

## American University Washington College of Law

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Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity, by Professor Diane Orentlicher

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**PROMOTION AND PROTECTION OF HUMAN RIGHTS**

**Impunity\***

**Note by the Secretary-General**

In its resolution 2003/72, the Commission on Human Rights requested the Secretary-General to commission an independent study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity, taking into account the Set of Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/Sub.2/1997/20/Rev.1, annex II) and how they have been applied, reflecting recent developments and considering the issue of their further implementation, and also taking into account the information and comments received pursuant to the resolution, and to submit the study to the Commission no later than its sixtieth session.

Accordingly, the Secretary-General has the honour to transmit to the Commission the independent study, undertaken by Professor Diane Orentlicher.

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\* The report was submitted after the deadline in order to incorporate the replies of all respondents and to take into account the results of the expert workshop held in December 2003.

**INDEPENDENT STUDY ON BEST PRACTICES, INCLUDING  
RECOMMENDATIONS, TO ASSIST STATES IN STRENGTHENING  
THEIR DOMESTIC CAPACITY TO COMBAT ALL ASPECTS OF  
IMPUNITY, BY PROFESSOR DIANE ORENTLICHER**

**Summary**

This report is submitted pursuant to resolution 2003/72.

Since their submission to the Commission in 1997, the Set of Principles for the protection and promotion of human rights through action to combat impunity have played an influential role in strengthening domestic efforts to combat impunity. During the same period, the Principles as a whole have received strong affirmation in decisions by international criminal tribunals and human rights treaty bodies.

The case law and statutes of international criminal tribunals have also further clarified the scope of States' obligations to combat impunity through the effective administration of justice. Among other developments, the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Rome Statute of the International Criminal Court have affirmed that crimes of sexual violence may constitute a crime against humanity, a war crime or an act of genocide when other elements of these international crimes are established.

Turning from law to practice, recent experience reinforces a central premise of the Principles: an effective programme for combating impunity requires a comprehensive strategy, comprising mutually reinforcing measures. Another important factor behind successful programmes is the broad participation of citizens, including victims, in deliberations about their design. More generally, the study highlights the central role of civil society in ensuring that States meet their obligations to protect human rights through effective measures of truth, justice, reparations and other guarantees of non-recurrence.

Another recurring theme of this study is that domestic efforts to combat impunity have been significantly enhanced by States' adherence to human rights treaties and their acceptance of optional complaint procedures. More generally, the capacity of States to ensure justice for crimes committed in their own territory has been enhanced by the emergence of an increasingly effective international and transnational architecture of justice. To meet their obligations as parties to the Rome Statute, some States have adopted or begun the process of enacting implementing legislation that enhances their domestic capacity to prosecute serious crimes under international law. Moreover, in light of increasing prospects that their nationals may be prosecuted before a foreign or international court, some States have made significant strides in overcoming barriers to prosecution at home. Finally, practical measures of inter-State and international support have significantly enhanced some States' domestic capacity to combat impunity.

Although some aspects of the Principles - notably those pertaining to the creation of an international criminal court - may benefit from updating, recent developments in international law have affirmed the Principles as a whole and highlighted their contribution to domestic efforts to combat impunity. It is therefore recommended that the Commission appoint an independent expert to update the Principles with a view towards their adoption by the Commission.

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## **Introduction**

1. In its resolution 2003/72, the Commission on Human Rights requested the Secretary-General to commission an independent study “on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity, taking into account” the Set of Principles for the protection and promotion of human rights through action to combat impunity produced by the Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/1997/20/Rev.1, annex II) (the Principles) “and how they have been applied, reflecting recent developments and considering the issue of their further implementation, and also taking into account the information and comments received” from States, “and to submit the study to the Commission no later than its sixtieth session”.

2. It also requested the Secretary-General “to invite States to provide information, including best practices, on any legislative, administrative or other steps they have taken to combat impunity for human rights violations in their territory and to provide information on remedies available to the victims of such violations”. Information was provided by the Governments of Argentina, Bulgaria, Canada, Chile, Colombia, Croatia, Cuba, Ethiopia, Germany, Italy, Madagascar, Mauritius, Mexico, Namibia, Panama, Portugal, Romania, the Russian Federation, Sierra Leone, and Switzerland.<sup>1</sup>

3. The study also benefited from an expert workshop on best practices to combat impunity organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Geneva on 8 and 9 December 2003 to facilitate an exchange of views between the expert engaged to prepare the study and experts from the various geographical regions (Africa, Asia, Eastern Europe, Latin America and the Caribbean, and Western Europe and other States). Participants also included representatives of OHCHR, the International Committee of the Red Cross (ICRC) and non-governmental organizations (NGOs). The separate contributions of Amnesty International, the International Center for Transitional Justice, the International Commission of Jurists, ICRC, Human Rights Watch, the International Human Rights Academy and the War Crimes Research Office of the American University Washington College of Law, the Open Society Justice Initiative, the World Council of Churches and the World Organization against Torture<sup>2</sup> are also acknowledged.

4. Several aspects of the mandate merit brief comment. By including specific measures as examples of best practices, there is no intention to suggest that the countries concerned have achieved overall or even substantial success in combating impunity. Measures that are well conceived in their own terms have often produced disappointing results when other elements of an effective policy for combating impunity are absent or have been poorly implemented. While recognizing that an effective programme for combating impunity requires a mutually reinforcing repertoire of strategies, this study includes as examples of best practices well-conceived components of a State’s policy, as well as promising proposals that have not yet been adopted.

5. The study also proceeds from the premise that, while States must meet their obligations under international law, including those reflected in the Principles, there is no “one-size-fits-all” response to serious violations of human rights. The unique historical experience of each society that has endured such violations will inevitably shape its citizens’ understanding of justice. For example, in Argentina and Uruguay the civil code has been amended to allow the Government to

issue certificates of “forcibly disappeared” to relatives of victims of enforced disappearance; this approach has enabled surviving relatives to settle the accounts of the disappeared without having to apply for a “presumed dead” certificate, an act that many relatives deemed morally unacceptable. With these considerations in mind, this report presents many examples of best practices as models whose consideration may enhance other societies’ deliberations rather than as measures that are equally valid for all societies.

6. The expert understands “recent developments” to include an assessment of key developments in international law and State practice since 1997, the year that the Principles were submitted to the Commission on Human Rights by Louis Joinet in his capacity as Special Rapporteur of the then Sub-Commission on Prevention of Discrimination and Protection of Minorities on the question of impunity of perpetrators of violations of human rights (civil and political).

7. Strict limits on the length of this study do not allow extensive consideration of each aspect of the mandate. In view of the in-depth work on reparations undertaken by M. Cherif Bassiouni and Theo van Boven,<sup>3</sup> principles 33-42 have not received the independent attention in this study that would be merited by their importance alone.<sup>4</sup> The central importance of reparations is reflected, nonetheless, throughout this study; virtually every measure addressed in this report has a reparative dimension. More generally, it has not been possible to reflect many salutary developments, including recent initiatives inspired by the ideal of restorative justice.

## **I. GENERAL OBSERVATIONS AND RECOMMENDATIONS**

8. The Principles have already had a profound impact on efforts to combat impunity. They have become a key reference in decisions by the supervisory bodies for the American Convention on Human Rights, which, in turn, have prompted national Governments to dismantle seemingly impregnable barriers to justice. The Principles have also been cited directly by national authorities in support of measures to combat impunity.<sup>5</sup>

9. A recurring theme of the study is that domestic efforts to combat impunity have been significantly enhanced by States’ adherence to human rights treaties and their acceptance of optional complaint procedures. It is therefore recommended that States ensure that they are parties to the principal international treaties cited in this study and that they have accepted the relevant complaint procedures.

