevention of Torture (CPT) are also referred to. Where appropriate, existing international standards have also been taken into account, it being understood that only those member states having ratified these texts are bound by the obligations and the case-law arising from them, but that inspiration can be drawn from these instruments in action to combat impunity.

Preamble

The Committee of Ministers,

Recalling that those responsible for acts amounting to serious human rights violations must be held to account for their actions;

In Assembly Resolution 1675 (2009) on "The state of human rights in Europe: the need to eradicate impunity", the Parliamentary Assembly insisted that:

1. […] all perpetrators of serious human rights violations must be held to ac-count for their actions.

Considering that a lack of accountability encourages repetition of crimes, as perpetrators and others feel free to commit further offences without fear of punishment;

Recalling that impunity for those responsible for acts amounting to serious human rights violations inflicts additional suffering on victims;

Considering that impunity must be fought as a matter of justice for the victims, as a deterrent to prevent new violations, and to uphold the rule of law and public trust in the justice system, including where there is a legacy of serious human rights violations;

Considering the need for states to co-operate at the international level in order to put an end to impunity;

Reaffirming that it is an important goal of the Council of Europe to erad-icate impunity throughout the continent, as the Parliamentary Assembly recalled in its Recommendation 1876 (2009) on "The state of human rights in Europe: the need to eradicate impunity", and that its action may contribute to worldwide efforts against impunity;

In Assembly Recommendation 1876 (2009) on "The state of human rights in Europe: the need to eradicate impunity", the Parliamentary Assembly stated:

1. The Parliamentary Assembly, referring to its Resolution 1675 (2009) on "The state of human rights in Europe: the need to eradicate impunity", considers the eradication of impunity for perpetrators, instigators and organisers of serious human rights violations as a priority for Council of Europe action, as a matter of individual justice, deterrence and upholding the rule of law.

Bearing in mind the European Convention on Human Rights (ETS No. 5, hereinafter "the Convention"), in the light of the relevant case-law of the European Court of Human Rights (the Court), as well as the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and other relevant standards estab-lished within the framework of the Council of Europe;

Stressing that the full and speedy execution of the judgments of the Court is a key factor in combating impunity;

In Assembly Resolution 1675 (2009) on "The state of human rights in Europe: the need to eradicate impunity", the Parliamentary Assembly stated that:

8. The full and speedy execution of the Court's judgments in cases of impuni-ty is the key to fighting this scourge in Council of Europe member states.

8.1. When the Court has found a failure to investigate effectively, the execution of the judgment cannot be limited to the payment of the pecuniary com-pensation fixed by the Court. Proper investigations must still be carried out and general measures taken to address the underlying causes of the viola-tion.

[…]

8.3. The Assembly commends the Committee of Ministers for having consist-ently noted that there

is a continuing obligation to conduct effective inves-tigations inasmuch as procedural violations of Article 2 of the Convention have been found by the Court. The application of these same rules to all states, without double standards, is of particular importance.

8.4. The timely communication by the Court to the states concerned of appli-cations alleging a failure to investigate sends an important message to the competent authorities giving them the opportunity to carry out investiga-tive acts before evidence is irretrievably lost.

Bearing in mind the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity of the United Nations Commission on Human Rights;

In the above-mentioned set of principles of 8 February 2005, the United Na-tions Commission on Human Rights laid down as Principle 1 ("General obli-gations of states to take effective action to combat impunity"):

Impunity arises from a failure by states to meet their obligations to investi-gate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of crim-inal responsibility are prosecuted, tried and duly punished; to provide vic-tims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.

Recalling the importance of the right to an effective remedy for victims of human rights violations, as contained in numerous international instru-ments – notably in Article 13 of the Convention, Article 2 of the United Nations International Covenant on Civil and Political Rights and Article 8 of the Universal Declaration on Human Rights – and as reflected in the United Nations General Assembly's Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of In-ternational Human Rights Law and Serious Violations of International Humanitarian Law;

In the preamble to the above-mentioned principles and guidelines of 16 De-cember 2005, the United Nations General Assembly stated:

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the inter-national legal principles of accountability, justice and the rule of law, […].

Having regard to the Council of Europe Committee of Ministers Recom-mendation Rec (2006) 8 to member states on assistance to crime victims of 14 June 2006, and the United Nations General Assembly's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;

Bearing in mind the need to ensure that, when fighting impunity, the fun-damental rights of persons accused of serious human rights violations as well as the rule of law are respected;

Adopts the following guidelines and invites member states to implement them effectively and ensure that they are widely disseminated, and where necessary translated, in particular among all authorities responsible for the fight against impunity.

I. The need to combat impunity

1. 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.

2. When it occurs, impunity is caused or facilitated notably by the lack of diligent reaction of institutions or state agents to serious human rights violations. In these circumstances, faults might be observed within state institutions as well as at each stage of the judicial or ad-ministrative proceedings.

3. States are to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system.

Concerning the prevention of torture and inhuman and degrading treat-ment, the CPT has defined the problem of impunity in the following manner:

The credibility of the prohibition of torture and other forms of ill-treatment is undermined each time officials responsible for such offences are not held to account for their actions. If the emergence of information indicative of ill-treatment is not followed by a prompt and effective response, those minded to ill-treat persons deprived of their liberty will quickly come to be-lieve – and with very good reason – that they can do so with impunity. All efforts to promote human rights principles through strict recruitment policies and professional training will be sabotaged. In failing to take effective action, the persons concerned – colleagues, senior managers, investigating authorities – will ultimately contribute to the corrosion of the values which constitute the very foundations of a democratic society.

Conversely, when officials who order, authorise, condone or perpetrate tor-ture and ill-treatment are brought to justice for their acts or omissions, an unequivocal message is delivered that such conduct will not be tolerated. Apart from its considerable deterrent value, this message will reassure the general public that no one is above the law, not even those responsible for upholding it. The knowledge that those responsible for ill-treatment have been brought to justice will also have a beneficial effect for the victims.1

II. Scope of the guidelines

1. These guidelines deal with impunity for acts or omissions that amount to serious human rights violations and which occur within the jurisdic-tion of the state concerned.

For the purposes of these guidelines, the term "jurisdiction" has the same meaning as the term "jurisdiction" in Article 1 of the Convention.

2. They are addressed to states, and cover the acts or omissions of states, including those carried out through their agents. They also cover states' obligations under the Convention to take positive action in re-spect of non-state actors.

1 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28], para. 25.

The references to "states" in the guidelines are not intended to exclude their application to any future Contracting Party to the Convention that is not a state.

3. For the purposes of these guidelines, "serious human rights viola-tions" concern those acts in respect of which states have an obligation under the Convention, and in the light of the Court's case-law, to enact criminal law provisions. Such obligations arise in the context of the right to life (Article 2 of the Convention), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention), the prohibition of forced labour and slavery (Article 4 of the Convention) and with regard to certain aspects of the right to lib-erty and security (Article 5, paragraph 1, of the Conven-tion) and of the right to respect for private and family life (Article 8 of the Conven-tion). Not all violations of these articles will necessarily reach this threshold.

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

Member states have obligations under the Convention to provide protection by criminal law with regard to certain rights enshrined in the Convention:

Article 2 of the Convention

The Court notes that the first sentence of Article 2 §1 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III, p. 1403, §36). It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. […]2

Article 3 of the Convention

For an investigation to be effective in practice it is a prerequisite that the state has enacted criminal-law provisions penalising practices that are con-trary to Article 3 (compare, mutatis mutandis, M.C. v. Bulgaria, no. 39272/98, §§150, 153 and 166, ECHR 2003-XII; Nikolova and Velichkova, cited above, §57; and Çamdereli, cited above, §38).3

2 Osman v. the United Kingdom (no. 23452/94), judgment of 28 October 1998 [Grand Chamber], para. 115.

3 Gäfgen v. Germany (no. 22978/05), judgment of 1 June 2010 [Grand Chamber], para. 117.

With regard to Article 3 of the Convention, the United Nations Convention against Torture and Other Inhuman and Degrading Treatment or Punish-ment of 10 December 1984 provides in its Article 4:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in tor-ture.

2. Each State Party shall make these offences punishable by appropriate pen-alties which take into account their grave nature.

