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4 Human rights

4.1 Steering Committee for Human Rights (CDDH)

Draft Guidelines of the Committee of Ministers on eradicating impunity for serious human rights' violations – Reference-texts

Item to be prepared by the GR-H at its meeting of 3 February 2011

Reference-texts
used for the preparation of the Guidelines on eradicating impunity for serious human rights violations

Preliminary note

This document was prepared by the Secretariat, in co-operation with the Chairman of the Committee of Experts on Impunity (DH-I).

Aim of the guidelines

The guidelines concentrate on the accountability of perpetrators for serious human rights violations. They are meant mainly as a guidance on the extensive case-law the European Court of Human Rights has developed on the fight against impunity, in particular by imposing on member states of the Council of Europe the obligation to investigate serious human rights violations and to hold their perpetrators to account, as well as to provide an effective remedy for the victims of those violations.

Legal basis

The specific relevance of the European Convention on Human Rights (hereafter "ECHR") should be recalled. The Convention and the case-law of the European Court of Human Rights (hereafter "the Court") are a primary source for defining guidelines on the fight against impunity. Other relevant sources such as the reports of the Committee for the Prevention of Torture (CPT) are also referred to. Where appropriate, existing international standards have also been taken into account, it being understood that only those member states having ratified these texts are bound by the obligations and the case-law arising from them, but that inspiration can be drawn from these instruments in action to combat impunity.

[1] This document has been classified restricted until examination by the Committee of Ministers.

Preamble

The Committee of Ministers,

Recalling that those responsible for acts amounting to serious human rights violations must be held to account for their actions;

In Assembly Resolution 1675 (2009) on "The state of human rights in Europe: the need to eradicate impunity", the Parliamentary Assembly insisted that:

> "1. (…) all perpetrators of serious human rights violations must be held to account for their actions".

Considering that a lack of accountability encourages repetition of crimes, as perpetrators and others feel free to commit further offences without fear of punishment;

Recalling that impunity for those responsible for acts amounting to serious human rights violations inflicts additional suffering on victims;

Considering that impunity must be fought as a matter of justice for the victims, as a deterrent to prevent new violations, and to uphold the rule of law and public trust in the justice system, including where there is a legacy of serious human rights violations;

Considering the need for states to co-operate at the international level in order to put an end to impunity;

Reaffirming that it is an important goal of the Council of Europe to eradicate impunity throughout the continent, as the Parliamentary Assembly recalled in its Recommendation 1876 (2009) on the state of human rights in Europe: the need to eradicate impunity, and that its action may contribute to worldwide efforts against impunity;

In Assembly Recommendation 1876 (2009) on the state of human rights in Europe: the need to eradicate impunity, the Parliamentary Assembly stated:

> "1. The Parliamentary Assembly, referring to its Resolution 1675 (2009) on the state of human rights in Europe: the need to eradicate impunity, considers the eradication of impunity for perpetrators, instigators and organisers of serious human rights violations as a priority for Council of Europe action, as a matter of individual justice, deterrence and upholding the rule of law."

Bearing in mind the European Convention on Human Rights (ETS No. 5, hereinafter "the Convention"), in the light of the relevant case law of the European Court of Human Rights (the Court), as well as the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and other relevant standards established within the framework of the Council of Europe;

Stressing that the full and speedy execution of the judgments of the Court is a key factor in combating impunity;

In Assembly Resolution 1675 (2009) on "The state of human rights in Europe: the need to eradicate impunity", the Parliamentary Assembly stated that:

> "8. The full and speedy execution of the Court's judgments in cases of impunity is the key to fighting this scourge in Council of Europe member states.
>
> 8.1. When the Court has found a failure to investigate effectively, the execution of the judgment cannot be limited to the payment of the pecuniary compensation fixed by the Court. Proper investigations must still be carried out and general measures taken to address the underlying causes of the violation.
>
> […]

8.3. The Assembly commends the Committee of Ministers for having consistently noted that there is a continuing obligation to conduct effective investigations inasmuch as procedural violations of Article 2 of the Convention have been found by the Court. The application of these same rules to all states, without double standards, is of particular importance.

8.4. The timely communication by the Court to the states concerned of applications alleging a failure to investigate sends an important message to the competent authorities giving them the opportunity to carry out investigative acts before evidence is irretrievably lost."

Bearing in mind the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity of the United Nations Commission on Human Rights;

In the above-mentioned set of principles of 8 February 2005, the United Nations Commission on Human Rights laid down as Principle 1 ("General obligations of states to take effective action to combat impunity"):

"Impunity arises from a failure by states to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations."

Recalling the importance of the right to an effective remedy for victims of human rights violations, as contained in numerous international instruments – notably in Article 13 of the Convention, Article 2 of the United Nations International Covenant on Civil and Political Rights and Article 8 of the Universal Declaration on Human Rights – and as reflected in the United Nations General Assembly's Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law;

In the preamble to the above-mentioned principles and guidelines of 16 December 2005, the United Nations General Assembly stated:

"*Recognizing* that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law, (…)".

Having regard to the Council of Europe Committee of Ministers Recommendation Rec(2006)8 to member states on assistance to crime victims of 14 June 2006, and the United Nations General Assembly's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;

Bearing in mind the need to ensure that, when fighting impunity, the fundamental rights of persons accused of serious human rights violations, as well as the rule of law, are respected,

Adopts the following guidelines and invites member states to implement them effectively and ensure that they are widely disseminated, and where necessary translated, in particular among all authorities responsible for the fight against impunity.

I. The need to combat impunity

1. These guidelines address the problem of impunity in respect of serious human rights violations. Impunity arises where those responsible for acts that amount to serious human rights violations are not brought to account.

2. When it occurs, impunity is caused or facilitated notably by the lack of diligent reaction of institutions or state agents to serious human rights violations. In these circumstances, faults might be observed within state institutions, as well as at each stage of the judicial or administrative proceedings.

3. States are to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system.

Concerning the prevention of torture and inhuman and degrading treatment, the Committee for the prevention of Torture (CPT) has defined the problem of impunity in the following manner:

> "The credibility of the prohibition of torture and other forms of ill-treatment is undermined each time officials responsible for such offences are not held to account for their actions. If the emergence of information indicative of ill-treatment is not followed by a prompt and effective response, those minded to ill-treat persons deprived of their liberty will quickly come to believe – and with very good reason – that they can do so with impunity. All efforts to promote human rights principles through strict recruitment policies and professional training will be sabotaged. In failing to take effective action, the persons concerned – colleagues, senior managers, investigating authorities – will ultimately contribute to the corrosion of the values which constitute the very foundations of a democratic society.
>
> Conversely, when officials who order, authorise, condone or perpetrate torture and ill-treatment are brought to justice for their acts or omissions, an unequivocal message is delivered that such conduct will not be tolerated. Apart from its considerable deterrent value, this message will reassure the general public that no one is above the law, not even those responsible for upholding it. The knowledge that those responsible for ill-treatment have been brought to justice will also have a beneficial effect for the victims."[2]

II. Scope of the guidelines

1. These guidelines deal with impunity for acts or omissions that amount to serious human rights violations and which occur within the jurisdiction of the state concerned.

For the purposes of these Guidelines, the term "jurisdiction" has the same meaning as the term "jurisdiction" in Article 1 ECHR.

2. They are addressed to states, and cover the acts or omissions of states, including those carried out through their agents. They also cover states' obligations under the Convention to take positive action in respect of non-state actors.

The references to "states" in the Guidelines are not intended to exclude their application to any future Contracting Party to the ECHR that is not a state.

3. For the purposes of these guidelines, "serious human rights violations" concern those acts in respect of which states have an obligation under the Convention, and in the light of the Court's case law, to enact criminal law provisions. Such obligations arise in the context of the right to life (Article 2 of the Convention), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention), the prohibition of forced labour and slavery (Article 4 of the Convention) and with regard to certain aspects of the right to liberty and security (Article 5, paragraph 1, of the Convention) and of the right to respect for private and family life (Article 8 of the Convention). Not all violations of these articles will necessarily reach this threshold.

[2] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28], paragraph 25.

Serious human rights violations may include, for example:

- extra-judicial killings;
- negligence leading to serious risk to life or health;
- torture or inhuman or degrading treatment by security forces, prison officers or other public officials;
- enforced disappearances;
- kidnapping;
- slavery, forced labour or human trafficking;
- rape or sexual abuse;
- serious physical assault, including in the context of domestic violence;
- the intentional destruction of homes or property.