10. Recent experience, as well as the jurisprudence of human rights treaty bodies,<sup>6</sup> reinforce a central premise of the Principles: the need for a comprehensive approach towards combating impunity. An effective policy requires a multifaceted strategy, with each component playing a necessary but only partial role. By way of illustration, there previously was a widespread perception that truth commissions were a “next best” response to mass atrocities when an amnesty or de facto impunity foreclosed prosecutions. Today, truth commissions, prosecutions and reparations are widely seen as complementary, each playing a distinctly important role.

11. In designing policies for combating impunity, States should promote the broad participation of victims and other citizens. Deliberations in South Africa following the end of apartheid provide one model in this regard. South Africa’s parliament held over 150 hours of

hearings on the draft law establishing a truth commission, which was also explored in seminars, workshops and radio programmes throughout the country. Broad participation in deliberations concerning strategies for combating impunity serve several purposes. To begin, it is likely to inspire greater public support for the resulting policy. Such consultations also help ensure that national policies respond to victims' actual needs. Including victims also serves a deeper aim: it can help reconstitute the full civic membership of those who were denied the protection of the law in the past. Their participation in public deliberations may itself contribute to a process in which victims reclaim control over their lives and may help restore their confidence in government.

12. Societies engaged in such deliberations derive considerable benefit from their exposure to the experiences of other countries that have faced similar challenges. For example, in consultations leading to the establishment in 2002 of the Commission for Reception, Truth and Reconciliation (CAVR) in Timor-Leste, Timorese found inspiration in South Africa's Truth and Reconciliation Commission (TRC) but sought to compensate for what they considered to be its deficiencies. Where the TRC granted amnesty in exchange for full disclosure of the truth concerning an individual's participation in a political offence, CAVR does not allow immunity for serious crimes such as murder or rape, and allows immunity for other crimes only when the confessor undertakes community service or makes a symbolic payment in addition to a confession. Moreover, the payment or community service is the product of a negotiated agreement between the perpetrator, the victim(s) and the community. This agreement must be formally approved by a court and, if perpetrators do not comply with their obligations, they may be prosecuted.

13. The United Nations has played a valuable role in facilitating this type of exchange of information, expertise and experience. In some instances, it may be appropriate for the United Nations to establish a commission of inquiry comprising both local and international experts to examine options for accountability and make recommendations based upon their assessment.

## **II. THE PRINCIPLES**

### **A. The right to know (principles 1-17)**

14. The individual dimension of the right to know the truth (principle 3) has received strong affirmation by human rights treaty bodies, although the contours of this right have been delineated somewhat differently under various conventions. The Human Rights Committee and supervisory bodies established under the American Convention on Human Rights have long recognized that the anguish that individuals experience as a result of uncertainty about the fate of close relatives who are direct victims of enforced disappearance in itself constitutes cruel, inhuman or degrading treatment and thus is a distinct violation of the relevant treaty. From this it follows that State authorities must investigate what happened to the victims and inform their relatives of their fate.<sup>7</sup> Recent case law under the American Convention has recognized that the next of kin of victims of serious violations of human rights other than enforced disappearance also have a right to be kept apprised of official investigations.<sup>8</sup> Since 1998, when it first began issuing judgements in cases involving enforced disappearance, the European Court of Human Rights has repeatedly (but not invariably) recognized that a Government's failure to provide information concerning victims of enforced disappearance can itself amount to a breach of

article 3 of the European Convention on Human Rights.<sup>9</sup> Interpreting the same treaty in a case concerning the 1995 massacre in the Bosnian town of Srebrenica, the Human Rights Chamber for Bosnia and Herzegovina found that the failure of Republika Srpska authorities “to inform the applicants about the truth of the fate and whereabouts of their missing loved ones”, including their failure to conduct a “meaningful and effective investigation into the massacre”, violated article 3.<sup>10</sup>

15. Supervisory bodies have linked the right of relatives to know the fate of their loved ones to other fundamental rights. In the *Srebrenica* case, the Human Rights Chamber concluded that the Republika Srpska’s failure to disclose information concerning some 7,500 missing men violated the applicants’ right to respect for their private and family life as well as article 3.<sup>11</sup> The European Court has found that a State’s failure to conduct an effective investigation “aimed at clarifying the whereabouts and fate” of “missing persons who disappeared in life-threatening circumstances” constitutes a continuing violation of its procedural obligation to protect the right to life (art. 2).<sup>12</sup> The Inter-American Commission has recognized that, in view of the general obligations of States parties under article 1 (1) of the American Convention, “the ‘right to the truth’ arises as a basic and indispensable consequence for all States Parties, given that not knowing the facts related to human rights violations means that, in practice, there is no system of protection capable of guaranteeing the identification and possible punishment of those responsible”.<sup>13</sup> The Commission also conceives the right to the truth to be related to the right under article 25 “to have a simple and prompt remedy for the protection of the rights enshrined in” the American Convention.<sup>14</sup> Consistent with principle 36 (Scope of the right to reparation), jurisprudence of the Inter-American Commission has also recognized the right “to know the full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them” as “part of the right to reparation for human rights violations”.<sup>15</sup> Similarly, in a case involving extrajudicial execution, the Inter-American Court found that the right of relatives and society to “be informed about everything that happened in relation to” the violations “constitutes an important measure of reparations”.<sup>16</sup>

16. Decisions by treaty bodies have demonstrably bolstered domestic efforts to ensure the individual dimension of the right to know the truth. At a time when domestic amnesties still prevented prosecution of human rights violations committed during the previous military government, several Argentine courts allowed “truth trials” to go forward to establish the fate of the disappeared. A decision by the Argentine Supreme Court rendered on 13 August 1998, which ruled that courts lacked jurisdiction to hold the proceedings as a result of the amnesty laws, led to submission of a case before the Inter-American Commission. In a friendly settlement resolving this case, the Government of Argentina accepted and undertook to guarantee “the right to the truth, which involves the exhaustion of all means to obtain information on the whereabouts of the disappeared persons”.<sup>17</sup> As a result, Argentine courts were allowed to carry on truth trials and an ad hoc Prosecutor’s Commission on truth proceedings was established to investigate cases. In July 2001, approximately 3,570 human rights cases were being investigated.

17. With respect to countries whose criminal procedure provides for the possibility of guilty pleas, a recent succession of pleas by defendants before the International Criminal Tribunal for the former Yugoslavia (ICTY) provides another potential model for domestic efforts to establish



the truth about serious crimes under international law without compromising the right to justice (principle 30). As part of their guilty pleas, two Serb officers provided detailed testimony in 2003 about the role of Bosnian Serb forces in organizing and carrying out the 1995 Srebrenica massacre, thereby breaching the fortress of denial concerning Serb responsibility.

