



Strasbourg, 31 May 2010

DH-I(2010)07

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

COMMITTEE OF EXPERTS ON IMPUNITY
(DH-I)

**Report of the 3rd meeting of
the Committee of Experts on Impunity (DH-I)
(DH-I)**

3rd meeting
Strasbourg, Wednesday 26 May (9.30am) – Friday 28 May 2010 (1pm)

Agora-Building, Room G03
Council of Europe

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

1. The Committee of Experts on Impunity (DH-I) held its third meeting in Strasbourg on 26-28 May 2010 with Mr Derek WALTON (United Kingdom) in the Chair. 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. The Chair made an opening statement to welcome all participants.

Item 2: Draft guidelines of the Committee of Ministers of the Council of Europe on impunity

2. The Committee agreed to discuss the revised draft Guidelines prepared by the Secretariat section by section and paragraph by paragraph, considering the relevant comments provided by experts in writing prior to the meeting as well as those provided by DH-DEV (see the report of its 40th meeting of 26-28 April 2010, DH-DEV (2010)06, paras. 4-10). The Committee made a number of changes to the text and identified a number of issues on which further discussion was needed.

3. The Committee decided to change the title of the Guidelines to “Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations”. One expert argued against the inclusion in the Preamble of a reference to the relevant UN principles on impunity (Preamble, [h]) and reparation of victims (Preamble, [i]).

4. As regards Guideline II. on the “Scope of the Guidelines”, the Committee considered several options. The first option consisted of defining the scope with regard to the obligation of States under the Convention, in the light of the Court’s case-law, to enact criminal law provisions (which mirrors the approach taken in the UN Principles on Impunity). A second possibility consisted in defining the scope not with regard to the duty to criminalise, but to focus on States’ duty to investigate under the Convention. The third approach discussed was to define the scope through an enumerative list of Convention articles, as originally envisaged in the first draft of the Guidelines. The Committee eventually chose the first option, combined with a list of relevant Convention articles. The Committee then discussed whether that list should be exhaustive or merely illustrative. Opinion in the Committee was evenly divided on this point. However, in light of the guidance provided by CDDH (see the report of the 69th meeting of 24-27 November 2009, CDDH (2009)019, paras. 24-28) the Committee decided that the outcome of the second reading of this part of Guideline II should be an exhaustive list, which should contain Articles 2, 3 and 4 of the Convention with certain relevant aspects of Articles 5 (1) and 8 of the Convention, followed by a clarification that not all violations of these articles necessarily required a duty to enact criminal law provisions on States. As that approach would in one respect go beyond the original scope indicated by the CDDH (i.e. by including Article 8 of the Convention), the Committee decided to ask the CDDH for further guidance on the feasibility of this approach. The reason for the proposal to include certain relevant aspects of Article 8 is that the Court’s case law identifies a number of specific positive obligations that are relevant to the duty to criminalise referred to in

Guideline II¹ and that the omission of these aspects of Article 8 might be considered to leave the text of Guideline incomplete and out of step with the Court's case law. The Committee also considered a suggestion that specific examples of circumstances in which impunity may arise (such as extrajudicial killings, enforced disappearances or human trafficking) should also be listed in this Guideline. It was decided that a list of illustrative examples would appear in the Reference texts.

5. A number of other issues in Guideline II. were left in brackets in the revised draft text in order to be considered at the next meeting. This concerned notably the definition of "victim", in particular whether it has to be established that a person has suffered harm from a human rights violation in order to be considered a "victim". Views in the Committee were equally divided on this issue. One expert also proposed to have a reference to "communities" as a possible category of victims in this Guideline.

6. The Committee decided to merge and rearrange former Guidelines III. (on practical measures to prevent impunity) and IV. (on legislative measures to prevent impunity) into one single Guideline ("General measures on the prevention of impunity"). There was discussion whether an additional paragraph concerning the recruitment and removal from office of State agents responsible for serious human rights violations should be added to that Guideline. While the majority of experts preferred to have a general statement on this issue, there was not sufficient time to agree on the wording. One expert proposed to have the following paragraph included: *"When recruiting officials, States should also ensure that present and future State agents have no record of bearing responsibility for serious human rights violations or of furthering or tolerating impunity. Individuals who, by the competent authority, have been found bearing responsibility for serious human rights violations or of furthering or tolerating impunity should be removed from office."*

