

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

**DRAFTING GROUP ON THE ERADICATION OF IMPUNITY FOR  
SERIOUS HUMAN RIGHTS VIOLATIONS  
(CDDH-ELI)**

Summary of the exchange of views  
held with external experts at the 1st CDDH-ELI meeting (15–17 May 2024)

## 1. Introduction

The CDDH-ELI agreed to hold an exchange of views on issues related to the 2011 [Guidelines on eradicating impunity for serious human rights violations](#) and recent development in the case-law of the European Court of Human Rights, as well as recent trends in standards and practice.

At its 1<sup>st</sup> meeting (15–17 May 2024), the CDDH-ELI held the exchange of views with:

- Mykola GNATOVSKYY, Judge, European Court of Human Rights.
- Emmanuel DECAUX, President of the René Cassin Foundation, former President of the Committee on Enforced Disappearances.
- Kerli VESKI, Vice-Chair of the Committee of Legal Advisers on Public International Law (CAHDI).
- Matt CANNOCK, Director, Centre for International Justice, Amnesty International.
- Alexandra SYTNYK, Lawyer, European Court of Human Rights.

## 2. Summary of discussions

### Key points made by Mykola Gnatovskyy

- The current stage of human rights protection in Europe is fragile, and the system's foundations are shaken and under serious threat. The human rights protection system of the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) can no longer be viewed as an autonomous one. It must be connected to broader international law, including international humanitarian law, international criminal, and the rules on the prohibition of the use of force.
- The ECtHR faces increasingly systemic and severe human rights violations, often in the context of armed conflict and mass violence. The Court must allocate resources to address inter-State cases that typically involve mass violence and armed conflict. Despite its historical reticence to do so, it has had to address issues related to international humanitarian law and will have to continue doing so. The case of *Hassan v. the United Kingdom* was cited as an example where the Court integrated international humanitarian law into questions of liberty and security. There is a need for the Court to consider integrating international humanitarian law with respect to other rights in future cases.
- The practical added value of the 2011 Guidelines as they stand is not necessarily evident. In that light, simply adding words like "massive" or "grave" to the Guidelines would not in itself be sufficient. Solutions should be tailored to the specific features of armed conflict and mass violence, raising the question of whether this falls within the scope of the Council of Europe's work. The Guidelines would be an appropriate instrument to address these specific features, on the condition that the Convention is not viewed in a vacuum but interpreted and applied in conjunction with relevant norms of public international law governing armed conflict and the legality of the use of force.
- The subsidiary nature of the international human rights system, similar to the international criminal law system where international mechanisms are complementary to domestic ones, is also a key consideration in this discussion. Exploring such analogies between the two systems is, therefore, imperative. State obligations, the duty to investigate and prosecute, and the concept of universal jurisdiction include topics that merit further examination. Universal jurisdiction could be a way forward to overcome challenges faced by territorial

states regarding international crimes and increase chances for their effective investigation and prosecution.

### **Key points made by Emmanuel Decaux**

- The geopolitical context in 2011 limited the adoption of a particularly ambitious text, unlike developments at the UN level or in Latin America. For instance, the mandate at the time included references to positive obligations of a criminal nature but ignored obligations stemming from international law, including IHL and ICL. The cautious approach taken was excessive and insufficient for effectively protecting victims. Crucially, there is a distinction between gross and grave violations from ICL language, which was excluded from the guidelines.
- Significant developments at the UN level since the adoption of the 2011 Guidelines include the establishment of a Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence in 2011, focusing on the right to truth, reparation, and non-repetition. In addition, the International Law Commission (ILC), under Sean Murphy, established a set of Draft articles for the Prevention and Punishment of Crimes Against Humanity, addressing a gap in the international legal system. This draft is currently before the Sixth Committee of the General Assembly. Finally, a project developed by the Netherlands and Belgium on crime prevention, signed recently at the multilateral level, is noteworthy for its potential impacts on universal jurisdiction.
- The current structure of the Guidelines is impractical as a matter of implementation. Reparation is inadequately covered, with only five lines addressing it, and there is a neglect of immunities and amnesties. The Guidelines omit mention of social and environmental rights. Crucially, impunity concerns all human rights, reflecting the indivisibility of human rights. Article 3 guarantees also relate to the victim's relatives, emphasizing the concept of dignity and decent human conditions in detention. The effective investigation aspect in the Guidelines as they stand is rather vague and merits additional attention.
- Non-judicial mechanisms are mentioned in the Guidelines, but victim participation is included at an individual level without addressing the systemic nature of violations. Effective measures to establish mechanisms for combating impunity should consider Article 24 of the International Convention for the Protection of all Persons from Enforced Disappearance.
- Finally, the main shortcoming of the 2011 Guidelines is the lack of reference to certain human rights violations, necessitating adaptation and flexibility. It is crucial to adopt a global approach in cases of enforced disappearances and similar issues. In that light, there is a pressing need to improve the 2011 Guidelines and ensure follow-up work, taking into account the new context and case law. The Council of Europe should continue its efforts to protect the rule of law based on these updates.