Article 4 of the Convention

In those circumstances, the Court considers that limiting compliance with Article 4 of the Convention only to direct action by the state authorities would be inconsistent with the international instruments specifically con-cerned with this issue and would amount to rendering it ineffective. Ac-cordingly, it necessarily follows from this provision that states have positive obligations, in the same way as under Article 3 for example, to adopt crim-inal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice (see M.C. v. Bulgaria, cited above, §153).4

Article 5 of the Convention

The Court emphasises in this respect that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effec-tive measures to safeguard against the risk of disappearance and to con-duct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.5

Article 8 of the Convention

In the context of sexual abuse of mentally handicapped persons, the Court has stated:

The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.6

Sexual abuse is unquestionably an abhorrent type of wrongdoing, with de-bilitating 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 (see, mutatis mutandis, the above-mentioned X and Y judgment, p. 13, para-graph 27).7

In the context of rape, the Court has stated:

On that basis, the Court considers that states have a positive obligation in-herent in Articles 3 and 8 of the Convention to enact criminal-law provi-sions effectively punishing rape and to apply them in practice through effective investigation and prosecution.8

4 Siliadin v. France (no. 73316/01), judgment of 26 July 2005, para. 89.
5 Kurt v. Turkey (no. 24276/94), judgment of 25 May 1998, para. 124.
6 X and Y v. the Netherlands (no. 8978/80), judgment of 26 March 1985, para. 27.
7 Stubbings and others v. the United Kingdom (nos. 22083/93 and 22095/93), judgment of 22 October 1996, para. 64.
8 M.C. v. Bulgaria (no. 39272/98), judgment of 4 December 2003, para. 153.

4. In the guidelines, the term "perpetrators" refers to those responsible for acts or omissions amounting to serious human rights violations.

In Assembly Resolution 1675 (2009) on "The state of human rights in Europe: the need to eradicate impunity", in which it insisted 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 re-cently affirmed by the Assembly in Resolution 1645 (2009) with respect to the Gongadze case.9

5. In the guidelines, the term "victim" refers to a natural person who has suffered harm, including physical or mental injury, emotional suffer-ing or economic loss, caused by a serious human rights violation. The term "victim" may also include, where appropriate, the immediate family or dependants of the direct victim. A person shall be considered a victim regardless of whether the perpetrator of the violation is iden-tified, apprehended, prosecuted, or convicted and regardless of the fa-milial relationship between the perpetrator and the victim.

The definition is based on the definition of "victims" in the Council of Europe Recommendation of the Committee of Ministers to member states on assist-ance to crime victims (Rec (2006) 8, adopted on 14 June 2006):

> 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 de-pendants of the direct victim.

See also the definition of "victims" in principle 2 of the United Nations Gen-eral Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985, as well as Guideline I on the Pro-tection of Victims of Terrorist Acts, adopted by the Committee of Ministers on 2 March 2005.

6. These guidelines complement and do not replace other standards re-lating to impunity. In particular, they neither replicate nor qualify the obligations and responsibilities of states under international law, in-cluding international humanitarian law and international criminal law, nor are they intended to resolve questions as to the relationship be-tween international human rights law and other rules of international law. Nothing in these guidelines prevents states from establishing or maintaining stronger or broader measures to fight impunity.

The guidelines are not intended to resolve questions as to the relationship between international human rights law (as reflected in these guidelines) and other rules of international law.

9 The case referred to by the Parliamentary Assembly is the case of Gongadze v. Ukraine (no. 34056/02), judgment of 8 November 2005.

III. General measures for the prevention of impunity

1. In order to avoid loopholes or legal gaps contributing to impunity,
- States should take all necessary measures to comply with their obliga-tions under the Convention to adopt criminal law provisions to effec-tively punish serious human rights violations through adequate penalties. These provisions should be applied by the appro-priate exec-utive and judicial authorities in a coherent and non-discriminatory manner.
- States should provide for the possibility of disciplinary proceedings against state officials.
- In the same manner, states should provide a mechanism involving criminal and disciplinary measures in order to sanction behaviour and practice within state authorities which lead to impunity for serious hu-man rights violations.

2. States – including their officials and representatives – should publicly condemn serious human rights violations.

3. States should elaborate policies and take practical measures to prevent and combat an institutional culture within their authorities which pro-motes impunity. Such measures should include:
- promoting a culture of respect for human rights and systematic work for the implementation of human rights at the national level;
- establishing or reinforcing appropriate training and control mecha-nisms;
- introducing anti-corruption policies;
- making the relevant authorities aware of their obligations, including taking necessary measures, with regard to preventing impunity, and establishing appropriate sanctions for the failure to uphold those obli-gations;
- conducting a policy of zero-tolerance of serious human rights viola-tions;
- providing information to the public concerning violations and the au-thorities' response to these violations;
- preserving archives and facilitating appropriate access to them through applicable mechanisms.

4. States should establish and publicise clear procedures for reporting al-legations of serious human rights violations, both within their authorities and for the general public. States should ensure that such reports are received and effectively dealt with by the competent au-thorities.

5. States should take measures to encourage reporting by those who are aware of serious human rights violations. They should, where appro-priate, take measures to ensure that those who report such violations are protected from any harassment and reprisals.

6. States should establish plans and policies to counter discrimination that may lead to serious human rights violations and to impunity for such acts and their recurrence.

7. States should also establish mechanisms to ensure the integrity and ac-countability of their agents. States should remove from office individ-uals who have been found, by a competent authority, to be responsible for serious human rights violations or for furthering or tolerating im-punity, or adopt other appropriate disciplinary measures. States should notably develop and institutionalise codes of conduct.

In its 14th General Report the CPT stated:

26. Combating impunity must start at home, that is within the agency (police or prison service, military authority, etc.) concerned. Too often the esprit de corps leads to a willingness to stick together and help each other when al-legations of ill-treatment are made, to even cover up the illegal acts of col-leagues. Positive action is required, through training and by example, to **promote a culture** where it is regarded as unprofessional – and unsafe from a career path standpoint – to work and associate with colleagues who have resort to ill-treatment, where it is considered as correct and profes-sionally rewarding to belong to a team which abstains from such acts.

An atmosphere must be created in which the right thing to do is to report ill-treatment by colleagues; there must be a clear understanding that cul-pability for ill-treatment extends beyond the actual perpetrators to anyone who knows, or should know, that ill-treatment is occurring and fails to act to prevent or report it. This implies the existence of a clear reporting line as well as the adoption of whistle-blower protective measures.

27. In many states visited by the CPT, torture and acts such as ill-treatment in the performance of a duty, coercion to obtain a statement, abuse of author-ity, etc. constitute specific criminal offences which are prosecuted ex officio. The CPT welcomes the existence of legal provisions of this kind. Nevertheless, the CPT has found that, in certain countries, prosecutorial au-thorities have considerable discretion with regard to the opening of a pre-liminary investigation when information related to possible ill-treatment of persons deprived of their liberty comes to light. In the Committee's view, even in the absence of a formal complaint, such authorities should be under a **legal obligation to undertake an investigation** whenever they receive credible information, from any source, that ill-treatment of persons deprived of their liberty may have occurred. In this connection, the legal framework for accountability will be strengthened if public officials (police officers, prison directors, etc.) are formally required to notify the relevant authorities immediately whenever they become aware of any information in-dicative of ill-treatment.

28. The existence of a suitable legal framework is not of itself sufficient to guar-antee that appropriate action will be taken in respect of cases of possible ill-treatment. Due attention must be given to **sensitising the relevant au-thorities** to the important obligations which are incumbent upon them.

[…]

37. **Disciplinary proceedings** provide an additional type of redress against ill-treatment, and may take place in parallel to criminal proceedings. Discipli-nary culpability of the officials concerned should be systematically exam-ined, irrespective of whether the misconduct in question is found to constitute a criminal offence. The CPT has recommended a number of pro-cedural safeguards to be followed in this context; for example, adjudication panels for police disciplinary proceedings should include at least one inde-pendent member.

38. Inquiries into possible disciplinary offences by public officials may be per-formed by a separate internal investigations department within the struc-tures of the agencies concerned. Nevertheless, the CPT strongly encourages the creation of a fully-fledged independent investigation body. Such a body should have the power to direct that disciplinary proceedings be instigated.

Regardless of the formal structure of the investigation agency, the CPT con-siders that its functions should be properly publicised. Apart from the pos-sibility for persons to lodge complaints directly with the agency, it should be mandatory for public authorities such as the police to register all repre-sentations which could constitute a complaint; to this end, appropriate forms should be introduced for acknowledging receipt of a complaint and confirming that the matter will be pursued.

If, in a given case, it is found that the conduct of the officials concerned may be criminal in nature, the investigation agency should always notify directly

– without delay – the competent prosecutorial authorities.

39. Great care should be taken to ensure that persons who may have been the victims of ill-treatment by public officials are not dissuaded from lodging a complaint. For example, the potential negative effects of a possibility for such officials to bring proceedings for defamation against a person who wrongly accuses them of ill-treatment should be kept under review. The balance between competing legitimate interests must be evenly established. Reference should also be made in this context to certain points al-ready made in paragraph 28.

40. Any evidence of ill-treatment by public officials which emerges during **civil proceedings** also merits close scrutiny. For example, in cases in which there have been successful claims for damages or out-of-court settlements on grounds including assault by police officers, the CPT has recommended that an independent review be carried out. Such a review should seek to identify whether, having regard to the nature and gravity of the allegations against the police officers concerned, the question of criminal and/or disci-plinary proceedings should be (re)considered.

