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**CIVIL AND POLITICAL RIGHTS**

**The right to a remedy and reparation for victims of violations  
of international human rights and humanitarian law**

**Note by the High Commissioner for Human Rights**

The High Commissioner for Human Rights has the honour to transmit to the Commission on Human Rights the report of the Chairperson-Rapporteur, Alejandro Salinas (Chile), on the second consultative meeting on the “Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law” (Geneva, 20, 21 and 23 October 2003).

## **Annex**

# **REPORT OF THE SECOND CONSULTATIVE MEETING ON THE BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (GENEVA, 20, 21 AND 23 OCTOBER 2003)**

**Chairperson-Rapporteur: Mr. Alejandro Salinas (Chile)**

## **Summary**

Pursuant to Commission on Human Rights resolution 2003/34, the Office of the High Commissioner for Human Rights convened, with the cooperation of the Government of Chile, the second consultative meeting for all interested member States, intergovernmental organizations (IGOs) and non-governmental organizations (NGOs), with a view to finalizing the “Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law” (hereinafter “Principles and Guidelines”) and, if appropriate, to consider options for their adoption.

The second consultative meeting, held in Geneva on 20, 21 and 23 October 2003, was chaired by Alejandro Salinas (Chile). Theo van Boven and M. Cherif Bassiouni, the mandated authors of the Principles and Guidelines, provided expert guidance. The consultation further benefited from the broad participation of member States, IGOs and NGOs.

The participants in the consultation considered the revised version of the Principles and Guidelines dated 15 August 2003 and provided general and specific comments on the text. Based on the comments received, the Chairperson-Rapporteur circulated a further revised version of the Principles and Guidelines, dated 23 October 2003, as well as a proposal put forward by himself and the independent experts that arose out of informal consultations held on 22 October 2003 (hereinafter “the Proposal”). The Chairperson-Rapporteur informed the meeting that the revised version of the Principles and Guidelines of 24 October 2003 would also incorporate comments made during the last day of the second consultative meeting. Subsequently, the Chairperson-Rapporteur and the various participants discussed the follow-up to the meeting.

Based on discussions during the second consultative meeting, the Chairperson-Rapporteur recommended that, in order to give delegations more time to examine the Proposal as well as the revised Principles and Guidelines of 24 October 2003, he planned to convene an additional one-day informal consultation prior to the next session of the Commission on Human Rights, the exact date being subject to the availability of facilities. In order to prepare for those consultations, the revised Principles and Guidelines of 24 October 2003 would be translated and circulated to delegations. He invited delegations to submit written comments and suggestions at the informal consultation. The deadline for the receipt of comments as well as the exact date of the informal consultation would be communicated in due course.

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## **Introduction**

1. On 20, 21 and 23 October 2003, the Office of the High Commissioner for Human Rights (OHCHR) convened the second consultative meeting with a view to finalizing the “Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law” (hereinafter “Principles and Guidelines”) and, if appropriate, to consider options for their adoption. The meeting, convened pursuant to Commission on Human Rights resolution 2003/34, was chaired by Alejandro Salinas (Chile) and benefited from the expert guidance of the mandated authors of the Principles and Guidelines, Theo van Boven and M. Cherif Bassiouni. Representatives of a large number of member States, non-governmental organizations (NGOs) and international agencies participated.

2. The consultative meeting had, as one of the bases for its work, the revised version of the Principles and Guidelines of 15 August 2003, which had been prepared pursuant to resolution 2003/34 by the Chairperson-Rapporteur in consultation with the independent experts. During the preparation of the revised text, all comments, questions and suggestions raised to date by member States, NGOs and intergovernmental organizations (IGOs) were reflected.

3. The meeting was opened by the Acting High Commissioner for Human Rights. Following the election of Mr. Salinas as Chairperson-Rapporteur, the meeting adopted its agenda. The Chairperson then encouraged the participants to make general comments on the revised text. The meeting proceeded with a review of the revised text, principle by principle, highlighting the recent amendments.

4. Subsequently, the Chairperson and the independent experts further revised the text of the Principles and Guidelines in order to reflect the oral and written comments received from the participants during the first two days of the meeting. The Chairperson and the experts also held informal consultations with several delegations, in order to achieve consensus.

5. On the last day of the meeting, the participants considered a revised text of the Principles and Guidelines, dated 23 October 2003, as well as a proposal put forward by the Chairperson and the experts arising out of informal consultations held on 22 October 2003 (hereinafter “the Proposal”). The Chairperson informed the meeting that the secretariat would prepare and circulate a further revised version of the Principles and Guidelines, dated 24 October 2003 which would incorporate comments and suggestions made during the second consultative meeting, including those made on the last day. Subsequently, the Chairperson and the various participants discussed the follow-up to the consultative meeting.

6. The present report on the final outcome of the second consultative meeting includes (a) the Chairperson’s observations (sect. I); (b) the Chairperson’s recommendations for follow-up to the meeting (sect. II); (c) the revised version of the Principles and Guidelines, dated 24 October 2003 (appendix I); and (d) the Proposal (appendix II).

## **I. OBSERVATIONS OF THE CHAIRPERSON-RAPPORTEUR**

7. Based on the discussions during the consultative meeting, the Chairperson-Rapporteur made the following observations. These are not intended to be either comprehensive or exclusive, but merely to serve as a summary of the main issues addressed during the meeting.

### **A. General observations**

8. The draft Principles and Guidelines have greatly benefited from the broad consultative process facilitated by the two consultative meetings, and the text of the document has been significantly enhanced by the useful input from Governments, IGOs and NGOs, as well as from the ongoing efforts and assistance of the two experts.

9. The Principles and Guidelines have been drafted to reflect a victim-based perspective and have systematized existing international legal norms, not according to the source, but according to the needs and rights of the victims. This premise has enjoyed broad support and should be maintained.

10. The Principles and Guidelines do not introduce new principles of international law, but rather consolidate and organize existing obligations, with a view to identifying mechanisms, modalities, procedures and methods for implementing these obligations.

11. The text of the document has been drafted to reflect this reality and, accordingly, mandatory language has been used only where a particular international obligation exists. It is important that the expression in the document of existing legal norms reflect States' understanding of what their international legal obligations are.