18. As in past decisions, the Inter-American Commission has continued to affirm the collective dimension of the right to know the truth (principles 1-2).<sup>18</sup> In 2002 the Inter-American Court affirmed that “Society has the right to know the truth” regarding “atrocities of the past” “so as to be capable of preventing them in the future”.<sup>19</sup> More recently, the Court reaffirmed both the preventive and reparatory role that disclosure of the truth plays for family members and society as a whole.<sup>20</sup> In the *Srebrenica* case, the Human Rights Chamber ordered authorities of Republika Srpska “to conduct a full, meaningful, thorough, and detailed investigation” into the events surrounding the Srebrenica massacre with a view to making its own role known to “the applicants, all other family members, *and the public*”.<sup>21</sup>

19. In the period that is the focus of this study, truth commissions were established or continued their work in Ecuador, Ghana, Guatemala, Nigeria, Panama, Peru, Sierra Leone, South Africa, Timor-Leste, and the former Yugoslavia. The following best practices and other recommendations can be distilled from their experiences.<sup>22</sup>

(a) To ensure public confidence in a truth commission, civil society’s input into the selection of commissioners is recommended, as happened in South Africa and Sierra Leone. More generally, civil society organizations, including but not limited to human rights NGOs, should play a role in designing a commission’s terms of reference; be consulted concerning policy recommendations; and be recognized as a potential source of information for the commission;

(b) A truth commission’s terms of reference should take account of other transitional justice processes that may be under way or may follow its work. This may include directing the commission to make recommendations concerning a reparations programme; directing the commission to turn any appropriate files over to prosecutorial authorities upon its completion or otherwise setting out the relationship it will have to prosecutorial authorities; considering how the truth commission’s information may feed into a vetting programme; and granting the commission appropriately circumscribed powers to protect the confidentiality of its sources or of the information it receives. Although truth commissions may make a useful contribution in recommending programmes of reparation, it is generally not desirable for them to provide reparations directly as this may skew their truth-seeking role;

(c) The staff of a truth commission should include a publicly identified contact point for victims and other witnesses and potential witnesses seeking information about the proceedings. There should also be a mechanism in place to follow up with witnesses after they testify before a truth commission, although this role need not be performed by the commission itself;

(d) If a truth commission has authority to identify suspected perpetrators of violations or if individuals may be implicated in the commission’s proceedings, those individuals should be provided appropriate opportunities to provide to the commission their version of the events in question, as contemplated in principle 8 (b). The law establishing South Africa’s TRC provided:

“If during any investigation by or any hearing before the Commission, (a) any person is implicated in a manner which may be to his detriment; or (b) the Commission contemplates making a decision which may be to the detriment of a person who has been so implicated”, the Commission must afford that person “an opportunity to submit representations to the Commission within a specified time with regard to the matter under consideration or to give evidence at a hearing of the Commission”;<sup>23</sup>

(e) Executive, legislative and judicial authorities should be required to consider in good faith the recommendations of a truth commission. States should also implement measures to track compliance with the commission’s recommendations. Article 18 of the Truth and Reconciliation Commission Act 2000 (Sierra Leone) provides an example of such measures; it stipulates that the Government must establish a body to monitor implementation of the Commission’s recommendations and facilitate their implementation. The Government must provide to this body quarterly reports summarizing steps it has taken towards implementing the Commission’s recommendations. The monitoring body, in turn, is directed to publish the Government’s reports as well as its own assessments of the Government’s efforts and those of others to whom recommendations were directed;

(f) In view of the special challenges entailed in addressing crimes of sexual violence, the terms of reference of some recent truth commissions, including those established in Haiti and Sierra Leone, explicitly directed the body to give special attention to this subject. In Sierra Leone, South Africa, Peru and Timor-Leste, truth commissions have held focused hearings on gendered patterns of human rights abuse. To encourage female victims to provide testimony, some truth commissions have provided the opportunity to testify before hearings comprising only female commissioners and staff. How truth commissions conceptualize gender-related abuse should be informed by victims, who may not wish to see their experience framed solely in terms of sexual violence;

(g) Countries that have suffered serious and systemic abuses such as to warrant the establishment of a truth commission often find it challenging to allocate the necessary resources. The Government of Peru met this challenge in part by allocating to the country’s truth commission a significant portion of funds that had been misappropriated by the former regime and recovered by the current Government from foreign accounts. It bears emphasizing that truth commissions must be assured adequate resources and powers to carry out their mandate effectively;

(h) Experience suggests that truth commissions should be given a time-bound mandate, generally lasting no more than two fully-operational years. States that establish truth commissions should, however, establish a follow-up process for continuing to obtain clarification of past atrocities once the principal commission’s work is completed, for the final report of such commissions does not close the book on the past. For example, 12 years after Chile’s National Commission on Truth and Reconciliation completed its final report, the Government has proposed a new commission that could identify individuals who survived political imprisonment and torture, cases that were excluded from the mandate of the earlier commission;

(i) The findings of a truth commission should be made widely available to the general public through media that are technically and culturally accessible. A “transfer

committee” established after the mandate of the Peruvian Truth and Reconciliation Commission expired printed 500,000 copies of a summary of the Commission’s final report. The TRC also made its report widely accessible on the Internet and issued abstracts of key sections as enclosures in leading Peruvian newspapers.

20. More generally, States should take measures to ensure that information concerning human rights violations is publicly available. In many countries, access to information laws advance this aim. For example, the petitioner in *Bámaca Velásquez*, a leading case on enforced disappearance before the Inter-American Court, was further aided in her pursuit of the truth by her ability to obtain, through the United States Freedom of Information Act (FOIA), documents showing that her husband had been alive for an extended period following his initial detention by Guatemalan government forces. The South African History Archive of the University of Witwatersrand has utilized South Africa’s Promotion of Access to Information Act, which was adopted in 2000, to pursue “missing” records and expose the degree to which some files were concealed from the country’s truth commission. The National Security Archive, a United States-based NGO that has extensive experience using FOIA to obtain documentation pertaining to human rights, assisted the Salvadoran, Guatemalan and Peruvian truth commissions in obtaining declassified documents pertaining to human rights violations covered by their respective mandates and has collaborated with Mexican NGOs to analyse and publicize documents relating to a 1968 massacre in Tlatelolco, Mexico. In view of their potential for enhancing citizens’ access to the truth concerning human rights violations, it is recommended that States that have not already done so adopt legislation enabling citizens to obtain access to government documents, including those disclosing information concerning human rights violations. A model in this regard is Mexico’s *Ley Federal de Acceso a la Información*, enacted in 2002, which bars the withholding of documents that describe “grave violations” of human rights.

21. Several countries have taken measures in accordance with principle 17 (a). For example, on 27 November 2001, the President of Mexico ordered a large number of previously secret documents held by former secret service institutions to be transferred to the National General Archive. The Government of Argentina has undertaken to create a National Archive for Remembrance, within the Department of Human Rights, in which various partial archives and databases will be consolidated.

22. While truth commissions have played a notably important role during periods of political transition, parliamentary and other commissions, including truth commissions, can play an important role in combating impunity in other contexts. For example, in 1998 Sweden created the Parliamentary Law Committee on Sexual Offences to assess and make recommendations concerning legal protections against rape and trafficking.

23. Consistent with principle 17 (c), States that possess relevant information concerning abuses committed in another State should make such information available. Examples of such disclosures include the release by the United States Government in August 2003 of 4,677 documents concerning human rights violations in Argentina during the period of military rule, many of which proved relevant to cases under investigation in Argentine courts. The Government has also declassified documents pertaining to human rights and United States policy in respect of Chile, El Salvador, Honduras and Guatemala.

## **B. The right to justice (principles 18-32)**

24. Recent years have seen major advances in international, regional and domestic efforts to combat impunity through criminal prosecution. The most visible emblems of this trend include the establishment of the International Criminal Court (ICC) in 2002, the trial of senior officials before ICTY and the International Criminal Tribunal for Rwanda (ICTR), and unprecedented recourse to foreign courts to seek justice for serious crimes under international law committed outside the context of the Second World War.