Member states have obligations under the ECHR to provide protection by criminal law with regard to certain rights enshrined in the ECHR:

Article 2 ECHR

> "The Court notes that the first sentence of Article 2 § 1 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. (…)"[3]

Articles 3 ECHR

> "For an investigation to be effective in practice it is a prerequisite that the state has enacted criminal-law provisions penalising practices that are contrary to Article 3 (compare, *mutatis mutandis*, *M.C. v. Bulgaria*, No. 39272/98, §§ 150, 153 and 166, ECHR 2003-XII; *Nikolova and Velichkova*, cited above, § 57; and *Çamdereli*, cited above, § 38)."[4]

With regard to Article 3 ECHR, the United Nations Convention against Torture and Other Inhuman and Degrading Treatment or Punishment of 10 December 1984 provides in its Article 4:

> "1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
>
> 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

Article 4 ECHR

> "In those circumstances, the Court considers that limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that states have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice (see *M.C. v. Bulgaria*, cited above, § 153)."[5]

[3] *Osman v. the United Kingdom* (No. 23452/94), judgment of 28 October 1998 [Grand Chamber], paragraph 115.
[4] *Gäfgen v. Germany* (No. 22978/05), judgment of 1 June 2010 [Grand Chamber], paragraph 117.
[5] *Siliadin v. France* (No. 73316/01), judgment of 26 July 2005, paragraph 89.

Article 5 ECHR

> "The Court emphasises in this respect that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since."[6]

Article 8 ECHR

In the context of sexual abuse of mentally handicapped persons, the Court has stated:

> "The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated."[7]
>
> "Sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives (see, mutatis mutandis, the above-mentioned X and Y judgment, p. 13, paragraph 27).[8]

In the context of rape, the Court has stated:

> "On that basis, the Court considers that states have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution."[9]

4. In the guidelines, the term "perpetrators" refers to those responsible for acts or omissions amounting to serious human rights violations.

In Assembly Resolution 1675 (2009) on "The state of human rights in Europe: the need to eradicate impunity", in which it insisted that all perpetrators of serious human rights violations must be held to account for their actions, the Parliamentary Assembly stated that:

> "2. This shall also apply to the instigators and organisers of such crimes, as recently affirmed by the Assembly in Resolution 1645 (2009) with respect to the Gongadze case."[10]

5. In the guidelines, the term "victim" refers to a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by a serious human rights violation. The term "victim" may also include, where appropriate, the immediate family or dependants of the direct victim. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of the familial relationship between the perpetrator and the victim.

The definition is based on the definition of "victims" in the Council of Europe Recommendation of the Committee of Ministers to member states on assistance to crime victims (Rec(2006)8, adopted on 14 June 2006):

> "1.1 Victim means a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by acts or omissions that are in violation of the criminal law of a member state. The term victim also includes, where appropriate, the immediate family or dependants of the direct victim."

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[6] *Kurt v. Turkey* (No. 15/1997/799/1002), judgment of 25 May 1998, paragraph 124.
[7] *X and Y v. the Netherlands* (No. 8978/80), judgment of 26 March 1985, paragraph 27.
[8] *Stubbings and Others v. the United Kingdom* (No's. 22083/93 and 22095/93), judgment of 22 October 1996, paragraph 64.
[9] *M.C. v. Bulgaria* (No. 39272/98), judgment of 4 December 2003, paragraph 153.
[10] The case referred to by the Parliamentary Assembly is the case of *Gongadze v. Ukraine* (No. 34056/02), judgment of 8 November 2005.

See also the definition of “victims” in principle 2 of the United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985, as well as Guideline I on the Protection of Victims of Terrorist Acts, adopted by the Committee of Ministers on 2 March 2005.

6. These guidelines complement and do not replace other standards relating to impunity. In particular, they neither replicate nor qualify the obligations and responsibilities of states under international law, including international humanitarian law and international criminal law, nor are they intended to resolve questions as to the relationship between international human rights law and other rules of international law. Nothing in these guidelines prevents states from establishing or maintaining stronger or broader measures to fight impunity.

The Guidelines are not intended to resolve questions as to the relationship between international human rights law (as reflected in these Guidelines) and other rules of international law.

III. General measures for the prevention of impunity

1. In order to avoid loopholes or legal gaps contributing to impunity,

- States should take all necessary measures to comply with their obligations under the Convention to adopt criminal law provisions to effectively punish serious human rights violations through adequate penalties. These provisions should be applied by the appropriate executive and judicial authorities in a coherent and non-discriminatory manner.
- States should provide for the possibility of disciplinary proceedings against state officials.
- In the same manner, states should provide a mechanism involving criminal and disciplinary measures in order to sanction behaviour and practice within state authorities which lead to impunity for serious human rights violations.

2. States – including their officials and representatives – should publicly condemn serious human rights violations.

3. States should elaborate policies and take practical measures to prevent and combat an institutional culture within their authorities which promotes impunity. Such measures should include:

- promoting a culture of respect for human rights and systematic work for the implementation of human rights at the national level;
- establishing or reinforcing appropriate training and control mechanisms;
- introducing anti-corruption policies;
- making the relevant authorities aware of their obligations, including taking necessary measures, with regard to preventing impunity, and establishing appropriate sanctions for the failure to uphold those obligations;
- conducting a policy of zero-tolerance of serious human rights violations;
- providing information to the public concerning violations and the authorities’ response to these violations;
- preserving archives and facilitating appropriate access to them through applicable mechanisms.

4. States should establish and publicise clear procedures for reporting allegations of serious human rights violations, both within their authorities and for the general public. States should ensure that such reports are received and effectively dealt with by the competent authorities.

5. States should take measures to encourage reporting by those who are aware of serious human rights violations. They should, where appropriate, take measures to ensure that those who report such violations are protected from any harassment and reprisals.

6. States should establish plans and policies to counter discrimination that may lead to serious human rights violations and to impunity for such acts and their recurrence.

7. States should also establish mechanisms to ensure the integrity and accountability of their agents. States should remove from office individuals who have been found, by a competent authority, to be responsible for serious human rights violations or for furthering or tolerating impunity, or adopt other appropriate disciplinary measures. States should notably develop and institutionalise codes of conduct.

In its 14th General Report, the Committee for the Prevention of Torture (CPT) stated:

"26. Combating impunity must start at home, that is within the agency (police or prison service, military authority, etc.) concerned. Too often the esprit de corps leads to a willingness to stick together and help each other when allegations of ill-treatment are made, to even cover up the illegal acts of colleagues. Positive action is required, through training and by example, to **promote a culture** where it is regarded as unprofessional – and unsafe from a career path standpoint – to work and associate with colleagues who have resort to ill-treatment, where it is considered as correct and professionally rewarding to belong to a team which abstains from such acts.

An atmosphere must be created in which the right thing to do is to report ill-treatment by colleagues; there must be a clear understanding that culpability for ill-treatment extends beyond the actual perpetrators to anyone who knows, or should know, that ill-treatment is occurring and fails to act to prevent or report it. This implies the existence of a clear reporting line as well as the adoption of whistle-blower protective measures.

27. In many States visited by the CPT, torture and acts such as ill-treatment in the performance of a duty, coercion to obtain a statement, abuse of authority, etc. constitute specific criminal offences which are prosecuted *ex officio*. The CPT welcomes the existence of legal provisions of this kind.

Nevertheless, the CPT has found that, in certain countries, prosecutorial authorities have considerable discretion with regard to the opening of a preliminary investigation when information related to possible ill-treatment of persons deprived of their liberty comes to light. In the Committee's view, even in the absence of a formal complaint, such authorities should be under a **legal obligation to undertake an investigation** whenever they receive credible information, from any source, that ill-treatment of persons deprived of their liberty may have occurred. In this connection, the legal framework for accountability will be strengthened if public officials (police officers, prison directors, etc.) are formally required to notify the relevant authorities immediately whenever they become aware of any information indicative of ill-treatment.

28. The existence of a suitable legal framework is not of itself sufficient to guarantee that appropriate action will be taken in respect of cases of possible ill-treatment. Due attention must be given to **sensitising the relevant authorities** to the important obligations which are incumbent upon them. (…)

[…]

37. **Disciplinary proceedings** provide an additional type of redress against ill-treatment, and may take place in parallel to criminal proceedings. Disciplinary culpability of the officials concerned should be systematically examined, irrespective of whether the misconduct in question is found to constitute a criminal offence. The CPT has recommended a number of procedural safeguards to be followed in this context; for example, adjudication panels for police disciplinary proceedings should include at least one independent member.

38. Inquiries into possible disciplinary offences by public officials may be performed by a separate internal investigations department within the structures of the agencies concerned. Nevertheless, the CPT strongly encourages the creation of a fully-fledged independent investigation body. Such a body should have the power to direct that disciplinary proceedings be instigated.

