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PROMOTION AND PROTECTION OF HUMAN RIGHTS

Impunity

**Report of the independent expert to update the Set of Principles to
combat impunity, Diane Orentlicher***

* The report was submitted after the deadline in order to take into account replies of all respondents as well as the results of the expert workshop held in November 2004.

Summary

Pursuant to Commission resolution 2004/72, the Set of Principles for the protection and promotion of human rights through action to combat impunity (the Principles) have been updated “to reflect recent developments in international law and practice, including international jurisprudence and State practice, and taking into account the independent study” on impunity (E/CN.4/2004/88) commissioned by the Secretary-General pursuant to resolution 2003/72. The independent study, in turn, identified best practices in combating impunity, using the Principles as a framework for assessment.

Relevant developments in international law have on the whole strongly affirmed the Principles while providing further clarification of the scope of States’ established legal obligations. Accordingly, the updated text largely affirms and preserves the Principles as they were proposed in 1997 (E/CN.4/Sub.2/1997/20/Rev.1, annex II) while clarifying specific aspects of their application in light of recent developments in international law. While most revisions reflect developments in substantive international law, some reflect major institutional developments since the Principles were proposed, such as the emergence of a new breed of court comprising both national and international elements.

Some revisions reflect recent developments in State practice that, beyond their potential relevance in disclosing emerging principles of international law or confirming established legal norms, have provided valuable insights concerning effective strategies for combating impunity. For example recent experience has affirmed the central importance of promoting the broad participation of victims and other citizens, including in particular women and minorities, in the design and implementation of programmes for combating impunity. This experience is reflected in revisions that avoid categorical language in respect of questions whose resolution is appropriately left to national deliberations while distilling generally helpful insights from States’ evolving experience in combating impunity.

Some revisions reflect the cumulative experience of States, the United Nations, and other institutions and organizations that have played leading roles in addressing the challenge of justice after the wholesale collapse of legal process. The updated principles have distilled this experience by, for example, recognizing the need to consider comprehensive institutional reform as a foundation for sustainable justice during periods of democratic transition.

In larger perspective, the developments underlying revisions to the Principles represent remarkable advances in national and international efforts to combat impunity. Seemingly impregnable barriers to prosecution have been dismantled in countries that have endured the depredations of dictatorship; a new breed of court, combining national and international elements, has entered the lexicon of institutions designed to render justice for atrocious crimes; States have cooperated to ensure prosecution of officials at the highest levels of Government before international, internationalized and national courts; and Governments and civil society have acquired an expanding repertoire of tools for combating impunity. While these developments have made it necessary to update the Principles, the Principles themselves have played a singularly influential role in contributing to these advances.

The revised text of the Principles is set forth in document E/CN.4/2005/102/Add.1.

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Introduction

1. This report is submitted pursuant to resolution 2004/72, in which the Commission on Human Rights requested the Secretary-General to appoint an independent expert for a period of one year to update 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) (the Principles) “to reflect recent developments in international law and practice, including international jurisprudence and State practice, and taking into account the independent study” on impunity (E/CN.4/2004/88) commissioned by the Secretary-General pursuant to resolution 2003/72 (Independent Study) as well as information and views received from States and intergovernmental and non-governmental organizations (NGOs) pursuant to resolution 2004/72.

2. The Independent Study mentioned in resolution 2004/72 identified “best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity, taking into account” the Principles “and how they have been applied, reflecting recent developments and considering the issue of their further implementation”.¹ Recent developments reflected in the study included “key developments in international law and State practice since 1997”,² the year that the Principles were submitted to the then Sub-Commission on Prevention of Discrimination and Protection of Minorities by Louis Joinet, Special Rapporteur on the question of impunity of perpetrators of violations of human rights (civil and political), and transmitted to the Commission by Sub-Commission decision 1997/28. In accordance with resolution 2004/72, the Principles have been updated in light of recent developments in international law and practice, including those noted in the Independent Study as well as more recent developments.

3. In addition to information provided by Governments,³ this report benefited from an expert workshop organized by the United Nations Office of the High Commissioner for Human Rights (OHCHR) in Geneva on 18 and 19 November 2004. The workshop was convened to facilitate an exchange of views between the independent expert and experts drawn from the various geographical regions (Africa, Asia, Eastern Europe, Latin America and Caribbean, and Western Europe and Other States). Participants also included representatives of OHCHR, the International Committee of the Red Cross (ICRC) and NGOs. The independent expert also wishes to acknowledge the separate contributions of Amnesty International, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the International Federation of Human Rights, Human Rights Watch, the International Center for Transitional Justice, the International Commission of Jurists, ICRC, the International Rehabilitation Council for Torture Victims, the Open Society Justice Initiative, the Office of the United Nations High Commissioner for Refugees, and Redress Trust.⁴

4. As the Independent Study recognized, although “some aspects of the Principles ... may benefit from updating” to reflect significant developments in international law and State practice, “recent developments in international law have affirmed the Principles as a whole and highlighted their contribution to domestic efforts to combat impunity”.⁵ Indeed, the study concluded, the “Principles have already had a profound impact on efforts to combat impunity.”⁶ Accordingly the updated text, which is set forth in the addendum to this report (E/CN.4/2005/102/Add.1), largely affirms and preserves the Principles as they were proposed by the Sub-Commission in 1997 while reflecting relevant developments.

5. Where revisions have been made, they reflect one or more of the following considerations (more detailed explanations, which supplement these general observations to the extent necessary or useful, are set forth in section I). Most of the revisions reflect recent developments in international law as reflected in jurisprudence of international courts, human rights treaty bodies and national courts as well as in other aspects of State practice. For the most part these developments provide further clarification of the scope of States' established obligations under international law while generally affirming the relevant Principles.

6. In some instances recent developments have underscored the comparative importance of certain principles or of the premises underlying the Principles as a whole. Reflecting developments of this kind, some revisions represent a corresponding change in emphasis without modifying the Principles. For example recent developments have strongly affirmed a central premise of the Principles - "the need for a comprehensive approach towards combating impunity".⁷ To highlight the overarching importance of this principle, the updated text includes as its first principle text previously included in principle 18 (1), which recognizes a range of measures that States must take to meet their obligations to combat impunity.⁸

7. Another category of revisions broadly reflects developments in State practice that, beyond their potential relevance in disclosing emerging principles of customary law or confirming established norms, have provided valuable insights concerning effective strategies for combating impunity. Perhaps most important in this regard, recent experience has affirmed the central importance of promoting "the broad participation of victims and other citizens" in "designing policies for combating impunity".⁹ Their participation helps ensure that policies for combating impunity effectively respond to victims' actual needs and, in itself, "can help reconstitute the full civic membership of those who were denied the protection of the law in the past".¹⁰ Broad consultations also help ensure that policies for combating impunity are themselves rooted in processes that ensure public accountability. Finally, programmes that emerge from national consultations are, in the words of a recent report by the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, more likely than those imposed from outside "to secure sustainable justice for the future, in accordance with international standards, domestic legal traditions and national aspirations".¹¹

8. Recent experience has also shown that the aims of the Principles can be effectively achieved only when concerted efforts are made to ensure that men and women participate on an equal basis in the development and implementation of policies for combating impunity. For example, the Principles affirm that commissions of inquiry should "pay particular attention to violations of the basic rights of women";¹² recent experience has shown that this aim is facilitated by ensuring gender balance in the composition of truth commissions and their staff.

9. The principle that policies for combating impunity should be informed by public consultations, including in particular the views of victims, is closely related to another conclusion of the Independent Study: "[W]hile States must meet their obligations under international law, ... there is no 'one-size-fits-all' response to serious violations of human rights."¹³ Addressing the role of the United Nations in supporting the rule of law and transitional justice in conflict and post-conflict societies, the aforementioned report of the Secretary-General (see paragraph 7) similarly concluded: "We must ... eschew one-size-fits-all formulas and the

importation of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations.”¹⁴ Reflecting both insights, which derive from extensive recent experience, in some instances the updated text of the Principles reflects the importance of public consultations in shaping anti-impunity measures.

10. In the course of updating the Principles in light of the factors specified in resolution 2004/72, the independent expert has framed changes with a view towards ensuring that the Principles are readily adapted to diverse legal systems and, more generally, towards enhancing their clarity. In some instances, the text of the Principles has been revised to reflect clarification of their meaning previously provided in the report to the Sub-Commission accompanying the Principles when they were submitted in 1997.¹⁵ Several revisions also seek to ensure that the English text corresponds as nearly as possible to the original French text of the Principles. The independent expert has noted that, when the English and French texts of the Principles convey somewhat different connotations, the French text better reflects relevant principles of international law. Finally, the text of some principles has been updated as necessary to reflect revisions made in other principles.