25. Although less readily observed, a deeper transformation is taking place within States where atrocious crimes occurred. Bolstered by the increasingly credible prospect that their nationals may face prosecution abroad or before an international court, some Governments have made significant strides in holding perpetrators to account in national courts. With respect to ICC, this result is not by accident but design. Through its core commitment to complementarity, the Rome Statute affirms the enduring primacy of national Governments in combating impunity. Thus, far from displacing domestic courts in countries blighted by crimes against the basic code of humanity, the advent of a permanent international criminal court has reaffirmed the responsibility of States to ensure justice for international crimes committed in their territory (principle 19) - and enhanced their capacity to meet this obligation.

26. So, too, have recent developments in substantive law. Consistent with their longstanding practice, supervisory bodies established under the International Covenant on Civil and Political Rights (ICCPR), the American Convention and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment have reaffirmed the obligation of States parties to investigate thoroughly serious violations of human rights and to prosecute those responsible. The European Court has repeatedly recognized that, in cases involving serious violations of human rights, article 13 of the European Convention may require States parties to carry out “a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure”.<sup>24</sup>

27. Recent decisions have also clarified the nature of States’ obligations to repress serious violations of the laws of war that apply to non-international armed conflicts. During the 1990s some national courts rejected challenges to amnesties that prevented punishment of serious violations of common article 3 of the Geneva Conventions of 12 August 1949 for the protection of victims of war and of Additional Protocol II of 1977, based upon the mistaken belief that article 6 (5) of the latter requires a complete amnesty following the cessation of a non-international armed conflict. Consistent with the views of ICRC, the Inter-American Commission has confirmed that article 6 (5) was not meant to cover violations of international humanitarian law committed in non-international armed conflicts,<sup>25</sup> while ICTY has affirmed that serious violations of these provisions are international crimes.<sup>26</sup>

28. More generally, recent decisions have reaffirmed the incompatibility of amnesties that lead to impunity with the duty of States to punish serious crimes under international law (principles 18 and 25 (a)). In 1998 an ICTY Trial Chamber observed that a domestic amnesty covering crimes, such as torture, whose prohibition has the status of *jus cogens* “would not be accorded international legal recognition”.<sup>27</sup> Several State courts have reached similar conclusions:

(a) In an order affirming Spain's jurisdiction in a criminal investigation of former Chilean President Augusto Pinochet, the *Audiencia Nacional* concluded that Spanish jurisdiction was not precluded by Chilean courts' dismissal of certain cases covered in the Spanish investigation pursuant to the 1978 Chilean amnesty law;<sup>28</sup>

(b) In a 2002 decision, the *Cour de cassation* of France upheld a decision that had rejected application by French courts of a 1993 Mauritanian amnesty. The court stated that recognizing the applicability of the amnesty would be tantamount to a violation by the French authorities of their international obligations and would deprive the principle of universal jurisdiction of its purpose.<sup>29</sup>

29. The Inter-American Commission has continued to find every amnesty it has considered incompatible with the American Convention. In 2001, the Inter-American Court rendered its first judgement on the merits on an amnesty. Noting that the Government of Peru had accepted responsibility for violating the American Convention in part "as a result of the promulgation and application of" two amnesty laws - an acknowledgment that itself represents a best practice - the Court observed that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law".<sup>30</sup> Since this judgement, 179 cases have been reopened in Peru as of January 2004.

30. Several other countries have abrogated amnesties that violate their international legal obligations or have restricted their application. For example, a Polish law enacted in December 1998 provides that amnesties adopted before 7 December 1989 shall not be enforced in relation to, inter alia, war crimes or crimes against humanity. In a decision now under review, the National Court of Appeal for Federal Criminal and Correctional Cases of Argentina confirmed a federal judge's March 2001 ruling<sup>31</sup> declaring invalid the Full Stop Law, Law No. 23,492 of 12 December 1986, and the Due Obedience Law, Law No. 23,521 of 4 June 1987, which had effectively barred further prosecutions of military officers for human rights violations committed during the previous military regime; other Argentine courts followed suit. In August 2003, both houses of Congress voted to annul these two laws with retroactive effect (the laws had previously been repealed with prospective effect). In consequence, the National Court of Appeal for Federal Criminal and Correctional Cases ordered two cases that had been blocked by the amnesty laws to be reopened. Citing Chile's obligations under the Inter-American Convention on Forced Disappearance of Persons, the Santiago Court of Appeals ruled in January 2004 that a 1978 amnesty could not apply in respect of a kidnapping when the fate of the victim remained unclarified.<sup>32</sup>

31. On the international plane, political organs as well as human rights and judicial bodies have, in the words of the Security Council, affirmed the responsibility of States "to end impunity and to prosecute those responsible for genocide, crimes against humanity and serious violations of humanitarian law".<sup>33</sup> In his 2000 report on the establishment of a Special Court for Sierra Leone (SCSL), the Secretary-General summarized United Nations policy this way: "While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international

crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.”<sup>34</sup> In conformity with this position, the Special Representative of the Secretary-General for Sierra Leone appended to his signature to a 1999 peace accord a statement clarifying that the United Nations interprets the amnesty provision to exclude the “international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law”. The SCSL Statute affirms the court’s jurisdiction over these crimes notwithstanding any amnesty.

32. As developments in Argentina, Sierra Leone and other countries suggest, there are prudential as well as principled reasons for States to resist demands for amnesties that violate their international obligations, even if conditions do not permit them to undertake prosecutions immediately.

33. Some States have overcome other significant barriers to prosecution. Some have assured their domestic legal capacity to honour principle 24 (restrictions on prescription) by ratifying the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. In Argentina, this Convention was accorded constitutional status pursuant to Act No. 25,778 of 2 September 2003. On 5 November 2003, the Supreme Court of Mexico ruled that the statute of limitations in relation to the illegal deprivation of liberty could begin running only from the time when the body of the illegally detained person was recovered.

34. Prosecutions before ICTY and ICTR have brought crimes of sexual violence, which had previously received scant attention in major war crimes prosecutions, out of the shadows. A 1998 ICTR Trial Chamber judgement in *Prosecutor v. Jean-Paul Akayesu* was the first by an international criminal court recognizing rape as an act of genocide and a crime against humanity when other elements of these international crimes are established and defining rape under international law. In another landmark ruling (*Prosecutor v. Kunarac*, judgement of 22 February 2001), an ICTY Trial Chamber ruled that, under some circumstances, crimes of sexual violence constitute the crime against humanity of “enslavement”. In a 2001 judgement in *Prosecutor v. Kvočka*, an ICTY Trial Chamber clarified the circumstances in which sexual violence constitutes the crime against humanity of “persecution”. The Rome Statute explicitly recognizes that, under specified circumstances, sexual violence constitutes an international crime.<sup>35</sup>

35. Recent case law has also helped clarify the nature of States’ obligations to combat impunity for serious violations of economic, social and cultural rights. The European Court has found that the duty to conduct “a thorough and effective investigation capable of leading to the identification and punishment of those responsible” arises by virtue of the deliberate destruction of individuals’ homes and household property.<sup>36</sup> In a 2002 decision, the African Commission on Human and Peoples’ Rights appealed to the Government concerned “to ensure protection of the environment, health and livelihood” of a group whose rights had been violated by “[c]onducting an investigation into the human rights violations described” in the decision “and prosecuting officials of the security forces” and other “relevant agencies involved in human rights violations”.<sup>37</sup> ICTY Trial Chambers have recognized that comprehensive destruction of homes and property may constitute the crime against humanity of persecution when committed with the requisite intent.<sup>38</sup>

36. Another significant development relates to the principle of *non bis in idem*, which generally prohibits a second trial of defendants for the same offence. Although *non bis in idem* provisions in human rights treaties generally bar only a second prosecution by the same State that conducted the first trial, many extradition treaties allow a State to refuse an extradition request if a court in the requested State has rendered a final judgement in respect of the same offence for which the suspect's extradition is sought. The statutes of ICTY (art. 10) and ICTR (art. 9) take a similar approach, but allow a defendant to be tried before the relevant tribunal in respect of an act for which he or she has already been prosecuted in a national court if the "national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted". Similarly, article 20 of the Rome Statute precludes prosecution of a person already tried for the same conduct by another court unless the previous proceedings were "for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the" ICC or otherwise "were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice".