Regardless of the formal structure of the investigation agency, the CPT considers that its functions should be properly publicised. Apart from the possibility for persons to lodge complaints directly with the agency, it should be mandatory for public authorities such as the police to register all representations which could constitute a complaint; to this end, appropriate forms should be introduced for acknowledging receipt of a complaint and confirming that the matter will be pursued.

If, in a given case, it is found that the conduct of the officials concerned may be criminal in nature, the investigation agency should always notify directly – without delay – the competent prosecutorial authorities.

39. Great care should be taken to ensure that persons who may have been the victims of ill-treatment by public officials are not dissuaded from lodging a complaint. For example, the potential negative effects of a possibility for such officials to bring proceedings for defamation against a person who wrongly accuses them of ill-treatment should be kept under review. The balance between competing legitimate interests must be evenly established. Reference should also be made in this context to certain points already made in paragraph 28.

40. Any evidence of ill-treatment by public officials which emerges during **civil proceedings** also merits close scrutiny. For example, in cases in which there have been successful claims for damages or out-of-court settlements on grounds including assault by police officers, the CPT has recommended that an independent review be carried out. Such a review should seek to identify whether, having regard to the nature and gravity of the allegations against the police officers concerned, the question of criminal and/or disciplinary proceedings should be (re)considered.

[…]

42. Finally, no one must be left in any doubt concerning the **commitment of the State authorities** to combating impunity. This will underpin the action being taken at all other levels. When necessary, those authorities should not hesitate to deliver, through a formal statement at the highest political level, the clear message that there must be "zero tolerance" of torture and other forms of ill-treatment."[11]

With regard to the training of law-enforcement personnel, the Committee for the Prevention of Torture stated in its 2nd General Report:

"59. Finally, the CPT wishes to emphasise the great importance it attaches to the training of law enforcement personnel (which should include education on human rights matters – cf. also Article 10 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). There is arguably no better guarantee against the ill-treatment of a person deprived of his liberty than a properly trained police or prison officer. Skilled officers will be able to carry out successfully their duties without having recourse to ill-treatment and to cope with the presence of fundamental safeguards for detainees and prisoners.

60. In this connection, the CPT believes that aptitude for interpersonal communication should be a major factor in the process of recruiting law enforcement personnel and that, during training, considerable emphasis should be placed on developing interpersonal communication skills, based on respect for human dignity. The possession of such skills will often enable a police or prison officer to defuse a situation which could otherwise turn into violence, and more generally, will lead to a lowering of tension, and raising of the quality of life, in police and prison establishments, to the benefit of all concerned."[12]

[11] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28].
[12] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 2nd General Report of the CPT's activities, covering the period 1 January to 31 December 1991 [CPT/Inf (92) 3].

IV. Safeguards to protect persons deprived of their liberty from serious human rights violations

1. States must provide adequate guarantees to persons deprived of their liberty by a public authority, in order to prevent any unlawful detention or ill-treatment, and ensure that any unlawful detention or ill-treatment does not go unpunished. In particular, persons deprived of their liberty should be provided with the following guarantees:

- the right to inform, or to have informed, a third party of his or her choice of their deprivation of liberty, their location and of any transfers;
- the right to have access to a lawyer;
- the right to have access to a medical doctor.

Persons deprived of their liberty should be expressly informed without delay about all their rights, including those listed above. Any possibility for the authorities to delay the exercise of one of these rights, in order to protect the interests of justice or public order, should be clearly defined by law, and its application should be strictly limited in time and subject to appropriate procedural safeguards.

When a person is injured during custody or detention, the Court has established certain safeguards for the protection of the person concerned:

> "The Court underlines that a state is responsible for each person in detention, as the latter, being in the hands of police officers, is in a vulnerable situation and the authorities have the obligation to protect that person. From the very beginning of the deprivation of liberty, a strict application of the fundamental guarantees such as the right to be examined by a medical doctor of one's choice in addition to an examination by a medical doctor summoned by the police authorities, as well as access to a lawyer and a family member in addition to a prompt judicial intervention can effectively lead to the detection and prevention of ill-treatment which, like in the present case, detained persons risk to be subjected to, notably for the extortion of confessions.
>
> The Court recalls in this respect that where a person is injured while being in police custody, even though that person is entirely under the control of police officers, strong presumptions of fact will arise in respect of any injury that occurs during that period (see the judgment of *Salman v. Turquie* [GC], n° 21986/93, § 100, CEDH 2000-VII). It is incumbent on the State to give a plausible explanation of how those injuries were caused and to provide evidence which establishes facts casting doubt on the allegations of the victim, notably if those facts are supported by medical reports (see, among others, the judgments of *Selmouni* cited above, § 87, and *Altay v. Turkey*, n° 22279/93, § 50, 22 May 2001)."[13]

With regard to police custody, the Committee for the Prevention of Torture (CPT) has stated in its 2nd General Report:

> "36. The CPT attaches particular importance to three rights for persons detained by the police: the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities). They are, in the CPT's opinion, three fundamental safeguards against the ill-treatment of detained persons which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc).
>
> 37. Persons taken into police custody should be expressly informed without delay of all their rights, including those referred to in paragraph 36. Further, any possibilities offered to the authorities to delay the exercise of one or other of the latter rights in order to protect the interests of justice should be clearly defined and their application strictly limited in time. As regards more particularly the rights of access to a lawyer and to request a medical examination by a doctor other than one called by the police, systems whereby, exceptionally, lawyers and doctors can be chosen from pre-established lists drawn up in agreement with the relevant professional organisations should remove any need to delay the exercise of these rights.

[13] *Algür v. Turkey* (No. 32574/96), judgment of 22 October 2002, paragraph 44 (only available in French; unofficial translation provided by the Secretariat).

38. Access to a lawyer for persons in police custody should include the right to contact and to be visited by the lawyer (in both cases under conditions guaranteeing the confidentiality of their discussions) as well as, in principle, the right for the person concerned to have the lawyer present during interrogation. As regards the medical examination of persons in police custody, all such examinations should be conducted out of the hearing, and preferably out of the sight, of police officers. Further, the results of every examination as well as relevant statements by the detainee and the doctor's conclusions should be formally recorded by the doctor and made available to the detainee and his lawyer."[14]

In this regard, it should be recalled that the Committee of Ministers, in its reply to Recommendation 1257 (1995) of the Parliamentary Assembly of the Council of Europe, already invited the authorities of member states to comply with the Guidelines of the CPT presented above (paras. 36-38).

In its 12th report, the CPT underlines once again the importance of these fundamental guarantees and further clarifies how they can be applied in practice:

- *Concerning access to a lawyer*

"41. (…) The CPT has repeatedly stressed that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs. The CPT recognises that in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer should be arranged.

The right of access to a lawyer must include the right to talk to him in private. The person concerned should also, in principle, be entitled to have a lawyer present during any interrogation conducted by the police. Naturally, this should not prevent the police from questioning a detained person on urgent matters, even in the absence of a lawyer (who may not be immediately available), nor rule out the replacement of a lawyer who impedes the proper conduct of an interrogation.

The CPT has also emphasised that the right of access to a lawyer should be enjoyed not only by criminal suspects but also by anyone who is under a legal obligation to attend – and stay at – a police establishment, e.g. as a "witness".

Further, for the right of access to a lawyer to be fully effective in practice, appropriate provision should be made for persons who are not in a position to pay for a lawyer."

- *Concerning access to a medical doctor*

"42. Persons in police custody should have a formally recognised right of **access to a doctor**. In other words, a doctor should always be called without delay if a person requests a medical examination; police officers should not seek to filter such requests. Further, the right of access to a doctor should include the right of a person in custody to be examined, if the person concerned so wishes, by a doctor of his/her own choice (in addition to any medical examination carried out by a doctor called by the police).

All medical examinations of persons in police custody must be conducted out of the hearing of law enforcement officials and, unless the doctor concerned requests otherwise in a particular case, out of the sight of such officials.

[14] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 2nd General Report of the CPT's activities, covering the period 1 January to 31 December 1991 [CPT/Inf (1992) 3].

It is also important that persons who are released from police custody without being brought before a judge have the right to directly request a medical examination/certificate from a recognised forensic doctor."

In its 2nd General Report, the CPT stresses the importance of the access to a medical doctor in the context of using force within prisons:

"Prison staff will on occasion have to use force to control violent prisoners and, exceptionally, may even need to resort to instruments of physical restraint. These are clearly high risk situations insofar as the possible ill-treatment of prisoners is concerned, and as such call for specific safeguards.