12. At the same time, in drafting the text efforts have been made to ensure that the Principles and Guidelines in no way fall below the requirements of existing international legal standards.

13. The Principles and Guidelines have been built on international law and practice as they have evolved in the course of the development of the Principles; thus, the emerging concept of the responsibility of non-State actors is reflected in the Principles and Guidelines.

14. In general, no operative distinction is intended between the words "principles" and "guidelines". The subject matter of particular paragraphs is more in keeping with one or the other of these expressions, and therefore it is appropriate to retain both. However, no substantive consequence is intended to flow from the use of either term.

### **B. Observations on the specific principles\***

#### **Principles 1 and 2**

15. The "victim-based" approach embraces two distinct areas of international law, namely human rights law and international humanitarian law (IHL). The clear distinction between violations of human rights law and violations of IHL should be maintained, especially with regard to non-State actors accountable under IHL.

16. The directive language, including words such as "shall" found in principle 2, could be revisited with a view to employing less categorical wording, such as "should".

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\* The numbers of the principles in this section do not necessarily concur with those in appendix I, which reflects the results of all the discussions at the second meeting.

17. In relation to the scope of the obligation discussed under principle 2, some elaborations and amendments were considered. In principle 2 (b), a reference could be included to “justice and reparation”; principle 2 (c) could refer to “technical and legal advice”; principle 2 (d) could be reworded to emphasize that, where there is a difference between international and domestic law, the provision affording the greater degree of protection will be applied.

18. Reference in principle 2 to the obligation to “incorporate” international law into national law could benefit from further clarification, so as to ensure that international legal norms are not expected to be automatically incorporated in national law, without reference to the relevant modalities of national legal systems.

### **Principle 3**

19. The scope of the obligation referred to in principle 3 reflect international law and the pronouncements of relevant international case law. It was therefore generally not contested; however, nuances and implications of the particular paragraphs were the cause of some concern.

20. In relation to principle 3 (a), it was suggested that the cultural dimension should be taken into account in considering measures to prevent violations. Some delegations queried the meaning of the reference in principle 3 (b) to an “effective” investigation. It was noted that this word was intended to underscore that an investigation should be meaningful, prompt, thorough, impartial and substantive. Additional wording to reinforce this intent could be considered.

21. It was important to maintain consistency in terminology; the terms “perpetrator” and “violation” were used throughout the text, including in principle 3 (b). It was felt that the word “perpetrator” should be used in lieu of “violation”. In principle 3 (c), it was suggested that the reference to “violation” could be replaced with a more general reference to actions that may give rise to violations.

22. The concepts of “remedy” and “access to justice” used in principles 3 (c) and 3 (d), whilst separate and distinct, could potentially give rise to some confusion. Some delegations queried whether the reference to “remedy” should be understood as a procedural remedy or a substantive remedy. This confusion was particularly apparent in the French texts, where “remedy” is translated as *voie de recours*, which is procedural rather than substantive in nature and is more suggestive of “access to justice”. However, in principle 11, which introduces the topics of “access to justice”, “reparations” and “access to information”, the reference to “remedy” is clearly intended to mean a substantive remedy. Appropriate amendments should be considered in this regard. It was important that principle 3 be aligned and consistent with principle 11. Further consideration would be given to these issues.

### **Principles 4 and 5**

23. Principle 4 represents an important statement of the obligation to combat impunity, which is one of the central purposes of the Principles and Guidelines. A brief reference could be inserted in this principle to the need to afford remedies.

24. It was important to ensure that the reference to the obligation to prosecute persons alleged to have committed violations of human rights law and humanitarian law did not exceed the relevant legal boundaries. Whilst the duty to prosecute grave breaches of humanitarian law and serious international crimes was well recognized, in many instances States' duties under international law go no further than the prevention, suppression or investigation of violations. The explanatory comments to the revised text indicate that the expression "duty to prosecute" is intended simply to reflect the general international law obligation to proceed under national law or in accordance with applicable international legal obligations. Nevertheless, appropriate modifications to the text of principle 4 itself could be considered in this connection.

25. Important changes had been made to the text of principle 5 following the first consultative meeting. A reference had been inserted to States' incorporating in their domestic legislation appropriate provisions for universal jurisdiction, consistent with international law. Several delegations noted that universal jurisdiction applied only in specific circumstances, such as in connection with grave violations of humanitarian law or as a consequence of the ratification of the Rome Statute of the International Criminal Court. There was concern to ensure that the Principles and Guidelines should not overstate the reach and application of universal jurisdiction under international law, and should not unduly fetter the discretion of domestic prosecutors. Some concerns were raised as to whether it was appropriate for principle 5 to refer to a relevant "nexus", and some delegations queried whether this properly reflected international legal principles that apply in relation to universal jurisdiction. An appropriate reference should also be made to IHL. Further consideration could be given to the wording of this provision.

26. Principle 5 would also benefit from an amendment making clear that, consistent with established principles, extradition of suspected perpetrators of human rights violations would not take place where this might lead to torture or an unfair trial.

### **Principles 6 and 7**

27. The Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes against Humanity has not been widely ratified, although the relevant principles continue to be acknowledged internationally. The Principles and Guidelines recognize that the obligations contained in that convention are not binding on many States, and the amendment inserted after the last consultative meeting was aimed at ensuring that the text of principle 6 was not read as purporting to say otherwise. The phrase "consistent with international law" means that, where a State is not party to the Convention, it is not bound under international law to observe it. Nevertheless, in response to further concerns raised by some delegations, these qualifying words could be revisited.

28. Principle 7 was intended to reflect that victims' right to appropriate redress should not be hindered by statutes of limitation relating to possible civil action which the victim could pursue directly against the perpetrator. Further refinement of this wording could be considered to give effect to this intention.

## **Principles 8 and 9**

29. The definition of “victim” in principle 8 is based on the definition contained in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Consistent with this definition, it is not necessary for the State to be directly culpable in order for a person to fall within the definition.

30. Given the focus of the Principles and Guidelines on gross violations of human rights and IHL, it would be useful to consider a corresponding reference to “gross” or “serious” violations of human rights in the definition of “victim” in principle 8.