[…]

42. Finally, no one must be left in any doubt concerning the **commitment of the state authorities** to combating impunity. This will underpin the action being taken at all other levels. When necessary, those authorities should not hesitate to deliver, through a formal statement at the highest political level, the clear message that there must be "zero tolerance" of torture and other forms of ill-treatment."[10]

With regard to the training of law-enforcement personnel, the CPT stated in its 2nd General Report:

59. Finally, the CPT wishes to emphasise the great importance it attaches to the training of law-enforcement personnel (which should include education on human rights matters – cf. also Article 10 of the United Nations Conven-tion against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). There is arguably no better guarantee against the ill-treat-ment of a person deprived of his liberty than a properly trained police or prison officer. Skilled officers will be able to carry out successfully their duties without having recourse to ill-treatment and to cope with the pres-ence of fundamental safeguards for detainees and prisoners.

60. In this connection, the CPT believes that aptitude for interpersonal commu-nication should be a major factor in the process of recruiting law enforce-ment personnel and that, during training, considerable emphasis should be placed on developing interpersonal communication skills, based on re-spect for human dignity. The possession of such skills will often enable a police or prison officer to defuse a situation which could otherwise turn into violence, and more generally, will lead to a lowering of tension, and raising of the quality of life, in police and prison establishments, to the ben-efit of all concerned.[11]

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

1. States must provide adequate guarantees to persons deprived of their liberty by a public authority, in order to prevent any unlawful deten-tion or ill-treatment, and ensure that any unlawful detention or ill-treatment does not go unpunished. In particular, persons deprived of their liberty should be provided with the following guarantees:

- the right to inform, or to have informed, a third party of his or her choice of their deprivation of liberty, their location and of any trans-fers;
- the right to have access to a lawyer;
- the right to have access to a medical doctor.

Persons deprived of their liberty should be expressly informed without delay about all their rights, including those listed above. Any possibil-ity for the authorities to delay the exercise of one of these rights, in order to protect the interests of justice or public order, should be clear-ly defined by law, and its application should be strictly limited in time and subject to appropriate procedural safeguards.

10 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28].

11 2nd General Report of the CPT's activities, covering the period 1 January to 31 December 1991 [CPT/Inf (92) 3].

When a person is injured during custody or detention, the Court has estab-lished certain safe-guards for the protection of the person concerned:

> The Court underlines that a state is responsible for each person in deten-tion, as the latter, being in the hands of police officers, is in a vulnerable sit-uation and the authorities have the obligation to protect that person. From the very beginning of the deprivation of liberty, a strict application of the fundamen-tal guarantees such as the right to be examined by a medical doctor of one's choice in addition to an examination by a medical doctor summoned by the police authorities, as well as access to a lawyer and a family member in addition to a prompt judicial intervention can effectively lead to the detection and prevention of ill-treatment which, like in the present case, detained persons risk to be subjected to, notably for the ex-tortion of confessions.
>
> The Court recalls in this respect that where a person is injured while being in police custody, even though that person is entirely under the control of police officers, strong presumptions of fact will arise in respect of any injury that occurs during that period (see the judgment of Salman v. Turkey [GC], no. 21986/93, §100, ECHR 2000-VII). It is incumbent on the state to give a plausible explanation of how those injuries were caused and to provide ev-idence which establishes facts casting doubt on the allegations of the vic-tim, notably if those facts are supported by medical reports (see, among others, the judgments of Selmouni cited above, §87, and Altay v. Turkey, no. 22279/93, §50, 22 May 2001).[12]

With regard to police custody, the CPT stated in its 2nd General Report:

> 36. The CPT attaches particular importance to three rights for persons detained by the police: the right of the person concerned to have the fact of his de-tention notified to a third party of his choice (family member, friend, consu-late), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (in addition to any medical examina-tion carried out by a doctor called by the police authorities). They are, in the CPT's opinion, three fundamen-tal safeguards against the ill-treatment of detained persons which should apply as from the very outset of depriva-tion of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc.).
>
> 37. Persons taken into police custody should be expressly informed without delay of all their rights, including those referred to in paragraph 36. Further, any possibilities offered to the authorities to delay the exercise of one or other of the latter rights in order to protect the interests of justice should be clearly defined and their application strictly limited in time. As regards more particular-ly the rights of access to a lawyer and to request a medical exam-ination by a doctor other than one called by the police, systems whereby, exceptionally, lawyers and doctors can be chosen from pre-established lists drawn up in agreement with the relevant professional organisations should remove any need to delay the exercise of these rights.
>
> 38. Access to a lawyer for persons in police custody should include the right to contact and to be visited by the lawyer (in both cases under conditions guaranteeing the confidentiality of their discussions) as well as, in principle, the right for the person concerned to have the lawyer present during inter-rogation.
>
> As regards the medical examination of persons in police custody, all such examinations should be conducted out of the hearing, and preferably out of the sight, of police officers. Further, the results of every examination as well as relevant statements by the detainee and the doctor's conclusions should be formally recorded by the doctor and made available to the de-tainee and his lawyer.[13]

12 Algür v. Turkey (no. 32574/96), judgment of 22 October 2002, para. 44 (only available in French; unofficial translation provided by the Secretariat).

13 2nd General Report of the CPT's activities, covering the period 1 January to 31 December 1991 [CPT/Inf (1992) 3].

In this regard, it should be recalled that the Committee of Ministers, in its reply to Recommendation 1257 (1995) of the Parliamentary Assembly of the Council of Europe, already invited the authorities of member states to comply with the guidelines of the CPT presented above (paras. 36-38).

In its 12th report the CPT underlines once again the importance of these fun-damental guarantees and further clarifies how they can be applied in prac-tice:

Concerning access to a lawyer

41. […] The CPT has repeatedly stressed that, in its experience, the period im-mediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actu-ally occurs. The CPT recognises that in order to protect the legitimate inter-ests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer should be arranged.

The right of access to a lawyer must include the right to talk to him in pri-vate. The person concerned should also, in principle, be entitled to have a lawyer present during any interrogation conducted by the police. Naturally, this should not prevent the police from questioning a detained person on urgent matters, even in the absence of a lawyer (who may not be immedi-ately available), nor rule out the replacement of a lawyer who impedes the proper conduct of an interrogation.

The CPT has also emphasised that the right of access to a lawyer should be enjoyed not only by criminal suspects but also by anyone who is under a legal obligation to attend – and stay at – a police establishment, e.g. as a "witness".

Further, for the right of access to a lawyer to be fully effective in practice, ap-propriate provision should be made for persons who are not in a position to pay for a lawyer.

Concerning access to a medical doctor

42. Persons in police custody should have a formally recognised right of **access to a doctor**. In other words, a doctor should always be called without delay if a person requests a medical examination; police officers should not seek to filter such requests. Further, the right of access to a doctor should include the right of a person in custody to be examined, if the person concerned so wishes, by a doctor of his/her own choice (in addition to any medical exam-ination carried out by a doctor called by the police).

All medical examinations of persons in police custody must be conducted out of the hearing of law-enforcement officials and, unless the doctor con-cerned requests otherwise in a particular case, out of the sight of such offi-cials.

It is also important that persons who are released from police custody with-out being brought before a judge have the right to directly request a medical examination/certificate from a recognised forensic doctor.

In its 2nd General Report the CPT stresses the importance of access to a medical doctor in the context of using force within prisons:

Prison staff will on occasion have to use force to control violent prisoners and, exceptionally, may even need to resort to instruments of physical re-straint. These are clearly high risk situations insofar as the possible ill-treatment of prisoners is concerned, and as such call for specific safeguards. A prisoner against whom any means of force have been used should have the right to be immediately examined

and, if necessary, treated by a medi-cal doctor. This examination should be conducted out of the hearing and preferably out of the sight of non-medical staff, and the results of the exam-ination (including any relevant statements by the prisoner and the doctor's conclusions) should be formally recorded and made available to the pris-oner. In those rare cases when resort to instruments of physical restraint is required, the prisoner concerned should be kept under constant and ade-quate supervision. Further, instruments of restraint should be removed at the earliest possible opportunity; they should never be applied, or their ap-plication prolonged, as a punishment. Finally, a record should be kept of every instance of the use of force against prisoners.[14]

Concerning the right to inform a third party

43. A detained person's **right to have the fact of his/her detention notified to a third party** should in principle be guaranteed from the very outset of police custody. Of course, the CPT recognises that the exercise of this right might have to be made subject to certain exceptions, in order to protect the legitimate interests of the police investigation. However, such excep-tions should be clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards (e.g. any delay in notification of custody to be recorded in writing with the reasons therefor, and to require the approval of a senior police officer unconnected with the case or a prosecutor).

