



Strasbourg, 15 September 2009

DH-I (2009) 007 final

**STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)**

**COMMITTEE OF EXPERTS FOR
THE DEVELOPMENT OF HUMAN RIGHTS
(DH-DEV)**

**COMMITTEE OF EXPERTS ON IMPUNITY
(DH-I)**

Meeting Report

1st meeting
Wednesday 9 September – Friday 11 September 2009

Room G04, Agora Building
Strasbourg

Item 1: Opening of the meeting and adoption of the agenda

1. The Committee of Experts on Impunity (DH-I) held its first meeting in Strasbourg on 9-11 September 2009 with Mr Derek WALTON (United Kingdom) in the Chair. Mr Jeroen SCHOKKENBROEK, Head of the Human Rights Development Department (Directorate General of Human Rights and Legal Affairs, DG-HL), made an opening statement to welcome all participants. He underlined the importance the Council of Europe attached to addressing impunity and to this Committee's work. The list of participants can be found in Appendix I. The agenda as adopted and the references to the working documents appear in Appendix II.

Item 2: Election of a Vice-Chair

2. Mrs Brigitte KONZ (Luxembourg) was elected Vice-Chair of the Committee by acclamation.

Item 3: Discussion on the feasibility of guidelines against impunity for human rights violations

3. The discussion was structured in four parts:

- general discussion on scope and purpose of guidelines
- possible content of guidelines
- form of the guidelines
- conclusions of the Committee

General discussion on scope and purpose of guidelines

4. The Committee began its discussion by exchanging views on the scope and the purpose of the guidelines, with particular regard to the definition of the concept of impunity in the human rights context, to the human rights violations which the guidelines should deal with, to the actors to be covered and to the territorial application of the guidelines.

5. It was generally agreed that a first step would be to define the concept of impunity. No precise definition was discussed at this stage, although the definition presented on the occasion of the Warsaw seminar (see document DH-I inf(2009)001) was noted. It was considered that the definition exercise would be easier once the scope of the guidelines had been defined.

6. The scope of the guidelines was discussed. The question as to whether, and if so, how, the guidelines should deal with issues covered by international criminal law and international humanitarian law was left open for the time being. The question as to whether the Guidelines should only deal with serious human rights violations, such as those breaching Articles 2 and 3 of the Convention, or whether their scope should be larger, was also considered. While impunity for violations of Articles 2 and 3 is a particularly serious problem which should be addressed by the guidelines, most delegations were in favour of a larger scope, while some considered that a scope including only Articles 2 and 3 of the Convention would already be wide enough. This was discussed further under the heading of content of the guidelines. Other

articles of the Convention, such as Articles 4, 5, 6 and 13 were mentioned as potentially relevant in this respect, although it was underlined that the court has elaborated the scope of States' positive obligations only in respect of some rights.

7. As regarded the actors to be covered, it was decided that the guidelines should concern primarily the accountability of states and concentrate on states' own actions and those of their agents. The positive obligations on states in respect of actions of non-state actors could also be included. There was no conclusion on this point or on the inclusion of international actors.

8. The territorial application of the guidelines was discussed, and notably whether they should apply to acts within the territory of the state alone or also to human rights violations committed abroad. It was suggested the scope should be that of Article 1 of the Convention, but no conclusion was drawn at this stage. It was noted that the case-law of the Court on Article 1 was evolving.

9. The issue was raised as to whether the guidelines should be limited to identifying standards drawn from the case-law of the Court and those of the CPT or whether they should also include instruments of other Council of Europe bodies, international treaties, or "soft law" from outside the Council of Europe. It was concluded that where possible, standards should be drawn from the Court's case-law and the CPT's work, and that the Commissioner's work and the recommendations and decisions of the Committee of Ministers should also be taken into account. There would be considerable added value in clarifying these standards and bringing them together in one place. Some delegations thought that standards from other international bodies should only be included where they were binding, but others thought that "soft law" standards from outside the Council of Europe could also be referred to (as they had been in the drafting of the Guidelines on Human Rights and the Fight against Terrorism). The Committee identified two possible approaches for dealing with cases where no standards could be drawn and where gaps in international human rights protection could be detected: the Committee could simply identify the gaps and leave it up to higher bodies to decide how to fill them (by means of a Committee of Ministers recommendation, for example); or, the Committee could assess whether the guidelines could provide general guidance, by means of practical steps for states, or of issues they should keep in mind, without creating new standards. No final conclusion was reached on this issue, as the Committee felt that it could be considered in more detail as the drafting of specific guidelines progressed.