A prisoner against whom any means of force have been used should have the right to be immediately examined and, if necessary, treated by a medical doctor. This examination should be conducted out of the hearing and preferably out of the sight of non-medical staff, and the results of the examination (including any relevant statements by the prisoner and the doctor's conclusions) should be formally recorded and made available to the prisoner. In those rare cases when resort to instruments of physical restraint is required, the prisoner concerned should be kept under constant and adequate supervision. Further, instruments of restraint should be removed at the earliest possible opportunity; they should never be applied, or their application prolonged, as a punishment. Finally, a record should be kept of every instance of the use of force against prisoners."[15]

- *Concerning the right to inform a third party*

"43. A detained person's **right to have the fact of his/her detention notified to a third party** should in principle be guaranteed from the very outset of police custody. Of course, the CPT recognises that the exercise of this right might have to be made subject to certain exceptions, in order to protect the legitimate interests of the police investigation. However, such exceptions should be clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards (e.g. any delay in notification of custody to be recorded in writing with the reasons therefor, and to require the approval of a senior police officer unconnected with the case or a prosecutor).

44. Rights for persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence. Consequently, it is imperative that persons taken into police custody are **expressly informed of their rights** without delay and in a language which they understand. In order to ensure that this is done, a form setting out those rights in a straightforward manner should be systematically given to persons detained by the police at the very outset of their custody. Further, the persons concerned should be asked to sign a statement attesting that they have been informed of their rights."

- *Concerning the prevention of violence within penal institutions*

"61. Any signs of violence observed when a prisoner is medically screened on his admission to the establishment should be fully recorded, together with any relevant statements by the prisoner and the doctor's conclusions. Further, this information should be made available to the prisoner."[16]

In its 12th General Report, the CPT stresses the importance of judicial control in the framework of police custody:

"45. The CPT has stressed on several occasions **the role of judicial and prosecuting authorities** as regards combating ill-treatment by the police.

[15] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 2nd General Report of the CPT's activities, covering the period 1 January to 31 December 1991 [CPT/Inf (1992) 3], paragraph 53.
[16] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 3rd General Report of the CPT's activities, covering the period 1 January to 31 December 1992 [CPT/Inf (93) 12].

For example, all persons detained by the police whom it is proposed to remand to prison should be physically brought before the judge who must decide that issue; there are still certain countries visited by the CPT where this does not occur. Bringing the person before the judge will provide a timely opportunity for a criminal suspect who has been ill-treated to lodge a complaint. Further, even in the absence of an express complaint, the judge will be able to take action in good time if there are other indications of ill-treatment (e.g. visible injuries; a person's general appearance or demeanour).

Naturally, the judge must take appropriate steps when there are indications that ill-treatment by the police may have occurred. In this regard, whenever criminal suspects brought before a judge at the end of police custody allege ill-treatment, the judge should record the allegations in writing, order immediately a forensic medical examination and take the necessary steps to ensure that the allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries. Further, even in the absence of an express allegation of ill-treatment, the judge should request a forensic medical examination whenever there are other grounds to believe that a person brought before him could have been the victim of ill-treatment.

The diligent examination by judicial and other relevant authorities of all complaints of ill-treatment by law enforcement officials and, where appropriate, the imposition of a suitable penalty will have a strong deterrent effect. Conversely, if those authorities do not take effective action upon complaints referred to them, law enforcement officials minded to ill-treat persons in their custody will quickly come to believe that they can do so with impunity."[17]

2. In addition to the rights listed above, persons deprived of their liberty are entitled to take court proceedings through which the lawfulness of their detention shall be speedily decided and release ordered if that detention is not lawful. Persons arrested or detained in relation to the commission of an offence must be brought promptly before a judge, and they have the right to receive a trial within a reasonable time or to be released pending trial, in accordance with the Court's case law.

3. States should take effective measures to safeguard against the risk of serious human rights violations by the keeping of records concerning the date, time and location of persons deprived of their liberty, as well as other relevant information concerning the deprivation of liberty.

According to the case-law of the Court, the above-mentioned data must be kept in order for the detention to be in conformity with Article 5 § 1 ECHR:

"The recording of accurate holding data concerning the date, time and location of detainees, as well as the grounds for the detention and the name of the persons effecting it, is necessary for the detention of an individual to be compatible with the requirements of lawfulness for the purposes of Article 5 § 1. The lack of records of this applicant discloses a serious failing, which is aggravated by the Commission's findings as to the general unreliability and inaccuracy of the records in question. The Court also shares the Commission's concerns with regard to the practices applied in the registration of holding data by the gendarme witnesses who appeared before the Commission's delegates – the fact that it is not recorded when a person is held elsewhere than the officially designated custody area or when a person is removed from a detention area for any purpose or held in transit. It finds unacceptable the failure to keep records which enable the location of a detainee to be established at a particular time."[18]

[17] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 12th General Report of the CPT's activities, covering the period 1 January to 31 December 2001 [CPT/Inf (02)].
[18] *Çakici v. Turkey* (No. 23657/94), judgment of 8 July 1999 [Grand Chamber], paragraph 105.

The Court has stated that deficiencies in the practice of recording custody may amount to a violation of Article 5 § 1 ECHR:

> "Further, certain serious deficiencies have been noted in the practice of recording custody in gendarme stations (see paragraphs 313 above). The first established deficiency is not allowed by domestic law namely, the gendarme practice of detaining persons for various reasons in their stations without being entered in the custody records. The second and third failing further underline the unreliability of custody records as those records will not show whether one is apprehended by military forces and may not show the date of release from the gendarme station. These three deficiencies attest to the absence of effective measures to safeguard against the risk of disappearance of individuals in detention."[19]

Moreover, in its 2nd General Report, the Committee for the Prevention of Torture states:

> "The CPT considers that the fundamental safeguards granted to persons in police custody would be reinforced (and the work of police officers quite possibly facilitated) if a single and comprehensive custody record were to exist for each person detained, on which would be recorded all aspects of his custody and action taken regarding them (when deprived of liberty and reasons for that measure; when told of rights; signs of injury, mental illness, etc; when next of kin/consulate and lawyer contacted and when visited by them; when offered food; when interrogated; when transferred or released, etc.). For various matters (for example, items in the person's possession, the fact of being told of one's rights and of invoking or waiving them), the signature of the detainee should be obtained and, if necessary, the absence of a signature explained. Further, the detainee's lawyer should have access to such a custody record."[20]

In its 12th General Report, the Committee for the Prevention of Torture recognised that audio and video recording of interviews by the authorities of persons deprived of their liberty is an important safeguard against the ill-treatment of detainees:

> "The **electronic (i.e. audio and/or video) recording of police interviews** represents an important additional safeguard against the ill-treatment of detainees. The CPT is pleased to note that the introduction of such systems is under consideration in an increasing number of countries. Such a facility can provide a complete and authentic record of the interview process, thereby greatly facilitating the investigation of any allegations of ill-treatment. This is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure. Electronic recording of police interviews also reduces the opportunity for defendants to later falsely deny that they have made certain admissions."[21]

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

With regard to the practice of blindfolding, the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) stated in its 12th General Report:

> "In certain countries, the CPT has encountered the practice of **blindfolding** persons in police custody, in particular during periods of questioning. CPT delegations have received various – and often contradictory – explanations from police officers as regards the purpose of this practice. From the information gathered over the years, it is clear to the CPT that in many if not most cases, persons are blindfolded in order to prevent them from being able to identify law enforcement officials who inflict ill-treatment upon them. Even in cases when no physical ill-treatment occurs, to blindfold a person in custody – and in particular someone undergoing questioning – is a form of oppressive conduct, the effect of which on the person concerned will frequently amount to psychological ill-treatment. The CPT recommends that the blindfolding of persons who are in police custody be expressly prohibited."[22]

[19] *Orhan v. Turkey* (No. 25656/94), judgment of 18 June 2002, paragraph 372.
[20] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 2nd General Report of the CPT's activities, covering the period 1 January to 31 December 1991, [CPT/Inf (92) 30], paragraph 40.
[21] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 12th General Report of the CPT's activities, covering the period 1 January to 31 December 2001, [CPT/Inf (2002) 15], paragraph 36.
[22] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 12th General Report of the CPT's activities, covering the period 1 January to 31 December 2001, [CPT/Inf (2002) 15], paragraph 38.

V. The duty to investigate

1. Combating impunity requires that there be an effective investigation in cases of serious human rights violations. This duty has an absolute character.

- ***The right to life (Article 2 of the Convention)***

The obligation to protect the right to life requires, *inter alia*, that there should be an effective investigation when individuals have been killed, whether by state agents or private persons, and in all cases of suspicious death. This duty also arises in situations in which it is uncertain whether or not the victim has died, and there is reason to believe the circumstances are suspicious, such as in the case of enforced disappearances.

