

CDDH-ELI(2024)15  
13/12/2024

**STEERING COMMITTEE FOR HUMAN RIGHTS**

**(CDDH)**

**DRAFTING GROUP ON THE ERADICATION OF IMPUNITY FOR  
SERIOUS HUMAN RIGHTS VIOLATIONS**

**(CDDH-ELI)**

Background document  
Issues related to criminal law (cluster 3)

## I. Introduction

1. The CDDH Drafting Group on the Eradication of Impunity for Serious Human Rights Violations (CDDH-ELI) is mandated to prepare a study on the need for and feasibility of (an) additional non-binding instrument(s) to complement the 2011 Committee of Ministers' Guidelines on eradicating impunity for serious human rights violations (the 2011 Guidelines). It held its first meeting from 15 to 17 May 2024 during which the Group identified a list of issues relevant to its work and grouped them in five clusters to facilitate future discussion.<sup>1</sup> Clusters 1 and 2 were examined at its second meeting from 15 to 17 October 2024. It decided to examine the third, fourth and fifth clusters at its third meeting.

2. This paper is intended to present the issues included in the third cluster (issues related to criminal law) and provide concrete elements for the CDDH-ELI to consider in the preparation of the study. It builds on the information presented in the discussion paper prepared by the Secretariat in May 2024, the exchange of views held with experts as well as on the discussions held by the Group during its first and second meetings.<sup>2</sup>

## II. Examination of Issues

3. The Group has identified several issues related to criminal law to be addressed within cluster 3, namely: universal criminal jurisdiction, extradition of (alleged) perpetrators of serious violations of human rights, amnesties, pardons and time-bars, immunities of State officials, separation of powers, independence of the judiciary, and fair trial guarantees.

### 1. Universal Criminal Jurisdiction

4. As underlined in the discussion paper of the CDDH Secretariat,<sup>3</sup> universal criminal jurisdiction plays a crucial role in combating impunity for serious human rights violations by enabling States to prosecute individuals responsible for such crimes regardless of where the crimes were committed or the nationality of the perpetrator or victim.

5. Universal jurisdiction is a well-recognised principle under international law,<sup>4</sup> and several international instruments and treaties provide for it in relation to their subject matter, particularly concerning serious international crimes:

- The 1949 Geneva Conventions impose an obligation on States Parties to search for and prosecute or extradite persons accused of grave breaches of the Conventions.<sup>5</sup>

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<sup>1</sup> See doc. [CDDH-ELI\(2024\)11](#).

<sup>2</sup> See doc. [CDDH-ELI\(2024\)03](#).

<sup>3</sup> See doc. [CDDH-ELI\(2024\)03](#), paras. 18-20.

<sup>4</sup> See the [work of the Sixth Committee of the General Assembly of the United Nations](#) in relation to the scope and application of the principle of universal jurisdiction.

<sup>5</sup> Article 49 of Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Article 50 of the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949; Article 129 of the Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949; and Article 146 of the Geneva Convention (IV) relative to the Protection of Civilians Persons in Time of War, 12 August 1949.

- The 1973 Convention against Apartheid obliges State Parties to adopt measures, including prosecution or extradition, to prevent and punish the crime of apartheid.<sup>6</sup>
- The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides for universal jurisdiction by requiring States Parties to establish jurisdiction over acts of torture committed outside their territory if the alleged offender is present in their territory.<sup>7</sup>
- The 2006 Convention for the Protection of All persons against Enforced Disappearance provides for the establishment of jurisdiction over the crime of enforced disappearance under specific conditions, when the alleged offender is present in any territory under its jurisdiction (implying a form of universal jurisdiction).<sup>8</sup>
- The Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes (the Ljubljana-The Hague Convention) enhances cooperation mechanisms to help States implement prosecutions, including those based on universal jurisdiction for serious international crimes.<sup>9</sup>
- The International Law Commission (ILC)'s draft articles on the prevention and punishment of crimes against humanity provides that States Parties may assert jurisdiction when the alleged perpetrator is present in their territory, regardless of where the crime occurred, thereby incorporating the principle of universal jurisdiction.<sup>10</sup> While the draft articles are not yet legally binding, they reflect the international community's intent to enhance legal frameworks addressing such crimes and the proposed jurisdictional provisions align with existing international instruments that recognise universal jurisdiction for serious offences, reinforcing the global efforts to prevent impunity for perpetrators of crimes against humanity.