7. In Guideline VI. on "The duty to investigate", in order to be consistent with the approach adopted in respect of Guideline II (see para. 4 above) the Committee decided in principle to include in the list of Convention articles (from which a duty to conduct an effective investigation arises in the light of the Court's case-law) a reference to certain serious violations of Article 8 of the Convention. It considered this as appropriate in view of the cases of *M.C. v. Bulgaria* (no. 39272/98, judgment of 4 December 2003, para. 153; with regard to effective investigation of rape) and *Mentes and Others v. Turkey* (no. 23186/94, judgment of 28 November 1997, para. 89; with regard to effective investigation of the deliberate destruction of homes and possessions). The Committee however decided to seek further guidance from the CDDH on such an inclusion. The Secretariat was instructed to produce a draft reflecting the existing case law for consideration at the next meeting, depending on the guidance received from CDDH .

8. The Committee slightly redrafted Guideline IX. on the "criteria for an effective investigation". One expert had some reservations on the second sentence on the bullet-

¹ See, for example, the cases of *X and Y v. the Netherlands* (no. 8978/80, judgment of 26 March 1985, para. 27) and *Stubbings and Others v. the United Kingdom* (nos. 22083/93 and 22095/93, judgment of 22 October 1996, para. 64) and the case of *M.C. v. Bulgaria* (no. 39272/98, judgment of 4 December 2003, para. 153) with regard to the obligation to enact criminal law provisions to effectively punish sexual abuse of children as well as rape.

point regarding “public scrutiny”, and in particular the degree of the latter. Another expert opposed to the inclusion of the sentence “In particular serious cases, a public inquiry might be appropriate” in the same bullet-point.

9. With regard to Guideline X. on the “involvement of victims in the investigation”, two main issues arose during the course of the meeting. Firstly, paragraph 5 on obstacles to unduly impede victims’ access to the case-file was reformulated but not yet fully agreed, even though a majority of experts supported the text. Secondly, concerning legal assistance, one expert proposed to include a reference to national law in paragraph 6 which did however not find support.

10. The Committee drafted a new formulation for Guideline XV. on “international co-operation”. There was discussion within the Committee on the need to include a second paragraph on the limits of international co-operation with regard to extradition of alleged perpetrators which might face the risk of ill-treatment, flagrant denial of justice or the death penalty upon arrival in their country of destination.

11. A majority of experts in the Committee was in favour of retaining Guideline XVI. on “command responsibility”, given the fact that this principle is incorporated in the legal systems of all Council of Europe Member States. Some experts however preferred to have that Guideline deleted from the text, arguing that “command responsibility” was mainly a concept of international criminal law, an area that has been expressly excluded from the scope of the text in accordance with Guideline II 6.

12. As regards Guideline XVII. on “Restrictions and limitations”, the Committee considered whether to add an additional sentence dealing with specific restrictions such as amnesties, pardons and time-bars. While the majority preferred not to make reference to specific restrictions, there was some support within the Committee for an additional sentence, especially in order to be in line existing case-law of the Court, particularly regarding amnesties.²

13. The Committee adopted new language on Guideline XVIII. on “non-judicial mechanisms”. One expert proposed to have this Guideline deleted, as not all legal systems of Council of Europe Member States provide for such mechanisms.

14. The Committee completed the second reading of the draft Guidelines. In the text representing the agreed outcome of the second reading, those parts on which there was no consensus are indicated by square brackets. The Chair thanked the Committee for its constructive work.

Item 3: Draft Reference texts for the Guidelines

15. The Committee decided that the priority of the meeting was to complete the second reading of the draft Guidelines, in particular as the latter define the content of the

² See, for example, the case of *Yaman v. Turkey*, no. 32446/96, judgment of 2 November 2004, para. 55: “... where a State agent has been charged with crimes involving torture or ill-treatment, it is of utmost importance for the purpose 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.”

Reference-texts to be prepared by the Secretariat. For that reason, it asked the Secretariat to prepare a revised version of the Reference texts which takes into account the amendments made by the Committee on the text of the Guidelines. The revised draft version of the Reference texts should be circulated shortly, and delegations should send their comments on the document by 20 August 2010.

Item 4: Other business

16. The Secretariat was asked to circulate the draft meeting report together with the latest version of the Guidelines by 4 June 2010.