11. In view of the independent expert’s mandate to update the Principles “to reflect recent developments in international law and practice, including international jurisprudence and State practice”, as well as other considerations specified in resolution 2004/72, it may be useful to reiterate that “these principles are not legal standards in the strict sense, but guiding principles”.¹⁶ The apparent premise of resolution 2004/72, which has informed the independent expert’s approach in updating the Principles, is that guidelines that are not legally binding in themselves should nonetheless reflect and comport with pertinent legal standards.

I. COMMENTARY ON THE UPDATED PRINCIPLES

12. As used herein, the phrase “the Principles” refers to the text of the Principles set forth in annex II of E/CN.4/Sub.2/1997/20/Rev.1, while references in the form of “principle 1” denote specific principles in that text. Phrases such as “revised text”, “updated text”, “revised principle”, and “updated principle” refer to text that has been updated pursuant to resolution 2004/72. The updated principles are set forth in the addendum to this report.

A. Definitions

13. The updated definition of “serious crimes under international law” reflects clarifications of relevant law provided by recent jurisprudence of international criminal tribunals, human rights treaty bodies and national courts. While the previous definition mentioned “war crimes” and “grave breaches of international humanitarian law” separately, the revised text reflects the fact that grave breaches are a subset of the broader category of war crimes and, as recognized in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY),¹⁷ the respective statutes of the International Criminal Tribunal for Rwanda (ICTR)¹⁸ and of the International Criminal Court (Rome Statute),¹⁹ and the jurisprudence of the Inter-American Commission on Human Rights,²⁰ other serious violations of international humanitarian law also constitute war crimes. The phrase “other violations of internationally-protected human rights

that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery” has been included in the revised definition to reflect the jurisprudence of human rights treaty bodies,²¹ national courts,²² and international criminal tribunals;²³ the text of relevant treaties;²⁴ and resolutions of the General Assembly and other United Nations bodies.²⁵

14. The revised text introduces the phrase “truth commissions”, a particular type of commission of inquiry, in view of their increasing importance as a mechanism for exercising the right to know. The updated text uses this phrase in respect of standards that are especially or uniquely relevant to truth commissions.²⁶ The definition set forth in the addendum largely follows the definition used in the report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies.²⁷

15. The updated text also introduces a definition of “archives”, a term that is centrally important to several principles. The definition is largely self-explanatory, but several points merit brief comment. First, while the archives that are of principal concern in principles 4 and 13-17 are those possessed by government agencies relating to periods of significant repression, in recent years the proliferation of truth commissions has increased the importance of their own archives and highlighted the need to address issues relating to this source of archival material. Second, in accordance with professional archival practice, the word “documents” comprises a broad range of formats, such as paper (including maps, drawings and posters), electronic records (such as e-mail and word processing records and databases), still photographs, film, videotapes and audio tapes. Finally, although the definition used in the updated principles focuses on official sources, materials pertaining to human rights violations collected by foreign Governments, domestic and international NGOs, universities and international organizations also play an important part in societies’ ability to exercise their right to know the truth about violations of human rights and humanitarian law. States must respect and protect the right of non-State organizations and individuals to collect, preserve and make available relevant documents concerning such violations.

16. The updated text retains the definition of “impunity” in the Principles. This definition should be understood in light of principle 18 (1)/updated principle 1, which makes clear that States must undertake a range of measures to combat impunity. Satisfying one of their obligations, such as the duty to ensure prosecution of those responsible for serious crimes under international law, does not relieve States of their independent obligations, including those bearing on reparations, the right to know and, more generally, non-recurrence of violations.

B. The right to know

17. Two overarching considerations have informed the independent expert’s approach to this section of the Principles. First, recent developments in international jurisprudence and State practice have strongly affirmed both the individual and collective dimensions of the right to know, although the contours of this right have been delineated somewhat differently by various treaty bodies.²⁸

18. Second, extensive global experience with truth commissions in the period since the Principles were developed²⁹ has shown that the “participation of victims and other citizens” (see paragraph 7 above) has special importance for deliberations concerning the collective dimension of the right to know. Revisions to principles 5-12 reflect this experience by avoiding categorical language in respect of questions whose resolution is appropriately left to national deliberations while distilling generally helpful insights from the recent experience of truth commissions.

19. At the same time, the updated text recognizes that some questions bearing on the right to know are governed by established or emerging international standards. For example, while the question whether or when to establish a truth commission should generally be determined through national deliberations, the principle that States must preserve archives that enable societies to exercise their right to know the truth about past repression has universal relevance.

1. General principles

20. The English text of the first sentence of revised principle 2 - which corresponds to principle 1 - replaces “systematic, gross” with “massive or systematic”. This change brings the English text into conformity with the original French text, which uses the phrase “*massive ou systématique*”. Besides conforming to the original French text, this modification reflects recent practice and international law better than the English text of principle 1. With respect to practice, the mandates of truth commissions generally have not restricted the commissions’ inquiry to violations that are *both systematic and gross*. With respect to relevant law, the phrasing of the French text evokes the definition of crimes against humanity reflected in recent jurisprudence of the ICTY and the Human Rights Committee³⁰ and in article 3 of the Statute of the ICTR and article 7 (1) of the Rome Statute. Each of these sources defines crimes against humanity as certain acts when committed on a widespread *or* systematic basis. While the mandates of recent truth commissions have typically encompassed crimes that do not necessarily rise to the level of crimes against humanity, the occurrence of this international crime would represent a paradigmatic basis for establishing a truth commission.

21. The heading and text of revised principle 3 are framed in terms of the duty of States to “preserve memory”. This phrasing seeks to clarify without modifying the meaning of principle 2, which uses the phrase “duty to remember”. Put differently, the updated text seeks to make explicit the intended meaning of the original phrasing as reflected in the second sentence of principle 2, those of the Principles that provide specific guidance concerning application of principle 2 (notably principles 13-17), and the commentary accompanying the Principles.³¹

22. The revised text of principle 5, which updates principle 4 and incorporates the first paragraph of principle 5, reflects two considerations. First, the updated text seeks to avoid any possible implication that the work of truth commissions is an alternative to the essential role of the judiciary in protecting human rights³² by removing the phrase “If judicial institutions are wanting in that respect”. Indeed, recent experience has highlighted the independent contributions of the judiciary in clarifying circumstances surrounding human rights violations.³³ That truth commissions “are not intended to act as substitutes for the civil, administrative or criminal courts” is explicitly affirmed in principle 7 (a); the revised text of principle 5 simply

reinforces this point. Second, consistent with the considerations noted above in paragraphs 7-9 and 18, the updated text implicitly recognizes that the decision whether to establish a truth commission should be the product of national deliberations when local conditions allow such deliberations to take place freely and safely,³⁴ although international support can significantly enhance domestic deliberations and may be essential to the successful operation of the commission.³⁵

2. Commissions of inquiry

23. Principle 5 (2) provides: “In order to restore the dignity of victims, families and human rights advocates, [investigations by commissions of inquiry] shall be conducted with the object of securing recognition of such parts of the truth as were formerly constantly denied.” This text has been revised in principle 6 (2), which uses the phrase “In recognition of the dignity” rather than “In order to restore the dignity” and does not include a reference to “human rights advocates”. The first change seeks to avoid any possible implication that perpetrators of atrocious crimes have been successful in depriving victims and their families of their inherent dignity. The second change seeks to reinforce the core concern of principle 5 (2) with direct and indirect victims of human rights violations without changing this principle’s meaning. Victims may, and often do, include human rights advocates. In these instances, their status is subsumed in the principle’s general reference to victims.³⁶ At the same time, the revised text addresses the concern underlying the explicit reference to human rights advocates in principle 5 (2) by preserving its recommendation that investigations by truth commissions should be conducted with the object in particular “of securing recognition of such parts of the truth as were formerly constantly denied”. As explained in the commentary to the Principles, acknowledging aspects of the truth that “oppressors often denounced as lies as a means of discrediting human rights advocates” is a means of “rehabilitat[ing] those advocates”.³⁷

24. The revised text preserves the aim of principle 6 (a) - to ensure the independence, impartiality and, more generally, the accountability of commissions of inquiry - by incorporating its central principle in general terms in the chapeau of revised principle 7 while avoiding language (e.g. “Commissions shall be established by law”) that may appear to constrain decisions that should be addressed in a national context. Recent experience suggests that the most appropriate means of establishing a publicly accountable truth commission may vary depending upon the particular features of a country’s legal system and its national experience. While some truth commissions created through national action have been established by legislation, others have been established by presidential decree.³⁸

25. Revised principle 7 (a) adds the phrase “except on grounds of incapacity or behaviour rendering them unfit to discharge their duties and pursuant to procedures ensuring fair, impartial and independent determinations” after the text, derived from principle 6 (b), assuring the irremovability of commission members during their terms of office. The new text, which draws from the Basic Principles on the Independence of the Judiciary,³⁹ should be understood as referring solely to legitimate grounds for removal, such as corrupt behaviour, under procedures assuring fair, independent and impartial determinations.