6. The Committee of Ministers has noted that "several member States of the Council of Europe have acknowledged the principle of universal jurisdiction" but that "there is no international consensus on the definition and scope of [the principle of universal jurisdiction], as the exercise of universal jurisdiction is in practice often subject to legal limitations defined in national legislation."<sup>11</sup> The European Court on Human Rights (the Court) recognised that universal jurisdiction "is relatively widely accepted by the States with regard to criminal matters."<sup>12</sup> It also considered, in relation to the right to life under Article 2 of the Convention, member States were not required to provide for universal jurisdiction under domestic criminal law in cases involving the death of one of their nationals<sup>13</sup> and, in relation to the prohibition of slavery and forced labour under Article 4 of the Convention, that States were not required to provide for universal jurisdiction over trafficking offences committed abroad.<sup>14</sup>

<sup>6</sup> Article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid, entered into force on 18 July 1976.

<sup>7</sup> Article 5(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984.

<sup>8</sup> Article 9 of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 23 December 2010.

<sup>9</sup> Article 8(3) of the Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes, adopted on 26 May 2023.

<sup>10</sup> See International Law Commission, [Draft articles on Prevention and Punishment of Crimes Against Humanity](#), 2019, Article 7.

<sup>11</sup> [Reply to Recommendation 1953 \(2011\)](#) of the Parliamentary Assembly of the Council of Europe "The obligation of member and observer states of the Council of Europe to co-operate in the prosecution of war crimes", §6, adopted at the 1145th meeting of the Ministers' Deputies, 13 June 2012.

<sup>12</sup> [Nait-Liman v. Switzerland](#), Application No. 51357/07, Grand Chamber judgement of 15 March 2018, §178. See also, with regard to the crime of genocide, [Jorgic v. Germany](#), Application No. 74613/01, 12 July 2007, §66-72.

<sup>13</sup> [Rantsev v. Russian Federation and Cyprus](#), Application No. 25965/04, judgment of 7 January 2010, §244.

<sup>14</sup> [J and Others v. Austria](#), Application No. 58216/12, judgment of 17 January 2017, §114.

7. There have been calls for States to establish the principle of universal jurisdiction in their national legal framework.<sup>15</sup> Member States of the Council of Europe have exercised universal jurisdiction in cases concerning serious international crimes, such as genocide, war crimes, crimes against humanity and torture.<sup>16</sup>

8. Russia's aggression against Ukraine puts an emphasis on the need to hold accountable those responsible for serious violations of international law in order to avoid impunity and prevent further violations.<sup>17</sup> In this regard, the Committee of Ministers of the Council of Europe "reiterated their decision to make sure that the Council of Europe mobilises all its instruments to ensure the Russian Federation's full accountability for violations of human rights"<sup>18</sup>. It also "called on the member States and the Council of Europe to remain actively seized of the matter and actively engage in further developing a comprehensive system of accountability in accordance with the standards of international law, including the European Convention on Human Rights."<sup>19</sup>

9. The 2011 Guidelines cover the duty to investigate under Article 2 (right to life) of the Convention, Article 3 (the prohibition of torture and inhumane or degrading treatment or punishment), Article 4 (the prohibition of slavery and forced labour), Article 5 (the right to liberty and to security), Article 8 (the right to respect for private and family life), as well as the duty to prosecute, where warranted by the results of the investigation, and the criteria for an effective investigation. However, the Guidelines remain silent on universal jurisdiction. The CDDH-ELI could assess the opportunity of addressing the issue of universal jurisdiction in revised Guidelines and/or (a) future additional instrument(s).

## **2. Extradition of (alleged) Perpetrators of Serious Violations of Human Rights**

10. The 2011 Guidelines contain one section on international cooperation, recommending that States fulfil their obligations, notably with regard to extraditions, in a manner consistent with respect for human rights, including the principle of "non-refoulement," and in good faith.<sup>20</sup>

11. Extradition of (alleged) perpetrators of serious violations of human rights is central in the framework of the fight against impunity. As presented in the discussion paper prepared by the

<sup>15</sup> See for example, [A/HRC/48/60](#) – Report of the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on "Accountability: Prosecuting and punishing gross violations of human rights and serious violations of international humanitarian law in the context of transitional justice", July 2021, §97(u).