44. Rights for persons deprived of their liberty will be of little value if the per-sons concerned are unaware of their existence. Consequently, it is impera-tive that persons taken into police custody are **expressly informed of their rights** without delay and in a language which they understand. In order to ensure that this is done, a form setting out those rights in a straightforward manner should be systematically given to persons de-tained by the police at the very outset of their custody. Further, the persons concerned should be asked to sign a statement attesting that they have been informed of their rights.

Concerning the prevention of violence within penal institutions

61. Any signs of violence observed when a prisoner is medically screened on his admission to the establishment should be fully recorded, together with any relevant statements by the prisoner and the doctor's conclusions. Fur-ther, this information should be made available to the prisoner.[15]

In its 12th General Report the CPT stresses the importance of judicial control in the framework of police custody:

45. The CPT has stressed on several occasions **the role of judicial and prose-cuting authorities** as regards combating ill-treatment by the police.

For example, all persons detained by the police whom it is proposed to remand to prison should be physically brought before the judge who must decide that issue; there are still certain countries visited by the CPT where this does not occur. Bringing the person before the judge will provide a timely opportunity for a criminal suspect who has been ill-treated to lodge a complaint. Further, even in the absence of an express complaint, the judge will be able to take action in good time if there are other indications of ill-treatment (e.g. visible injuries; a person's general appearance or de-meanour).

Naturally, the judge must take appropriate steps when there are indications that ill-treatment by the police may have occurred. In this regard, whenever criminal suspects brought before a judge at the end of police custody allege ill-treatment, the judge should record the allegations in writing, order immediately a forensic medical examination and take the necessary steps to ensure that the allegations are properly investigated. Such an ap-proach should be followed whether or not the person con-

14 2nd General Report of the CPT's activities, covering the period 1 January to 31 December 1991 [CPT/Inf (1992) 3], para. 53.

15 3rd General Report of the CPT's activities, covering the period 1 January to 31 December 1992 [CPT/Inf (93) 12].

cerned bears vis-ible external injuries. Further, even in the absence of an express allegation of ill-treatment, the judge should request a forensic medical examination whenever there are other grounds to believe that a person brought before him could have been the victim of ill-treatment.

The diligent examination by judicial and other relevant authorities of all com-plaints of ill-treatment by law enforcement officials and, where appropriate, the imposition of a suitable penalty will have a strong deterrent effect. Con-versely, if those authorities do not take effective action upon complaints re-ferred to them, law enforcement officials minded to ill-treat persons in their custody will quickly come to believe that they can do so with impunity.[16]

2. In addition to the rights listed above, persons deprived of their liberty are entitled to take court proceedings through which the lawfulness of their detention shall be speedily decided and release ordered if that de-tention is not lawful. Persons arrested or detained in relation to the commission of an offence must be brought promptly before a judge, and they have the right to receive a trial within a reasonable time or to be released pending trial, in accordance with the Court's case-law.

3. States should take effective measures to safeguard against the risk of serious human rights violations by the keeping of records concerning the date, time and location of persons deprived of their liberty, as well as other relevant information concerning the deprivation of liberty.

According to the case-law of the Court, the above-mentioned data must be kept in order for the detention to be in conformity with Article 5 §1 of the Convention:

The recording of accurate holding data concerning the date, time and lo-cation of detainees, as well as the grounds for the detention and the name of the persons effecting it, is necessary for the detention of an individual to be compatible with the requirements of lawfulness for the purposes of Ar-ticle 5 §1. The lack of records of this applicant discloses a serious failing, which is aggravated by the Commission's findings as to the general unreli-ability and inaccuracy of the records in question. The Court also shares the Commission's concerns with regard to the practices applied in the registra-tion of holding data by the gendarme witnesses who appeared before the Commission's delegates – the fact that it is not recorded when a person is held elsewhere than the officially designated custody area or when a person is removed from a detention area for any purpose or held in transit. It finds unacceptable the failure to keep records which enable the location of a detainee to be established at a particular time.[17]

The Court has stated that deficiencies in the practice of recording custody may amount to a violation of Article 5 §1 of the Convention:

Further, certain serious deficiencies have been noted in the practice of re-cording custody in gendarme stations […]. The first established deficiency is not allowed by domestic law namely, the gendarme practice of detaining persons for various reasons in their stations without being entered in the custody records. The second and third failing further underline the unrelia-bility of custody records as those records will not show whether one is ap-prehended by military forces and may not show the date of release from the gendarme station. These three deficiencies attest to the absence of ef-fective measures to safeguard against the risk of disappearance of individ-uals in detention.[18]

Moreover, in its 2nd General Report the CPT states:

The CPT considers that the fundamental safeguards granted to persons in police custody would be reinforced (and the work of police officers quite possibly facilitated) if a single and comprehensive cus-

16 12th General Report of the CPT's activities, covering the period 1 January to 31 Decem-ber 2001 [CPT/Inf (2002) 15].

17 Çakici v. Turkey (no. 23657/94), judgment of 8 July 1999 [Grand Chamber], para. 105.

18 Orhan v. Turkey (no. 25656/94), judgment of 18 June 2002, para. 372.

tody record were to exist for each person detained, on which would be recorded all aspects of his custody and action taken regarding them (when deprived of liberty and reasons for that measure; when told of rights; signs of injury, mental illness, etc; when next of kin/consulate and lawyer contacted and when visited by them; when offered food; when interrogated; when transferred or released, etc.). For various matters (for example, items in the person's possession, the fact of being told of one's rights and of invoking or waiving them), the sig-nature of the detainee should be obtained and, if necessary, the absence of a signature explained. Further, the detainee's lawyer should have access to such a custody record.[19]

In its 12th General Report the CPT recognised that audio and video recording of interviews by the authorities of persons deprived of their liberty is an im-portant safeguard against the ill-treatment of detainees:

> The **electronic (i.e. audio and/or video) recording of police interviews** represents an important additional safeguard against the ill-treatment of detainees. The CPT is pleased to note that the introduction of such systems is under consideration in an increasing number of countries. Such a facility can provide a complete and authentic record of the interview process, thereby greatly facilitating the investigation of any allegations of ill-treat-ment. This is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure. Electronic recording of police interviews also reduces the opportunity for defendants to later falsely deny that they have made certain admissions.[20]

4. States must ensure that officials carrying out arrests or interrogations or using force can be identified in any subsequent criminal or discipli-nary investigations or proceedings.

With regard to the practice of blindfolding, the CPT stated in its 12th General Report:

> In certain countries, the CPT has encountered the practice of **blindfolding** persons in police custody, in particular during periods of questioning. CPT delegations have received various – and often contradictory – explanations from police officers as regards the purpose of this practice. From the infor-mation gathered over the years, it is clear to the CPT that in many if not most cases, persons are blindfolded in order to prevent them from being able to identify law enforcement officials who inflict ill-treatment upon them. Even in cases when no physical ill-treatment occurs, to blindfold a person in custody – and in particular someone undergoing questioning – is a form of oppressive conduct, the effect of which on the person con-cerned will frequently amount to psychological ill-treatment. The CPT rec-ommends that the blindfolding of persons who are in police custody be expressly prohibited.[21]

V. The duty to investigate

1. Combating impunity requires that there be an effective investigation in cases of serious human rights violations. This duty has an absolute character.

The right to life (Article 2 of the Convention)

The obligation to protect the right to life requires INTER ALIA that there should be an effective investigation when individuals have been killed, whether by state agents or private persons, and in all cases of suspicious death. This duty also arises in situations in which it is uncertain whether or not the victim has died, and there is reason to believe the circumstances are suspicious, such as in case of enforced disappearances.

19 2nd General Report of the CPT's activities, covering the period 1 January to 31 December 1991 [CPT/Inf (92) 30], para. 40.

20 12th General Report of the CPT's activities, covering the period 1 January to 31 Decem-ber 2001 [CPT/Inf (2002) 15], para. 36.

21 12th General Report of the CPT's activities, covering the period 1 January to 31 Decem-ber 2001, [CPT/Inf (2002) 15], para. 38.

The obligation to carry out an effective investigation was first developed by the Court within the framework of Article 2 of the Convention and originated in the case of McCann and others v. the United Kingdom:

> The obligation to protect the right to life under this provision, read in con-junction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms de-fined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.[22]

The Court has stated that the duty to investigate applies also in relation to killings by private actors:

> The Court finds, first of all, that a procedural obligation arose to investigate the circumstances of the death of Christopher Edwards. He was a prisoner under the care and responsibility of the authorities when he died from acts of violence of another prisoner and in this situation it is irrelevant whether State agents were involved by acts or omissions in the events leading to his death. The State was under an obligation to initiate and carry out an inves-tigation which fulfilled the requirements set out above.[23]

The Court found that the political context at the time of the respective inci-dents did not relieve the authorities of their obligation to conduct an effec-tive investigation:

> However, neither the prevalence of violent armed clashes nor the high in-cidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear.[24]

In the context of violent armed clashes, the Court also mentioned the danger of a growing climate of impunity:

> Nonetheless, circumstances of that nature cannot relieve the authorities of their obligations under Article 2 to carry out an investigation, as otherwise that would exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle (see mutatis mutandis, the Kaya judgment cited above, p. 326, §91).[25]

See also Articles 2 and 3 of the United Nations International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006:

Article 2

> For the purposes of this Convention, "enforced disappearance" is consid-ered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorisation, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Article 3

> Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorisation, support or acquiescence of the State and to bring those re-sponsible to justice.