26. To conform to the French text of principle 6 (c), the word “safety” in the English text has been changed to “protection” in revised principle 7 (b). “Protection”, which mirrors “*protection*” in the French text, is more appropriate than “safety” in light of this provision’s particular concern with defamation and other legal proceedings that may threaten commission members’ ability to safeguard the truth.

27. The updated text of principle 7 (c) reflects recent experience highlighting the importance of ensuring gender balance in appointments to truth commissions, international criminal tribunals and other bodies that address violations of human rights and humanitarian law. For example recent truth commissions have encouraged female victims of sexual violence to provide testimony by allowing them to do so before female commissioners and staff.⁴⁰ Similarly, fair representation on truth commissions of members of minority groups - who often number disproportionately among victims⁴¹ and are sometimes the target of violations - is likely to enhance these victims’ confidence in the proceedings while securing the right of each member of society to participate in public life on a basis of equality.

28. The text of updated principle 8, which addresses the terms of reference of commissions of inquiry, reorganizes principle 7 in accordance with the general considerations noted above in paragraphs 5-10. For example, while principle 7 (b) indicates that the terms of reference of a commission of inquiry “shall” stipulate the conditions in which the body may seek the assistance of law enforcement authorities and take other specified measures, revised principle 8 (a) suggests that the “commission’s terms of reference may reaffirm its right to seek the assistance of law enforcement authorities” and take other investigative measures. This phrasing seeks to avoid any inadvertent implication that a commission’s terms of reference should limit the commission’s ability to seek the cooperation of law enforcement authorities while recognizing that the desirability of specifying the commission’s investigative powers in its terms of reference (rather than, for example, in its operational procedures or in legislation requiring the police and other agencies to cooperate with a commission of inquiry) may vary from one context to another. The text of the chapeau of updated principle 8 also avoids language that might inadvertently imply that truth commissions may not establish non-legal responsibility for violations.⁴² Truth commissions may establish, and often have established, non-legal responsibility in a form that is appropriate to their mandate by, for example, identifying likely perpetrators by name.

29. The phrase “or take other appropriate measures” has been introduced in revised principle 8 (b), which addresses protection measures that commissions of inquiry should be empowered to undertake, to enhance the effectiveness of the measures contemplated by principle 7 (c) while reflecting the more comprehensive authority that truth commissions have exercised.

30. The updated text of principle 8 (c) and (d), which addresses the scope of investigations undertaken by commissions of inquiry, includes explicit reference to violations of international humanitarian law. This reflects the fact that recent truth commissions typically have examined serious violations of this law, a development welcomed in resolution 2004/72.⁴³

31. Revised principles 8 (f) and 10 (d) reflect recent experience highlighting the need to ensure that information provided to commissions of inquiry on a confidential basis is not disclosed except under conditions previously communicated to the sources. Those conditions should protect victims and other witnesses from premature or otherwise harmful disclosure of information. The length of time that records should remain closed may vary according to their nature (for example, comparatively long embargo periods may be appropriate in respect of documents pertaining to sexual violence), in light of local standards, and in view of prevailing security concerns.⁴⁴ Revised principle 10 (d) also incorporates principle 9 (b) while updating the latter in light of the considerations noted above in paragraphs 9 and 18.

3. Preservation of and access to archives bearing witness to violations

32. The technical measures for preserving archives mentioned in revised principle 14 (which corresponds to principle 13) should be understood to include measures for preserving paper, video, audio and other documents and the use of microfilm. Such measures must be taken on an urgent basis in some situations, as when an outgoing regime attempts to destroy records of its human rights violations. When possible and appropriate, copies of archives should be made and stored in diverse locations. Except in extreme cases where the physical survival of archives is imperilled, the original documents should remain in the country concerned. Even in situations justifying removal of archives, the records should remain outside the country concerned for limited periods only. These general guidelines are subject to legally binding orders or requests of international criminal tribunals, which may require States to provide original documents.

33. The third paragraph of revised principle 15 recognizes the need for “reasonable restrictions” on access to archives “aimed at safeguarding the privacy and security of victims and other individuals”. Safeguards encompassed in this paragraph may apply, inter alia, to individuals who have provided information on a confidential basis, including individuals who participate in witness-protection programmes that preclude public disclosure of their identity or of information that would indirectly identify them as sources of information in archives.

34. The second sentence of updated principle 16, which addresses the cooperation of archive departments with courts and commissions of inquiry, reflects considerations relating to confidential testimony addressed in other principles. While the third sentence of this provision retains the general rule that access to archives may not be denied on grounds of national security (see principle 15), it refines this standard in light of recent developments in international law and State practice.⁴⁵ For purposes of the revised text, “legitimate national security interest” should be understood to exclude restrictions whose actual purpose or effect is to protect a government from embarrassment or to prevent exposure of wrongdoing.⁴⁶

35. Where principle 16 (b) provides that documents challenging an official document should be “attached” to the latter, revised principle 17 (b) frames this same standard somewhat differently with a view towards reflecting the practice of professional archivists. Particularly in respect of electronic documents, it is more accurate to speak in terms of cross-referencing documents and making both available at the same time than in terms of attaching documents to each other.

C. The right to justice

1. General principles

36. For reasons previously noted (see paragraph 6), principle 18 (1) has become updated principle 1. The remaining text of principle 18 has been incorporated in revised principle 19, which focuses on States' obligations in the sphere of criminal justice. The text has been revised to accommodate diverse legal systems and in recognition of the important role that NGOs, both national and international, have played in ensuring effective implementation of States' obligations to combat impunity through the proper administration of criminal justice.⁴⁷

37. NGOs may have a legitimate interest in representing victims even if, in the words of principle 18 (2), they have not engaged in "recognized long-standing activities on behalf of the victims concerned". Particularly during periods of restoration of or transition to democracy and/or peace, the most effective domestic NGOs may not have been able to establish themselves on a long-standing basis; victims could effectively be denied the right to a judicial remedy⁴⁸ if recently established NGOs were denied standing to assist victims. Accordingly, the revised text uses the phrase "any ... non-governmental organization having a legitimate interest therein" instead of "non-governmental organizations with recognized long-standing activities on behalf of the victims concerned". The text of revised principle 19 (2) urging States to guarantee wronged parties "broad legal standing in the judicial process" is relevant at all appropriate stages of the criminal proceedings, provided the participation of these parties is exercised in a manner that is consistent with the rights of the accused and, more generally, with a fair and impartial trial.⁴⁹

38. In larger perspective, the general obligation of States to ensure prosecution of individuals responsible for serious crimes under international law entails a duty not only to institute proceedings against suspects in a State's jurisdiction if the suspects are not handed over for trial by another court, but also, when applicable, to provide appropriate forms of cooperation to other States, international tribunals, and internationalized courts in connection with their criminal proceedings.

2. Distribution of jurisdiction between national, foreign, international and internationalized courts

39. Principle 19, which addresses the jurisdiction of national courts in relation to international criminal tribunals, has been updated in revised principle 20 to reflect recent institutional developments in international criminal law. These include the entry into force of the Rome Statute; the emergence of a new breed of court comprising both national and international elements, a trend exemplified by the establishment of the Special Court for Sierra Leone, the Special Panels for Serious Crimes in Timor-Leste, and courts in Kosovo established under the authority of the United Nations Interim Administration Mission in Kosovo; and the likely establishment of other internationalized courts, including the Extraordinary Chambers in the Courts of Cambodia.⁵⁰ References in this and other updated principles to "international criminal tribunals" include any regional courts that may be established with appropriate jurisdiction over serious crimes under international law.

40. The first sentence of principle 19/updated principle 20, which reaffirms the primary responsibility of States to ensure justice for serious crimes under international law, reflects the general obligation of States to ensure prosecution of those responsible for atrocious crimes.⁵¹ Whereas principle 19 recognizes the concurrent jurisdiction of an international criminal tribunal in circumstances “where national courts cannot yet offer satisfactory guarantees of independence and impartiality, or are physically unable to function”, the second sentence of updated principle 20 affirms this same approach in terms that reflect the establishment since 1993 of various international and internationalized tribunals⁵² (see paragraph 39 above), whose respective statutes define the terms of their jurisdiction vis-à-vis national courts in somewhat different terms.