<sup>16</sup> As recent examples, Germany has used universal jurisdiction under its Code of Crimes Against International Law which allows prosecution for genocide, war crimes, and crimes against humanity regardless of where they occurred. See the Al-Khatib trial (2022), in which a former Syrian intelligence officer was convicted in 2022 by a German court for crimes against humanity, including torture, committed in Syria. France has prosecuted several individuals accused of participating in the 1994 Rwandan genocide. See for instance the Pascal Simbikangwa case where a former Rwandan intelligence officer was convicted of complicity in genocide and crimes against humanity. In Sweden, see the case of Hamid Nouri (2021), an Iranian official arrested and tried in Sweden under universal jurisdiction for his alleged role in the 1988 mass executions of political prisoners in Iran. Based on the international crimes act (2003), courts in the Netherlands have tried cases against Afghan war criminals who were present in its territory.

<sup>17</sup> See Committee of Ministers' decisions [CM/Del/Dec\(2024\)1490/2.3](#) adopted at the 1490<sup>th</sup> meeting of the Ministers' Deputies, 21 and 23 February 2024; [CM/Del/Dec\(2023\)1457bis/2.3](#) adopted at the 1457bis meeting of the Ministers' Deputies, 24 February 2023; [CM/Del/Dec\(2022\)1442/2.3](#) adopted at the 1442<sup>nd</sup> meeting, 14-15 September 2022.

<sup>18</sup> Committee of Ministers' [Decision CM/Del/Dec\(2024\)1490/2.3](#) "Consequences of the aggression of the Russian Federation against Ukraine", adopted at the 1490<sup>th</sup> meeting of the Ministers' Deputies, 21 and 23 February 2024, §4.

<sup>19</sup> [Decision CM/Del/Dec\(2022\)1442/2.3](#) "Consequences of the aggression of the Russian Federation against Ukraine – Accountability for international crimes", adopted at the 1442<sup>nd</sup> meeting, 14-15 September 2022, §5.

<sup>20</sup> See 2011 Guidelines, XII.

CDDH Secretariat,<sup>21</sup> the International Law Commission (ILC) noted that “the view that the obligation to extradite or prosecute plays a crucial role in the fight against impunity is widely shared by States” and that “the obligation applies in respect of a wide range of crimes of serious concern to the international community.”<sup>22</sup> The ILC’s report also lists existing multilateral treaties that contain provisions reflecting this obligation.

12. The Parliamentary Assembly of the Council of Europe long ago invited Council of Europe member States to introduce the principle of *aut dedere aut iudicare* (extradite or prosecute) in their national criminal law, thus allowing for the trial of all perpetrators of war crimes in the country of their present residence, when there are obstacles to their extradition to the States where the crimes were committed.<sup>23</sup> The Parliamentary Assembly reiterated this call and invited member States to examine requests for extradition speedily and to process in good faith requests for extradition on charges relating to war crimes.<sup>24</sup> It also encouraged member States to lift the ban on the extradition of nationals, which “constitutes a serious obstacle to the course of justice.”<sup>25</sup>

13. The Committee of Ministers further underlined that the Council of Europe could reinforce the application of the principle of *aut dedere aut iudicare* as a means of prosecuting war crimes effectively in cases where universal jurisdiction cannot be exercised.<sup>26</sup>

14. In a 2023 report, the Council of Europe Commissioner for Human Rights underlined, in relation to the issue of extradition, that an exception to the rule of non-extradition of nationals for offences other than gross human rights violations should be introduced by all countries regarding the most serious crimes under international law (war crimes, crimes against humanity and genocide), as it would “send the signal that these crimes are so abhorrent that no safe haven can be provided to those who commit them.”<sup>27</sup>

15. The new Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes (Ljubljana-The Hague Convention) contains provisions on extradition to ensure perpetrators cannot evade justice.<sup>28</sup> Under the convention, States Parties must cooperate and extradite, unless legitimate grounds for refusal apply as listed in the convention.<sup>29</sup>

16. During previous meetings, the CDDH-ELI discussed the importance of encouraging member States to reinforce the application of the principle of *aut dedere aut iudicare* and to make extradition possible under their domestic systems, with a focus on overcoming legal and practical

<sup>21</sup> See doc. [CDDH-ELI\(2024\)03](#), paras. 21-23.