31. Some delegations expressed the view that the definition of “victim” was too narrow and that it should embrace groups, such as those affected by violations that impact on whole communities. It was noted that individual victims within a group that had been affected by violations of human rights should in most instances be able to seek redress in their individual capacity, although there might be some cases where the nature of the violation was intrinsically collective. Other delegations queried whether additional categories of victims should be included in the definition.

32. There was debate on whether it was appropriate to include in the definition of victim a reference to “legal personality”, which would include corporate entities.

## **Principle 10**

33. It was suggested that principle 10 could be amended so as to provide that appropriate measures should be taken to ensure victims’ safety, physical and psychological well-being and privacy, consistent with article 68 (1) of the Rome Statute.

34. Principle 10 addresses the various types of entities that treat victims of violations. Some delegations believed that this list should be made clearly non-exhaustive, or that a general reference be inserted to treatment by “States and, where applicable, other entities and groups”. This could address the problems some delegations had with the reference to “private enterprise”.

35. There was some debate as to whether the use of the word “compassion” in the principle, was appropriate, or whether it had connotations of paternalism. Some delegations took the view that there should instead be a focus on treating victims with respect for their dignity. It was noted that the word “compassion” is used in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

36. Concerning the “special consideration” to be provided to the victim, an appropriate balance should be sought with due regard to the right of others, in order to avoid imbalances between the accused and the victim.

## **Principle 11**

37. There was debate concerning the structure of principle 11 and how it related to the rest of the document, in particular principles 3 and 12. A particular linguistic problem was posed by the two concepts of remedy and reparation, which should be maintained as different concepts.



38. In view of the fact that principle 11 was an introductory or umbrella paragraph for the following chapters, and in light of the title of the document, it may be necessary to amend the title of this chapter in order to embrace the different meanings and to restructure the section in order to avoid ambiguities. Further, attention should be given to the relationship between principle 11 (c) and principle 27. Particular attention should be paid to consistency in the use of terms.

### **Principles 12 to 14**

39. A number of issues were raised during the discussion on principles 12 to 14, in particular concerning the issue of collective rights and claims for reparation, the right to receive reparation collectively and the issue of the scope of access to justice.

40. There was scope for improving the language with respect to the available and “applicable” mechanisms and modalities under domestic and international law to ensure access to justice. However, it might be difficult to resolve the issue of collective rights. A compromise could potentially be achieved by inserting a reference to relevant mechanisms for the protection of collective rights that may exist under domestic law. Another option would be to clarify in more detail what was meant by collective rights and when collective reparations would be appropriate.

41. Some legal systems allow for organizations or groups representing collectivities to act in a collective capacity to present claims and even to receive remedies on behalf of those who constitute part of the group or collectivity, irrespective of whether they are identified. Most legal systems, however, do not recognize a cause of action, or a right to representative claims, unless an agency relationship exists. It could be difficult to reconcile these two approaches. Nevertheless, contemporary practice in international claims evidences the fact that certain organizations have been recognized as having the legal standing to represent members of a class of persons at large. Moreover, some legal systems have recognized the rights of collective actions known as “class actions”.

42. These questions are particularly relevant to the rights of indigenous people and to the rights of certain collective communities of victims who are unable to represent themselves and more so, to have their individual members seek remedies under domestic or international law. Consequently, the only way to provide for such disenfranchised and disempowered groups to have claims presented on their behalf is to recognize their right to do so in a collective capacity. Recognizing, however, that there is no international legal obligation binding upon States to provide for such standing before administrative and legal organs, the above provision reflects the desideratum that collective rights of action be established under national law.

### **Principles 15 to 20**

43. One significant issue arising in connection with these principles relates to the *extent* of a party’s obligation in circumstances where it is not responsible for a violation itself, nor for the violation of a relevant non-State actor. This could benefit from further clarification. There were considered to be a number of ways in which a State party could facilitate redress, on the basis of solidarity with the victim, in situations where it is not responsible for the breach in question.

44. In principle 18, it was suggested that the reference to the establishment of “national funds” for victims of reparations was too narrow, and that it should be replaced by a more general reference to “programmes”. This would embrace a much broader range of possible support mechanisms, extending beyond only the financial.

45. The enforcement of foreign judgements referred to in principle 19 presents certain difficulties, as the subject matter of a foreign judgement may not be compatible with the relevant domestic law of the State concerned. Further, the complexities of this matter are dealt with under relevant international law. These concerns could be met by introducing less categorical language in relation to the enforcement of foreign judgements, such as using the word “should”, rather than “shall”, and including a reference to domestic law. On the other hand, it was considered by some delegations that there would be merit in inserting a specific reference to “effective” mechanisms for “prompt enforcement” of judgements.

46. In general, in relation to non-State actors, the use of the term “abuse” was to be preferred to “violation”. Thus in principle 17, the text might read “In cases where the ‘abuse’ is not attributable to the State ....”

47. A number of delegations considered that the appropriate focus should be on gross violations of human rights, whilst others believed the Principles and Guidelines should relate to all violations of human rights.

48. Queries were raised about whether principle 20 was in conformity with relevant international legal principles governing State succession.

## **Principles 21 to 26**

49. Principle 21 lists a number of aspects of reparation; however, this list could be interpreted as being exhaustive, and it would be appropriate to insert wording that makes clear that the list is open ended.

50. Some concerns were raised that the wording of principle 22 was too categorical, requiring that restitution wherever “possible” should restore the victim to the original situation, and it was suggested other words could be used. Further, the final sentence of principle 22 is in directive terms, stating that restitution *includes* certain aspects. A number of delegations considered that this could be too prescriptive and that less mandatory language could be used. For example, a particular form of restitution may not be appropriate, whereas others not listed, such as the establishment of true identity, may be appropriate.

51. Some delegations believed that compensation for lost opportunities, referred to in principle 23 (b), was problematic, as such opportunities could be very difficult to assess and quantify for the purpose of compensation.

52. Principle 23 (d) refers specifically to harm to reputation and dignity, and there was a suggestion that the text refer also to “moral damage”.