41. In some instances, the circumstances described in the second sentence of principle 19 (1)/ updated principle 20 (1) have led the Security Council to create or approve ad hoc tribunals that may assert primacy over domestic courts in respect of crimes that are subject to concurrent jurisdiction.⁵³ Pursuant to article 17 of the Rome Statute, the International Criminal Court (ICC) may exercise its jurisdiction only when a State that has jurisdiction over a case that is potentially subject to ICC jurisdiction is unwilling or unable genuinely to carry out an investigation or prosecution. Each of these approaches is encompassed in the text of updated principle 20 (1) recognizing that “international and internationalized criminal tribunals” may exercise concurrent jurisdiction “[i]n accordance with the terms of their statutes”.

42. With the advent of international and internationalized criminal tribunals in the past 12 years, cooperation with these tribunals to the extent required by applicable sources of legal obligation has become an increasingly important component of States’ general obligation to ensure prosecution of serious crimes under international law. This development is reflected in the second paragraph of revised principle 20, which recognizes the duty of States to ensure that they fully satisfy applicable legal obligations in respect of international and internationalized criminal tribunals.⁵⁴

43. Revised principle 21 consolidates principles 20-22. The principal thrust of the revised text is that States should undertake measures necessary to enable their courts to exercise universal jurisdiction to the extent permitted by international law⁵⁵ and must take measures necessary to enable them to meet their obligations under applicable sources of law - such as the Geneva Conventions of 1949, Additional Protocol No. I of 1977, and the Convention against Torture - to institute prosecutions over individuals in their territory suspected of criminal responsibility for specified violations unless those individuals are transferred for prosecution before another court with jurisdiction.

44. The updated text also reflects the institutional developments noted above in paragraph 39. While principles 20-22 focus on the jurisdiction of national courts (as implied in the reference to extradition in principle 21 (b)), revised principle 21 (2) recognizes that States may satisfy their obligations aimed at ensuring prosecution of certain offences not only by instituting prosecutions if they do not extradite suspects to another State, but also by surrendering suspects for prosecution before an international or internationalized criminal tribunal.⁵⁶ Indeed, in accordance with relevant sources of legal obligation, including resolutions of the Security Council, the Rome Statute, and the statutes of internationalized tribunals, under some circumstances States’ obligations must be satisfied by searching for, arresting, and transferring indicted suspects to one of these tribunals.

3. Restrictions on rules of law justified by action to combat impunity

45. The revised text of principle 22 introduces several modifications to principle 23, which commends States to introduce safeguards “against any abuse for purposes of impunity” of various widely recognized legal doctrines; corresponding revisions are introduced in revised principle 26 (b).⁵⁷ First, the revised text includes a reference to the legal doctrine *non bis in idem* in light of recent legal developments. As noted in the Independent Study (paras. 36-37), the statutes of recently established international criminal tribunals include provisions allowing retrial of defendants in respect of acts for which they have already been prosecuted in a national court if the earlier proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or if the case was not diligently prosecuted. Similar provisions have been adopted by national legislatures.

46. Second, the updated text of principle 22 includes a reference to “official immunities”, a subject that has received substantial judicial attention in recent years⁵⁸ and which was already recognized in principle 29 (b). As noted in the Independent Study (para. 52), at the very least “official immunities *ratione materiae* may not encompass conduct condemned as a serious crime under international law”.⁵⁹ Finally, the proposed text does not include a reference to in absentia procedures for reasons noted earlier (see above, first sentence of paragraph 10).⁶⁰ The last change in no way implies, however, that States may abuse the absence of in absentia procedures in their own legal systems in ways that foster or contribute to impunity. Indeed, inter-State cooperation in relation to investigations undertaken in absentia would generally increase the likelihood that the investigating State could obtain physical custody of criminal suspects.⁶¹

47. Principle 24 (2), which recognizes the imprescriptibility of certain offences, has been slightly reworded in updated principle 23 (2) in view of the revised definition of serious crimes under international law (see above, paragraph 13); somewhat different rules concerning statutory limitations may apply to certain offences included in the updated definition⁶² and the law in this area is evolving. While the revised text therefore does not specify which international crimes are imprescriptible, the general trend in international jurisprudence has been towards increasing recognition of the relevance of this doctrine not only for such international crimes as crimes against humanity and war crimes, but also for gross violations of human rights such as torture.

48. In *Furundžija*, for example, ICTY Trial Chamber II expressed its view that “torture may not be covered by a statute of limitations”.⁶³ In 2000, the Human Rights Committee included the following recommendation in its concluding observations on Argentina: “Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice. The Committee recommends that rigorous efforts continue to be made in this area.”⁶⁴ The Committee against Torture has recommended that States parties to the Convention against Torture repeal or consider repealing statutes of limitation for crimes involving torture.⁶⁵ In judgements rendered since 2001, the Inter-American Court of Human Rights has repeatedly observed: “This Court considers 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.”⁶⁶

49. The approach reflected in these developments may be of special importance in overcoming impunity for crimes of sexual violence. In many countries, the non-responsiveness of national legal systems has long prevented victims of sexual violence from seeking redress.

50. As noted in the Independent Study (para. 28), “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))”. This general trend has continued,⁶⁷ further affirming principle 25 (a)/revised principle 24 (a) and clarifying its scope. Notably, in his report on the rule of law and transitional justice in conflict and post-conflict societies, the Secretary-General concluded that “United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights”.⁶⁸

51. National court decisions have also continued to limit the application of past amnesties.⁶⁹ In a recent decision, the Supreme Court of Chile found that, because enforced disappearance is an ongoing crime until proof of the direct victim’s death has been established, a 1978 amnesty decree covering human rights crimes committed between 1973 and 1978 did not apply in the *Miguel Angel Sandoval Rodríguez* case (17 November 2004).

52. Principle 27, which addresses restrictions on extradition, has been revised in updated principle 26 (a) by including a prohibition on extradition of suspects to countries “where there are substantial grounds for believing that the suspect would be in danger of being subjected to gross violations of human rights such as torture; enforced disappearance; or extralegal, arbitrary or summary executions”. This text derives from article 3 (1) of the Convention against Torture, article 8 (1) of the Declaration on the Protection of All Persons from Enforced Disappearance, and principle 5 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.⁷⁰ The revised text of principle 26 (a) adds: “If extradition is denied on these grounds, the requested State shall submit the case to its competent authorities for the purpose of prosecution.” This text, which tracks the language of article 7 (1) of the Convention against Torture, is equally relevant to other serious crimes under international law.⁷¹ Recent developments underlying updated principle 26 (b) are summarized above in paragraph 45.

53. Changes to principle 29 that are reflected in updated principle 27 reconcile the English text with the original French. In addition, the last sentence of principle 29 (b) has become a separate subparagraph - revised principle 27 (c) - in recognition of the distinct nature of the two legal doctrines reflected in principle 29 (b). Whereas principle 29 (b) addresses doctrines concerning superior responsibility and official immunities in a single paragraph, revised principle 27 (b) addresses the former while revised principle 27 (c) addresses the latter.

54. Extensive jurisprudence of international criminal tribunals makes clear that the doctrine of superior responsibility reflected in principle 27 (b) should be understood to apply, when relevant, in respect of individuals exercising de facto control over subordinates as well as to individuals whose power to control subordinates derives from de jure authority.⁷² More generally, jurisprudence of human rights treaty bodies and other sources reflect the relevance of updated principle 27 for all serious crimes under international law.⁷³

55. Principle 30 (1) provides in part: “The fact that, once the period of persecution is over, a perpetrator discloses the violations that he or others have committed in order to benefit from the favourable provisions of legislation on repentance cannot exempt him or her from criminal or other responsibility.” This text has been updated in revised principle 28 (1) by removing “once the period of persecution is over” and adding “disclosure or” between “legislation on” and “repentance”. The latter change takes account of variations among national laws that provide incentives for perpetrators to disclose the truth about human rights violations. It has been more common to frame such laws in terms of disclosure than of repentance.

56. The first change seeks to avoid any possible implication that a perpetrator of serious crimes under international law may be exempted from criminal punishment altogether by disclosing his or her violations during a period of persecution. This result would be incompatible with international legal developments concerning amnesties summarized in paragraphs 28-31 of the Independent Study and noted above in paragraph 50, as well as with article 18 (1) of the Declaration on Enforced Disappearance. The Declaration does, however, explicitly recognize that “persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance” may benefit from national legislation establishing such conduct as a mitigating circumstance.⁷⁴ Substantially the same approach is reflected in the second sentence of principle 30 (1)/updated principle 28 (1), which provides: “The disclosure may only provide grounds for a reduction of sentence in order to encourage revelation of the truth.”