<sup>22</sup> [Final report](#) of the International Law Commission on “The obligation to extradite or prosecute (*aut dedere aut iudicare*)”, 2014, p. 2.

<sup>23</sup> [Recommendation 1427 \(1999\)](#) “Respect for international humanitarian law in Europe”, Parliamentary Assembly of the Council of Europe, 23 September 1999, §8.2; [Resolution 1785 \(2011\)](#) “The obligation of member and observer states of the Council of Europe to co-operate in the prosecution of war crimes”, Parliamentary Assembly of the Council of Europe, 26 January 2011, §9 and 10.6.

<sup>24</sup> [Resolution 1785 \(2011\)](#) “The obligation of member and observer states of the Council of Europe to co-operate in the prosecution of war crimes”, Parliamentary Assembly of the Council of Europe, 26 January 2011, §10.4-10.6.

<sup>25</sup> *Ibid*, §6 and 11.4.

<sup>26</sup> Reply to [Recommendation 1953 \(2011\)](#) “The obligation of member and observer states of the Council of Europe to co-operate in the prosecution of war crimes”, adopted at the 1145th meeting of the Ministers’ Deputies, 18 June 2012, §7.

<sup>27</sup> [Dealing with the past for a better future - Achieving justice, peace and social cohesion in the region of the former Yugoslavia](#), Issue Paper, Council of Europe Commissioner for Human Rights, November 2023, p. 41.

<sup>28</sup> See Doc. [CDDH-ELI\(2024\)12](#), Key points made by Mirjam Ekkart.

<sup>29</sup> See Article 51 of the Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes (“Ljubljana-The Hague Convention”).

barriers to inter-State cooperation for the investigation and prosecution of serious human rights violations. These could be reflected in revised Guidelines and/or (an) additional non-binding instrument(s) alongside encouragement to sign and ratify the Ljubljana-The Hague Convention.

### 3. Amnesties, Pardons and Time-bars

17. The issue of amnesties, pardons, and time-bars were introduced in the CDDH Secretariat's discussion paper,<sup>30</sup> highlighting the barriers they pose to accountability for serious human rights violations.

18. The 2011 Guidelines call on States to support the investigation of serious human rights violations and the prosecution of alleged perpetrators, emphasising that legitimate restrictions and limitations on investigations and prosecutions "should be restricted to the minimum necessary to achieve their aim."<sup>31</sup>

19. In 2014, the Court underlined that, in respect to acts of torture, which constitute violations of *jus cogens* norms, statutes of limitations, amnesties and pardons cannot be tolerated.<sup>32</sup> The Court also recognised the growing tendency in international law to consider amnesties for acts which amounted to grave breaches of fundamental human rights as unacceptable because they are incompatible with the obligation of States to prosecute and punish such acts.<sup>33</sup>

20. In 2016, the Committee of Ministers underlined that "when a State agent has been charged with crimes involving ill-treatment, it is of the utmost importance that criminal proceedings and sentencing are not time-barred. In order to maintain public trust in the justice system, measures such as the granting of an amnesty or pardon should not be envisaged or accepted without convincing reasons."<sup>34</sup> In a recent opinion, the European Commission for Democracy through Law (Venice Commission), building on the *Furundžija* case<sup>35</sup>, stated that "amnesties have the effect of retrospectively nullifying the criminality of certain acts and can therefore deprive criminal provisions as laid down in acts of parliament of any practical effect"<sup>36</sup> and concluded that amnesties are impermissible in relation to serious international crimes and serious human rights violations.<sup>37</sup>

21. In 2021, the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence stated that "legal, judicial or de facto obstacles to accountability [for gross human rights violations and serious violations of international humanitarian law], such as immunities, total or partial amnesties, pardons, the application of statutory limitations or of provisions of non-retroactivity in criminal law, ne bis in idem or res

<sup>30</sup> See doc. [CDDH-ELI\(2024\)03](#), paras. 24-26.

<sup>31</sup> See 2011 Guidelines, XIV.