53. Delegations noted some inconsistencies in the translation of principle 25 (c), which states in English that “satisfaction” should include the search “for the bodies of those killed or for the disappeared”. There is an inconsistency with the Spanish text, which states that the search is for the *bodies* of the killed or disappeared. In other words, the Spanish text suggests that the search is for bodies, which precludes persons who have disappeared, but who are alive.

54. It was noted that, in relation to principles 25 and 26, the concepts of guarantee of non-repetition and prevention could be separated into distinct provisions, whereas currently they appear in various different principles.

55. The role of military tribunals in peacetime was discussed and, whilst many delegations appeared to be satisfied with the current provision, a number of delegations raised concerns. Some delegations considered that it would be appropriate to clarify, in principle 26 (b), that military tribunals should have no role in peacetime. Others felt that it was important to allow a role for military tribunals even in peacetime, and that to do otherwise would create problems in relation to their domestic legislation. Further, some delegations remarked that the restriction on the jurisdiction of military tribunals in principle 26 (b) could apply to cover other ad hoc tribunals invested with special jurisdiction.

56. Principle 26 (e) could be improved by providing that training on international humanitarian law be directed at all sectors of society. Currently, the text refers to human rights training for all sectors of society, but not training on humanitarian law. There was no reason to restrict training on humanitarian law to the public sector.

57. Principle 26 (f), in referring to the promotion of codes of conduct and ethical norms, currently lists particular sectors of society. By mentioning these specifically, one necessarily excludes other sectors, and accordingly it would be prudent to either delete references to these sectors, or to make clear that the listed categories are inclusive, not exclusive.

58. The new reference in principle 26 (g) to “preventive social intervention” was discussed at some length. Concern was raised about the word “intervention” and questions were raised about the intended meaning of this new provision. Some thought it suggested external intervention in a State’s internal affairs. It was noted, however, that the new wording was intended to focus attention on social tensions and conflicts that may give rise to situations where human rights abuses occur, and that States should take appropriate preventive measures to avoid such situations. To allay any concerns, it was suggested that, in lieu of “preventive social intervention”, the text could refer simply to “appropriate preventive measures”.

59. As concerns principle 26 in general, it was suggested that the provision would benefit from a paragraph stating that concrete legislative and administrative measures should be taken in relation to guaranteeing that violations are prevented or will not be repeated. Further, the principle should contain a new paragraph highlighting the responsibility of States to reform laws that have contributed to or permitted the violation of human rights.

### **Principle 27**

60. It was suggested that principle 27 should be properly aligned with principle 11 (c), in order to facilitate the access by victims and their representative to factual information concerning violations. The text should refer to the right to know, seek, obtain and retain information on the alleged violations and to the truth.

### **Principle 28**

61. Some delegations raised objections to the inclusion of sexual orientation in the non-discrimination provision found in principle 28. It was noted that, regardless of the direct treatment of different sexual orientations by domestic legal orders, there was no legal basis for legal discrimination against persons of different sexual orientation in terms of access to remedies for human rights violations. One option would be to refer generally to non-discrimination, without listing the various categories.

62. As the Principles and Guidelines relate to both human rights and international humanitarian law, some delegations considered that there should be a specific reference in principle 28 to humanitarian law.

### **Principle 29**

63. It was suggested that this principle could profit from the inclusion of the text of the Inter-American Convention on Human Rights to the effect that the Principles and Guidelines do not derogate from any right under domestic law.

## **C. Observations on the revised version of the Principles and Guidelines dated 23 October 2003 and on the Proposal made by the Chairperson-Rapporteur and the independent experts**

64. Many delegations expressed their appreciation for the amendments made in the revised Principles and Guidelines of 23 October 2003, which took into account many of the comments made during the consultation and the written proposals. Nevertheless, most delegations emphasized the need for more time for an in-depth study of the revised Principles and Guidelines of 23 October 2003, so as to be in a position to comment on their substance, particularly because they would have to consult with their capitals.

65. In light of the above, following a detailed explanation of the revised text by Mr. Bassiouni, the Chairperson-Rapporteur invited the participants to provide any additional substantive comments. Such additional comments would be included in the revised text of the Principles and Guidelines dated 24 October 2003 (appendix I).

66. One specific suggestion related to principle 18, which would request States to provide under their domestic laws effective mechanisms for the enforcement of reparation judgements. Several non-governmental organizations expressed concern that the wording “and as appropriate” in principle 4 could be misused for political rather than juridical purposes. Concerning principle 7, the reference to “civil claims” was felt to be too narrow since in some

States there were also other types of available legal processes, such as administrative proceedings. With reference to principle 12 (b), which provides for the victims' right to "reparation for harm suffered or other appropriate remedy", a proposal was made to change "or" to "and", since "or" might be interpreted to exclude other appropriate remedies. Since the new draft would be limited in its scope to *gross* violations, suggestions were made to include a separate provision highlighting that the instrument would not prejudice the right of *all* victims to seek reparation.

67. With respect to the enforcement of judgements under principle 18, it is evident that, where the enforcement is not possible, such as where the doctrine of sovereign immunity or act of State applies, the obligation of a State shall be limited to its best efforts.

68. Concerning the jurisdiction of military tribunals, principle 25 deals with non-repetition of violations. Consequently, the provision to limit the jurisdiction of military tribunals to military offences committed by military personnel is not intended to address the general issue of military jurisdiction. Rather, it addresses only those cases in which military tribunals have a record of violations and, therefore, by limiting their jurisdiction one can prevent repetition.

69. Several delegations were in favour of having additional informal consultations before or during the next session of the Commission on Human Rights with a view to finalizing the Principles and Guidelines and facilitating their adoption in a spirit of cooperation and consensus.

70. One delegation in particular emphasized the importance of deleting from the title the words "gross" and "serious", and urged that the matter be given serious consideration at the forthcoming informal consultations.

71. With respect to the Proposal which is attached to this document (appendix II), several delegations commented favourably on the spirit of cooperation reflected in it, while others felt that it weakened the overall scope of the Principles and Guidelines. Since the Proposal accepts in principle the entire contents of the revised Principles and Guidelines of 23 October 2003, subject to the changes indicated in the said Proposal, it was felt that its main aspect was of a judgemental character and therefore that it should be discussed at the forthcoming informal consultations.