57. Principle 31, which addresses restrictions on the jurisdiction of military courts, is presented in a streamlined form in revised principle 29. The standard embodied in revised principle 29 - that military courts should not exercise jurisdiction over serious human rights violations - is reflected in article 16 (2) of the Declaration on Enforced Disappearance and has been reaffirmed in resolutions of the Commission and Sub-Commission and in the practice of human rights treaty bodies.⁷⁵

D. The right to reparation/guarantees of non-recurrence⁷⁶

1. General principles

58. Principle 34 (1)/updated principle 32 (1), which reaffirms the right of victims to “have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings”, reflects a well-established rule of international human rights law.⁷⁷ As the jurisprudence of human rights treaty bodies has repeatedly affirmed, “if the violation ... is particularly serious”, victims must have recourse to judicial remedies.⁷⁸ Without prejudice to this right, recent experience has affirmed the important role of national programmes of reparation in the aftermath of mass atrocity.⁷⁹ In these circumstances, where the universe of victims is typically very large, administrative programmes can facilitate the distribution to victims of adequate, effective and prompt reparation. This development is reflected in the first sentence of updated principle 32 (2).

59. Several insights concerning the effective design of administrative programmes of reparation can be distilled from recent experience:⁸⁰

(a) Ideally, the programme should be “complete” in the sense that the class of beneficiaries should coincide with the class of victims. To this end, special care should be taken in defining categories of crimes that give rise to benefits. Frequently, these categories have been selected in a way that excludes from benefits those who have traditionally been marginalized, including women and some minority groups. (To compensate all victims, of course, does not mean that all of them have to receive the same benefits.);

(b) The possibility of achieving completeness - of providing benefits to all victims - is related to the programme’s comprehensiveness, that is, to the breadth of categories of crimes for which the programme provides redress. Focusing on a narrow set of offences would unfairly exclude large numbers of victims - and would likely ensure that the excluded victims’ claims remain on the political agenda for a long time to come;

(c) To make it feasible to provide benefits to all victims of all relevant categories of crime, it is important to design a programme that distributes a variety of material and symbolic benefits and does so in a coherent fashion. A reparations programme is internally coherent if it establishes relations of complementarity or mutual support between the various kinds of benefits it distributes;

(d) A reparations programme should also operate in coordination with other justice measures. When a reparations programme functions in the absence of other justice measures, the benefits it distributes risk being seen as constituting the currency with which the State tries to buy the silence or acquiescence of victims and their families. Thus it is important to ensure that reparations efforts cohere with other justice initiatives, including criminal prosecutions, truth-telling, and institutional reform;

(e) If two of the critical aims of a reparations programme are to provide recognition to victims (not just in their status as victims, but also in their status as citizens and bearers of equal human rights) and to promote their trust in State institutions, it is essential to involve victims in the process of designing and implementing the programme.

60. The principal aim of principle 35/revised principle 33 is to make the right to a remedy effective by undertaking outreach programmes aimed at informing as many victims as possible of procedures through which they may exercise this fundamental right.⁸¹ The first sentence evokes this aim through the phrase “widest possible publicity”. This phrase should be understood to include other appropriate measures for identifying potential beneficiaries of reparations programmes that may, under some circumstances, be more effective than dissemination through public media. Recent experience has also highlighted the need to ensure that victims of sexual violence know that the violations they endured are included in reparations programmes and, more generally, to ensure that victims belonging to traditionally marginalized groups are able effectively to exercise their right to reparations. Besides ensuring the effective implementation of reparations programmes, disseminating information about applicable

procedures may advance two core aims of reparations programmes in situations entailing the restoration of or transition to democracy and/or peace - providing recognition to victims as citizens who bear equal rights vis-à-vis other citizens and facilitating their trust in State institutions (see above, paragraph 59 (e)).⁸²

61. Principle 36 (1) has been revised in principle 34 (1) by deleting the word “individual” before “measures concerning the right to restitution, compensation and rehabilitation” and by deleting the word “general” before the phrase “measures of satisfaction”. As reflected in the most recent version of the draft Principles on Reparation,⁸³ the right to restitution, compensation and rehabilitation does not pertain solely to “individual measures”, nor are measures of satisfaction appropriate only as “general measures”,⁸⁴ as the text of principle 36 (1) might imply. The updated text also replaces the reference in principle 36 (1) to an earlier version of draft principles and guidelines on the right to reparation, which have been revised in recent years, with a more general reference to principles of international law.⁸⁵

62. Principle 36 (2) affirms: “In the case of forced disappearances, when the fate of the disappeared person has become known, that person’s family has the imprescriptible right to be informed thereof.” In its revised form, the phrase “when the fate of the disappeared person has become known” has been deleted to avoid any inadvertent implication that the right of families to learn the fate of the direct victim of enforced disappearance is qualified. As jurisprudence of human rights treaty bodies⁸⁶ and the text of the Declaration on Enforced Disappearance affirm, the right of families to know the fate of the direct victim of an enforced disappearance is unqualified; States must conduct a prompt, thorough and impartial investigation whenever there are reasonable grounds to believe that an enforced disappearance has been committed⁸⁷ and must continue the investigation “for as long as the fate of the victim of enforced disappearance remains unclarified”.⁸⁸

63. The location of principle 36 (2)/updated principle 34 (2) under the heading “Scope of the right to reparation” merits brief comment. As reflected in the Independent Study, the right of families to know the fate of the direct victim of enforced disappearance has both a substantive and a remedial dimension. The former is reflected in jurisprudence of various supervisory bodies recognizing that authorities’ failure to inform relatives about the fate of the direct victim of enforced disappearance may itself entail a breach of human rights, such as the right of relatives to be protected from cruel, inhuman or degrading treatment; the right to life; and the right to respect for private and family life.⁸⁹ The remedial dimension of the right to know is reflected in the jurisprudence of human rights treaty bodies, particularly in the inter-American system, which have explicitly recognized the reparative effect of knowledge of the circumstances surrounding gross violations of human rights such as enforced disappearance.⁹⁰ Consistent with this approach, in decisions, views or judgements concerning reparations/remedies for human rights treaty violations, supervisory bodies have ordered or recommended that the State party concerned take measures necessary to clarify the circumstances relating to serious human rights violations such as enforced disappearance and denial of the right to life and, where relevant, to identify the victim’s mortal remains and deliver them to his or her next of kin.⁹¹

2. Guarantees of non-recurrence of violations

64. Principles 37-42 have been revised in principles 35-38 in light of several general considerations. Most important, guidelines aimed at ensuring non-recurrence of violations have been updated to reflect recent developments in State practice and in relevant principles of international law. Some aspects of principles 37-42 reflect concerns that were characteristic of periods of restoration of or transition to democracy and/or peace that prevailed in Latin America and other regions at the time the Principles were drafted. Relevant provisions have been updated with a view towards reflecting additional concerns that have arisen or come to light in virtually every region of the world during periods of restoration of or transition to democracy and/or peace, some of which have received attention in recently adopted instruments of international law.

65. With these considerations in mind, the revised text includes some guidelines that were not included in the Principles, including standards pertaining to institutions of civilian oversight,⁹² human rights training,⁹³ and demobilization and social reintegration of children who have been involved in armed conflict.⁹⁴ Moreover, the focus of some Principles has been broadened in light of recent experience. For example, where principle 39 addresses the need to repeal emergency laws insofar as they imperil fundamental rights, revised principle 38 recognizes the importance of broader legislative reform, with a view towards safeguarding human rights and democratic institutions, during periods of transition to democracy and/or peace.⁹⁵

66. More generally, the revised text reflects the cumulative experience of States, the United Nations, and other institutions and organizations that have played leading roles in addressing the challenge of justice in the aftermath of armed conflict and/or systemic repression. That experience has been distilled in the updated principles by recognizing, for example, the importance of comprehensive attention to institutional reform as a foundation for sustainable justice.⁹⁶

67. Revised principle 36 (d) includes civil complaint procedures among the measures that are necessary to ensure that public institutions operate in accordance with international human rights standards. In this regard it may be noted that “[t]he establishment of national human rights commissions is one ... strategy that has shown promise for helping to restore the rule of law ... and protection of vulnerable groups where the justice system is not yet fully functioning”.⁹⁷ As noted in the Independent Study, another “institution that has recently gained in importance in some countries is that of the office of the ombudsman or public advocate”.⁹⁸

68. Recent experience has affirmed the importance of “[v]etting the public service to screen out individuals associated with past abuses”⁹⁹ as a guarantee of non-recurrence, while human rights treaty bodies have recognized the role of vetting in fulfilling States’ general obligation to prevent violations of human rights.¹⁰⁰ In circumstances involving the restoration of or transition to democracy and/or peace, vetting can also play a part in addressing the “impunity gap” between the number of individuals who actively participated in past abuses and the capacity of any justice system - national or international - to prosecute all those who may be criminally responsible.