The obligation to carry out an effective investigation was first developed by the Court within the framework of Article 2 ECHR and originated in the case of *McCann and Others v. the United Kingdom*:

> "The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State."[23]

The Court has stated that the duty to investigate applies also in relation to killings by private actors:

> "The Court finds, first of all, that a procedural obligation arose to investigate the circumstances of the death of Christopher Edwards. He was a prisoner under the care and responsibility of the authorities when he died from acts of violence of another prisoner and in this situation it is irrelevant whether State agents were involved by acts or omissions in the events leading to his death. The State was under an obligation to initiate and carry out an investigation which fulfilled the requirements set out above."[24]

The Court found that the political context at the time of the respective incidents did not relieve the authorities of their obligation to conduct an effective investigation:

> "However, neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear." [25]

In the context of violent armed clashes, the Court also mentioned the danger of a growing climate of impunity:

> "Nonetheless, circumstances of that nature cannot relieve the authorities of their obligations under Article 2 to carry out an investigation, as otherwise that would exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle (see *mutatis mutandis*, the Kaya judgment cited above, p. 326, § 91)."[26]

See also Articles 2 and 3 of the United Nations International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006:

> "Article 2
>
> For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

[23] *McCann and Others v. the United Kingdom* (No. 18984/91), judgment of 27 September 1995 [Grand Chamber], paragraph 161.
[24] *Paul and Audrey Edwards v. the United Kingdomi* (No. 46477/99), judgment of 14 March 2002, paragraph 74.
[25] *Kaya v. Turkey* (No. 158/96), judgment of 19 February 1998, paragraph 91.
[26] *Yaşa v. Turkey* (No. 22495/93), judgment of 2 September 1998, paragraph 104.

> Article 3
>
> Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorisation, support or acquiescence of the State and to bring those responsible to justice."

See also the "Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions" (paras. 9 – 17), recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.

The obligation to investigate racist attitudes

The Court has held that the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Articles 2 and 14 ECHR:

> "The Court considers that when investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see, *mutatis mutandis*, *Thlimmenos v. Greece* [GC], No. 34369/97, § 44, ECHR 2000-IV). In order to maintain public confidence in their law enforcement machinery, contracting states must ensure that in the investigation of incidents involving the use of force a distinction is made both in their legal systems and in practice between cases of excessive use of force and of racist killing.
>
> Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent state's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute (see, *mutatis mutandis*, *Shanaghan v. the United Kingdom,* No. 37715/97, § 90, ECHR 2001-III, setting out the same standard with regard to the general obligation to investigate). The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence."[27]

- ***The prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention)***

States are under a procedural obligation arising under Article 3 of the Convention to carry out an effective investigation into credible claims that a person has been seriously ill-treated, or when the authorities have reasonable grounds to suspect that such treatment has occurred.

Soon after it had developed the obligation to carry out an effective investigation under Article 2 ECHR, the Court also followed this approach with regard to Article 3 ECHR:

[27] *Nachova and Others v. Bulgaria* (nos. 43577/98 and 43579/98), judgment of 26 February 2004, paragraphs 158-159. As regards the responsibilitites under Article 14 ECHR (read in conjunction with Article 2 ECHR), see *Nachova and Others v. Bulgaria* (No's. 43577/98 and 43579/98), judgment of 6 July 2005 [Grand Chamber], paragraph 161.

> "The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention", requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible (see, in relation to Article 2 of the Convention, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A No. 324, p. 49, § 161, the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, p. 324, § 86, and the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2438, § 98). If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance (see paragraph 93 above), would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity." [28]

The Court gave as reasoning for the positive obligation to effectively investigate alleged cases of serious ill-treatment:

> "In cases of wilful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim. This is so because, if the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice (see, among many other authorities, *Krastanov*, cited above, § 60; *Çamdereli*, cited above, § 29; and *Vladimir Romanov*, cited above, § 78)."[29]

- ***The prohibition of slavery and forced labour (Article 4 of the Convention)***

The prohibition of slavery and forced labour entails a procedural obligation to carry out an effective investigation into situations of potential trafficking in human beings.

The Court recognised a procedural obligation to investigate under Article 4 ECHR with regard to trafficking in human beings:

> "Like Articles 2 and 3, Article 4 also entails a procedural obligation to investigate situations of potential trafficking."[30]

The duty to investigate situations of trafficking in human beings is further elaborated in Chapter V ("Investigation, prosecution and procedural law") of the Council of Europe "Convention on Action against Trafficking in Human Beings" of 16 May 2005.

- ***The right to liberty and security (Article 5 of the Convention)***

Procedural safeguards derived, *inter alia,* from the right to liberty and security require that states conduct effective investigations into credible claims that a person has been deprived of his or her liberty and has not been seen since.

With regard to enforced disappearances, Article 5 ECHR puts a procedural obligation on states to conduct an effective investigation:

> "The Court emphasises in this respect that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since."[31]

[28] *Assenov and Others v. Bulgaria* (No. 24760/94), judgment of 28 October 1998, paragraph 102.
[29] *Gäfgen v. Germany* (No. 22978/05), judgment of 1 June 2010 [Grand Chamber], paragraph 119.
[30] *Rantsev v. Cyprus and Russia* (No. 25965/04), judgment of 7 January 2010 [Grand Chamber], paragraph 288.
[31] *Kurt v. Turkey* (No. 15/97), judgment of 25 May 1998, paragraph 124; *Orhan v. Turkey* (No. 25656/94), judgment of 18 June 2002, paragraph 369.

- ***The right to respect for private and family life (Article 8 of the Convention)***

States have a duty to effectively investigate credible claims of serious violations of the rights enshrined in Article 8 of the Convention where the nature and gravity of the alleged violation so requires, in accordance with the case law of the Court.

The Court has found that the right to an effective remedy (Article 13 ECHR) may require states to conduct effective investigations with regard to the right to a private life (Article 8 ECHR):

> "The Court reiterates that Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the "competent national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The remedy must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see the Aksoy judgment cited above, p. 2286, § 95, and the above-mentioned Aydın judgment, pp. 1895–96, § 103).
> Furthermore, the nature and gravity of the interference complained of under Article 8 of the Convention in the instant case has implications for Article 13. The provision imposes, without prejudice to any other remedy available under the domestic system, an obligation on the respondent State to carry out a thorough and effective investigation of allegations brought to its attention of deliberate destruction by its agents of the homes and possessions of individuals.
> Accordingly, where an individual has an arguable claim that his or her home and possessions have been purposely destroyed by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure."[32]

Concerning rape, the Court has stated:

> "On that basis, the Court considers that states have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution."[33]

2. Where an arguable claim is made, or the authorities have reasonable grounds to suspect that a serious human rights violation has occurred, the authorities must commence an investigation on their own initiative.

The obligation to commence an investigation *motu proprio* by the State authorities has been established by the Court:

> "The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention."[34]

The investigation must also be initiated with promptness (see below, Guideline VI.).

3. The fact that the victim wishes not to lodge an official complaint, later withdraws such a complaint or decides to discontinue the proceedings does not absolve the authorities from their obligation to carry out an effective investigation, if there are reasons to believe that a serious human rights violation has occurred.

The Court has stated that investigations must be conducted regardless of the existence of a formal complaint by the victim:

[32] *Mentes and Others v. Turkey* (No. 23186/94), judgment of 28 November 1997, paragraph 89.
[33] *M.C. v. Bulgaria* (No. 39272/98), judgment of 4 December 2003, paragraph 153.
[34] *Kelly and Others v. the United Kingdom* (No. 30054/96), judgment of 4 May 2001, paragraph 94.

"However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, *mutatis mutandis*, *İlhan v. Turkey* [GC], No. 22277/93, § 63, ECHR 2000-VII, and *Finucane v. the United Kingdom*, No. 29178/95, § 67, ECHR 2003-VIII)."[35]

This applies even in the event that the victim later withdraws his or her complaint:

"(…) The Court reiterates in this connection that, once the situation has been brought to their attention, the national authorities cannot rely on the victim's attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim (see *Osman v. the United Kingdom*, cited above, § 116).

(…)

In this respect, the Government blamed the applicant for withdrawing her complaints and failing to cooperate with the authorities, which prevented the latter from continuing the criminal proceedings against H.O., pursuant to the domestic law provisions requiring the active involvement of the victim (see paragraph 70 above).

The Court reiterates its opinion in respect of the complaint under Article 2, namely that the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. despite the withdrawal of complaints by the applicant on the basis that the violence committed by H.O. was sufficiently serious to warrant prosecution and that there was a constant threat to the applicant's physical integrity (see paragraphs 137-148 above)."[36]

4. A decision either to refuse to initiate or to terminate investigations may be taken only by an independent and competent authority in accordance with the criteria of an effective investigation as set out in Guideline VI. They should be duly reasoned.