Possible content of guidelines

10. The Committee drew up a list of possible items to be included in the guidelines (see Appendix III), without making a final decision as to whether any particular item on the list should be included in the guidelines.

11. The Committee concluded that this list of potential issues was a good starting point for the content of the guidelines, with the principles concerning investigation and prosecution forming the main core. The importance of addressing the issue of reparation was also stressed. It was however recalled that this list should not be considered definitive, that some principles may be better placed in the preamble (for example, international cooperation), and others may ultimately be set aside altogether.

12. The Committee also discussed a possible structure for the guidelines. It was agreed that there should be a preamble, followed by a section on definition and scope, then a third, substantive section consisting of a first principle on the need to combat impunity and four separate sections:

- i) preventing impunity
- ii) determining the facts, responsibility and consequences of violations
- iii) reparation
- iv) other

13. During the discussion on the various possible items, the Committee provided a first clarification of its views on some of them.

14. For instance, it was noted that restrictions, immunities, state secrets and amnesties were issues which might cause problems in respect of impunity, but which were not in principle objectionable per se. No final decision was made.

15. The issue of the implementation of ECHR judgments was thought to raise issues relevant both to preventing impunity (general measures) and reparation (individual measures). The final placement of this item was yet to be decided. Implementation of domestic court decisions was thought to raise distinct issues and was placed in the section entitled “Determining facts, responsibility and consequences of violations”.

16. The subsection on conflict/emergency situations was considered to encompass international criminal law and international humanitarian law issues.

17. One of the issues raised in the discussion regarding victims was the difficulty experienced by ill-treated persons in obtaining access to forensic expertise.

18. A delegation suggested that the item “international cooperation to prevent impunity” might be dealt with in the preamble; and that the question of universal jurisdiction might also be explored under this heading. The issue of extradition (including extradition of nationals) was raised as a possible part of this section, but was considered by some delegations to be too complex to include in the guidelines. More generally, the need for international cooperation to comply with human rights standards, in ensuring that perpetrators are not subjected to torture, the death penalty or a flagrant denial of justice, for example, was stressed.

19. On the subject of non-judicial complaint mechanisms, it was stressed by several delegations that these should be considered a complement to other procedures; however, it was also pointed out that in some cases, such mechanisms replaced judicial proceedings, so could not always be said to be only complementary. The discussion was left open for the time being.

20. The importance of ensuring that in the fight against impunity the fundamental rights of persons accused of an offence are respected was stressed. It was suggested that preambular paragraph d) of the Guidelines on Human Rights and the Fight

against Terrorism could serve as inspiration for a preambular paragraph of the impunity guidelines.

The form of the guidelines

21. The Committee exchanged views as to the form of the guidelines, in particular in the light of the experience of some members in the drafting of other Council of Europe guidelines.

22. It was generally agreed that the guidelines should be concise, although some of them may merit more detail, depending on the subject-matter. However, most detail should be included in the explanatory memorandum, whose importance was particularly stressed. The guidelines should as far as possible be user-friendly and accessible to those who are not familiar with the subject matter as well as those who are not lawyers. The Council of Europe Guidelines on Human Rights and the Fight against Terrorism were considered a good model as regards form.

Conclusions of the Committee

23. It was unanimously agreed that the drafting of guidelines was indeed feasible.

24. As to what type of guidelines the Committee had in mind, two options emerged:

- i) a broad approach covering a wide range of issues to which questions of impunity were relevant. Through this instrument, the Council of Europe would also make its voice heard on this issue, sending a message to the wider world;
- ii) a more narrow approach which homed in on the most serious violations of the European Convention of Human Rights, focusing in particular on areas identified in the case-law of the Court and allowing for more detailed consideration of particular issues.

25. A majority of delegations were in favour of the broader approach, with some states expressing a preference for the narrower approach. The main basis of the guidelines would in any case be the case-law of the Court and CPT's standards, but - as discussed when examining the scope and the purpose of the guidelines - other norms could also be of relevance according to the specific issue. Furthermore, it was stressed that the choice of a broader approach would not necessarily mean that all issues on the list drawn up by the Committee would eventually appear in the body of the guidelines.

Item 4: Other business

26. The Committee discussed its working methods under this item. It was underlined that the results of this first meeting would be considered briefly by the DH-DEV and then by the CDDH, which would decide whether or not to instruct the DH-I to draft guidelines and may indicate their preference as to whether to adopt the broad or narrow approach. In case of agreement by the CDDH, the second meeting could take place early next year. 3-5 March 2010 were identified as possible dates.