69. Revised principle 36 (a) addresses the need for vetting in terms that for the most part consolidate the guidelines set forth in principles 40-42. The revised text begins: “Public officials and employees who are personally responsible for gross violations of human rights, in particular those involved in military, security, police, intelligence and judicial sectors, shall not continue to serve in State institutions. Their removal shall comply with the requirements of due process of law and the principle of non-discrimination.” The due process standards to which this guideline refers include notifying parties under investigation of the allegations against them; providing those parties “an opportunity to respond before a body administering the vetting process”; providing those charged with “reasonable notice of the case against them, the right to contest the case and the right to appeal an adverse decision to a court or other independent body”.¹⁰¹ Reflecting recent jurisprudence of human rights supervisory bodies and recent practice of special procedures,¹⁰² revised principle 36 (a) includes the following guideline: “Persons formally charged with individual responsibility for serious crimes under international law shall be suspended from official duties during the criminal or disciplinary proceedings.”¹⁰³

II. CONCLUSION

70. **This report, and the Independent Study that preceded it, chronicle remarkable advances in national and international efforts to combat impunity since the Principles were submitted. During that period, seemingly impregnable barriers to prosecution have been dismantled in countries that endured the depredations of dictatorship; States have cooperated to ensure prosecution of officials at the highest levels of Government before international tribunals and national courts; a new breed of court, combining national and international elements, has entered the lexicon of institutions designed to render justice for atrocious crimes; and Governments and civil society have benefited from an expanding repertoire of tools for combating impunity and from a deepening reservoir of expertise and insight concerning the design and implementation of effective anti-impunity programmes. While these advances have made it necessary to update the Principles, the Principles themselves have played a singularly influential role in contributing to those developments. Their imprint is reflected in the nature of the revisions reflected in the updated principles; as noted at the outset of this report, recent developments in law and practice have strongly affirmed the Principles, while further clarifying their scope.**

Notes

¹ Commission on Human Rights resolution 2003/72, para. 16.

² E/CN.4/2004/88, para. 6.

³ The full text of government replies is available from the Office of the High Commissioner for Human Rights.

⁴ This study further benefited from the views of NGO representatives who participated in a meeting convened by the New York Office of the High Commissioner for Human Rights, the International Center for Transitional Justice and the Open Society Justice Initiative

on 18 October 2004; input provided by Morton Halperin, Trudy Huskamp Peterson and Julissa Mantilla; and research assistance provided by Jamal Jafari and Aytul Sogukoglu.

⁵ E/CN.4/2004/88, p. 2.

⁶ Ibid., para. 8.

⁷ Ibid., para. 10.

⁸ Reflecting its comprehensive nature, revised principle 1 also includes a reference to the right to the truth.

⁹ E/CN.4/2004/88, para. 11.

¹⁰ Ibid.

¹¹ S/2004/616, para. 17.

¹² E/CN.4/Sub.2/1997/20/Rev.1, annex II, principle 7 (e).

¹³ E/CN.4/2004/88, para. 5.

¹⁴ S/2004/616, p. 1.

¹⁵ For example, by defining “archives” as certain “documents pertaining to violations of human rights and humanitarian law”, the updated text reflects the report in which Mr. Joinet submitted the Principles to the Sub-Commission - which notes that the Principles include measures “aimed at preserving archives relating to human rights violations” (E/CN.4/Sub.2/1997/20/Rev.1, para. 18) - as well as developments reflected in para. 30 and note 43 of this report.

¹⁶ E/CN.4/Sub.2/1997/20/Rev.1, para. 49.

¹⁷ See, e.g. the decision of the Appeals Chamber on the Defence Motion for interlocutory appeal on jurisdiction, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, 2 October 1995, para. 134; and the judgement of the Appeals Chamber of 20 February 2001 in *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, paras. 163-73.

¹⁸ Security Council resolution 955 (1994), annex, art. 4 (1994).

¹⁹ See especially art. 8 (2) (c) and (e).

²⁰ E.g., Inter-American Commission on Human Rights, case 10.480, *Lucio Parada et al.* (El Salvador), report No. 1/99, para. 116 (by implication).

²¹ See E/CN.4/2004/88, para. 26. The Human Rights Committee affirmed its longstanding interpretation of article 2 of the International Covenant on Civil and Political Rights (ICCPR) in general comment No. 31 (2004):

“Where [investigations required by Article 2, paragraph 3] reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (art. 7), summary and arbitrary killing (art. 6) and enforced disappearance (arts. 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations ... may well be an important contributing element in the recurrence of the violations” (para. 18).

Similarly, the Inter-American Court of Human Rights has interpreted the American Convention on Human Rights to require States parties to investigate and punish “those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance”. *Barrios Altos case (Chumbipuma Aguirre et al. v. Peru)*, judgement of 14 March 2001, para. 41.

²² See, e.g., *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3), judgement of 24 March 1999 [2000] AC 147, 198 (characterizing torture as an international crime subject to universal jurisdiction).

²³ See, e.g., the judgement rendered by Trial Chamber II of ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, on 10 December 1998, para. 156 (recognizing torture as an international crime subject to universal jurisdiction).

²⁴ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 4-7; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 6.

²⁵ See, e.g., Declaration on the Protection of All Persons from Enforced Disappearance, art. 4 (1) (1992); Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, principles 1 and 18 (1989); High Commissioner for Refugees, Executive Committee, Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees (No. 101 (LV) - 2004), para. (g). The revised definition reflects the premises underlying Commission resolution 2004/72, para. 3, which recognizes “that amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes”.

²⁶ Although the Principles do not use the term “truth commission”, their provisions relating to commissions of inquiry are especially pertinent to this type of commission. See E/CN.4/Sub.2/1997/20/Rev.1, para. 18 (indicating that proposed measures concerning commissions of inquiry are addressed to situations of political transition, a context in which truth commissions have typically operated).

²⁷ S/2004/616, para. 50. The definition set forth in the addendum introduces the word “usually” before the phrase “committed over a number of years”, recognizing that in some contexts abuses may have taken place over a shorter period. This definition would not generally cover

commissions of experts appointed from time to time by the Secretary-General to examine a situation involving mass atrocities and to report its conclusions and recommendations. See, e.g., Security Council resolution 1564 (2004), para. 12 (requesting the Secretary-General to appoint an international commission of inquiry in connection with violations of international humanitarian and human rights law in Darfur, Sudan). The definition included in the revised principles would, however, cover some commissions of inquiry, such as the Commission on the Truth for El Salvador, that have occasionally been appointed by the Secretary-General in implementing the terms of a peace accord.

²⁸ See E/CN.4/2004/88, paras. 14-23. The right to learn the fate of a disappeared relative (see principle 3) is recognized in international humanitarian law, and is embodied in article 32 of Additional Protocol No. I of 1977 to the Geneva Conventions of 1949. The Human Rights Committee has found that violations of principle 3 breach article 7 of the ICCPR. See, e.g., *Staselovich v. Belarus*, communication No. 887/1999, para. 9.2 (2003).

²⁹ At least 15 truth commissions have been in operation since 1997. In late 2004 preparations were under way for truth commissions in Liberia, the Democratic Republic of the Congo, Indonesia and Burundi. See Priscilla Hayner, *Verdades innombrables: Cómo trabajan las comisiones de la verdad* (Fondo de Cultura Económica, Mexico City, forthcoming 2005).

³⁰ See, e.g., the judgement of Trial Chamber II in *Tadić*, 7 May 1997, para. 646; Human Rights Committee, general comment No. 31, para. 18.

³¹ See E/CN.4/Sub.2/1997/20/Rev.1, para. 17.

³² See E/CN.4/2004/88, para. 10; see also S/2004/616, para. 26.

³³ See, e.g., the reference to “truth trials” in Argentina in E/CN.4/2004/88, para. 16.

³⁴ Some truth commissions have been established pursuant to peace accords. Even in these situations, it is desirable to secure the broadest possible public input into questions relating to the composition and mandate of the commissions.

³⁵ See E/CN.4/2004/88, paras. 12-13; S/2004/616, para. 17.

³⁶ See 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”, dated 1 October 2004 (E/CN.4/2005/59, Annex I) (draft Principles on Reparation), draft principle 8 (“Where appropriate, ... the term ‘victim’ also includes ... persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”)

³⁷ E/CN.4/Sub.2/1997/20/Rev.1, para. 19.

³⁸ See International Center for Transitional Justice, “Basic Principles and Approaches to Truth Commissions”, OHCHR (forthcoming 2005).

³⁹ See especially principles 17-20.

⁴⁰ See E/CN.4/2004/88, para. 19 (f). Cf. Rome Statute, art. 36 (8) (a) (iii), which provides that States parties to the Rome Statute “shall, in the selection of judges” of the International Criminal Court, “take into account the need” for a “fair representation of female and male judges”.

⁴¹ See S/2004/616, para. 25.