72. The observer for Pakistan, on behalf of the Organization of the Islamic Conference, expressed satisfaction with the revised text of 23 October 2003 which accommodated the concerns expressed by the organization and its members regarding the previous formulation of the "non-discrimination" provision. He also expressed some concern about the title, particularly with respect to the addition of the terms "gross" and "serious", which were not included in the revised Principles and Guidelines of 15 August 2003.

73. The observer for Italy, on behalf of the European Union and acceding countries, expressed support for the process and, in particular, for the continuation of the consultative process, which he hoped would lead to a prompt and satisfactory outcome.

## **II. RECOMMENDATIONS OF THE CHAIRPERSON-RAPPORTEUR FOR THE FOLLOW-UP TO THE SECOND CONSULTATIVE MEETING**

74. In order to give delegations more time to examine the Proposal as well as the revised Principles and Guidelines of 24 October 2003, the Chairperson-Rapporteur announced that he planned to convene an additional one-day informal consultation prior to the next session of the Commission on Human Rights, the exact date being subject to availability of conference facilities. In order to prepare for those consultations, the revised Principles and Guidelines of 24 October 2003 would be translated and circulated to the delegations. Delegations were invited to submit written comments and suggestions on the revised text for discussion at the informal consultations. The deadline for the receipt of comments as well as the exact date of the informal consultation would be communicated to the delegates in due course.

## **Appendix I**

### **BASIC 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**

**(Rev. 24 October 2003)**

#### **Background**

The Sub-Commission on Prevention of Discrimination and Protection of Minorities, in its resolution 1989/13, decided to entrust the Special Rapporteur, Mr. Theo van Boven, with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. In 1993, Mr. van Boven submitted the study in his final report to the Sub-Commission (E/CN.4/Sub.2/1993/8). The Commission on Human Rights, in its resolution 1994/35, welcomed the study and regarded the proposed basic principles and guidelines contained in the study of the Special Rapporteur as a useful basis for giving priority to the question of restitution, compensation and rehabilitation. In accordance with the Sub-Commission resolution 1996/28, the Secretary-General transmitted to the Commission the revised draft basic principles and guidelines prepared by Mr. van Boven (E/CN.4/1997/104, annex).

In accordance with Commission resolution 1998/43, Mr. M. Cherif Bassiouni was appointed as independent expert to prepare a revised version of the draft basic principles and guidelines, taking into account the views and comments provided by States, intergovernmental and non-governmental organizations. In its resolution 1999/33, the Commission noted with appreciation the report of the independent expert (E/CN.4/1999/65). In 2000, Mr. Bassiouni submitted the final report containing a revised version of the basic principles and guidelines (E/CN.4/2000/62) to the Commission at its fifty-sixth session. In preparing the revised version of the principles and guidelines, the independent expert benefited from the foundation provided by prior reports as well as comments made by various member States, intergovernmental and non-governmental organizations. Additionally, Mr. Bassiouni held two consultative meetings in Geneva for all interested member States, intergovernmental and non-governmental organizations and comments made during those meetings were taken into account in formulating the principles and guidelines.

On the basis of Commission resolutions 2000/41 and 2002/44, the Office of the High Commissioner for Human Rights (OHCHR) circulated the text of the principles and guidelines and comments were received from member States, intergovernmental and non-governmental organizations.

In accordance with Commission resolution 2002/44, OHCHR convened, with the cooperation of the Government of Chile, an international consultation in Geneva for all interested member States, intergovernmental and non-governmental organizations, with a view

to finalizing the principles and guidelines (E/CN.4/2000/62). The consultation was chaired by Mr. Alejandro Salinas (Chile), and benefited from the expert guidance of the mandated authors of the principles and guidelines, Mr. van Boven and Mr. Bassiouni. Following presentations by two experts, the participants at the consultation reviewed the draft principles and guidelines and discussed follow-up to the consultative meeting. The Chairperson-Rapporteur submitted to the Commission at its fifty-ninth session a report on the consultative meeting, *inter alia* recommending that the Commission on Human Rights establish an appropriate and effective mechanism with the objective of finalizing the elaboration of the set of “Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and humanitarian law”.

In its resolution 2003/34, the Commission took note of the report of the Chairperson-Rapporteur of the consultative meeting (E/CN.4/2003/63).

In accordance with Commission resolution 2003/34, the Chairperson-Rapporteur of the consultative meeting, in consultation with the independent experts, Mr. van Boven and Mr. Bassiouni, prepared a revised version of the “Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law”, taking into account the opinions and commentaries of States and of intergovernmental and non-governmental organizations and the results of the consultative meeting.

In resolution 2003/34, the Commission further requested the OHCHR to hold, with the cooperation of interested Governments, a second consultative meeting for all interested member States, intergovernmental and non-governmental organizations with a view to finalizing the “Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law” and, if appropriate, to consider options for the adoption of these principles and guidelines. The second consultative meeting should have, as a basis for its work, the comments submitted, the report of the Chairperson-Rapporteur of the first consultative meeting, and the revised version of the principles and guidelines prepared by the Chairperson-Rapporteur of the first consultative meeting in consultation with the independent experts.

On the basis of the above resolution the Chairperson-Rapporteur and the independent experts met in Geneva on 4, 5 and 6 August 2003 to revise the text in accordance with comments and observations received by Governments. The revised text, dated 15 August 2003, was reviewed by Governments, intergovernmental organizations and non-governmental organizations at the second consultative meeting held in Geneva from 20 to 23 October 2003. The comments made during the first two days of meeting, 20 and 21 October 2003, were incorporated by the Chairperson-Rapporteur and the two independent experts into the text which was reviewed further during the last day of the meeting on 23 October 2003.

The following is the revised text of the principles and guidelines, dated 24 October 2003, which also incorporates comments and suggestions made during the last day of the second consultative meeting.