<sup>32</sup> [Mocanu and Others v. Romania](#), Applications Nos. 10865/09, 45886/07 and 32431/08, Grand Chamber judgment of 17 September 2014, § 326. See also [Advisory Opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture](#), Requested by the Armenian Court of Cassation, Request no. P16-2021-001, 26 April 2022.

<sup>33</sup> [Marguš v. Croatia](#), Application No. 4455/10, Grand Chamber Judgement of 27 May 2014, §139-140.

<sup>34</sup> [Recommendation CM/Rec\(2016\)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors](#), adopted at the 1253rd meeting of the Ministers' Deputies, 13 April 2016, §24.

<sup>35</sup> Judgment of 10 December 1998, see in particular §155.

<sup>36</sup> [CDL-AD\(2024\)003](#), Spain - Opinion on the rule of law requirements of amnesties, with particular reference to the parliamentary bill of Spain "on the organic law on amnesty for the institutional, political and social normalisation of Catalonia", adopted by the Venice Commission at its 138th Plenary Session (Venice, 15-16 March 2024), §60.

<sup>37</sup> *Ibid*, §122.



judicata, or dispensations or remissions that are at odds with the determination and execution of a quantum of the sentence [...] run counter to international law.”<sup>38</sup> He underlined that amnesties led to a series of violations of human rights, including the rights of victims to be heard and their access to remedies, and paved the way for impunity.<sup>39</sup> In relation to acts of torture specifically, he further considered that “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.”<sup>40</sup> He also stated that statutory limitations were not applicable to serious human rights violations.<sup>41</sup>

22. In 2022, the Court issued an Advisory Opinion on the applicability of statutes of limitations in respect of offences amounting to torture, thereby underlining that the prohibition against torture has the status of peremptory norm in international law, and that “criminal proceedings ought not to be discontinued on account of a limitation period, and also that amnesties and pardons should not be tolerated.”<sup>42</sup> The Court also noted significant State practice among Council of Europe member States in abrogating or suspending statutes of limitations for acts of torture, in order to prevent impunity for State officials.<sup>43</sup> The UN Human Rights Committee has also expressed the view that “amnesties are generally incompatible” with acts of torture.<sup>44</sup> Similarly, the UN Committee Against Torture has found that amnesties for the crime of torture are incompatible with States’ obligations,<sup>45</sup> and that the imposition of light penalties for such acts is also incompatible with the duty to impose adequate punishment.<sup>46</sup> In that light, it could be argued that States’ obligation to prevent, investigate, and punish violations of peremptory norms is a heightened one and might amount to an obligation of result, as opposed to a mere obligation of conduct which might often be the case for other human rights violations, so as to avoid situations of “legitimised impunity”.<sup>47</sup>

23. In light of the above, the 2011 Guidelines could be strengthened and address barriers to accountability by recommending that States exclude the application of amnesties, pardons, and time-bars in relation to *jus cogens* norms and other relevant international norms.

24. Statutes of limitations can also impede the prompt and full execution of judgements of the Court and have in the past hindered effective accountability. Measures such as reopening investigations and suspending statutes of limitations could help overcome these barriers, thereby facilitating progress towards achieving the full execution of the Court’s judgements.<sup>48</sup> Revised

<sup>38</sup> [A/HRC/48/60](#), op. cit., §97(b).

<sup>39</sup> [A/HRC/48/60](#), op. cit., §29.

<sup>40</sup> [General Comment No. 20](#): Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), adopted at the 44<sup>th</sup> session of the Human Rights Committee, 10 March 1992, §15.

<sup>41</sup> [A/HRC/48/60](#), op. cit., §34.

<sup>42</sup> [Advisory Opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture](#), Requested by the Armenian Court of Cassation, Request no. P16-2021-001, 26 April 2022, §69-64. On the prohibition of torture amounting to a *jus cogens* norm, see also: International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, *ICJ Reports* 2012, §99.

<sup>43</sup> *Advisory Opinion* (ibid), §64.

<sup>44</sup> Human Rights Committee, [CCPR General Comment No. 20; Article 7](#) (Prohibition of Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment), §15.