⁴² Principle 7 (a) provides that commissions of inquiry “are not intended to act as substitutes for the civil, administrative or criminal courts, which shall alone have jurisdiction to establish individual criminal *or other* responsibility” (emphasis added). The corresponding text of revised principle 8 provides that “criminal courts alone have jurisdiction to establish individual criminal responsibility”. This change clarifies without changing the meaning of principle 7 (a). Indeed, principle 8 explicitly recognizes that commissions of inquiry may, under defined circumstances, implicate individuals as likely perpetrators.

⁴³ Para. 12 (welcoming the establishment in some States of truth and reconciliation commissions “to address violations of human rights and international humanitarian law”). More generally, resolution 2004/72 makes repeated reference to violations of human rights and international humanitarian law.

⁴⁴ See Trudy Huskamp Peterson, *Final Acts: A Guide to Preserving the Records of Truth Commissions* (Baltimore, MD: Johns Hopkins University Press and the Woodrow Wilson International Center for Scholars, 2005).

⁴⁵ See generally the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1996) (Johannesburg Principles), cf. Rome Statute, arts. 72 and 93 (4).

⁴⁶ See Johannesburg Principles, principle 2 (b).

⁴⁷ See E/CN.4/2004/88, para. 44.

⁴⁸ The premise underlying updated principle 19, which recognizes that criminal prosecution plays a necessary role in combating impunity for serious crimes under international law, has been strongly affirmed in jurisprudence of human rights treaty bodies. For example, the Human Rights Committee has recognized that “purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life”. *Bautista v. Colombia*, communication No. 563/1993, para. 8.2, CCPR/C/55/D/563/1993 (1995). See also *Arhuaco v. Colombia*, communication No. 612/1995, para. 8.2, CCPR/C/60/D/612/1995 (1997); *Coronel et al. v. Colombia*, communication No. 778/1997, para. 6.2, CCPR/C/76/D/778/1997 (2002). When such violations occur, the right to an effective remedy entails recourse to criminal processes. The Inter-American Court of Human Rights has observed: “All the States party to the American Convention have the duty to investigate human rights violations and to punish the perpetrators and accessories after the fact in said violations. And any person who considers himself or herself to be a victim of such violations has the right to resort to the system of justice to attain compliance with this duty by the State, for his or her benefit and that of society as a

whole.” *El Caracazo v. Venezuela* (Reparations), judgement of 29 August 2002, para. 115. More generally, the Court has recognized that States parties to the American Convention have assumed an “obligation to avoid and combat impunity, which the Court has defined as ‘the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention’”. *Trujillo Oroza v. Bolivia* (Reparations), judgement of 27 February 2002, para. 101.

⁴⁹ Cf. Rome Statute, art. 68 (3).

⁵⁰ See E/CN.4/2004/88, paras. 24, 39.

⁵¹ See Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, General Assembly resolution 3074 (XXVIII) (1973); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5-7 (1984); Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, principle 18 (1989); Declaration on the Protection of All Persons from Enforced Disappearance, art. 14 (1992); Commission on Human Rights resolution 2004/72, para. 2.

⁵² See S/2004/616, para. 40 (“Of course, domestic justice systems should be the first resort in pursuit of accountability. But where domestic authorities fail to discharge their international obligations and are unwilling or unable to prosecute violators at home, the role of the international community becomes crucial.”) See also para. 48.

⁵³ See ICTY Statute, art. 9; ICTR Statute, art. 8; Statute of the Special Court for Sierra Leone, art. 8.

⁵⁴ The obligations to which this text refers include duties deriving from decisions of the Security Council, such as those set forth in Council resolutions 827 (1993), para. 4 and 955 (1994), para. 2; duties assumed by States parties to the Rome Statute; and obligations assumed pursuant to other treaties, such as the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002) (see especially article 17).

⁵⁵ See the judgement of ICTY in *Furundžija*, op cit. note 23, para. 156 (recognizing the right of every State to prosecute and punish the authors of international crimes such as torture); Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, principle 18 (“Governments shall ensure that persons identified by the investigation as having participated in extralegal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.”); Case Concerning Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*); Merits, Judgement of 14 February 2002, *I.C.J. Reports, 2002*, joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, paras. 61 and 65 (concluding that international law allows the exercise of universal

jurisdiction over war crimes and crimes against humanity); *ibid.*, separate opinion of Judge Koroma, para. 9 (expressing the opinion that, “together with piracy, universal jurisdiction is available for ... war crimes and crimes against humanity, including the slave trade and genocide”); *ibid.*, dissenting opinion of Judge Van den Wyngaert, para. 51 (expressing the view that international law clearly permits universal jurisdiction for war crimes and crimes against humanity).

⁵⁶ The four Geneva Conventions of 1949 and Additional Protocol No. I of 1977 require High Contracting Parties to prosecute persons alleged to have committed or to have ordered the commission of grave breaches of the treaties unless they hand the suspects over for trial to another High Contracting Party that has made out a *prima facie* case. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146. According to the leading commentary on the Geneva Conventions, this provision “does not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties”. ICRC, *IV Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Jean Pictet (ed.), 1958, p. 593.

⁵⁷ Revised principle 26 (b) is adapted from the text of article 20 (3) of the Rome Statute.

⁵⁸ See, e.g., *Prosecutor v. Charles Ghankay Taylor*, case No. SCSL-2003-01-I, Appeals Chamber, Decision on Immunity from Jurisdiction, 31 May 2004 (denying Head of State immunity to individual indicted by prosecutor of an internationalized tribunal); *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, *op. cit.* at note 22 (denying immunity to former Head of State in relation to charges of torture in extradition proceedings); *Jones v. Saudi Arabia et al.*, [2004] EWCA Civil 1394 (concluding that foreign officials are not entitled to blanket immunity in relation to charges of systematic torture in civil actions).

⁵⁹ See also I.C.J., Case Concerning Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), *op. cit.* at note 55, joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 74 (“Now it is generally recognized that in the case of [serious international] crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility”); Human Rights Committee, general comment No. 31 (where public officials or State agents have committed violations of Covenant rights “recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (art. 7), summary and arbitrary killing (art. 6) and enforced disappearance (arts. 7 and 9 and, frequently, 6),” the “States parties concerned may not relieve perpetrators from personal responsibility, as has occurred with ... prior legal immunities and indemnities” (para. 18); *Jones v. Saudi Arabia et al.*, *op. cit.* at note 58, opinion of Lord Justice Mance, paras. 83-84 (distinguishing the immunity of a State *ratione personae* from the immunity of a State’s officials *ratione materiae* in respect of claims of systematic torture); *ibid.*, para. 92

(concluding that, “whatever the position may be apart from article 6 of the European Convention, it can no longer be appropriate to give blanket effect to a foreign state’s claim to state immunity *ratione materiae* in respect of a state official alleged to have committed acts of systematic torture.”).

⁶⁰ For the same reason the updated principles do not include a provision corresponding to principle 28.

⁶¹ Cf. I.C.J., Case Concerning Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), op. cit. at note 55, joint separate opinion of Judges Higgins, Kooijmans and Buerghental, paras. 57-58 (international law does not exclude the issuance of an arrest warrant for non-nationals in respect of offences occurring outside a State’s jurisdiction and “there is no rule of international law ... which makes illegal cooperative overt acts designed to secure [the] presence [of persons committing international crimes] within a State wishing to exercise jurisdiction”).

⁶² Article 17 (3) of the Declaration on the Protection of All Persons from Enforced Disappearance requires that, where they exist, statutory limitations relating to acts of enforced disappearance must be “substantial and commensurate with the extreme seriousness of the offence”. See also Human Rights Committee, general comment No. 31, para. 18 (“unreasonably short periods of statutory limitation in cases where such limitations are applicable” should be removed in respect of torture and similar cruel, inhuman and degrading treatment; summary and arbitrary killing; and enforced disappearance). Article VII of the Inter-American Convention on the Forced Disappearance of Persons provides that criminal prosecution for the forced disappearance of persons “shall not be subject to statutes of limitations”. If, however, “there should be a norm of a fundamental character preventing application of [this] stipulation ..., the period of limitation shall be equal to that which applies to the gravest crime in the domestic laws of the ... State Party”.

⁶³ Op. cit., at note 23, para. 157.

⁶⁴ CCPR/CO/70/ARG, para. 9.

⁶⁵ See, e.g., Human Rights Committee, conclusions and recommendations: Turkey, CAT/C/CR/30/5, para. 7 (c) (2003); Slovenia, CAT/C/CR/30/4, para. 6 (b) (2003); Chile, CAT/C/CR/32/5, para. 7 (f) (2004). See also conclusions and recommendations: Venezuela, CAT/C/CR/29/2, para. 6 (c) (2002) (commending a provision of Venezuela’s Constitution declaring, inter alia, that action to punish human rights offences is not subject to statutory limitations).