37. A similar approach has been followed in some national laws and at least one national judicial decision. For example, Canada's Crimes Against Humanity and War Crimes Act of 2000 provides that a person may not plead *autrefois acquit* or *autrefois convict*, or pardon, if he or she was tried by a foreign court and the proceedings were for the purpose of shielding him or her from criminal responsibility, or were not otherwise conducted independently or impartially and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice. In a 2003 judgement, the Constitutional Court of Colombia found that where a human rights supervisory organ has found that Colombia breached its treaty obligations by failing to carry out an effective investigation, a case resulting in a judgement of acquittal can be reopened without violating the principles of *res judicata* and *non bis in idem*. In its supporting analysis, the Constitutional Court cited article 20 (3) of the Rome Statute.<sup>39</sup>

38. In view of the complexity and continuously evolving nature of international criminal law, concerted efforts may be necessary to ensure that national judges are familiar with recent developments in this area. Technical proficiency is important for its own sake and also bolsters the ability of judges to operate independently and impartially. A valuable contribution in this regard has been made by some countries that support judicial training in third States. In cases involving human rights violations committed on a massive scale, prosecutors may also need specialized technical training in the management and conduct of an effective investigation.

39. For countries whose national judiciary has been decimated by protracted violence or repressive governance, more substantial forms of external support may be needed. To meet this need, recent years have seen the emergence of a new breed of court comprising both domestic and international judges and prosecutors who enforce an amalgam of international and national law. SCSL, the first such court established outside the context of a United Nations administration, was established in 2002.<sup>40</sup> While not a United Nations subsidiary body, SCSL is a treaty-based court established by agreement between the United Nations and the Government of Sierra Leone. In contrast to international tribunals located outside the countries directly affected by their work, SCSL is based in Sierra Leone. This, along with the participation of Sierra Leonean personnel, enhances prospects for the Court's operations to be known, understood, and seen as legitimate by citizens of Sierra Leone.

40. Effective outreach programmes are essential to ensure that (a) citizens are aware of and understand important developments in respect of prosecutions for serious violations of human rights; (b) citizens understand why the prosecutor has brought charges for some offences but not others; (c) judicial officials are aware of how human rights prosecutions are perceived by citizens; and (d) public perceptions of prosecutions are not distorted either as a result of lack of information or because judicial officials have failed to counter revisionist interpretations of prosecutions. Initiatives undertaken by SCSL exemplify such efforts. The Registrar has established an Outreach Unit that seeks to ensure timely transmission of information to and from every district of the country despite a poor communications infrastructure. Between September 2002 and February 2003, the Prosecutor and Registrar held town meetings in 10 of the country's 12 districts. The Prosecutor has made several public statements clarifying his office's policy on important issues.

41. A number of other States, including Argentina, Bosnia and Herzegovina, Canada, Chile, Ethiopia, Guatemala, Indonesia, Mexico, the Netherlands, Serbia and Montenegro, Timor-Leste and the United Kingdom of Great Britain and Northern Ireland, have established specialized prosecutors' offices, police investigative units, judges and/or courts that focus on serious violations of human rights. Although not always successful, this approach may enable Governments to mobilize the political and material resources necessary to prosecute serious crimes under international law.

42. While specialized civilian courts may strengthen domestic efforts to combat impunity, human rights treaty bodies and a wide range of special mechanisms of the Commission on Human Rights have concluded that military courts should not be competent to try serious human rights violations<sup>41</sup> (principle 31). Several countries have made progress in complying with this norm. In Germany, Greece, Guatemala, Haiti, Honduras, Italy, Mexico, Nicaragua, Paraguay, and Venezuela, the jurisdiction of military courts has been strictly limited by the country's constitution or fundamental law. In Bolivia, Colombia, Guatemala, Haiti, Nicaragua and Venezuela, either pursuant to the constitution, fundamental law or regular legislation, only civil courts can try military personnel for alleged human rights violations.

43. Whether tried before regular or specialized civilian courts, prosecutions for serious violations of human rights present special challenges for victims, particularly in cases involving sexual assault. One model for addressing these challenges is the establishment of an office, such as the Victims and Witnesses Section (VWS) of the ICTY Registrar's office and the Victims and Witnesses Unit of the ICC Registrar's office, to provide services to witnesses ranging from logistical support to psychological counselling. Based upon the experiences of witnesses assisted by VWS, similar efforts by State and other courts should be designed to ensure that (a) professional staff receive specialized training in dealing with victims of sexual violence or traumatized victims; (b) witnesses are informed about and, if necessary, receive adequate measures of protection; (c) witnesses are contacted within several months of testifying; (d) and witnesses receive information concerning the outcome of proceedings in which they testify.<sup>42</sup> The Rome Statute makes special provision for measures relating to the participation of victims and witnesses in ICC proceedings (art. 68) and for victim reparations (art. 75). States may also find a useful model in the rules of procedure and evidence for each of these courts, which provide for various protective measures for witnesses. With respect to testimony by victims of



sexual assault, rule 96 of the ICTY rules of procedure specifies that the testimony does not have to be corroborated, consent is not a defence if the victim has been subjected to such inherently coercive conditions as detention, and evidence of the victim's prior sexual conduct is inadmissible.

44. In many countries the right to justice has been bolstered by laws that enable victims and NGOs to institute and participate in criminal proceedings (principle 18). For example, the French code of criminal procedure provides for the possibility of non-profit associations whose purpose is to secure prosecution of crimes against humanity, racism, sexual violence and other crimes to constitute themselves as civil plaintiffs in relation to such prosecutions. Spain's criminal procedure law permits NGOs to participate in criminal proceedings as private prosecutors. In Guatemala, the code of criminal procedure (Decree No. 51-92, art. 116) provides that "any citizen or association of citizens" can be associated plaintiffs "against public officials or employees who have directly violated human rights". In Belgium, the law of 13 April 1995 (art. 11,5), relating to sexual abuses against minors, authorizes non-profit associations to constitute themselves as civil plaintiffs in criminal proceedings. Through judicial interpretation, NGOs can constitute themselves as plaintiffs in Argentine criminal proceedings. In Portugal, Law No. 20/96 authorizes non-governmental human rights organizations to take part in criminal proceedings instigated for acts of racism, xenophobia or discrimination. In Germany, victims of especially serious crimes, including sexual offences, can join as intervener in the charge brought by the public prosecutor.

45. Turning to substantive law, past experience has shown that gaps in domestic legislation have contributed to impunity. Many States have failed to enact legislation fully implementing their obligations under human rights treaties; the resulting gaps have sometimes led courts to dismiss prosecutions instituted in accordance with those obligations. In the past decade, however, the operation of ICTY and ICTR and, more recently, the establishment of ICC have provided a catalyst for countries to enact or draft legislation implementing existing treaty obligations as well as new obligations under the Rome Statute. In some countries, civil society has been actively mobilized around the process of drafting legislation to implement the Rome Statute. In view of the essential role of civil society in combating impunity, this process itself should enhance domestic and regional efforts to combat impunity.