<sup>45</sup> CAT, Concluding Observations on Azerbaijan, UN Doc. A/55/44, 1999, para. 69(c). See also CAT, Concluding Observations on Senegal, UN Doc. A/51/44, 1996, para. 117; CAT, Concluding Observations on Chile, UN Doc. CAT/C/CR/32/5, 2004, para. 7(b); CAT, Concluding Observations on Bahrain, UN Doc. CAT/CO/34/BHR, 2005, para. 6(d); CAT, Concluding Observations on Cambodia, UN Doc. CAT/C/CR/31/7, 2005, §6.

<sup>46</sup> *Urra Guridi v. Spain*, CAT Communication No. 212/2002, 17 May 2005, §6.7.

<sup>47</sup> *Advisory Opinion* (cited above), Concurring Opinion of Judge Harutyunyan.

<sup>48</sup> See Doc. [CDDH-ELI\(2024\)12](#), Key points made by Frederic Dolt.

Guidelines and/or (an) additional non-binding instrument(s) could encourage States to adopt such measures allowing, tailored to the nature and severity of the human rights violations.

#### 4. Immunities of State Officials

25. The 2011 Guidelines do not address the issue of immunities of state officials. Since their adoption, significant developments have indicated that the immunities traditionally granted to state officials no longer shield them from prosecution for serious human rights violations.

26. The topic of immunities of state officials was introduced in the CDDH Secretariat's discussion paper.<sup>49</sup> To recall, in 2021, the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence considered that "States should remove any barrier that could result in immunity or legal protection for Heads of State and other civil servants who are authors of, or linked to, serious violations of human rights and international humanitarian law, including State or diplomatic immunity or any other form of judicial protection."<sup>50</sup> Before that, the Human Rights Council had held that no official status justifies persons who may be accused of responsibility for violations recognised as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7, 9 and frequently, 6), from being held immune from legal responsibility.<sup>51</sup>

27. In its draft Articles on immunity of state officials from foreign criminal jurisdiction adopted in 2022, the International Law Commission considered that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of certain crimes under international law (crime of genocide; crimes against humanity; war crimes; crime of apartheid; torture; enforced disappearance).<sup>52</sup> This includes Heads of State, Heads of Government and Ministers for Foreign Affairs once their term of office has ended and they no longer enjoy immunity *ratione personae*.<sup>53</sup> The International Law Commission, in drafting these articles, took into account "the need to preserve respect for the principle of the sovereign equality of States, to ensure the implementation of the principles of accountability and individual criminal responsibility and to end impunity for the most serious international crimes, which is one of the primary objectives of the international community."<sup>54</sup>

28. The Council of Europe Committee of Legal Advisers on Public International Law (CAHDI) is working on issues related to the immunity of State officials, to ensure fairness and legitimacy in the context of the potential establishment of an *ad hoc* tribunal to prosecute the crime of aggression committed by the Russian Federation against Ukraine.<sup>55</sup> The Parliamentary Assembly of the Council of Europe called on member and observer States to set up a special international criminal tribunal for the crime of aggression. It further stated that the statute of such a tribunal "would clearly state that personal immunities would not apply to incumbent state officials, in line with the practice of other international criminal tribunals, and that functional immunities would in

<sup>49</sup> See doc. [CDDH-ELI\(2024\)03](#), paras. 27-30.

<sup>50</sup> [A/HRC/48/60](#), op. cit., §97(d).

<sup>51</sup> [General Comment No. 20](#): Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), adopted at the 44<sup>th</sup> session of the Human Rights Committee, 10 March 1992, §18.

<sup>52</sup> [A/77/10](#) - Report of the International Law Commission, Seventy-third session (18 April–3 June and 4 July–5 August 2022), [Chapter VI](#), Article 7 - Crimes under international law in respect of which immunity *ratione materiae* shall not apply, p. 190.

<sup>53</sup> *Ibid.*, p. 231.

<sup>54</sup> *Ibid.*, p. 234.

<sup>55</sup> See Doc. [CDDH-ELI\(2024\)12](#), Key points made by Jörg Polakiewicz.



any event not be applicable to the crime of aggression”, considering that the official capacity of a state official should not come in the way of the establishment of criminal responsibility.<sup>56</sup>

29. International criminal tribunals have held that state officials, including heads of state, do not enjoy immunity for serious international crimes such as genocide, crimes against humanity and war crimes. The International Criminal Court for the former Yugoslavia (ICTY) indicted Slobodan Milošević, the former President of Serbia and Yugoslavia, emphasising that official capacity does not exempt individuals from criminal responsibility under international law. Similarly, the Special Court for Sierra Leone indicted Charles Taylor, then-President of Liberia, for crimes against humanity and war crimes, rejecting his claim of immunity from prosecution.