17. The Committee took note of the fact that the Chair will present the text of the draft Guidelines to the CDDH at its next meeting, on 15-18 June 2010, and seek its guidance on the outstanding issues identified by the Committee.

18. It was agreed that the fourth meeting of the DH-I would take place on 22-24 September 2010. On that occasion, the DH-I would finalise the text of the Guidelines, in the light of instructions to be given by the CDDH, as well as its work on the Reference texts.

Appendix I

**LIST OF PARTICIPANTS
26-28 mai 2010**

MEMBERS / MEMBRES

AUSTRIA / AUTRICHE

Excused/excisé

AZERBAIJAN / AZERBAIDJAN

Excused/excisé

BELGIUM / BELGIQUE

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

BULGARIE/BULGARIA

Ms Emanuela TOMOVA, Second Secretary in the Human Rights Directorate in the Ministry of Foreign Affairs, Sofia

FINLAND / FINLANDE

Mme Marjatta HIEKKA, Legal Consellor, Unit for Human Rights Courts and Conventions, Ministry for Foreign Affairs, Helsinki

FRANCE

M. Benoît COMBOURIEU, sous-direction des droits de l'Homme, Direction des affaires juridiques, Ministère des affaires étrangères, Paris

LUXEMBOURG

Mme Brigitte KONZ, Vice-Présidente du tribunal d'arrondissement de Luxembourg, Cité judiciaire, 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, Nicholas Copernicus University, Faculty of Law and Administration, Torun

RUSSIAN FEDERATION / FÉDÉRATION DE RUSSIE

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

Ms Elena ANTONOVICH, Ministry of Internal 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 TOBIASOVA, (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

Ms Tessa WEARING, Senior Policy Advisor, EU Criminal Justice & Rights Branch, International Directorate, Ministry of Justice, London

PARTICIPANTS

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

Mr Lauri SIVONEN, Thematic coordinator/Coordinateur thématique

Saint Siège / Holy See

Excused/excuseé

Amnesty International

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

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

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

SECRETARIAT

Directorate General of Human Rights and Legal Affairs

Direction générale des droits de l'Homme et des affaires juridiques

Council of Europe/Conseil de l'Europe, F-67075 STRASBOURG CEDEX

Mr Jeroen SCHOKKENBROEK, Head of Department / Chef de Service, Human Rights Development Department / Service du développement des droits de l'Homme

Mr Daniele CANGEMI, Head of Human Rights Law and Policy Division / Chef de la Division du droit et de la politique des droits de l'Homme, Secretary of the DH-I / Secrétaire du DH-I

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

Mme Virginie FLORES, Programme Officer / Officier de programmes, Human Rights Law and Policy Division / Division du droit et de la politique des droits de l'Homme

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Mr Stuart MAC LEAN, Study visitor/Visiteur d'études, Human Rights Law and Policy Division /
Division du droit et de la politique des droits de l'Homme

Mme Frédérique BONIFAIX, Assistant / Assistante, Human Rights Law and Policy Division /
Division du droit et de la politique des droits de l'Homme

Interpreters / Interprètes:

Mme Bettina LUDEWIG-QUAINE

M. Philippe QUAINÉ

M. Christopher TYCZKA

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Appendix II

AGENDA 26-28 May 2010

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

Item 2: Draft guidelines of the Committee of Ministers of the Council of Europe on impunity

Working documents

Draft guidelines of the Committee of Ministers of the Council of Europe on impunity as revised following the 2 nd DH-I meeting	DH-I (2010)05
Comments from Belgium	Belgium
Comments from Denmark	Denmark
Comments from Finland	Finland
Comments from Germany	Germany
Comments from Serbia	Serbia
Comments from Sweden	Sweden
Comments from Switzerland	Switzerland
Comments from Turkey	Turkey
Comments from United-Kingdom	UK
Comments from the ICJ and Amnesty International	ICJ & AI
Terms of reference and decisions of the Committee of Ministers	DH-I (2010)03
Report of the 2 nd meeting of the Committee of Experts on Impunity (DH-I) (3-5 March 2010)	DH-I (2010)04
Report of the 40 th meeting of the Committee of experts for the Development of Human Rights (DH-DEV) (26-28 April 2010)	DH-DEV(2010)06

Item 3: Draft texts of reference for the guidelines

DH-I(2010)07

Working documents

Draft texts of reference for the guidelines

DH-I (2010)06

Item 4: Other business

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