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22 McCann and others v. the United Kingdom (no. 18984/91), judgment of 27 September 1995 [Grand Chamber], para. 161.

23 Paul and Audrey Edwards v. the United Kingdom (no. 46477/99), judgment of 14 March 2002, para. 74.

24 Kaya v. Turkey (no. 158/96), judgment of 19 February 1998, para. 91.

25 Yaşa v. Turkey (no. 22495/93), judgment of 2 September 1998, para. 104.

See also the "Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions" (paras. 9-17), recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.

The obligation to investigate racist attitudes

The Court has held 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 Articles 2 and 14 of the Conven-tion:

> The Court considers that when investigating violent incidents and, in par-ticular, deaths at the hands of state agents, state authorities have the addi-tional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particu-larly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may con-stitute unjustified treatment irreconcilable with Article 14 of the Conven-tion (see, mutatis mutandis, Thlimmenos v. Greece [GC], no. 34369/97, §44, ECHR 2000-IV). In order to maintain public confidence in their law enforce-ment machinery, con-tracting 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.
>
> Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent state's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute (see, mutatis mutandis, Shanaghan v. the United Kingdom, no. 37715/97, §90, ECHR 2001-III, setting out the same standard with regard to the general obligation to investigate). The authorities must do what is rea-sonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impar-tial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence.[26]

The prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention)

States are under a procedural obligation arising under Article 3 of the Convention to carry out an effective investigation into credible claims that a person has been seriously ill-treated, or when the authorities have reasonable grounds to suspect that such treatment has occurred.

Soon after it had developed the obligation to carry out an effective investi-gation under Article 2 of the Convention, the Court also followed this ap-proach with regard to Article 3 of the Convention:

> The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the state unlawfully and in breach of Article 3, that provision, read in conjunction with the state's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention", requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and pun-ishment of those responsible (see, in relation to Article 2 of the Conven-tion, the McCann and others v. the United Kingdom judgment of 27 Septem-ber 1995, Series A no. 324, p. 49, §161, the Kaya v. Turkey judgment of 19 February 1998, Reports 1998-I, p. 324, §86, and the Yaşa v. Turkey judg-ment of 2 Sep-

26 Nachova and others v. Bulgaria (nos. 43577/98 and 43579/98), judgment of 26 February 2004, paras. 158-159. As regards the responsibilities under Article 14 of the Convention (read in con-junction with Article 2 of the Convention), see Nachova and others v. Bulgaria (nos. 43577/98 and 43579/98), judgment of 6 July 2005 [Grand Chamber], para. 161.

tember 1998, Reports 1998-VI, p. 2438, §98). If this were not the case, the general legal prohibition of torture and inhuman and degrad-ing treatment and punishment, despite its fundamental importance (see paragraph 93 above), would be ineffective in practice and it would be pos-sible in some cases for agents of the state to abuse the rights of those within their control with virtual impunity.[27]

The Court gave as reasoning for the positive obligation to effectively investi-gate alleged cases of serious ill treatment:

> In cases of wilful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim. This is so because, if the authorities could confine their reaction to incidents of wilful ill-treatment by state agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental impor-tance, would be in-effective in practice (see, among many other authorities, Krastanov, cited above, §60; Çamdereli, cited above, §29; and Vladimir Romanov, cited above, §78).[28]

The prohibition of slavery and forced labour (Article 4 of the Convention)

The prohibition of slavery and forced labour entails a procedural obliga-tion to carry out an effective investigation into situations of potential traf-ficking in human beings.

The Court recognised a procedural obligation to investigate under Article 4 of the Convention with regard to trafficking in human beings:

> Like Articles 2 and 3, Article 4 also entails a procedural obligation to inves-tigate situations of potential trafficking.29

The duty to investigate situations of trafficking in human beings is further elaborated in Chapter V ("Investigation, prosecution and procedural law") of the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005.

The right to liberty and security (Article 5 of the Convention)

Procedural safeguards derived inter alia from the right to liberty and se-curity require that states must conduct effective investigations into cred-ible claims that a person has been deprived of his or her liberty and has not been seen since.

With regard to enforced disappearances, Article 5 of the Convention puts a procedural obligation on states to conduct an effective investigation:

> The Court emphasises in this respect that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effec-tive measures to safeguard against the risk of disappearance and to con-duct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.[30]

27 Assenov and others v. Bulgaria (no. 24760/94), judgment of 28 October 1998, para. 102.
28 Gäfgen v. Germany (no. 22978/05), judgment of 1 June 2010 [Grand Chamber], para. 119.
29 Rantsev v. Cyprus and Russia (no. 25965/04), judgment of 7 January 2010, para. 288.
30 Kurt v. Turkey (no. 24276/94), judgment of 25 May 1998, para. 124; Orhan v. Turkey (no. 25656/94), judgment of 18 June 2002, para. 369.

The right to respect for private and family life (Article 8 of the Convention)

States have a duty to effectively investigate credible claims of serious vi-olations of the rights enshrined in Article 8 of the Convention where the nature and gravity of the alleged violation so requires, in accordance with the case-law of the European Court of Human Rights.

The Court has found that the right to an effective remedy (Article 13 of the Convention) may require states to conduct effective investigations with regard to the right to a private life (Article 8 of the Convention):

> The Court reiterates that Article 13 guarantees the availability at the nation-al level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the do-mestic legal order. The effect of this article is thus to require the provision of a domestic remedy allowing the "competent national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discre-tion as to the manner in which they conform to their obligations under this provision. The remedy must be "effective" in practice as well as in law, in par-ticular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent state (see the Aksoy judgment cited above, p. 2286, §95, and the above-mentioned Aydın judgment, pp. 1895-96, §103).
>
> Furthermore, the nature and gravity of the interference complained of under Article 8 of the Convention in the instant case has implications for Article 13. The provision imposes, without prejudice to any other remedy available under the domestic system, an obligation on the respondent state to carry out a thorough and effective investigation of allegations brought to its attention of deliberate destruction by its agents of the homes and possessions of individuals.
>
> Accordingly, 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 investiga-tion capable of leading to the identification and punishment of those re-sponsible and including effective access for the complainant to the investigative procedure.[31]

Concerning rape, the Court has stated:

> On that basis, the Court considers that states have a positive obligation in-herent in Articles 3 and 8 of the Convention to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.[32]

2. Where an arguable claim is made, or the authorities have reasonable grounds to suspect that a serious human rights violation has occurred, the authorities must commence an investigation on their own initia-tive.

The obligation to commence an investigation motu proprio by the state authorities has been established by the Court:

> The essential purpose of such investigation is to secure the effective imple-mentation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention.[33]

31 Mentes and others v. Turkey (no. 23186/94), judgment of 28 November 1997, para. 89.
32 M.C. v. Bulgaria (no. 39272/98), judgment of 4 December 2003, para. 153.
33 Kelly and others v. the United Kingdom (no. 30054/96), judgment of 4 May 2001, para. 94.

The investigation must also be initiated with promptness (see below, Guide-line VI).

3. The fact that the victim wishes not to lodge an official complaint, later withdraws such a complaint or decides to discontinue the proceedings does not absolve the authorities from their obligation to carry out an effective investigation, if there are reasons to believe that a serious human rights violation has occurred.

The Court has stated that investigations must be conducted regardless of the existence of a formal complaint by the victim:

> However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, mutatis mutandis, İlhan v. Turkey [GC], no. 22277/93, §63, ECHR 2000-VII, and Finucane v. the United Kingdom, no. 29178/95, §67, ECHR 2003-VIII).[34]

This applies even in the event that the victim later withdraws his or her com-plaint:

> […] The Court reiterates in this connection that, once the situation has been brought to their attention, the national authorities cannot rely on the victim's attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim (see Osman v. the United Kingdom, cited above, §116).
>
> […]
>
> In this respect, the Government blamed the applicant for withdrawing her complaints and failing to co-operate with the authorities, which prevented the latter from continuing the criminal proceedings against H.O., pursuant to the domestic law provisions requiring the active involvement of the victim (see paragraph 70 above).
>
> The Court reiterates its opinion in respect of the complaint under Article 2, namely that the legislative framework should have enabled the prosecut-ing authorities to pursue the criminal investigations against H.O. despite the withdrawal of complaints by the applicant on the basis that the vio-lence committed by H.O. was sufficiently serious to warrant prosecution and that there was a constant threat to the applicant's physical integrity (see paragraphs 137-148 above).[35]

4. A decision either to refuse to initiate or to terminate investigations may be taken only by an independent and competent authority in ac-cordance with the criteria of an effective investigation as set out in Guideline VI. They should be duly reasoned.