30. On 17 March 2023, the Pre-Trial Chamber II of the International Criminal Court (ICC) issued an arrest warrant against a sitting head of state, President Vladimir Putin of the Russian Federation, for allegedly committing war crimes.<sup>57</sup> The ICC also issued arrest warrants for the Minister of Defence of the Russian Federation and the Chief of the General Staff of the Armed Forces of the Russian Federation, who also serves as the First Deputy Minister of Defence.<sup>58</sup> Earlier, in 2019, the ICC issued arrest warrants for Sudanese President Omar Al-Bashir, charging him with genocide, crimes against humanity and war crimes in Darfur. The ICC Appeals Chamber held that customary international law does not recognise immunity for heads of state before international tribunals.<sup>59</sup>

31. More recently, ICC Pre-Trial Chamber I issued arrest warrants for Benjamin Netanyahu, the Prime Minister of Israel, and Yoav Gallant, then-Minister of Defence of Israel, for crimes against humanity and war crimes.<sup>60</sup>

32. Courts in Council of Europe member States have also rejected claims of immunity for state officials for international crimes. In November 2023, French judges issued an arrest warrant against then-Syrian President Bashar al-Assad, accusing him of complicity in crimes against humanity.<sup>61</sup> The Paris Court of Appeal held that accountability for international crimes supersedes claims of immunity, including those of a sitting head of state. Switzerland’s Federal Criminal Court sentenced Ousman Sonko, Gambia’s former interior minister, to 20 years of imprisonment for committing crimes against humanity, including murder and torture, while he was in office.<sup>62</sup>

33. In light of these developments since the adoption of the Guidelines in 2011, the CDDH-ELI could examine the scope and limitations of state officials’ immunities under international law and explore the possibility of including standards to reconcile these immunities with the obligation to combat impunity.

## 5. Separation of Powers, Independence of the Judiciary

<sup>56</sup> [Resolution 2482 \(2023\)](#) “Legal and human rights aspects of the Russian Federation’s aggression against Ukraine”, Parliamentary Assembly of the Council of Europe, 26 January 2023, §7.3.

<sup>57</sup> See [Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvona-Belova](#), 17 March 2023.

<sup>58</sup> See [Situation in Ukraine: ICC judges issue arrest warrants against Sergei Kuzhugetovich Shoigu and Valery Vasilyevich Gerasimov](#), 24 June 2024.

<sup>59</sup> See [Al-Bashir Case: ICC Appeals Chamber confirms Jordan’s non-cooperation but reverses the decision referring it to the ASP and UNSC](#), 6 May 2019.

<sup>60</sup> See [Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant](#), 21 November 2024.

<sup>61</sup> See [Paris court upholds validity of arrest warrant for Syrian President Bashar al-Assad](#), 26 June 2024.

<sup>62</sup> See [Gambia: Landmark Swiss Conviction of Ex-Official](#), 15 May 2024.

34. The 2011 Guidelines emphasise the need to ensure the independence and impartiality of investigations and the judiciary, in line with the principle of the separation of powers. The Guidelines also highlight the necessity of protecting justice personnel from reprisals and the obligation to conclude proceedings within a reasonable time.<sup>63</sup>

35. Revised Guidelines and/or (an) additional non-binding instrument(s) could further elaborate on international standards governing the separation of powers and the independence of the judiciary, in line with the recent jurisprudence of the Court,<sup>64</sup> while also promoting the principles of independence, impartiality, transparency, victim participation and gender sensitivity in judicial processes in the context of proceedings relating to serious violations of human rights.