46. A fundamental feature of some new and draft laws is their incorporation of crimes that are subject to ICC jurisdiction (although recent legislation has not always fully implemented States' obligations as parties to the Rome Statute). Among other benefits, this may overcome one barrier to effective enforcement of States' obligation to bring to justice perpetrators of international crimes - the lack of familiarity of many judges with international law, which has led some judges to interpret relevant principles restrictively. Recent legislation implementing the Rome Statute may also foster greater harmonization of domestic laws. In view of many States' observance of the "dual criminality" rule in extradition practice, this may enhance transnational cooperation in ensuring prosecution of alleged perpetrators. Another salutary feature of some countries' implementing legislation is their incorporation of principles of criminal responsibility established by international law.<sup>43</sup>

47. International assistance has facilitated the adoption of legislation implementing States' obligations under the Rome Statute. The European Union (EU) and some non-EU States, including Canada, have sponsored programmes aimed at promoting adherence to and implementation of the Rome Statute in every region of the world. ICRC and international NGOs have also made valuable contributions in this area.

48. Outside the context of the Rome Statute, a number of countries have taken steps to address legislative gaps that contribute to impunity: in the past eight years Colombia, El Salvador, Guatemala, Mexico, Paraguay, Peru and Venezuela have adopted legislation criminalizing enforced disappearances; Guatemala also penalized extrajudicial executions. Colombia, Ecuador, Paraguay and Venezuela incorporated provisions in their national constitutions prohibiting the practice of enforced disappearance. Through Law No. 24.820 of 30 April 1997, Argentina granted constitutional status to the Inter-American Convention on Forced Disappearance of Persons. Some countries, including Germany, Sweden and the United States, have enacted legislation penalizing specific forms of violence against women, including genital mutilation and trafficking offences.

49. Recent years have seen major developments in relation to the role of foreign courts in combating impunity (principles 20-22). To begin, there has been unprecedented recourse to extraterritorial jurisdiction in respect of serious crimes under international law committed outside the context of atrocities of the Second World War. Some States enacted legislation in the 1990s to ensure that they did not become havens for individuals responsible for crimes committed in the former Yugoslavia and Rwanda who would not likely be prosecuted before ICTY or ICTR; in other States, the presence of alleged perpetrators from these places provided the occasion to enforce existing laws.<sup>44</sup> Thus, the operation of international tribunals created an atmosphere in which States were motivated to play their own part in bringing alleged perpetrators of international crimes to justice. Another catalyst for increasing recourse to foreign jurisdiction was the arrest of former Chilean President Augusto Pinochet in October 1998 by British authorities acting at the request of a Spanish magistrate. Inspired by this precedent, victims of human rights abuses initiated criminal proceedings in several countries whose laws provide for extraterritorial jurisdiction over international crimes.

50. Notably, some States have acquiesced in the exercise of jurisdiction over their nationals by other States. The Government of Bosnia and Herzegovina did not object to Germany's exercise of universal jurisdiction over Bosnian nationals in several cases prosecuted in the 1990s. In July 2003, the Government of Argentina repealed a decree that had prevented extradition of Argentine nationals to face human rights charges abroad.<sup>45</sup> The Government of Chad has cooperated with a Belgian magistrate's investigation of Chad's former president. There have also been notable developments relating to the cooperation of third countries in the exercise of extraterritorial jurisdiction for international crimes. In June 2003, the Government of Mexico extradited retired Argentine Navy Captain Miguel Cavallo to Spain, where he faces charges of genocide and terrorism in connection with abuses committed during the period of military rule in Argentina.

51. The prospect of prosecution in foreign courts has opened up new possibilities for securing justice in countries where amnesties and other immunities previously barred prosecution. After former Chilean President Pinochet was arrested in the United Kingdom, Chilean authorities pledged to bring him to trial if he returned home. Following his return

in 2000, Chilean courts rendered several decisions that had the effect of lifting the former president's immunity from prosecution. Although proceedings were terminated by later rulings finding Mr. Pinochet mentally unfit to stand trial, other prosecutions of crimes committed during the period of military rule have advanced in Chile's courts. Similarly, recent actions nullifying impunity laws in Argentina (see para. 30 above) have been attributed in part to the effect of a Spanish magistrate's issuance of warrants for the extradition of 45 former Argentine military officers and a civilian accused of torture and disappearances.

52. With increasing recourse to foreign jurisdiction in the past decade, States have inevitably confronted several issues not previously settled by their own courts or fully addressed in international decisions. One concerns the application of official immunities in prosecutions of international crimes by foreign national courts. The International Court of Justice (ICJ) addressed some aspects of this issue in 2002, finding that an incumbent Minister for Foreign Affairs was entitled to procedural immunity from another State's jurisdiction even though he had been charged with serious crimes under international law. The majority opinion did not, however, clarify the scope of immunities available to former officials.<sup>46</sup> On one point there should be no doubt: as recognized in the Charter of the Nürnberg Tribunal and its judgement, and subsequently affirmed in numerous international instruments, including the statutes of every international tribunal, official immunities *ratione materiae* may not encompass conduct condemned as a serious crime under international law.

53. National courts in several countries, including Belgium, Germany, the Netherlands and Spain, have also considered whether an offence must have a particular link to the State before universal jurisdiction can or should be exercised;<sup>47</sup> in Belgium and Germany, the issue has been addressed in recent legislation. A related issue, some aspects of which have been addressed by Spanish courts<sup>48</sup> and the Belgian legislature, is whether courts that can exercise extraterritorial jurisdiction should defer to another State with a greater link to the crime in question and, if so, which State should bear the burden of establishing any relevant preconditions for exercising jurisdiction.

54. A case now pending before ICJ is likely to address some of these questions.<sup>49</sup> Further examination of best practices of national courts in enforcing international law through extraterritorial jurisdiction may also be desirable, with a view to identifying principles concerning the appropriate exercise of universal jurisdiction that may help clarify any uncertainties in this regard.<sup>50</sup> States should in any event ensure that their domestic law allows them fully to implement their unambiguous obligations under such treaties as the Convention against Torture, the Geneva Conventions of 12 August 1949, and Additional Protocol I of 1977, which include undertakings to institute prosecutions under specified circumstances unless a State party hands a suspect over for trial in another State.

55. States should, moreover, ensure effective compliance with these obligations. In this regard, there has been a significant gap in the practice of some States that have made concerted efforts to deport or deny entry to foreign nationals with respect to whom there are serious reasons to believe they have committed serious crimes under international law, but have not acted to ensure that these individuals are prosecuted abroad. The EU has recently taken steps that may help narrow this gap through decisions establishing a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes and requiring mutual assistance in investigation of such crimes.<sup>51</sup> It is recommended that States

review their laws and policies with a view to ensuring that persons who are deported or denied entry on the basis of their suspected participation in serious crimes under international law are subject to criminal proceedings in an appropriate forum.

56. The most significant development relating to principle 21 (a) is progress in the consideration of a draft international convention on the protection of all persons from enforced disappearance. A report undertaken pursuant to Commission resolution 2001/46 by the independent expert Manfred Nowak concluded that gaps in the existing legal framework “clearly indicate the need for a ‘legally binding normative instrument for the protection of all persons from enforced disappearance’” and that “universal jurisdiction in clearly defined individual cases of enforced disappearance, with appropriate punishment, will constitute the most effective measure to deter the practice of enforced disappearance in the future” (E/CN.4/2002/71).