5. Such decisions must be subject to appropriate scrutiny and be gener-ally challengeable by means of a judicial process.

The Court stated:

> […] The Commission further observed that decisions of the national au-thorities which had been produced to it contained no detailed reasons for the dismissal of the complaints of the applicant's parents. It was additional-ly noted that there was a lack of any contemporaneous records which could demonstrate, step by step, the nature of the investigation carried out into the allegations and that no

34 Tashin Acar v. Turkey (no. 26307/95), judgment of 8 April 2004 [Grand Chamber], para. 221.
35 Opuz v. Turkey (no. 33401/02), judgment of 9 June 2009, paras. 153, 167-168.

external authority appeared to have been involved in any such investigations. In these circumstances, the Commis-sion concluded that the investigations had been both perfunctory and su-perficial and did not reflect any serious effort to discover what had really occurred in the prison in September 1998.

In the light of its own examination of the material before it, the Court shares the findings and reasoning of the Commission and concludes that the ap-plicant's arguable claim that he was ill-treated in prison was not subject to an effective investigation by the domestic authorities as required by Article 3 of the Convention.[36]

VI. Criteria for an effective investigation

In order for an investigation to be effective, it should respect the follow-ing essential requirements:

Adequacy

The investigation must be capable of leading to the identification and punishment of those responsible. This does not create an obligation on states to ensure that the investigation leads to a particular result, but the authorities must have taken the reasonable steps available to them to se-cure the evidence concerning the incident.

The adequacy of the investigations was defined by the Court as follows:

In order to be "effective" as this expression is to be understood in the con-text of Article 2 of the Convention, an investigation into a death that engag-es the responsibility of a Contracting Party under that Article must firstly be adequate. That is, it must be capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard (cf. Tahsin Acar v. Turkey [GC], no. 26307/95, §223, ECHR 2004-III).37

Moreover, in its 14th General Report the CPT stresses that the investigation must be comprehensive:

The investigation must also be conducted in a **comprehensive** manner. The CPT has come across cas-es when, in spite of numerous alleged inci-dents and facts related to possible ill-treatment, the scope of the investiga-tion was unduly circumscribed, significant episodes and surrounding circumstances indicative of ill-treatment being disregarded.[38]

Thoroughness

The investigation should be comprehensive in scope and address all of the relevant background circumstances, including any racist or other dis-criminatory motivation. It should be capable of identifying any systemat-ic failures that led to the violation. This requires the taking of all reasonable steps to secure relevant evidence such as identifying and in-terviewing the alleged victims, suspects and eyewitnesses; examination of the scene of the alleged violation for material evidence; and the gath-ering of forensic and medical evidence by competent specialists. The evi-dence should be assessed in a thorough, consistent and objective manner.

36 Polotratskiy v. Ukraine (no.38812/97), judgment of 29 April 2003, paras. 126-127.

37 Ramsahai and others v. the Netherlands (no. 24746/94), judgment of 15 May 2007 [Grand Chamber], para. 324.

38 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28], para. 33.

The Court has described the requirement of "thoroughness" as follows:

> The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye-witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see concerning autopsies, e.g. Salman v. Turkey cited above, §106; concerning witnesses e.g. Tanrıkulu v. Turkey [GC], no. 23763/94, ECHR 1999-IV, §109; concerning fo-rensic evidence e.g. Gül v. Turkey, 22676/93, [Section 4], §89). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this stand-ard.[39]

Moreover, in its 14th General Report the CPT has stated that:

> An investigation into possible ill-treatment by public officials must comply with the criterion of **thoroughness**. It must be capable of leading to a de-termination of whether force or other methods used were or were not jus-tified under the circumstances, and to the identification and, if appropriate, the punishment of those concerned. This is not an obligation of result, but of means. It requires that all reasonable steps be taken to secure evidence concerning the incident, including, inter alia, to identify and interview the alleged victims, suspects and eyewitnesses (e.g. police officers on duty, other detainees), to seize instruments which may have been used in ill-treatment, and to gather forensic evidence. Where applicable, there should be an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. […][40]

Impartiality and independence

Persons responsible for carrying out the investigation must be impartial and independent from those implicated in the events. This requires that the authorities which are implicated in the events can neither lead the tak-ing of evidence nor the preliminary investigation; in particular, the inves-tigators cannot be part of the same unit as the officials who are the subject of the investigation.

The Court stated:

> For an investigation into alleged unlawful killing by state agents to be effec-tive, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice (see Güleç v. Turkey, judg-ment of 27 July 1998, Reports 1998-IV, p. 1733, §§81-82; Oğur v. Turkey [GC], no. 21594/93, §§91-92, ECHR 1999-III; and Ergi v. Turkey, judgment of 28 July 1998, Reports 1998-IV, pp. 1778-79, §§83-84).41

That principle was further elaborated by the Court:

> It reiterates that, for an investigation into the facts of an alleged unlawful killing or ill-treatment by state agents to be effective, it is generally neces-sary for the persons responsible for the investigation and those conducting the investigation to be independent from those implicated in the events (see, for example, the judgments of Güleç v. Turkey of 27 July 1998, Reports 1998-IV, §§81-82, and Öğur v. Turkey [GC] no. 21954/93, CEDH 1999-III, §§91-92). This requires not only the absence of any hierarchical or institutional links, but also independence in practice (see, for example, the judgment Ergı v. Turkey of 28 July 1998, Reports 1998-IV, §§83-84; and Kelly and others v. the United Kingdom, no. 30054/96, §114, 4 May 2001).[42]

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39 Hugh Jordan v. the United Kingdom (no. 24746/94), judgment of 4 May 2001, para. 107.

40 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28], para. 33.

41 Nachova and others v. Bulgaria (nos. 43577/98 and 43579/98), judgment of 6 July 2005 [Grand Chamber], para. 112.

42 Bursuc v. Romania (no. 42066/98), judgment of 12 October 2004, para. 103 (available in French only; unofficial translation provided by the Secretariat).

Examples in which the Court has found that an investigation had not been impartial and independent:

- the investigation was carried out by direct colleagues of the persons al-legedly involved (see Aktaş v. Turkey (no. 24351/94), judgment of 24 April 2003, para. 301);
- the investigation into the allegations of a detainee was carried out by prison authorities without the involvement of an external authority or body (see Kuznetsov v. Ukraine (no. 39042/97), judgment of 29 April 2003, para. 106);
- an inquiry conducted by military prosecutors who, in view of the regu-lations in force, were part of the same structure as the police (Barbu Anghelescu v. Romania (no. 46430/99), judgment of 5 October 2004, para. 67 (only available in French));
- essential parts of the investigation were carried out by the same force to which the alleged perpetrators belonged and acting under its own chain of command (see Ramsahai and others v. the Netherlands (no. 24746/94), judgment of 15 May 2007 [Grand Chamber], para. 406).

Moreover, in its 14th General Report the CPT stated that:

> For an investigation into possible ill-treatment to be effective, it is essential that the persons responsible for carrying it out are independent from those implicated in the events. In certain jurisdictions, all complaints of ill-treat-ment against the police or other public officials must be submitted to a prosecutor, and it is the latter – not the police – who determines whether a preliminary investigation should be opened into a complaint; the CPT wel-comes such an approach. However, it is not unusual for the day-to-day re-sponsibility for the operational conduct of an investigation to revert to serving law enforcement officials. The involvement of the prosecutor is then limited to instructing those officials to carry out inquiries, acknowl-edging receipt of the result, and deciding whether or not criminal charges should be brought. It is important to ensure that the officials concerned are not from the same service as those who are the subject of the investigation. Ideally, those entrusted with the operational conduct of the investigation should be completely independent from the agency implicated. Further, prosecutorial authorities must exercise close and effective supervision of the operational conduct of an investigation into possible ill-treatment by public officials. They should be provided with clear guidance as to the manner in which they are expected to supervise such investigations.[43]

Promptness

The investigation must be commenced with sufficient promptness in or-der to obtain the best possible amount and quality of evidence available. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authori-ties may generally be regarded as essential in maintaining public confi-dence in the maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. The investiga-tion must be completed within a reasonable time and, in all cases, be con-ducted with all necessary diligence.