## Preamble

*The Commission on Human Rights,*

*Recalling* the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular the Universal Declaration of Human Rights at article 8, the International Covenant on Civil and Political Rights at article 2, the International Convention on the Elimination of All Forms of Racial Discrimination at article 6, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at article 14, the Convention on the Rights of the Child at article 39, and of humanitarian law as found in article 3 of the Hague Convention of 18 October 1907 concerning the Laws and Customs of War and Land (Convention No. IV of 1907) and article 91 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

*Recalling* the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular the African Charter on Human and Peoples' Rights at article 7, the American Convention on Human Rights at article 25, and the (European) Convention for the Protection of Human Rights and Fundamental Freedoms at article 13,

*Recalling* the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and resolution 40/34 of 29 November 1985 by which the General Assembly adopted the text recommended by the Congress,

*Reaffirming* the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

*Recalling* resolution 1989/57 of 24 May 1989 of the Economic and Social Council, entitled "Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power," as well as Council resolution 1990/22 of 24 May 1990, entitled "Victims of crime and abuse of power,"

*Noting* that in resolution 827 (1993) of 25 May 1993 in which it adopted the Statute of the International Criminal Tribunal for the Former Yugoslavia, the Security Council decided that "the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law,"

*Noting also* that the Rome Statute of the International Criminal Court requires the establishment of "principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation" and requires the Assembly of States Parties to establish a trust fund for the benefit of victims of covered crimes within the purview of the Court

and of the families of such victims, and mandates the Court “to protect the safety, physical and psychological well-being, dignity and privacy of victims” and to permit the participation of victims at all “stages of the proceedings determined to be appropriate by the Court,”

*Considering* that the principles and guidelines contained herein are directed at gross violations of civil, political, economic, social and cultural rights, which include the protection of life, physical integrity and other aspects essential to the human person and to human dignity,

*Emphasizing* that the principles and guidelines do not create new substantive international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms,

*Recalling* that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with treaty obligations assumed by States Parties and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

*Noting* that international human rights law and international humanitarian law have developed along separate legal and historic tracks which nevertheless overlap in some respects and provide complementary protections of victims, though not necessarily in the same manner or using the same terminology,

*Noting also* that conflicts of a non-international character as well as internal disturbances and tensions that have occurred since the Second World War reveal that a high level of victimization has occurred at the hands of non-State actors and that the victims of violations of international humanitarian law and human rights law require the same protections as other victims, not only on the basis of principles of State responsibility but also on the basis of social and human solidarity,

*Noting further* that the recognition of the rights of victims and providing for substantive and procedural remedies arise as a consequence of violations of international law irrespective of the specific sources of law applicable to the rights of victims,

*Noting* that international human rights law and international humanitarian law are complementary, though separate and distinct bodies of international law and that the recognition of the substantive and procedural remedies for victims contained in the present document are not intended to be construed as commingling the two bodies of law and moreover that the recognition of victims’ substantive and procedural remedies does not prejudice or affect the norms applicable under these two bodies of international law nor their substantive and procedural content,

*Noting also*, as established in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, that victims of serious abuses of political and economic power are entitled to the protection of their rights like other victims,

*Noting further* that, contemporary forms of victimization, while essentially directed against individuals, may nevertheless also be directed against classes of persons or identifiable groups of persons who are targeted collectively, and who should also be entitled to the protection of their collective rights and to engage in collective legal action to secure the rights of collective groups,

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

*Convinced* that, in adopting a victim-oriented perspective, the international community affirms its human solidarity and compassion with victims of violations of international law, including violations of international human rights and humanitarian law, as well as with humanity at large,

*Decides* to adopt the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of [Gross] Violations of International Human Rights and [Serious] Violations of Humanitarian Law as follows:

**I. OBLIGATION TO RESPECT, ENSURE RESPECT FOR AND  
ENFORCE INTERNATIONAL HUMAN RIGHTS AND  
HUMANITARIAN LAW**

1. The obligation of each State to respect, ensure respect for and enforce international human rights and humanitarian law applicable to it pertains to norms that are, inter alia:

- (a) Contained in treaties to which a State is a party;
- (b) Found in customary international law; or
- (c) Contained in a State's domestic law.

2. To that end, if they have not already done so, States shall ensure that their domestic law is consistent with their international legal obligations by:

- (a) Incorporating norms of international human rights and humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
- (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
- (c) Making available adequate, effective, prompt, and appropriate procedural and substantive remedies, including reparation, as defined below; and
- (d) Ensuring, in the case that there is a difference between a State's national requirements and its international legal obligations, that the requirement or obligation that provides the greatest degree of protection to the victim is applied.

## II. SCOPE OF THE OBLIGATION

3. The obligation to respect, ensure respect for and enforce its international human rights and humanitarian law obligations includes, inter alia, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against the alleged perpetrator in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Afford effective, prompt and appropriate procedural and substantive remedies to victims, including providing and facilitating reparation to victims, as defined below.

## III. GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND SERIOUS VIOLATIONS OF HUMANITARIAN LAW THAT CONSTITUTE CRIMES UNDER INTERNATIONAL LAW

4. Those gross violations of international human rights and serious violations of humanitarian law that constitute crimes under international law require the duty to investigate and, if there is sufficient evidence, the duty to prosecute the person alleged to have committed the violations and, if found guilty, the duty to punish the perpetrator. Moreover, in these cases, States shall cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international obligation, States shall incorporate and otherwise implement within their domestic law appropriate provisions, consistent with applicable international law, providing for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligation, States shall facilitate extradition or surrender of offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to and protection of victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

## IV. STATUTES OF LIMITATIONS

6. Where so provided for in an applicable treaty or contained in another international legal obligation, statutes of limitations shall not apply to violations of international human rights and humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes against international law, including those time limitations applicable to civil claims and other

procedures, should not be unduly restrictive, procedurally or in other ways, so as to deprive the victim of pursuing a claim against the perpetrator or any other body or entity. Moreover, statutes of limitations shall not be applied to periods during which no effective remedies exist for gross violations of human rights and serious violations of humanitarian law.

## V. VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND SERIOUS VIOLATIONS OF HUMANITARIAN LAW

8. For purposes of this document, a victim is a person or a collective group of persons who suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of their fundamental legal rights. A victim may also be a legal personality, the representative of a victim, a dependant, a member of the immediate family or household of the direct victim, as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, suffered physical, mental, or economic harm.

9. For the purposes of this document, a victim as defined above is one who suffers harm as a result of acts or omissions that constitute a gross violation of international human rights, or serious violations of humanitarian law.