27. Several suggestions for the preparation of the second meeting were discussed, such as the thematic reorganisation of the information provided in the existing documents, or whether to commission the first drafting of the guidelines from an external expert or from a restricted working group. It was agreed that the Secretariat could prepare the first draft of elements for the guidelines by 20 January 2010, then circulate these for comments by delegations (to be received by 17 February 2010) and circulate a compilation before the meeting.

28. The Committee welcomed the participation in its meeting of the Secretariat of the Parliamentary Assembly, the Office of the Commissioner for Human Rights, the Secretariat of the CPT and civil society. As regards additional participants for future meetings, the importance of having someone present from the Registry of the Court, and from the Department for the Execution of Judgments of the Court was stressed. The Secretariat underlined that the terms of reference of the Committee already allowed for their presence. It was agreed that the second meeting would be devoted to a first examination of the draft guidelines by the Committee, and that Professor Theo van Boven, former UN Special Rapporteur on Torture and former registrar of the ICTY, should be invited to attend the third meeting of the Committee, as his expertise in the field of impunity and his experience in participating in the drafting of the United Nations principles on the topic would be extremely valuable for the finalisation of the draft.

Appendix I

LIST OF PARTICIPANTS

MEMBERS / MEMBRES

AZERBAIJAN / AZERBAIDJAN

Kamran BALAYEV, Deputy Director of International Cooperation Department,
Ministry of Justice, Baku

BELGIUM / BELGIQUE

Mme Stéphanie GRISARD, Attachée, Service Public Fédéral Justice, Direction
générale de la Législation et des Libertés et Droits fondamentaux, Service des droits
de l'Homme, Bruxelles

FINLAND / FINLANDE

Ms. Päivi ROTOLA-PUKKILA, Legal Officer, Legal Department, Unit for Human
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FRANCE

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affaires juridiques, Paris

GERMANY / ALLEMAGNE

Excused/excusé

ITALY / ITALIE

M. Nicola LETTIERI, Attaché juridique, Co-Agent Adjoint du gouvernement devant
la CEDH, Représentation Permanente de l'Italie auprès du Conseil de l'Europe,
Strasbourg

LATVIA / LETTONIE

Excused/excusé

LIECHTENSTEIN

Excused/excusé

LUXEMBOURG

Mme Brigitte KONZ, Vice-Présidente du tribunal d'arrondissement de et à
Luxembourg, ancien bâtiment, rue du Palais de Justice, Luxembourg

MOLDOVA

Mme Rodica SECRIERU, Conseillère du Ministre de la Justice de la République de
Moldova, Ministère de la Justice, Chisinau

POLAND / POLOGNE

Mr Michał BALCERZAK, Assistant Professor, Human Rights Department, faculty of
law and Administration, Nicolaus Copernicus University, Torun

Mrs. Marta KACZMARSKA, Legal Advisor, Office of the Plenipotentiary for the proceedings before the International Organs of the protection of Human Rights, Ministry of Foreign Affairs

Mr Jakub WOŁASIEWICZ, Agent of the Government, Office of the Plenipotentiary for the proceedings before the International Organs of the protection of Human Rights, Ministry of Foreign Affairs

ROMANIA / ROUMANIE

Mr Costin Horia ROGOVEANU, Legal Counselor, Permanent Representation of Romania to the Council of Europe, Strasbourg

RUSSIAN FEDERATION / FEDERATION DE RUSSIE

Ms Tatiana KLEIMENOVA, Department for International Humanitarian Cooperation and Human Rights, Ministry of Foreign Affairs, Moscow

SERBIA / SERBIE

Mr Slavoljub CARIC, Government Agent, Ministry for Human and Minority Rights, Office of the Agent before the ECHR, Beograd

SLOVAKIA / SLOVAQUIE

Mrs Lydia TOBIAŠOVA, (JUDr., PhD.), Department of Criminal Law, Comenius University, Bratislava

SWITZERLAND / SUISSE

M. Nikolas STÜRCHLER, Swiss Federal Department of Foreign Affairs FDFA, Directorate of International Law DIL, Section for Human Rights and Humanitarian Law, Berne

TURKEY / TURQUIE

Mr Bilal ÇALIŞKAN, Deputy General Director, Ministry of Justice of Turkey, Ankara