The Court found:

> The investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see Ögur v. Turkey [GC], no. 21954/93, §88, ECHR 1999-III). Any deficiency in the investi-gation which undermines its ability to establish the cause of death or the person responsible will risk falling below this standard. In this context, there must also be an implicit requirement of promptness and reasonable expe-dition (see Yaşa v. Turkey, judgment of 2 September 1998, Reports 1998-VI, §102-104, and Mahmut Kaya v. Turkey, no. 22535/93, ECHR 2000-III, §§106-107). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal

43 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28], para. 32.

force may generally be regarded as essential in maintaining public confidence in maintenance of the rule of law and in preventing any appearance of collu-sion in or tolerance of unlawful acts.[44]

Moreover, in its 14th General Report the CPT stated that:

To be effective, the investigation must also be conducted in a prompt and reasonably **expeditious** manner. The CPT has found cases where the nec-essary investigative activities were unjustifiably delayed, or where prosecu-torial or judicial authorities demonstrably lacked the requisite will to use the legal means at their disposal to react to allegations or other relevant infor-mation indicative of ill-treatment. The investigations concerned were sus-pended indefinitely or dismissed, and the law-enforcement officials implicated in ill-treatment managed to avoid criminal responsibility altogether. In other words, the response to compelling evidence of serious mis-conduct had amounted to an "investigation" unworthy of the name.[45]

Public scrutiny

There should be a sufficient element of public scrutiny of the investiga-tion or its results to secure accountability, to maintain public confidence in the authorities' adherence to the rule of law and to prevent any appear-ance of collusion in or tolerance of unlawful acts. Public scrutiny should not endanger the aims of the investigation and the fundamental rights of the parties.

With regard to victims' involvement, the Court stated:

The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the pro-cedure to the extent necessary to safeguard his or her legitimate interests (see Güleç, cited above, p. 1733, §82, where the father of the victim was not informed of the decision not to prosecute; Oğur, cited above, §92, where the family of the victim had no access to the investigation and court docu-ments; and Gül, cited above, §93).[46]

Moreover, in its 14th General Report the CPT stated that:

In addition to the above-mentioned criteria for an effective investigation, there should be a sufficient element of public scrutiny of the investigation or its results, to secure accountability in practice as well as in theory. The degree of scrutiny required may well vary from case to case. In particularly serious cases, a public inquiry might be appropriate. In all cases, the victim (or, as the case may be, the victim's next-of-kin) must be involved in the pro-cedure to the extent necessary to safeguard his or her legitimate interests.[47]

See also the "Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions" (paras. 16-17), recommend-ed by United Nations Economic and Social Council resolution 1989/65 of 24 May 1989.

VII. Involvement of victims in the investigation

1. States should ensure that victims may participate in the investigation and the proceedings to the extent necessary to safeguard their legiti-mate interests through relevant procedures under national law.

44 Kukayev v. Russia (no. 29361/02), judgment of 15 November 2007, para. 95.
45 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28], para. 35.
46 McKerr v. the United Kingdom (no. 28883/95), judgment of 4 May 2001, para. 115
47 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28], para. 36.

With regard to the participation of victims, the Court has stated:

> The Court reiterates that the nature of the right safeguarded under Article 3 has implications for Article 13. Where an individual has an arguable claim that he has been tortured or subjected to serious ill-treatment 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 inves-tigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigatory procedure (see the above-cited Aksoy judgment, §98).[48]

In its "Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity" of 8 February 2005, the United Nations Commission on Human Rights laid down as Principle 4 ("The victims' right to know"):

> Irrespective of any legal proceedings, victims and their families have the im-prescriptible right to know the truth about the circumstances in which vio-lations took place and, in the event of death or disappearance, the victims' fate.

In its "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 United Nations General Assembly laid down as Principle 24:

> Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

2. States have to ensure that victims may, to the extent necessary to safe-guard their legitimate interests, receive information regarding the follow-up and outcome of their complaints, the progress of the inves-tigation and the prosecution, the execution of judicial decisions and all measures taken concerning reparation for damage caused to the victims.

With regard to the right to receive information in criminal proceedings, the European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) states in Article 4:

> 2. Each member state shall ensure that victims who have expressed a wish to this effect are kept informed of:
> (a) the outcome of their complaint;
> (b) relevant factors enabling them, in the event of prosecution, to know the conduct of the criminal proceedings regarding the person prosecuted for offences concerning them, except in exceptional cases where the proper handling of the case may be adversely affected;
> (c) the court's sentence.

3. In cases of suspicious death or enforced disappearances, states must, to the extent possible, provide information regarding the fate of the person concerned to his or her family.

Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance states that:

> 1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.
>
> 2. Each victim has the right to know the truth regarding the circumstances of the enforced disap-

48 Yaman v. Turkey (no. 32446/96), judgment of 2 November 2004, para. 53 [emphasis add-ed].

pearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appro-priate measures in this regard.

3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.

4. Victims may be given the opportunity to indicate that they do not wish to receive such information.

5. Where participation in proceedings as parties is provided for in do-mestic law, states should ensure that appropriate public legal assist-ance and advice be provided to victims, as far as necessary for their participation in the proceedings.

The United Nations General Assembly's Declaration of Basic Principles of Jus-tice for Victims of Crime and Abuse of Power of 29 November 1985 states:

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: […]

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their priva-cy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; […]

6. States should ensure that, at all stages of the proceedings when neces-sary, protection measures are put in place for the physical and psycho-logical integrity of victims and witnesses. States should ensure that victims and witnesses are not intimidated, subject to reprisals or dis-suaded by other means from complaining or pursuing their complaints or participating in the proceedings. Those measures may include par-ticular means of investigation, protection and assistance before, during or after the investigation process, in order to guarantee the se-curity and dignity of the persons concerned.

On the participation of victims, see also the Recommendation of the Council of Europe's Committee of Ministers to member states on assistance to crime victims of 14 June 2006:

6. Information

Provision of information

6.1. States should ensure that victims have access to information of relevance to their case and necessary for the protection of their interests and the ex-ercise of their rights.

6.2. This information should be provided as soon as the victim comes into con-tact with law enforcement or criminal justice agencies or with social or health care services. It should be communicated orally as well as in writing, and as far as possible in a language understood by the victim.

Content of the information

6.3. All victims should be informed of the services or organisations which can provide support and the type and, where relevant, the costs of the support.

6.4. When an offence has been reported to law enforcement or criminal justice agencies, the information provided to the victim should also include as a minimum:

i. the procedures which will follow and the victims' role in these procedures;

ii. how and in what circumstances the victim can obtain protection;

iii. how and in what circumstances the victim can obtain compensation from the offender;

iv. the availability and, where relevant, the cost of:

– legal advice,
– legal aid, or
– any other sort of advice;

v. how to apply for state compensation, if eligible;

vi. if the victim is resident in another state, any existing arrangements which will help to protect his or her interests.

Information on legal proceedings

6.5. States should ensure in an appropriate way that victims are kept informed and understand:

– the outcome of their complaint;
– relevant stages in the progress of criminal proceedings;
– the verdict of the competent court and, where relevant, the sentence. Victims should be given the opportunity to indicate that they do not wish to receive such information. […]

10. Protection

Protection of physical and psychological integrity

10.1. States should ensure, at all stages of the procedure, the protection of the victim's physical and psychological integrity. Particular protection may be necessary for victims who could be required to provide testimony.

10.2. Specific protection measures should be taken for victims at risk of intimida-tion, reprisals or re-peat victimisation.

10.3. States should take the necessary measures to ensure that, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released, a decision may be taken to notify the victims if necessary.

10.4. In so far as a state forwards on its own initiative the information referred to in paragraph 10.3, it should ensure that victims have the right to choose not to receive it, unless communication thereof is compulsory under the terms of the relevant criminal proceedings.

VIII. Prosecutions

1. States have a duty to prosecute where the outcome of an investigation warrants this. Although there is no right guaranteeing the prosecution or conviction of a particular person, prosecuting authorities must, where the facts warrant this, take the necessary steps to bring those who have committed serious human rights violations to justice.

The Court has stated in this respect:

> It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence (see, mutatis mutandis, Perez v. France [GC], no. 47287/99, §70, ECHR 2004-I) or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence (see, mutatis mutandis, Tanlı v. Turkey, no. 26129/95, §111, ECHR 2001-III). On the other hand, the national courts should not under any circumstances be prepared to allow life-en-dangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for pre-venting any appearance of tolerance of or collusion in unlawful acts (see, mutatis mutandis, Hugh Jordan, cited above, §§108 and §§136-40). The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined.[49]

49 Öneryıldız v. Turkey (no. 48939/99), judgment of 30 November 2004 [Grand Chamber], para. 96.