10. A person's status as a victim should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted.

## VI. TREATMENT OF VICTIMS

11. Victims should be treated by the State and, where applicable, by other entities or groups, whether public or private, with compassion and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her retraumatization in the course of legal and administrative procedures designed to provide justice and reparation.

## VII. VICTIMS' RIGHT TO SUBSTANTIVE AND PROCEDURAL REMEDIES

12. Remedies for gross violations of international human rights and serious violations of humanitarian law include the victim's right to the following, whose contents are described below, namely:

- (a) Access to justice;
- (b) Reparation for harm suffered and other appropriate remedy; and
- (c) Access to factual information and other relevant information concerning the violations.

## VIII. ACCESS TO JUSTICE

13. A victim of a gross violation of human rights or of a serious violation of humanitarian law shall have effective access to a judicial remedy. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. A victim's right of effective access to justice also extends to international proceedings as provided by international law. Obligations arising under international law to secure the individual or collective right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

(a) Disseminate, through public and private mechanisms, all available remedies for violations of gross international human rights and serious violations of humanitarian law;

(b) Take measures to minimize the inconvenience to victims and their representatives, protect their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Facilitate assistance to victims seeking access to justice;

(d) Make available all appropriate diplomatic and legal means to ensure that victims can exercise their rights to a substantive and procedural remedy for violations of international human rights or humanitarian law.

14. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present collective claims for reparation and to receive reparation collectively, as appropriate.

15. Adequate, effective and prompt remedy against a gross violation of international human rights or serious violations of humanitarian law should include all available and appropriate international processes in which an individual may have legal standing and should be without prejudice to any other domestic remedies.

## IX. REPARATION FOR HARM SUFFERED OR OTHER APPROPRIATE REMEDY

16. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights or serious violations of humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for its acts or omissions constituting gross violations of international human rights and serious violations of humanitarian law. In cases where a person, a legal personality, or other entity is found liable for reparation to a victim, the party responsible for the violation should provide reparation to the victim, or to the State if the State has already provided reparation to the victim.

17. In the event that the party responsible for the violation is unable or unwilling to meet these obligations, the State should endeavour to provide assistance, including reparations as defined below, to victims who have sustained bodily injury or impairment of physical or mental

health as a result of these violations and to the families, in particular, dependants of persons who have died or become physically or mentally incapacitated as a result of the violation. To that end, States should endeavour to establish national programmes for reparation and other assistance to victims.

18. A State shall enforce its domestic judgements for reparation against individuals or entities responsible for the violations and shall endeavour to enforce valid foreign legal judgements for reparation against individuals or entities responsible for the violations. To that end, States shall provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

19. In cases where the State or Government under whose authority the violation occurred is no longer in existence, the State or Government successor in title should provide reparation to the victims.

20. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights and serious violations of humanitarian law should be provided, as appropriate and proportional to the violation and the circumstances of each case, with the following forms of reparation: restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition.

21. Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, legal rights, social status, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

22. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the violation and the circumstances of each case, resulting from gross violations of international human rights and serious violations of humanitarian law, such as:

- (a) Physical or mental harm, including pain, suffering and emotional distress;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Harm to reputation or dignity; and
- (e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

23. Rehabilitation should include, as appropriate, medical and psychological care as well as legal and social services.

24. Satisfaction should include, where applicable and as appropriate, any or all of the following:

- (a) Cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;
- (c) The search for the whereabouts of the disappeared and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim;
- (e) Apology, including public acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons responsible for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels.

25. Within national legal systems, guarantees of non-repetition and prevention should include, where applicable and as appropriate, any or all of the following:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces and ensuring that all military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Conducting and strengthening, on a priority and continued basis, human rights and humanitarian law training to all sectors of society, including law enforcement officials, as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises;



(g) Promoting mechanisms for monitoring and preventing inter-social conflicts and their resolution;

(h) Reviewing and reforming laws contributing to or allowing gross violations of human rights and serious violations of humanitarian law.

#### X. ACCESS TO FACTUAL INFORMATION AND OTHER RELEVANT INFORMATION CONCERNING THE VIOLATIONS

26. States should develop means of informing the general public and, in particular, victims of violations of international human rights and humanitarian law of the rights and remedies contained within these principles and guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of human rights and serious violations of humanitarian law and to learn the truth in regard to these violations.

#### XI. NON-DISCRIMINATION AMONG VICTIMS

27. The application and interpretation of these principles and guidelines must be consistent with internationally recognized human rights law and humanitarian law and be without any discrimination of any kind or grounds, without exception.

#### XII. NON-DEROGATION

28. Nothing in these principles and guidelines shall be construed as restricting or derogating from any rights or obligations arising under international law.

#### XIII. RIGHTS OF OTHERS

29. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from international and national standards of due process.

### **Explanatory comments**

The following explanatory comments are made in response to various comments and questions posed by States, intergovernmental and non-governmental organizations in the course of various consultations, including written comments received by the secretariat. The preamble as well as the principles and guidelines themselves reflect these issues. The following additional commentary on the text is to be read in conjunction with the Chairperson-Rapporteur's report on the discussions that took place during the course of the second consultative meeting.

#### **1. Nature of the principles and guidelines**

The principles and guidelines do not create new substantive international or domestic legal obligations. They provide for mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under human rights law and international humanitarian law. At the same time, they seek to rationalize through a consistent approach the means and methods by which victims' rights can be addressed, so as to maximize positive outcomes and minimize the diversity of approaches that may cause uneven implementation. It should be noted that the fact that the rights of victims are articulated with specificity, and their remedies addressed with particularity, does not create new substantive legal obligations.

#### **2. Sources of law and terminological distinctions**

International human rights law and international humanitarian law have developed along separate tracks. Their sources are in different international conventions, as well as in separate aspects of customary international law and general principles of law. These multiple sources of law, even when they overlap, utilize different terms in referring to similar protections, as well as use different terms with respect to their violation.