5. Such decisions must be subject to appropriate scrutiny and be generally challengeable by means of a judicial process.

The Court stated:

"(…) The Commission further observed that decisions of the national authorities which had been produced to it contained no detailed reasons for the dismissal of the complaints of the applicant's parents. It was additionally noted that there was a lack of any contemporaneous records which could demonstrate, step by step, the nature of the investigation carried out into the allegations and that no external authority appeared to have been involved in any such investigations. In these circumstances, the Commission concluded that the investigations had been both perfunctory and superficial and did not reflect any serious effort to discover what had really occurred in the prison in September 1998.

In the light of its own examination of the material before it, the Court shares the findings and reasoning of the Commission and concludes that the applicant's arguable claim that he was ill-treated in prison was not subject to an effective investigation by the domestic authorities as required by Article 3 of the Convention."[37]

VI. Criteria for an effective investigation

In order for an investigation to be effective, it should respect the following essential requirements:

- ***Adequacy***

The investigation must be capable of leading to the identification and punishment of those responsible. This does not create an obligation on states to ensure that the investigation leads to a particular result, but the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident.

[35] *Tashin Acar v. Turkey* (No. 26307/95), judgment of 8 April 2004 [Grand Chamber], paragraph 221.
[36] *Opuz v. Turkey* (No. 33401/02), judgment of 9 June 2009, paragraphs 153, 167-168.
[37] *Polotratskiy v. Ukraine* (No.38812/97), judgment of 29 April 2003, paragraphs 126-127.

The adequacy of the investigations was defined by the Court as follows:

> "In order to be "effective" as this expression is to be understood in the context of Article 2 of the Convention, an investigation into a death that engages the responsibility of a Contracting Party under that Article must firstly be adequate. That is, it must be capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard (cf. *Tahsin Acar v. Turkey* [GC], No. 26307/95, § 223, ECHR 2004-III)."[38]

Moreover, in its 14th General Report, the Committee for the Prevention of Torture stresses that the investigation must be of a comprehensive manner:

> "The investigation must also be conducted in a comprehensive manner. The CPT has come across cases when, in spite of numerous alleged incidents and facts related to possible ill-treatment, the scope of the investigation was unduly circumscribed, significant episodes and surrounding circumstances indicative of ill-treatment being disregarded."[39]

- ***Thoroughness***

The investigation should be comprehensive in scope and address all of the relevant background circumstances, including any racist or other discriminatory motivation. It should be capable of identifying any systematic failures that led to the violation. This requires the taking of all reasonable steps to secure relevant evidence, such as identifying and interviewing the alleged victims, suspects and eyewitnesses; examination of the scene of the alleged violation for material evidence; and the gathering of forensic and medical evidence by competent specialists. The evidence should be assessed in a thorough, consistent and objective manner.

The Court has described the requirement of "thoroughness" as follows:

> "The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see concerning autopsies, e.g. *Salman v. Turkey* cited above, § 106; concerning witnesses e.g. *Tanrıkulu v. Turkey* [GC], No. 23763/94, ECHR 1999-IV, § 109; concerning forensic evidence e.g. *Gül v. Turkey*, 22676/93, [Section 4], § 89). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard."[40]

Moreover, in its 14th General Report, the Committee for the Prevention of Torture has stated that:

> "An investigation into possible ill-treatment by public officials must comply with the criterion of thoroughness. It must be capable of leading to a determination of whether force or other methods used were or were not justified under the circumstances, and to the identification and, if appropriate, the punishment of those concerned. This is not an obligation of result, but of means. It requires that all reasonable steps be taken to secure evidence concerning the incident, including, inter alia, to identify and interview the alleged victims, suspects and eyewitnesses (e.g. police officers on duty, other detainees), to seize instruments which may have been used in ill-treatment, and to gather forensic evidence. Where applicable, there should be an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. (…)"[41]

[38] *Ramsahai and Others v. the Netherlands* (No. 24746/94), judgment of 15 May 2007 [Grand Chamber], paragraph 324.
[39] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28], paragraph 33.
[40] *Hugh Jordan v. the United Kingdom* (No. 24746/94), judgment of 4 May 2001, paragraph 107.
[41] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28], paragraph 33.

- ***Impartiality and independence***

Persons responsible for carrying out the investigation must be impartial and independent from those implicated in the events. This requires that the authorities which are implicated in the events can neither lead the taking of evidence nor the preliminary investigation; in particular, the investigators cannot be part of the same unit as the officials who are the subject of the investigation.

The Court stated:

> "For an investigation into alleged unlawful killing by State agents to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice (see *Güleç v. Turkey*, judgment of 27 July 1998, *Reports* 1998-IV, p. 1733, §§ 81-82; *Oğur v. Turkey* [GC], No. 21594/93, §§ 91-92, ECHR 1999-III; and *Ergi v. Turkey*, judgment of 28 July 1998, *Reports* 1998-IV, pp. 1778-79, §§ 83-84)."[42]

That principle was further elaborated by the Court:

> "It reiterates that, for an investigation into the facts of an alleged unlawful killing or ill-treatment by State agents to be effective, it is generally necessary for the persons responsible for the investigation and those conducting the investigation to be independent from those implicated in the events (see, for example, the judgments of *Güleç v. Turkey* of 27 July 1998, *Recueil* 1998-IV, §§ 81-82, and *Öğur v. Turkey* [GC] n° 21954/93, CEDH 1999-III, §§ 91-92). This requires not only the absence of any hierarchical or institutional links, but also independence in practice (see, for example, the judgment *Ergı v. Turkeyc. Turquie* of 28 July 1998, *Recueil* 1998-IV, §§ 83-84, and *Kelly and others v. the United Kingdom*, n° 30054/96, § 114, 4 May 2001)."[43]

Examples in which the Court has found that an investigation had not been impartial and independent:

- the investigation was carried out by direct colleagues of the persons allegedly involved (see *Aktaş v. Turkey* (No. 24351/94), judgment of 24 April 2003, paragraph 301);
- the investigation into the allegations of a detainee was carried out by prison authorities without the involvement of an external authority or body (see *Kuznetsov v. Ukraine* (No. 39042/97), judgment of 29 April 2003, paragraph 106);
- an inquiry conducted by military prosecutors who, in view of the regulations in force, were part of the same structure as the police (*Barbu Anghelescu v. Romania* (No. 46430/99), judgment of 5 October 2004, paragraph 67 (only available in French));
- essential parts of the investigation were carried out by the same force to which the alleged perpetrators belonged and acting under its own chain of command (see *Ramsahai and Others v. the Netherlands* (No. 24746/94), judgment of 15 May 2007 [Grand Chamber], paragraph 406).

Moreover, in its 14th General Report, the Committee for the Prevention of Torture has stated that:

> "For an investigation into possible ill-treatment to be effective, it is essential that the persons responsible for carrying it out are <u>independent</u> from those implicated in the events. In certain jurisdictions, all complaints of ill-treatment against the police or other public officials must be submitted to a prosecutor, and it is the latter – not the police – who determines whether a preliminary investigation should be opened into a complaint; the CPT welcomes such an approach. However, it is not unusual for the day-to-day responsibility for the operational conduct of an investigation to revert to serving law enforcement officials. The involvement of the prosecutor is then limited to instructing those officials to carry out inquiries, acknowledging receipt of the result, and deciding whether or not criminal charges should be brought. It is important to ensure that the officials concerned are not from the same service as those who are the subject of the investigation. Ideally, those entrusted with the operational conduct of the investigation should be completely independent from the agency implicated. Further, prosecutorial authorities must exercise close and effective supervision of the operational conduct of an investigation into possible ill-treatment by public officials. They should be provided with clear guidance as to the manner in which they are expected to supervise such investigations."[44]

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[42] *Nachova and Others v. Bulgaria* (nos. 43577/98 and 43579/98), judgment of 6 July 2005 [Grand Chamber], paragraph 112.
[43] *Bursuc v. Romania* (No. 42066/98), judgment of 12 October 2004, paragraph 103 (only available in French; unofficial translation provided by the Secretariat).
[44] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28], paragraph 32.

- ***Promptness***

The investigation must be commenced with sufficient promptness in order to obtain the best possible amount and quality of evidence available. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities may generally be regarded as essential in maintaining public confidence in the maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. The investigation must be completed within a reasonable time and, in all cases, be conducted with all necessary diligence.