In reference to Article 3 of the Convention, the Court held that:

> In cases of wilful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim. This is so because, if the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the state to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental impor-tance, would be ineffective in practice (see, among many other authorities, Krastanov, cited above, §60; Çamdereli, cited above, §29; and Vladimir Romanov, cited above, §78).[50]

In its 12th General Report the CPT stated that:

> The diligent examination by judicial and other relevant authorities of all complaints of ill-treatment by law enforcement officials and, where appro-priate, the imposition of a suitable penalty will have a strong deterrent ef-fect. Conversely, if those authorities do not take effective action upon complaints referred to them, law enforcement officials minded to ill-treat persons in their custody will quickly come to believe that they can do so with impunity.[51]

See also Principle 4 of the "United Nations Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Interna-tional Human Rights Law and Serious Violations of International Humanitar-ian Law" as well as Principle 19 of the "United Nations Principles for the Protection and Promotion of Human Rights through Action to Combat Im-punity".

2. The essential requirements for an effective investigation as set out in Guidelines V and VI also apply at the prosecution stage.

In the context of Article 3 of the Convention, the Court held that the proce-dural obligation to investigate extends to the proceedings as a whole:

> According to the Court's established case-law, when an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of agents of the state, it is the duty of the national authorities to carry out "an effective official investigation" capable of establishing the facts and identifying and punishing those responsible (see Slimani v. France, no. 57671/00, §§30 and 31, ECHR 2004-IX (extracts), and Assenov and others v. Bulgaria, judgment of 28 October 1998, Reports, §102). What is more, the procedural requirements of Article 3 go beyond the preliminary investiga-tion stage when, as in this case, the investigation leads to legal action being taken before the national courts: the proceedings as a whole, including the trial stage, must meet the requirements of the prohibition enshrined in Ar-ticle 3. This means that the domestic judicial authorities must on no ac-count be prepared to let the physical or psychological suffering inflicted go unpunished. This is essential for maintaining the public's confidence in, and support for, the rule of law and for preventing any appearance of the au-thorities' tolerance of or collusion in unlawful acts (see, mutatis mutandis, Öneryıldız, cited above, §96).[52]

50 Gäfgen v. Germany (no. 22978/05), judgment of 1 June 2010 [Grand Chamber], para. 119.

51 12th General Report of the CPT's activities, covering the period 1 January to 31 Decem-ber 2001 [CPT/Inf (2002) 15].

52 Okkali v. Turkey (no. 52067/99), judgment of 17 October 2006, para. 65.

IX. Court proceedings

1. States should ensure the independence and impartiality of the judici-ary in accordance with the principle of separation of powers.

2. Safeguards should be put in place to ensure that lawyers, prosecutors and judges do not fear reprisals for exercising their functions.

3. Proceedings should be concluded within a reasonable time. States should ensure that the necessary means are at the disposal of the judi-cial and investigative authorities to this end.

4. Persons accused of having committed serious human rights violations have the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Principle 4 of the United Nations Basic Principles on the Independence of the Judiciary:

> There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the ju-di-ciary, in accordance with the law.

X. Sentences

While respecting the independence of the courts, when serious human rights violations have been proven, the imposition of a suitable penalty should follow. The sentences which are handed out should be effective, proportionate and appropriate to the offence commit-ted.

With regard to courts applying minimum sentences without justifiable reasons, the Court has found:

> The Court observes, however, that not only was concern to give extra pro-tection to the minor in question sorely lacking throughout the proceedings, but the impunity which ensued was enough to shed doubt on the ability of the judicial machinery set in motion in this case to produce a suf-ficiently deterrent effect to protect anybody at all, minor or otherwise, from breaches of the absolute prohibi-tion enshrined in Article 3.
>
> […]
>
> In view of the above, the Court considers that the impugned court decision suggests that the judges exercised their discretion more in order to mini-mise the consequences of an extremely serious unlaw-ful act than to show that such acts could in no way be tolerated (see paragraph 65 above).[53]

In its 14th General Report the CPT stated:

> 41. It is axiomatic that no matter how effective an investigation may be, it will be of little avail if the **sanctions imposed for ill-treatment** are inadequate. When ill-treatment has been proven, the imposition of a suitable penalty should follow. This will have a very strong dissuasive effect. Con-versely, the imposition of light sentences can only engender a climate of impunity.

53 Okkali v. Turkey (no. 52067/99), judgment of 17 October 2006, para. 70 and 75.

Of course, judicial authorities are independent, and hence free to fix, within the parameters set by law, the sentence in any given case. However, via those parameters, the intent of the legislator must be clear: that the crimi-nal justice system should adopt a firm attitude with regard to torture and other forms of ill-treatment. Similarly, sanctions imposed following the determination of disciplinary culpability should be commensurate to the gravity of the case.[54]

XI. Implementation of domestic court judgments

Domestic court judgments should be fully and speedily executed by the competent authorities.

Even though the right to have a judgment of a domestic court executed under Article 6 §1 of the Convention does not apply to third parties seeking criminal prosecution of a perpetrator, the Court's reasoning in the case of Hornsby v. Greece on the right of access to court relating to civil rights and ob-ligations gives some guidance on the general importance of the speedy execution of final and binding judgments:

40. […] However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. […] Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6.[55]

XII. International co-operation

International co-operation plays a significant role in combating impunity. In order to prevent and eradicate impunity, states must fulfil their obligations, notably with regard to mutual legal assistance, prosecutions and extraditions, in a manner consistent with respect for human rights, including the principle of "non-refoulement", and in good faith. To that end, states are encouraged to intensify their co-operation beyond their existing obligations.

In the context of trafficking in human beings, the Court has stated:

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.[56]

In its "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 United Nations General Assembly states:

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under inter-national law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

54 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28].

55 Hornsby v. Greece (no. 18357/91), judgment of 1 April 1998, para. 40.

56 Rantsev v. Cyprus and Russia (no. 25965/04), judgment of 7 January 2010, para. 289.

The Council of Europe has elaborated on international co-operation with regard to criminal proceedings in the "European Convention on Extradition" of 13 December 1957 and the "European Convention on Mutual Assistance in Criminal Matters" of 20 April 1959.

With regard to the principle of non-refoulement, the Court has held:

> Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule (see the case-law cited in paragraph 127 above). It must therefore reaffirm the principle stated in the Chahal judgment (cited above, §81) that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State.[57]

According to Guideline XII §2 of the Committee of Ministers' "Guidelines on human rights and the fight against terrorism",

> It is the duty of a state that has received a request for asylum to ensure that the possible return ("refoulement") of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion.

XIII. Accountability of subordinates

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

Under the heading "Individual criminal responsibility", both Article 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and Article 6 of the Statute of the International Criminal Tribunal for Rwanda state:

> 4. The fact that an accused person acted pursuant to an order of a govern-ment or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

The Rome Statute of the International Criminal Court lays down the principle of superior orders in Article 33 ("Superior orders and prescription of law"). In Assembly Resolution 1675 (2009) on "The state of human rights in Europe: the need to eradicate impunity", the Parliamentary Assembly stated that:

> 3. The Assembly further recalls that it is internationally recognised, since the Nuremberg and Tokyo trials held in the wake of the Second World War, that the excuse of simply following order or instructions from one's superiors is not valid for cases of serious human rights violation.

See also Principle 27 ("Restrictions on justifications related to due obedience, superior responsibility, and official status") of the United Nations Commission on Human Rights' "Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity" of 8 February 2005.

XIV. Restrictions and limitations

States should support, by all possible means, the investigation of serious human rights violations and the prosecution of alleged perpetrators. Legitimate restrictions and limitations on investigations and prosecutions should be restricted to the minimum necessary to achieve their aim.

57 Saadi v. Italy (no. 37201/06), judgment of 28 February 2008 [Grand Chamber], para. 138.

With regard to restrictions and limitations, the Court has pointed out:

> […] 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 and that the granting of an amnesty or pardon should not be permissible.[58]

XV. Non-judicial mechanisms

States should also consider establishing non-judicial mechanisms such as parliamentary or other public inquiries, ombudspersons, independent commissions and mediation as useful complementary procedures to the domestic judicial remedies guaranteed under the Convention.

XVI. Reparation

States should take all appropriate measures to establish accessible and ef-fective 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.

The right to reparations is elaborated in the United Nations 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, in particular Principles 15-24,[59] and the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principles 31-34.

It is further affirmed by a wide range of provisions in international treaties such as Article 2 (3), 9 (5) and 14 (6) of the International Covenant on Civil and Political Rights as well as in Articles 5 (5), 13 and 41 of the European Convention on Human Rights.

See also the European Convention on the Compensation of Victims of Violent Crime of 24 November 1983 and the Recommendation of the Council of Europe's Committee of Ministers to member states on assistance to crime victims of 14 June 2006.

58 Yaman v. Turkey (no. 32446/96), judgment of 2 November 2004, para. 55. See also the cases of Yeter v. Turkey (no. 33750/03), judgment of 13 January 2009, para. 70; and Ould Dah v. France (no. 13113/03), decision of 17 March 2009, p. 17.

59 Definitions of the terms rehabilitation, compensation, satisfaction, restitution and guarantees of nonrepetition are given in paras. 20 to 24 of these principles.