UNITED KINGDOM / ROYAUME-UNI

Mr. Derek WALTON, [*Chair of the DH-I*], Legal Counsellor, Foreign and Commonwealth Office, London

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PARTICIPANTS

Parliamentary Assembly / Assemblée Parlementaire

Mr Andrew DRZEMCZEWSKI, Head of the Secretariat / Chef du Secrétariat, Committee on Legal Affairs & Human Rights / Commission des questions juridiques & des droits de l'homme

Council of Europe Commissioner for Human Rights / Commissaire aux Droits de l'Homme du Conseil de l'Europe

Ms Irène KITSOU-MILONAS, Adviser

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

Trevor STEVENS, Executive Secretary of the CPT, Council of Europe, Strasbourg

Fabrice KELLENS, Deputy Executive Secretary of the CPT, Council of Europe, Strasbourg

Saint Siège / Holy See

Excused/excusé

Mexico

Excused/excusé

BELARUS/BÉLARUS

Excused/excusé

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Mrs Jill HEINE, Legal Adviser, International Law and Organizations Programme

International Federation of Human Rights (FIDH)

Mme Clémence BECTARTE, Avocat à la Cour / Attorney at Law, Coordination du Groupe d'action judiciaire de la FIDH (Fédération internationale des ligues des droits de l'Homme), Coordination of the FIDH (International Federation for Human Rights) Legal Action Group, SCP Bouyeure, Baudouin, Kalantarian, Daumas, Paris

International Commission of Jurists (ICJ) / Commission internationale de juristes (CIJ)

Ms Róisín PILLAY, Senior Legal Adviser, Europe Programme, International Commission of Jurists, Geneva, Switzerland

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SECRETARIAT

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Mr Matthias KLOTH, Administrator, Human Rights Law and Policy Division / Division du droit et de la politique des droits de l'Homme

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Appendix II

Agenda

Item 1: Opening of the meeting and adoption of the agenda

Item 2: Election of a Vice-Chair

Item 3: Discussion on the feasibility of guidelines against impunity for human rights violations

Documents

Information document on Council of Europe action to combat impunity	DH-I(2009)001rev.
Selection of relevant Council of Europe texts concerning impunity	DH-I(2009)002
Compendium of the case-law of the European Court of Human Rights concerning the positive obligation of states to carry out an investigation into cases of violations of human rights and bring the perpetrators to justice	DH-I(2009)003
Overview of the case-law of other international bodies concerning impunity	DH-I(2009)004
Overview of action of other international bodies to combat impunity	DH-I(2009)005
Excerpts of reports of CDDH and DH-DEV concerning DH-I	DH-I(2009)006
Written Contribution by the Office of the Commissioner for Human Rights	CommDH_2009_32
Terms of reference of the DH-I	DH-I(2009)Misc 001

Item 4: Other business

Appendix III

Possible content for guidelines

Preamble

Definition and scope

Substance

Need to fight impunity

1 Preventing impunity

- Measures at the institutional level to prevent impunity
 - Institutional culture (role of silence, negative peer pressure; training)
 - Transparency
 - Anti-corruption policy
 - Non-judicial mechanisms (e.g. institutional reform, reparation projects, national prevention mechanisms (OPCAT))
 - Awareness-raising
 - Separation of powers
- Legislative measures to fill gaps

2 Determining the facts, responsibility and consequences of violations

- Investigation
 - Duty to investigate
 - Criteria for effective investigation
- Prosecution
 - Instigation of prosecutions and/or other proceedings
 - Command responsibility
- Limitation / restrictions on investigations and/or prosecutions
 - Immunities
 - Amnesties (laws, truth commissions, etc.)
 - Time bars and limitations
 - Defences (e.g. cultural issues, chain of command, theory of political acts)
 - State secrets
- Court procedures
 - Access
 - Exceptional jurisdiction / military courts
 - Independence of the judiciary / fair trial procedures
- For those found guilty, sentences commensurate to the offence committed
- Implementation of domestic court judgments

3 Reparation

- Victims (direct and indirect)
- Compensation
- Victims' interest in seeing justice done
- Access to information (and outcomes of investigations)

- Access to effective remedies

4 Other

- Non-judicial complaint procedures (e.g. Ombudsman, parliamentary inquiry)
- Implementation of ECHR judgments (general and individual measures)
- Conflict / emergency situations
 - Derogation
 - Humanitarian law
- International cooperation to prevent impunity
- Temporal issues