The Court found with regard to the requirement of "promptness":

> "The investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see *Ögur v. Turkey* [GC], No. 21954/93, § 88, ECHR 1999-III). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling below this standard. In this context, there must also be an implicit requirement of promptness and reasonable expedition (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, § 102-04, and *Mahmut Kaya v. Turkey*, No. 22535/93, ECHR 2000-III, §§ 106-07). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."[45]

Moreover, in its 14th General Report, the Committee for the Prevention of Torture has stated that:

> "To be effective, the investigation must also be conducted in a prompt and reasonably expeditious manner. The CPT has found cases where the necessary investigative activities were unjustifiably delayed, or where prosecutorial or judicial authorities demonstrably lacked the requisite will to use the legal means at their disposal to react to allegations or other relevant information indicative of ill-treatment. The investigations concerned were suspended indefinitely or dismissed, and the law enforcement officials implicated in ill-treatment managed to avoid criminal responsibility altogether. In other words, the response to compelling evidence of serious misconduct had amounted to an "investigation" unworthy of the name."[46]

- ***Public scrutiny***

There should be a sufficient element of public scrutiny of the investigation or its results to secure accountability, to maintain public confidence in the authorities' adherence to the rule of law and to prevent any appearance of collusion in or tolerance of unlawful acts. Public scrutiny should not endanger the aims of the investigation and the fundamental rights of the parties.

With regard to victims' involvement, the Court stated:

> "The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç*, cited above, p. 1733, § 82, where the father of the victim was not informed of the decision not to prosecute; *Oğur*, cited above, § 92, where the family of the victim had no access to the investigation and court documents; and *Gül*, cited above, § 93)."[47]

Moreover, in its 14th General Report, the CPT has stated that:

> "In addition to the above-mentioned criteria for an effective investigation, there should be a sufficient element of public scrutiny of the investigation or its results, to secure accountability in practice as well as in theory. The degree of scrutiny required may well vary from case to case. In particularly serious cases, a public inquiry might be appropriate. In all cases, the victim (or, as the case may be, the victim's next-of-kin) must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."[48]

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[45] *Kukayev v. Russia* (No. 29361/02), judgment of 15 November 2007, paragraph 95.
[46] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28], paragraph 35.
[47] *McKerr v. the United Kingdom* (No. 28883/95), judgment of 4 May 2001, paragraph 115.
[48] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28], paragraph 36.

See also the "Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions" (paragraphs 16-17), recommended by United Nations Economic and Social Council resolution 1989/65 of 24 May 1989.

VII. Involvement of victims in the investigation

1. States should ensure that victims may participate in the investigation and the proceedings to the extent necessary to safeguard their legitimate interests through relevant procedures under national law.

With regard to the participation of victims, the Court has stated:

> "The Court reiterates that the nature of the right safeguarded under Article 3 has implications for Article 13. Where an individual has an arguable claim that he has been tortured or subjected to serious ill-treatment by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, *including effective access for the complainant to the investigatory procedure* (see the above-cited *Aksoy* judgment, § 98)."[49]

In its "Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity" of 8 February 2005, the United Nations Commission on Human Rights laid down as Principle 4 ("The victims' right to know"):

> "Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate."

In its "Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", the United Nations General Assembly laid down as Principle 24:

> "Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimisation and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations."

2. States have to ensure that victims may, to the extent necessary to safeguard their legitimate interests, receive information regarding the progress, follow-up and outcome of their complaints, the progress of the investigation and the prosecution, the execution of judicial decisions and all measures taken concerning reparation for damage caused to the victims.

With regard to the right to receive information in criminal proceedings, the European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) states in Article 4:

> "2. Each member state shall ensure that victims who have expressed a wish to this effect are kept informed of:
>
> (a) the outcome of their complaint;
> (b) relevant factors enabling them, in the event of prosecution, to know the conduct of the criminal proceedings regarding the person prosecuted for offences concerning them, except in exceptional cases where the proper handling of the case may be adversely affected;
> (c) the court's sentence."

3. In cases of suspicious death or enforced disappearances, states must, to the extent possible, provide information regarding the fate of the person concerned to his or her family.

[49] *Yaman v. Turkey* (No. 32446/96), judgment of 2 November 2004, paragraph 53 [Emphasis added].

Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance states that:

> "1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.
> 2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.
> 3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains."

4. Victims may be given the opportunity to indicate that they do not wish to receive such information.

5. Where participation in proceedings as parties is provided for in domestic law, states should ensure that appropriate public legal assistance and advice be provided to victims, as far as necessary for their participation in the proceedings.

The United Nations General Assembly's "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985 states:

> "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (…)
>
> (c) Providing proper assistance to victims throughout the legal process;
>
> (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; (…)"

6. States should ensure that, at all stages of the proceedings when necessary, protection measures are put in place for the physical and psychological integrity of victims and witnesses. States should ensure that victims and witnesses are not intimidated, subject to reprisals or dissuaded by other means from complaining or pursuing their complaints or participating in the proceedings. These measures may include particular means of investigation, protection and assistance before, during or after the investigation process, in order to guarantee the security and dignity of the persons concerned.

On the participation of victims, see also the Council of Europe Recommendation of the Committee of Ministers to member states on assistance to crime victims of 14 June 2006:

> **"6. Information**
>
> *Provision of information*
>
> 6.1. States should ensure that victims have access to information of relevance to their case and necessary for the protection of their interests and the exercise of their rights.
>
> 6.2. This information should be provided as soon as the victim comes into contact with law enforcement or criminal justice agencies or with social or health care services. It should be communicated orally as well as in writing, and as far as possible in a language understood by the victim.
>
> *Content of the information*
>
> 6.3. All victims should be informed of the services or organisations which can provide support and the type and, where relevant, the costs of the support.

6.4. When an offence has been reported to law enforcement or criminal justice agencies, the information provided to the victim should also include as a minimum:

i. the procedures which will follow and the victims' role in these procedures;
ii. how and in what circumstances the victim can obtain protection;
iii. how and in what circumstances the victim can obtain compensation from the offender;
iv. the availability and, where relevant, the cost of:
– legal advice,
– legal aid, or
– any other sort of advice;
v. how to apply for state compensation, if eligible;
vi. if the victim is resident in another state, any existing arrangements which will help to protect his or her interests.

Information on legal proceedings

6.5. States should ensure in an appropriate way that victims are kept informed and understand:

– the outcome of their complaint;
– relevant stages in the progress of criminal proceedings;
– the verdict of the competent court and, where relevant, the sentence.

Victims should be given the opportunity to indicate that they do not wish to receive such information.
(…)

10. Protection

Protection of physical and psychological integrity

10.1. States should ensure, at all stages of the procedure, the protection of the victim's physical and psychological integrity. Particular protection may be necessary for victims who could be required to provide testimony.

10.2. Specific protection measures should be taken for victims at risk of intimidation, reprisals or repeat victimisation.

10.3. States should take the necessary measures to ensure that, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released, a decision may be taken to notify the victims if necessary.

10.4. In so far as a state forwards on its own initiative the information referred to in paragraph 10.3, it should ensure that victims have the right to choose not to receive it, unless communication thereof is compulsory under the terms of the relevant criminal proceedings."

VIII. Prosecutions

1. States have a duty to prosecute where the outcome of an investigation warrants this. Although there is no right guaranteeing the prosecution or conviction of a particular person, prosecuting authorities must, where the facts warrant this, take the necessary steps to bring those who have committed serious human rights violations to justice.

The Court has stated in this respect:

> "It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence (see, *mutatis mutandis*, *Perez v. France* [GC], No. 47287/99, § 70, ECHR 2004-I) or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence (see, *mutatis mutandis*, *Tanlı v. Turkey*, No. 26129/95, § 111, ECHR 2001-III). On the other hand, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts (see, *mutatis mutandis*, *Hugh Jordan*, cited above, §§ 108 and 136-40). The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined."[50]

In reference to Article 3 ECHR, the Court held that:

> "In cases of wilful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim. This is so because, if the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice (see, among many other authorities, *Krastanov*, cited above, § 60; *Çamdereli*, cited above, § 29; and *Vladimir Romanov*, cited above, § 78)."[51]

In its 12th General Report, the Committee for the Prevention of Torture has stated that:

> "The diligent examination by judicial and other relevant authorities of all complaints of ill-treatment by law enforcement officials and, where appropriate, the imposition of a suitable penalty will have a strong deterrent effect. Conversely, if those authorities do not take effective action upon complaints referred to them, law enforcement officials minded to ill-treat persons in their custody will quickly come to believe that they can do so with impunity."[52]

See also Principle 4 of the "United Nations Basic Principles and Guidelines on the right to a remedy and reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law" as well as Principle 19 of the "United Nations Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity".

2. The essential requirements for an effective investigation as set out in Guidelines V and VI also apply at the prosecution stage.

