

Ministers' Deputies

Decisions

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Decisions adopted



COUNCIL OF EUROPE CONSEIL DE L'EUROPE
Committee of Ministers
Comité des Ministres

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Item 4.8

**Steering Committee for Human Rights (CDDH) –
Draft Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for
serious human rights violations**
(CM(2011)13 and CM(2011)13 add)

Decision

The Deputies adopted the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, as they appear at Appendix 5 to the present volume of Decisions, and took note of the reference texts used for the preparation of the guidelines, as they appear in document CM(2011)13 add.

Appendix 5
(Item 4.8)

Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations

*(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 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 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 efforts 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' Recommendation 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 fundamental 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 deterrent 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 serious 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 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 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 suffered harm, including physical or mental injury, emotional suffering 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 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 humanitarian law and international criminal law, nor are they intended to resolve 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 Convention to adopt criminal law provisions to effectively punish serious human rights violations through adequate penalties. These provisions 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 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 promotes 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 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 accountability 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 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 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 authorities 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 procedural safeguards.

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 detention 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.

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

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 human 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 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 violations 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 Court.

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 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.
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. It 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 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 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 competent 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 who 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 progress, follow-up and outcome of their complaints, the progress of the investigation and the prosecution, the execution of judicial decisions and all measures taken concerning 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 concerned to his or her family.
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 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 proceedings.
6. States should ensure that, at all stages of the proceedings when necessary, protection measures are put in place for the physical and psychological integrity of victims and witnesses. States should ensure that victims and witnesses are not intimidated, subject to reprisals or dissuaded by other means from complaining or pursuing their complaints or participating in the proceedings. These 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 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.
2. The essential requirements for an effective investigation as set out in guidelines 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 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.

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 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, 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.

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 receive prompt and adequate reparation for the harm suffered. This may include measures of rehabilitation, compensation, satisfaction, restitution and guarantees of non-repetition.