### **C. The right to reparation (principles 33-42)**

57. Principle 33 represents a fundamental tenet of international human rights law, which is explicitly recognized in every comprehensive human rights treaty. Notably, article 75 of the Rome Statute gives this principle practical effect in the context of international criminal proceedings. In addition, recent jurisprudence has affirmed that principle 36 reflects the scope of the right to reparation under international law as further elaborated in draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.<sup>52</sup>

58. A programme proposed by the TRC of Peru (but not yet adopted by the Government), the Comprehensive Reparations Plan (PIR), reflects insights derived from the experience of other countries and thus provides a lens for distilling broader experience. To begin, the proposal reflects extensive consultations with victims’ organizations and other sectors of civil society. While helping to ensure that the proposal responds to victims’ needs, the engagement of civil society in shaping PIR helped strengthen its own capacity to play an effective part in both the public policy debate over reparations that lies ahead and in an eventual implementation process.

59. Several aspects of the conceptualization of PIR also represent best practices. First is the explicit acknowledgment by TRC that reparations are a moral, political and legal obligation of the State and that recognition of victims as human beings whose fundamental rights were violated is “the central goal” of reparations. By acknowledging the suffering and dignity of victims, the TRC report is itself a measure of reparation that may help reconstitute civic trust.

60. Another hallmark of an effective programme of reparations in a country where large numbers of individuals have been victimized is its comprehensiveness.<sup>53</sup> This criterion has several dimensions. First, the programme should be comprehensive in the sense that it makes reparations available to all victims of serious violations. As recognized in PIR, this approach minimizes the inequalities that result from exclusive reliance on judicial remedies, which well-educated victims are better able to access than members of socially marginalized groups, who often figure disproportionately among victims of systemic abuse. At the same time, the proposed PIR allows individuals to pursue individual remedies instead of participating in the comprehensive programme if that is their preference. Second, effective reparations programmes have included a spectrum of complementary measures. For example, reparations programmes

adopted in Chile and Argentina and proposed in Peru include measures of symbolic reparation, health and education-oriented programmes, and economic compensation. Finally, and as already noted, reparations programmes should be designed with an awareness of their place in a broader repertoire of mutually reinforcing measures of transitional justice. States must, of course, ensure that effective measures for obtaining reparations are assured in their national systems.

61. Measures of reparation include guarantees of non-recurrence of human rights violations (principles 37-42). With respect to principles 40-41, the Human Rights Committee has indicated that repealing amnesty laws does not obviate the need to ensure that individuals implicated in human rights violations no longer serve “in the military or in public office”.<sup>54</sup> Vetting processes must respect relevant international standards proscribing impermissible discrimination and assuring due process, which vary somewhat between the different treaties. At the least, vetting processes should ensure a hearing and a review by an independent and impartial body.

62. One institution that has recently gained in importance in some countries is that of the office of the ombudsman or public advocate. While their functions vary from one country to another, ombudsmen typically are empowered to receive complaints from citizens who believe that government bodies have violated their rights and to recommend appropriate remedial action. In this way, ombudsmen serve as an institutionalized link between citizens and Government. In some countries, the ombudsman has issued reports that appear to have been instrumental in the struggle against impunity. For example, along with the advocacy of civic organizations, a comprehensive report by the *Defensoria del Pueblo* of Peru on enforced disappearances from 1980 to 1996 was an important contribution to the work of Peru’s TRC. Its defence of the Inter-American Court’s judgement in a case invalidating Peru’s 1995 amnesty laws (see para. 29) and its interpretation of that judgement helped consolidate the Government’s commitment to nullify the effects of those laws. In the absence of a truth commission in Honduras, the *Comisión Nacional de Protección de los Derechos Humanos* produced a document clarifying the historical circumstances of the internal conflict in Honduras and the role of international intervention. In Northern Ireland, the work of an ombudsman who receives complaints relating to police conduct has led to some criminal convictions of police officers and a change in firearms policy.

63. As suggested earlier, recent years have also seen heightened awareness of and attention to gender-specific violations of human rights, as well as to violations of the rights of children. Despite this attention, efforts to eradicate these violations have encountered special challenges. A potentially significant initiative in this regard is the EU Daphne programme, which funded over 300 programmes aimed at combating violence against young people, women and children during its first phase (2000-2003). Of particular relevance to this study, the Daphne programme has identified illustrative programmes undertaken within EU member States that may constitute best practices.<sup>55</sup>

64. In this area, as in others addressed in the Principles, States’ participation in human rights treaty regimes has enhanced their domestic capacity to combat impunity. To cite one of many examples, on 19 June 2003 the Government of Montenegro agreed to pay over 985,000 euros to 74 Romani victims of a 1995 pogrom involving mob violence and the destruction of an entire Romani neighbourhood. The award followed a 2002 decision by the Committee against Torture urging the respondent State to provide “redress, including fair and adequate compensation”.<sup>56</sup>

### III. RECOMMENDATIONS FOR FURTHER IMPLEMENTATION

65. Although some aspects of the Principles - notably those pertaining to the creation of an international criminal court - may benefit from being updated, recent developments in international law have strongly affirmed the Principles as a whole. Some of the Principles embody principles of human rights treaty and customary law that were already well established in 1997; others have been affirmed by more recent developments in international law summarized in this study. The Principles have themselves provided an influential framework for domestic measures aimed at combating impunity. In light of these observations, it is recommended that the Commission on Human Rights appoint an independent expert to update the Principles with a view to their adoption by the Commission.

#### Notes

<sup>1</sup> The full text of these replies is available from the secretariat.

<sup>2</sup> The expert also wishes to acknowledge the research assistance of Holly Dae, Kristen McGeeney and Debra Wolf.

<sup>3</sup> The text of draft 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 prepared by Mr. Bassiouni, independent expert of the Commission on Human Rights on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, and Mr. van Boven, Special Rapporteur on the question of torture, is set forth in E/CN.4/2004/57, appendix I.

<sup>4</sup> A comparative study on reparations programmes, *Repairing the Past: Compensation for Victims of Human Rights Abuse* (Pablo de Greiff, ed.), has been undertaken by the International Center for Transitional Justice and will soon be available at [www.ictj.org](http://www.ictj.org).

<sup>5</sup> For example, the Principles are cited in a presidential decree establishing a National Archive of Remembrance in Argentina, Decree 1259/2003.

<sup>6</sup> See, e.g., Inter-American Commission on Human Rights (case No. 133/99), report No. 133/99, paras. 102-107.

<sup>7</sup> The leading case under the International Covenant on Civil and Political Rights is *Quinteros Almeida v. Uruguay*, Communication No. 107/1981 (2003). The Inter-American Court's jurisprudence on this subject is summarized and affirmed in the *Bámaca Velásquez* case, Inter-American Court of Human Rights, vol. 70, Series C, paras. 159-166 (25 November 2000).

<sup>8</sup> See the *Caracazo* case, Inter-American Court of Human Rights, vol. 95, Series C (Reparations), para. 118 (2002).

<sup>9</sup> See, e.g., *Cyprus v. Turkey*, paras. 157-158 (10 May 2001).

<sup>10</sup> Cases Nos. CH/01/8365 et al., Decision on Admissibility and Merits, para. 220 (4); see also para. 191 (7 March 2003).

<sup>11</sup> Ibid., paras. 181 and 220 (3).

<sup>12</sup> *Cyprus v. Turkey*, para. 136.