Insofar as the principles and guidelines are victim oriented and are essentially predicated on the concept of social and human solidarity and not only on the concept of State responsibility, it would be difficult to link the rights of victims to the source of the conventional or customary law that is at the basis of victims' rights. Consequently, it must be understood that these principles and guidelines are not intended to reflect the legal differences between international human rights law violations and international humanitarian law violations.

It is important, however, to underscore that with respect to international human rights law violations, the principles and guidelines are directed at what is commonly referred to as gross violations of human rights, which involve the protection of life, physical integrity and other matters essential to the human person and to human dignity. This is not intended to minimize the importance of other violations of human rights law, but merely to distinguish those violations which, for the purposes of these principles and guidelines, require the implementation mechanisms provided herein.

The principles and guidelines also address separately violations of human rights and international humanitarian law that constitute international crimes or that require States to take measures associated with criminal violations such as investigation, prosecution, punishment and international cooperation in connection with the prosecution or punishment of alleged perpetrators. In international humanitarian law, these violations are referred to as grave breaches

of the Geneva Conventions of 12 August 1949 and Protocol I thereto, and also as war crimes under the customary law of armed conflict. Violations of common article 3 of the Geneva Conventions and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) are not identified in the textual language of these conventions as either grave breaches or war crimes. Nevertheless, customary international law, particularly after the establishment of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court, has recognized such violations as being equivalent to their counterparts in conflicts of an international character that are referred to as grave breaches and war crimes. Other instruments of international human rights law prescribe the criminalization of certain acts as in the case of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as with respect to different instruments relating to international trafficking of persons for sexual exploitation and for slavery and practices related to slavery.

Considering the range of these terminological distinctions as well as the evolving nature of conventional and customary international law and general principles of law with respect to the protection of the rights of victims, the principles and guidelines have adopted a flexible approach to avoid having to address the distinctions noted above.

### **3. The duty to prosecute**

It is understood that national legal systems have different requirements and procedures for the initiation and conduct of criminal prosecutions. The term “duty to prosecute” is intended to reflect the general international law obligation to proceed under national law or in accordance with the statutes of international judicial organs. Moreover, the concept “duty to prosecute” as used herein is not intended to have any bearing on the concept of complementarity between national and international legal organs, and it also is not intended to have any bearing on theories of criminal jurisdictions that States and international judicial organs may rely upon.

### **4. Non-State actors**

Conflicts of a non-international character, as well as internal conflicts that have occurred since the Second World War, reveal that a significant level of victimization has occurred at the hands of non-State actors. In these cases, the group or groups referred to as non-State actors have transformed themselves into the Governments of States by assuming power. In these cases, there is a continuity between those who had been part of the non-State actor category and those who became the representatives of the State. It would be incongruous in these cases to deny the victims of such non-State actors the rights and remedies available to other victims. Another category of non-State actor consists of groups that assume effective control over certain territory and exercise over that territory and the people on that territory the equivalent control exercised by States. In some instances, these types of non-State actors receive limited international legal recognition. There is no legal reason why such non-State actors would be excluded either from responsibility for their actions or for the consequences of their policies and practices with respect

to victims of these policies and practices. The intention here is not to make States responsible for the policies and practices of non-State actors, but to make these non-State actors responsible for their policies and practices, while at the same time allowing victims to seek redress on the basis of social and human solidarity and not on the basis of State responsibility. The issue of the responsibility of non-State actors is essentially a policy judgement.

Furthermore, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides, in paragraph 18, that victims who have suffered “physical, or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights” including, in paragraph 21, “serious abuses of political or economic power”, are entitled to victims’ rights as provided therein.

## **5. Collective rights**

While the principles and guidelines deal essentially with individual rights, they do not exclude the concept of collective rights or the rights of collectivities. The term “collective rights” includes two aspects. The first is well established: it is where violations are committed against a class of persons or an identifiable group, and those who represent that class or group seek to implement or enforce the rights of individuals as members of that class or group. By recognizing collective claims and class actions, States can achieve administrative and judicial economy. In this context, the term “collective rights” provides for a collective modality of enforcing rights already established in a manner that enhances the capacity of States to address these claims in a collective, as opposed to an individualized manner.

The second aspect deals with violations that are committed by States in a manner that targets a specific group as a whole. This gives rise to that group’s ability to address procedurally its claims to a State and receive the remedies provided for in these principles and guidelines. Insofar as international law has not reached the level that requires States to provide, procedurally, for the judicial exercise of collective rights, such notions as “class action” are left to the determination of domestic law.

## **6. Future developments of international law**

Nothing in these principles and guidelines precludes the future development of victims’ collective rights under conventional and customary international law.

## **7. Non-derogation**

As specified in principle XII and in principle XIII, a non-derogation clause has been inserted as well as a provision recognizing the rights of others as provided under international standards of due process.

## **Appendix II**

### **PROPOSAL OF THE CHAIRPERSON-RAPPORTEUR AND THE INDEPENDENT EXPERTS ARISING OUT OF CONSULTATIONS HELD ON 22 OCTOBER 2003**

1. This proposal is made by the Chairperson-Rapporteur and the independent experts on the basis of suggestions made to them and on which they had consultations with several delegations as well as several intergovernmental and non-governmental organizations. It is presented as a way of facilitating discussion and not by way of endorsement.
2. The purpose of this proposal is to achieve consensus on the principles and guidelines and to facilitate their adoption by the Commission.
3. The proposal consists in changing the title of the basic principles and guidelines from “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of Humanitarian Law” to “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Law”.
4. If the change of title is accepted, the revised text of the principles and guidelines dated 23 October 2003 would reflect that change consistently throughout.
5. In view of the broad and inclusive contents of the term “gross violations of international law”, a definition would be required. That definition, which emerged from consultations, is as follows:

“For purposes of this document gross violations of international law means unlawful deprivation of the right to life, torture, or other cruel, inhuman treatment or punishment, enforced disappearance, slavery, slave trade and related practices, deprivation of the rights of persons before the law and similar serious violations of fundamental rights and freedoms and norms guaranteed under applicable international law.”

This provision would be included in the document under paragraph 9 of principle V.

6. This change would moreover require the deletion of the tenth, eleventh and thirteenth preambular paragraphs.
7. This proposal would not affect the rest of the 23 October 2003 text of the principles and guidelines.

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