### **Key points made by Kerli Veski**

- CAHDI's main task is to provide legal opinions based on PIL, serving as a laboratory of ideas essential for the development of PIL. In that light, two main issues were addressed:
  - Whether the revised Guidelines should widen their scope from the 2011 Guidelines to explicitly include international crimes.
  - The state of personal and functional immunities under current international law and their significance for the Guidelines.

- The Guidelines should address and include international crimes. Excluding them would be an inexplicable gap, leaving the work of the Drafting Group incomplete. It is particularly timely and necessary to include the duty of States to prevent, investigate, and prosecute international crimes, especially in the light of the war in Ukraine.
- There is an intrinsic link between international criminal law and international human rights law: serious human rights violations may constitute crimes against humanity under international criminal law, and, vice versa, the omission by the state to hold perpetrators of international crimes accountable within its jurisdiction can seriously violate the human rights of the victim of the international crime. While the two fields of law differ as to their vantage point on the issue, there is considerable overlap as to their substance. There is an identifiable trend towards addressing systemic and widespread patterns of serious human rights violations at the international level.
- The Council of Europe is well-suited to contribute to the fight against impunity, including in the context of international crimes, and has made significant contributions in facilitating international cooperation in criminal matters, in particular through a number of international conventions in this field. The Organisation has engaged in active efforts towards accountability for Ukraine, notably through the establishment of the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine and the participation in the discussions around the establishment of a Special Tribunal for the crime of aggression of the Russian Federation against Ukraine.
- There is an obligation for States to extradite or prosecute, and States have expressed willingness to cooperate among themselves and with international tribunals and it would be also useful or even necessary for the revised Guidelines to include the principle of *aut dedere aut judicare* (extradite or prosecute).
- Regarding immunities, the state of international law is under constant evolution, as evidenced by the case law of the International Criminal Court, the Special Court for Sierra Leone, and the work on the International Law Commission. The debate on immunities before international tribunals remains open-ended, and it is not considered an imminent concern for the Guidelines, often being left to judges. The question of immunities should, however, be addressed from a national perspective within the Guidelines, while encouraging enhanced international cooperation for the investigation and prosecution of international crimes. Current international law does not foresee exceptions to personal immunities for members of the Troika while in office when it comes to foreign prosecutions. The Draft Articles of the International Law Commission envisage exceptions to immunity only with respect to functional immunity for crimes such as genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearances. There is no consensus among states on the exclusion of the crime of aggression from these exceptions.

### **Key points made by Matt Cannock**

- Amnesty International and the International Commission of Jurists participated as observers during the drafting of the 2011 Guidelines and called for a greater consideration of relevant public international law. There is now a renewed call for the CDDH to consider public international law and adopt a more ambitious approach. While the current Guidelines serve as a good benchmark, they need revisiting to reflect recent developments. There is an urge to include strengthened language to ensure domestic legislation effectively combats impunity. Civil society, victims, and communities, including national non-governmental

organisations, are crucial interlocutors. The document should be victim-centered, ensuring truth and reparation are pursued.

- Effective accountability requires cooperation and complementarity, including sharing information and evidence. Signatories of the Rome Statute need to undertake national investigations, and to combat the common lack of willingness. In addition, some progress is needed regarding the obligation of states to criminalise and domesticate international crimes.
- The CDDH should explore the issue of complementarity and cooperation in depth. The Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes, and Other International Crimes represents a significant advancement and should be considered in the CDDH's work. This includes the general obligation to extradite or prosecute and pursue reparations.
- Victims play a crucial role in investigations and need support, protection, and empowerment. Amnesty International continues to call on States to ensure victims' rights are realized, including the right to legal representation, participation in legal proceedings, and reparation. Full realisation of these rights is still a long way off, and the Guidelines could assist in pursuing this objective.
- There are double standards in international justice, when all investigations require the same standard of treatment. There is a need to ensure that all victims of international crimes have equal access to international justice and redress. These issues were previously overlooked and should be included in the current Guidelines.
- The COE's response to the Ukraine war must include strengthening the fight against impunity. The establishment of a Special Tribunal should be coherent with broader efforts to eradicate impunity effectively. Recent developments, such as arrest warrants against President Putin for grave breaches of the Geneva Conventions 1949, highlight that these obligations apply to all states, not only those that have ratified the Rome Statute as they arise from international humanitarian law and customary law. States should either bring these individuals before their own courts, hand them over to another signatory party, or surrender them to the International Criminal Court.

### Key points made by Alexandra Sytnyk

- The case law of the ECtHR on which the 2011 Guidelines are based is not entirely obsolete, but certain aspects have evolved. Judgments not reversed remain good law, yet referencing more recent cases is common practice. Most guidelines remain usable and are still employed by the Court, such as the criteria for effective investigation, which have not changed.
- While many principles have not been reversed, some aspects could benefit from revision to better reflect current case law. For instance, the guidelines on the right to respect for private and family life lack clarity on whether the State should initiate investigations on its own initiative solely in cases of an Article 8 interference. It should be clearer that the State needs to initiate investigations under more articles.
- With respect to the prohibition of slavery and forced labour (Article 4 ECHR) the **C.N. and V. v. France** judgment centred on children forced to work as unpaid domestic help. The judgment made clear the distinction between "forced labour" and work which could reasonably be expected in the form of help from a family member or person sharing accommodation. In the **J. and Others v. Austria** judgment, the Court examined the scope

of the procedural obligation (if any) to investigate alleged human-trafficking offences committed outside the territory of a Contracting Party.