<sup>13</sup> *Parada Cea et al. v. El Salvador* (case 10.480), report No. 1/99, para. 150.

<sup>14</sup> Ibid., para. 152.

<sup>15</sup> *Monsignor Oscar Arnulfo Romero y Galdámez v. El Salvador* (case 11.481), report No. 37/00, para. 148; see also para. 147. Also relevant to principle 36, when the Inter-American Court has found a Government responsible for violating article 4 of the American Convention (right to life) in relation to a victim of enforced disappearance, it has concluded that the respondent State “must locate the mortal remains” of the victim “and hand them over to his next of kin”. *Bámaca Velásquez* case, op. cit., vol. 91, Series C (Reparations), para. 79 (22 February 2002).

<sup>16</sup> *Myrna Mack Chang* case, Inter-American Court of Human Rights, vol. 101, Series C, para. 274 (23 November 2003) (unofficial translation).

<sup>17</sup> *Lapacó v. Argentina*, Inter-American Court of Human Rights (case 12.059), report No. 21/00, para. 17.1.

<sup>18</sup> E.g., report No. 37/00, para. 148.

<sup>19</sup> *Bámaca Velásquez*, op. cit., vol. 91, para. 77. See also *Caracazo*, op. cit., para. 118.

<sup>20</sup> *Myrna Mack Chang*, op. cit., paras. 274-275.

<sup>21</sup> Cases Nos. CH/01/8365 et al., op. cit., para. 212 (emphasis added).

<sup>22</sup> For a comprehensive assessment of truth commissions, see Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001).

<sup>23</sup> Ibid., p. 125.

<sup>24</sup> *Kurt v. Turkey*, para. 140 (25 May 1998).

<sup>25</sup> E.g., Inter-American Commission on Human Rights, case 10.480, report No. 1/99, para. 116 (quoting a senior ICRC attorney who explained that the travaux préparatoires of article 6 (5) indicate that this provision aims at encouraging amnesty “as a type of liberation at the end of hostilities for those who were detained or punished merely for having participated in the hostilities” and does not aim at amnesty “for those who have violated international humanitarian law”).

<sup>26</sup> E.g., *Prosecutor v. Tadić*, Appeals Chamber, para. 134 (2 October 1995); *Prosecutor v. Delalić*, Appeals Chamber, paras. 163-73 (20 February 2001).

<sup>27</sup> *Prosecutor v. Furundžija*, para. 155 (judgement of 10 December 1998).

<sup>28</sup> Order of the Criminal Chamber, Appeal 173/98 (5 November 1998).

<sup>29</sup> See [www.universaljurisdiction.info/index/Cases/Cases/France - Ely Ould Dah Case/Case Doc Summaries/110303.0](http://www.universaljurisdiction.info/index/Cases/Cases/France_-_Ely_Ould_Dah_Case/Case_Doc_Summaries/110303.0) (summarizing *Ely Ould Dah case*, Crim. 23 October 2002: Bull. Crim. No. 195 p. 725).

<sup>30</sup> *Barrios Altos case*, Inter-American Court on Human Rights, vol. 75 (Series C), paras. 39-41 (14 March 2001). See also *Loayza Tamayo case*, paras. 167-168 (Reparations) (27 November 1998).

<sup>31</sup> Case 8686/2000, *Juzgado Nacional en lo Criminal y Correccional Federal*, No. 4 (6 March 2001).

<sup>32</sup> Sentencing of Fernando Laureani Maturana and Miguel Krassnoff Marchenko, Santiago Court of Appeal (5 January 2004).

<sup>33</sup> S/PRST/2002/41, p. 1.

<sup>34</sup> S/2000/915, para. 22 (footnote omitted).

<sup>35</sup> E.g., articles 7 (1) (g), 8 (2) (b) (xxii) and 8 (2) (e) (vi).

<sup>36</sup> E.g., *Selçuk and Asker v. Turkey*, para. 96 (24 April 1998).

<sup>37</sup> *SERAC v. Nigeria*, communication No. 155/96, concluding paragraphs, 15th *Annual Activity Report* (2001-2002).

<sup>38</sup> E.g., *Prosecutor v. Kupreškić*, Trial Chamber judgement, para. 631 (14 January 2001).

<sup>39</sup> Judgement C-004/03 (20 January 2003).

<sup>40</sup> Another hybrid court is planned for Cambodia.

<sup>41</sup> Relevant international decisions and reports are summarized in E/CN.4/Sub.2/2002/4. A more detailed discussion is provided in Federico Andreu-Guzmán, *Military Jurisdiction and International Law (Fuero militar y derecho internacional)*, published by the International Commission of Jurists, Bogotá, 2003.



<sup>42</sup> Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Human Rights Center, University of California, Berkeley, May 2003). Article 92 (6) of the ICC Rules of Procedure and Evidence provides for notification to victims of the outcome of proceedings in which they participated.

<sup>43</sup> Principles of international criminal responsibility as clarified by recent international jurisprudence are summarized in E/CN.4/2002/103, paras. 26-30.

<sup>44</sup> These prosecutions are described in Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation*, AI Index: IOR 43/002 - 018/2001, September 2001.

<sup>45</sup> Decree No. 420 of 25 July 2003.

<sup>46</sup> See case concerning arrest warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), *I.C.J. Reports, 2002 (Merits)*, para. 61 (briefly addressing immunities of former officials). The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal noted, however, that “it is generally recognized that in the case of [serious international] crimes ... immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility”. *Ibid.*, para. 74. The scope of official immunities is in issue in cases pending before the ICJ (*Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*) and SCSL (*Prosecutor v. Charles Ghankay Taylor*, SCSL 2003-01-I).

<sup>47</sup> Key decisions through 2001 are summarized in Amnesty International’s report on universal jurisdiction. See note 44 above.

<sup>48</sup> See Rios Montt case *Tribunal Supremo* (25 February 2003) (unofficial translation), *International Legal Materials*, vol. 42, pp. 686 ff (2003); *Fujimori case, Tribunal Supremo* (20 May 2003) (unofficial translation), *International Legal Materials*, vol. 42, pp. 1200 ff (2003).

<sup>49</sup> Case concerning certain criminal proceedings in France (*Republic of the Congo v. France*).

<sup>50</sup> Several non-governmental initiatives have produced principles concerning the exercise of universal jurisdiction, e.g. Amnesty International, *14 Principles on the Effective Exercise of Universal Jurisdiction*, AI Index: IOR 53/01/99, May 1999; Brussels Principles against Impunity and for International Justice, adopted by the Brussels Group for International Justice (Brussels, 11-13 March 2002); and the Princeton Principles on Universal Jurisdiction (2001), at [www.princeton.edu/~lapa/unive\\_jur.pdf](http://www.princeton.edu/~lapa/unive_jur.pdf).

<sup>51</sup> Council decisions 2002/494/JHA of 13 June 2002 and 2003/335/JHA of 8 May 2003.

<sup>52</sup> See note 3.

<sup>53</sup> The importance of comprehensiveness, as well as the role of reparations in restoring civic trust, are developed in de Greiff, *supra* note 4.

<sup>54</sup> CCPR/CO/70/ARG, para. 9 (2000).

<sup>55</sup> Descriptions of these projects are available at [http://europa.eu.int/comm/justice\\_home/funding/daphne/funding\\_illustr\\_cases\\_en.htm](http://europa.eu.int/comm/justice_home/funding/daphne/funding_illustr_cases_en.htm).

<sup>56</sup> *Dzemajl et al. v. Yugoslavia*, communication No. 161/2000, para. 11 (CAT/C/29/D/161/2000).

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