36. These could include recommending clear standards for judicial appointment and tenure, ensuring transparent and merit-based processes for judicial selection and appointments to prevent executive or legislative interference, based on recommendations from the Venice Commission.<sup>65</sup>

37. To specifically address proceedings related to serious human rights violations, the CDDH-ELI could recommend additional safeguards, such as mandatory training for judges and prosecutors on handling cases of serious human rights violations, including on international criminal law and international humanitarian law. Strengthening institutional safeguards, such as creating or reinforcing independent judicial councils with mandates to oversee judicial appointments, discipline and administration,<sup>66</sup> could be adapted to ensure the impartiality and expertise of judicial personnel dealing with such cases. Ensuring the financial and administrative autonomy of the judiciary by allocating adequate and independent budgets, particularly for complex and often lengthy cases involving serious human rights violations, could prevent undue financial leverage by other branches of power. Furthermore, accountability mechanisms tailored to address issues of judicial bias or misconduct in cases of serious human rights violations, could be recommended to ensure greater judicial accountability and public trust.

38. Regarding the investigation and prosecution of serious human rights violations, the Court has established that states have a positive obligation to conduct effective investigations. In the *Al-Skeini and Others* case, which dealt with allegations of unlawful killings by British forces in Iraq during the military occupation in 2003 in an extraterritorial context, the Court emphasised that all reasonable steps must be taken to ensure that investigations are independent and effective and subject to public scrutiny to maintain confidence in their outcomes.<sup>67</sup>

39. To enhance transparency, victim participation and gender sensitivity in the judiciary, measures could include publishing judicial decisions, ensuring public access to hearings, and establishing victim-friendly procedures such as access to legal assistance and case information. Promoting gender sensitivity may involve mandatory training for judicial personnel on gender equality, addressing the needs of victims of gender-based violence, and fostering the recruitment of women in the judiciary.

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<sup>63</sup> See 2011 Guidelines, VI and IX.

<sup>64</sup> See European Court of Human Rights, [Factsheet - Independence of the justice system](#), August 2023.

<sup>65</sup> See [Compilation of Venice Commission Opinions and Reports concerning Courts](#), CDL-PI(2023)020, 18 July 2023; [Compilation of Venice Commission Opinions and Reports concerning Judges](#), CDL-PI(2023)019, 18 July 2023.

<sup>66</sup> See [Recommendation CM/Rec\(2010\)12](#) of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities.

<sup>67</sup> *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, Judgment of 7 July 2011, §§ 164, 166-167

40. These measures, combined with strengthened accountability mechanisms, could contribute to a more inclusive, equitable and transparent judicial system and be reflected in revised Guidelines and/or (an) additional non-binding instrument(s).

## **6. Fair Trial Guarantees**

41. The 2011 Guidelines include safeguards to protect persons deprived of their liberty from serious human rights violations, to prevent any unlawful detention or ill-treatment, and to ensure the right to a fair and public hearing of persons accused of having committed serious human rights violations.<sup>68</sup>

42. In examining the need to strengthen the 2011 Guidelines, the Group could consider recent developments in jurisprudence of the Court on the right to a fair trial,<sup>69</sup> evolving international standards, and practical challenges in their implementation.

43. The Guidelines could provide more specific guidance on the time limits for accessing a lawyer or a doctor and for informing a third party of an arrest. Additional safeguards for vulnerable persons, as well as gender-specific protections, could also be included in revised Guidelines and/or (an) additional non-binding instrument(s). Since 2011, there has been an increased use of digital records and new technologies, such as detailed records-keeping systems for persons deprived of liberty and use of body cameras or surveillance technologies during arrests and interrogations. The Guidelines could ensure that the use of these methods is aligned with privacy and human rights standards.

44. The Guidelines could further be strengthened to recommend additional safeguards for persons on trial for serious human rights violations, including the right to legal representation at all stages of the proceedings, access to adequate time and facilities to prepare their defence and the right to appeal a judgement. These protections are essential to uphold the principle of fair trial and ensure that even those accused of grave crimes are afforded justice in line with international standards.

45. Lastly, the Guidelines could emphasise the importance of independent oversight bodies capable of investigating allegations of unlawful detention or ill-treatment, as well as the role of National Preventive Mechanisms (NPMs), which have been established in many Council of Europe member States. Lastly, the Guidelines could recommend robust accountability mechanisms for officials who violate procedural safeguards, including whistleblowing protections for individuals reporting such violations.

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<sup>68</sup> See 2011 Guidelines, IV and IX.

<sup>69</sup> See [Guide on article 6 of the European Convention on Human Rights – Right to a fair trial](#), updated on 31 August 2024.