- Regarding the right to life (Article 2 ECHR), in the case of **Aydan v. Turkey**, the Strasbourg Court indicated that the granting of a discharge to a gendarme who had made unjustified use of his firearm, when for the purposes of Article 2 § 2 of the Convention such use of lethal force had not been “absolutely necessary”, was incompatible with the requirements of the Convention. The **Turluyeva v. Russia** judgment was the first time in a Chechen disappearance case that the Court found a violation of the positive obligation under Article 2 to protect the right to life. In the **Tagayeva and Others v. Russia** judgment the Court considered the obligations of the State, as regards a large-scale hostage-taking by terrorists, before, during and after the event. This is the first time the Court has found that, given the intelligence information available to it, the State had failed to take adequate measures to protect against a terrorist attack. The **Anzhelo Georgiev and Others v. Bulgaria** judgment concerned the use of electrical-discharge weapons during a police operation. This is the first time the Court has addressed on the merits the use of electrical-discharge weapons by law-enforcement officers. In the **Bouyid v. Belgium** judgment “a slap” administered by police officers to each of the applicants was found to constitute degrading treatment and a violation of Article 3 of the Convention. The scope of a State’s procedural obligation to cooperate with another State investigating a murder committed within the latter’s jurisdiction was the subject of the judgment in **Romeo Castaño v. Belgium**.
- Concerning effective investigation, the judgment in **Jelić v. Croatia** concerned the effectiveness of the investigation into a war crime. The case is of interest in that it deals with the Convention responsibilities of the authorities in a post-conflict/post-ratification context. The case of **Gürtekin and Others** is interesting for its description of the scope of a fresh investigation into events which had taken place many years previously.
- Regarding the prohibition of torture under Article 3 ECHR, the **O’Keeffe v. Ireland** judgment concerned State protection of schoolchildren against sexual abuse by teaching staff. The judgment is noteworthy in that it deals, in the context of primary education, with the State’s positive obligation to protect children against sexual abuse and the requirement to provide an effective domestic remedy by which to complain of the State’s failure to afford protection (Articles 3 and 13).
- Finally, with regards to extradition, the judgment in **Trabelsi v. Belgium** is of jurisprudential interest in that (i) it underlines the absolute character of the prohibition of treatment contrary to Article 3; (ii) it extends the preventive function of that provision to cases where the risk of imposition of an irreducible life sentence has not yet materialised. The **Mozer v. the Republic of Moldova and Russia** judgment concerned the lawfulness of detention ordered by courts of the “Moldavian Republic of Transdniestria”. The Grand Chamber examined the issue of “jurisdiction” within the meaning of Article 1 of the Convention with regard to the two respondent States. The judgment in **Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia** concerned the delayed enforcement of a sentence imposed on an accused who had been found guilty of the serious assault of the applicant.

## Discussion

- On the question of consensus or convergence between member States, Judge Gnatovskyy underlined that the level of consensus is for state representatives to determine. The revised

Guidelines should be based on instruments with universal or at least Council of Europe Member States' support. Professor Decaux noted the prolonged work of the International Law Commission and how it indicates some reluctance, especially when it comes to immunities. Kerli Veski acknowledged that expanding the scope of the Guidelines will be challenging but highlighted that discussions in themselves promote understanding and progress. Finally, Matt Cannock pointed out that there is significant consensus among States that are parties to the Rome Statute. The Ljubljana–The Hague Convention and the European Union Victims' Rights Directive 2012/29/EU are key documents demonstrating shared commitments.

- Regarding the question of which human rights instruments could be used in bridging gaps between states, Judge Gnatovskyy suggested that instruments include the Ljubljana–The Hague Convention, the International Law Commission's work on enforced disappearances, and potentially future judgments on *Ukraine v. Russia* and *Ukraine and the Netherlands v. Russia*. Professor Decaux added that general observations on amnesties or time bars under the International Convention for the Protection of all Persons from Enforced Disappearance may provide useful insights, while Matt Cannock emphasised the Rome Statute, the Ljubljana–The Hague Convention, and the European Union Victims Rights Directive as vital instruments reflecting consensus and setting detailed victim rights.
- Finally, a clarifying question on the scope of the Guidelines and the approach the experts would advise the Drafting Group to take was raised. To that, Judge Gnatovskyy clarified that he advocates for a user-centric approach, outlining expectations for member States based on the Convention and other international law bodies to combat impunity comprehensively, while Professor Decaux stressed the importance of ensuring States fulfil their obligations, even if expanding the scope of the Guidelines might seem contradictory at first glance.