In the context of Article 3 ECHR, the Court held that the procedural obligation to investigate extends to the proceedings as a whole:

> "According to the Court's established case-law, when an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of agents of the State, it is the duty of the national authorities to carry out "an effective official investigation" capable of establishing the facts and identifying and punishing those responsible (see *Slimani v. France*, No. 57671/00, §§ 30 and 31, ECHR 2004-IX (extracts), and *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports*, § 102). What is more, the procedural requirements of Article 3 go beyond the preliminary investigation stage when, as in this case, the investigation leads to legal action being taken before the national courts: the proceedings as a whole, including the trial stage, must meet the requirements of the prohibition enshrined in Article 3. This means that the domestic judicial authorities must on no account be prepared to let the physical or psychological suffering inflicted go unpunished. This is essential for maintaining the public's confidence in, and support for, the rule of law and for preventing any appearance of the authorities' tolerance of or collusion in unlawful acts (see, *mutatis mutandis, Öneryıldız,* cited above, § 96)."[53]

[50] *Oneryildiz v. Turkey* (No. 48939/99), judgment of 30 November 2004 [Grand Chamber], paragraph 96.
[51] *Gäfgen v. Germany* (No. 22978/05), judgment of 1 June 2010 [GC], paragraph 119.
[52] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 12th General Report of the CPT's activities, covering the period 1 January to 31 December 2001 [CPT/Inf (2002) 15].
[53] *Okkali v. Turkey* (No. 52067/99), judgment of 17 October 2006, paragraph 65.

IX. Court proceedings

1. States should ensure the independence and impartiality of the judiciary in accordance with the principle of separation of powers.

2. Safeguards should be put in place to ensure that lawyers, prosecutors and judges do not fear reprisals for exercising their functions.

3. Proceedings should be concluded within a reasonable time. States should ensure that the necessary means are at the disposal of the judicial and investigative authorities to this end.

4. Persons accused of having committed serious human rights violations have the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Principle 4 of the United Nations Basic Principles on the Independence of the Judiciary:

> "There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law."

X. Sentences

While respecting the independence of the courts, when serious human rights violations have been proven, the imposition of a suitable penalty should follow. The sentences which are handed out should be effective, proportionate and appropriate to the offence committed.

With regard to courts applying minimum sentences without justifiable reasons, the Court has found:

> "The Court observes, however, that not only was concern to give extra protection to the minor in question sorely lacking throughout the proceedings, but the impunity which ensued was enough to shed doubt on the ability of the judicial machinery set in motion in this case to produce a sufficiently deterrent effect to protect anybody at all, minor or otherwise, from breaches of the absolute prohibition enshrined in Article 3.
>
> (…)
>
> In view of the above, the Court considers that the impugned court decision suggests that the judges exercised their discretion more in order to minimise the consequences of an extremely serious unlawful act than to show that such acts could in no way be tolerated (see paragraph 65 above)."[54]

In its 14th General Report, the Committee for the Prevention of Torture stated:

> "41. It is axiomatic that no matter how effective an investigation may be, it will be of little avail if the **sanctions imposed for ill-treatment** are inadequate. When ill-treatment has been proven, the imposition of a suitable penalty should follow. This will have a very strong dissuasive effect. Conversely, the imposition of light sentences can only engender a climate of impunity.
>
> Of course, judicial authorities are independent, and hence free to fix, within the parameters set by law, the sentence in any given case. However, via those parameters, the intent of the legislator must be clear: that the criminal justice system should adopt a firm attitude with regard to torture and other forms of ill-treatment. Similarly, sanctions imposed following the determination of disciplinary culpability should be commensurate to the gravity of the case."[55]

[54] *Okkali v. Turkey* (No. 52067/99), judgment of 17 October 2006, paragraph 70 and 75.
[55] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 14th General Report of the CPT's activities, covering the period 1 August 2003 to 31 July 2004 [CPT/Inf (2004) 28].

XI. Implementation of domestic court judgments

Domestic court judgments should be fully and speedily executed by the competent authorities.

Even though the right to have a judgment of a domestic court executed under Article 6 (1) ECHR does not apply to third parties seeking criminal prosecution of a perpetrator, the Court's reasoning in the case of *Hornsby v. Greece* on the right of access to court relating to civil rights and obligations gives some guidance on the general importance of the speedy execution of final and binding judgments:

> "40. (…) However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. (…) Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 (art. 6)."[56]

XII. International cooperation

International co-operation plays a significant role in combating impunity. In order to prevent and eradicate impunity, states must fulfil their obligations, notably with regard to mutual legal assistance, prosecutions and extraditions, in a manner consistent with respect for human rights, including the principle of "non-*refoulement*", and in good faith. To that end, states are encouraged to intensify their co-operation beyond their existing obligations.

In the context of trafficking in human beings, the Court has stated:

> "In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member states are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other states concerned in the investigation of events which occurred outside their territories."[57]

In its "Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", the United Nations General Assembly states:

> "4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, states have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, states should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations."

The Council of Europe has elaborated on international cooperation with regard to criminal proceedings in the "European Convention on Extradition" of 13 December 1957 and the "European Convention on Mutual Assistance in Criminal Matters" of 20 April 1959.

With regard to the principle of non-*refoulement*, the Court has held:

> "Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule (see the case-law cited in paragraph 127 above). It must therefore reaffirm the principle stated in the *Chahal* judgment (cited above, § 81) that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a state is engaged under Article 3, even where such treatment is inflicted by another state."[58]

[56] *Hornsby v. Greece* (No. 18357/91), judgment of 1 April 1998, paragraph 40.
[57] *Rantsev v. Cyprus and Russia* (No. 25965/04), judgment of 7 January 2010 [Grand Chamber], paragraph 289.
[58] *Saadi v. Italy* (No. 37201/06), judgment of 28 February 2008 [Grand Chamber], paragraph 138.

According to Guideline XII § 2 of the Committee of Ministers' "Guidelines on human rights and the fight against terrorism",

> "It is the duty of a state that has received a request for asylum to ensure that the possible return ("*refoulement*") of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion."

XIII. Accountability of subordinates

While the following of orders or instructions from a superior may have a bearing on punishment, it may not serve as a circumstance precluding accountability for serious human rights violations.

Under the heading "Individual criminal responsibility", both Article 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and Article 6 of the Statute of the International Criminal Tribunal for Rwanda state:

> "(…)
>
> 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

The Rome Statute of the International Criminal Court lays down the principle of superior orders in Article 33 ("Superior orders and prescription of law").

In Assembly Resolution 1675 (2009) on "The state of human rights in Europe: the need to eradicate impunity", the Parliamentary Assembly stated that:

> "3. The Assembly further recalls that it is internationally recognised, since the Nuremberg and Tokyo trials held in the wake of the Second World War, that the excuse of simply following order or instructions from one's superiors is not valid for cases of serious human rights violation."

See also Principle 27 ("Restrictions on justifications related to due obedience, superior responsibility, and official status") of the United Nations Commission on Human Rights' "Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity" of 8 February 2005.

XIV. Restrictions and limitations

States should support, by all possible means, the investigation of serious human rights violations and the prosecution of alleged perpetrators. Legitimate restrictions and limitations on investigations and prosecutions should be restricted to the minimum necessary to achieve their aim.

With regard to restrictions and limitations, the Court has pointed out:

> "(…) where a state agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes 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."[59]

XV. Non-judicial mechanisms

States should also consider establishing non-judicial mechanisms, such as parliamentary or other public inquiries, ombudspersons, independent commissions and mediation, as useful complementary procedures to the domestic judicial remedies guaranteed under the Convention.

[59] *Yaman v. Turkey* (No. 32446/96), judgment of 2 November 2004, paragraph 55; see also the cases of *Yeter v. Turkey* (No. 33750/03), judgment of 13 January 2009, paragraph 70, and *Ould Dah v. France* (No. 13113/03), decision of 17 March 2009, p. 17.

XVI. Reparation

States should take all appropriate measures to establish accessible and effective mechanisms which ensure that victims of serious human rights violations receive prompt and adequate reparation for the harm suffered. This may include measures of rehabilitation, compensation, satisfaction, restitution and guarantees of non-repetition.

The right to reparations is elaborated in the United Nations Basic Principles and Guidelines on the right to a remedy and reparations for victims of gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law, in particular Principles 15-24[60], and the Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Principles 31-34.

It is further affirmed by a wide range of provisions in international treaties such as Article 2 (3), 9 (5) and 14 (6) of the International Covenant on Civil and Political Rights as well as in Articles 5 (5), 13 and 41 of the European Convention on Human Rights.

See also the European Convention on the Compensation of Victims of Violent Crime of 24 November 1983 and the Council of Europe Recommendation of the Committee of Ministers to member states on assistance to crime victims of 14 June 2006.

[60] A definition of the terms “rehabilitation”, “compensation”, “satisfaction”, “restitution” and “guarantees of non-repetition” are notably listed in paragraphs 20 to 24 of these principles.