⁶⁶ Inter-American Court of Human Rights, Barrios Altos case (*Chumbipuma Aguirre et al. v. Peru*), op. cit. at note 21 (emphasis added). See also *Trujillo-Oroza v. Bolivia*, op. cit. at note 48, para. 106; *El Caracazo v. Venezuela*, ibid., para. 119; *Myrna Mack Chang v. Guatemala*, judgement of 25 November 2003, para. 276.

⁶⁷ In general comment No. 31, for example, the Human Rights Committee reaffirmed that States parties to the ICCPR may not relieve public officials or State agents who have committed violations of the Covenant that are recognized as criminal under either domestic or international law “from personal responsibility, as has occurred with certain amnesties” (para. 18).

⁶⁸ S/2004/616, para. 10; see also para. 32. In its report to the Secretary-General, the High-level Panel on Threats, Challenges and Change implicitly affirmed the United Nations experience in opposing an amnesty in the 1999 Lomé peace accord to the extent that it covered war crimes, crimes against humanity and genocide (see E/CN.4/2004/88, para. 31). The panel observed: “We must learn the lesson: peace agreements by Governments or rebels that engage in or encourage mass human rights abuses have no value and cannot be implemented.” A/59/565, para. 222.

⁶⁹ See E/CN.4/2004/88, para. 30.

⁷⁰ See also draft Principles on Reparation, draft principle 5 (extradition should be “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”).

⁷¹ See sources cited in note 51.

⁷² See, e.g., the judgement of ICTY Trial Chamber II in *Prosecutor v. Delalić et al.*, 16 November 1998, paras. 370-378, aff’d by the judgement of the Appeals Chamber, op. cit., paras. 186-198; Trial Chamber I, judgement of 25 June 1999 in *Prosecutor v. Zlatko Aleksovski*, case No. IT-95-14/1, paras. 76-78, and the judgement of the Appeals Chamber in the same case, of 24 March 2000, para. 76; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber, judgement of 21 May 1999, paras. 217-223, aff’d, Appeals Chamber, judgement (reasons) of 1 June 2001, paras. 293-294. See also Rome Statute, art. 28 (reflecting the principle that superior responsibility can be established by virtue of effective authority and control).

⁷³ See, e.g., Convention against Torture, art. 2 (3); Declaration on Enforced Disappearance, art. 6 (1) and art. 16 (3); Human Rights Committee, general comment No. 31, para. 18.

⁷⁴ Declaration on Enforced Disappearance, art. 4 (2).

⁷⁵ See report submitted by Mr. Emmanuel Decaux on the issue of the administration of justice through military tribunals (E/CN.4/Sub.2/2004/7), para. 18; see also E/CN.4/Sub.2/2004/7, principle No. 3.

⁷⁶ This section heading has been changed from “Right to reparation” to “The right to reparation/guarantees of non-recurrence” to reflect the two principal subsections of this portion of the Principles. As the previous section headings and organization of the Principles reflected, human rights treaty bodies have often treated guarantees of non-recurrence as a component of reparations; so, too, does the most recent version of the draft Principles on Reparation (see, e.g., draft principle 18). Human rights treaty bodies have also treated guarantees of non-repetition as

a distinct and general obligation of States parties to the relevant treaty; both approaches are reflected in the Human Rights Committee's general comment No. 31 on article 2 of the ICCPR. (See paras. 16-17.) Cf. Draft articles on Responsibility of States for internationally wrongful acts, draft arts. 30-31, adopted by the International Law Commission at its fifty-third session (2001), *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), chap. IV.E.1 (recognizing distinct obligations of a State that is responsible for an internationally wrongful act to "offer appropriate assurances and guarantees of non-repetition, if circumstances so require" on the one hand and "to make full reparation for the injury caused by the internationally wrongful act" on the other hand).

⁷⁷ The principle that a breach of international law gives rise to an obligation on the part of the responsible State to make full reparation for injuries caused by the internationally wrongful act is well established in customary international law, as reflected in draft article 31 (1) of the draft articles on Responsibility of States for internationally wrongful acts, *op. cit.* at note 76. General comment No. 31 of the Human Rights Committee reaffirms the central importance of the right to reparation, and its integral relationship with the right to an effective remedy, in the ICCPR paras. 15-16. Violations of international humanitarian law may also give rise to a duty to provide compensation. See the Hague Convention (IV) respecting the Laws and Customs of War on Land, art. 3 (1907); Additional Protocol No. I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 91 (1977); draft Principles on Reparation, draft principle 11.

⁷⁸ Human Rights Committee, *Coronel et al. v. Colombia*, *op. cit.* at note 48, para. 6.2. See also *F. Birindwa ci Bithashwiwa and E. Tshisekedi wa Mulumba v. Zaire*, communications Nos. 241/1987 and 242/1987, CCPR/C/37/D/241/1987, para. 14 (1989); draft Principles on Reparation, draft principle 12.

⁷⁹ Cf. E/CN.4/2004/88, para. 60. See also Pablo de Greiff, "Justice and Reparations", in *Repairing the Past: Compensation for Victims of Human Rights Violations*, P. de Greiff (ed.), (International Center for Transitional Justice, forthcoming).

⁸⁰ These insights have been informed by the work of Pablo de Greiff. See, e.g., Pablo de Greiff, "Reparations Efforts in International Perspective: What Compensation Contributes to the Achievement of Imperfect Justice", in *Repairing the Irreparable: Reparations and Reconstruction in South Africa*, Charles Villa-Vicencio and Erik Doxtader (eds.) (Cape Town: David Phillips, 2004).

⁸¹ Cf. draft Principles on Reparation, draft principles 12 (a) and 24.

⁸² See also E/CN.4/2004/88, para. 59; de Greiff, *op. cit.* at note 79.

⁸³ See note 36 above.

⁸⁴ See *ibid.*, draft principles 8 and 18.

⁸⁵ This formulation avoids the ambiguities introduced by explicitly linking the meaning of one set of draft principles to the text of another set of principles that are still in draft form.

⁸⁶ See E/CN.4/2004/88, paras. 14-15.

⁸⁷ Declaration on Enforced Disappearance, art. 13 (1); see also art. 9 (1).

⁸⁸ Ibid., art. 13 (6). Cf. draft Principles on Reparation, draft principle 22 (c) (measures of satisfaction include, where applicable, “[t]he search for the whereabouts of the disappeared ... and for the bodies of those killed ...”).

⁸⁹ See E/CN.4/2004/88, paras. 14-15. Cf. Human Rights Committee, general comment No. 31, para. 15 (“A failure by a State party to investigate allegations of violations [of the ICCPR] could in and of itself give rise to a separate breach of the Covenant.”).

⁹⁰ See E/CN.4/2004/88, para. 15; see also, inter alia, *Trujillo Oroza v. Bolivia*, op. cit. at note 48, para. 114.

⁹¹ See, e.g., *Trujillo Oroza v. Bolivia*, op. cit. at note 48, paras. 115, 117 and 141 (1); *Staselovich v. Belarus*, op. cit. at note 28, para. 11 (2003).

⁹² The importance of civilian oversight has received increasing recognition. See, e.g., United Nations Development Programme, *Human Development Report 2002: Deepening Democracy in a Fragmented World*, chap. 4; Organization for Economic Cooperation and Development, *Security System Reform and Governance: Policy and Good Practice* (2004), available at <http://www.oecd.org/dataoecd/8/39/31785288.pdf>; Willem F. van Eekelen, *The Parliamentary Dimension of Security Sector Reform*, Geneva Centre for the Democratic Control of the Armed Forces (DCAF), Working Paper No. 120 (2003), available at http://www.dcaf.ch/pfpc-ssr-wg/Meetings/Berlin/Van_Eekelen.pdf.

⁹³ See S/2004/616, para. 35 (“Legal education and training ... are important catalysts for sustained legal development”); draft Principles on Reparation, draft principle 23 (e) (including the following measure as a guarantee of non-repetition: “Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces.”)

⁹⁴ The text of revised principle 37 (3) derives from article 6 (3) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

⁹⁵ See S/2004/616, para. 35 (“Legislation that is in conformity with international human rights law and that responds to [a post-conflict] country’s current needs and realities is fundamental”); draft Principles on Reparation, draft principle 23 (h).

⁹⁶ Cf. Human Rights Committee, general comment No. 31, para. 7 (article 2 of the ICCPR “requires that States parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations”); see generally S/2004/616.

⁹⁷ S/2004/616, para. 31.

⁹⁸ E/CN.4/2004/88, para. 62; cf. Report of the Special Rapporteur on the question of torture (E/CN.4/2003/68), para. 26 (k) (“Independent national authorities, such as a national commission or ombudsman with investigatory and/or prosecutorial powers, should be established to receive and to investigate complaints.”)

⁹⁹ S/2004/616, para. 52.

¹⁰⁰ See, e.g., Human Rights Committee, concluding observations: Argentina, CCPR/CO/70/ARG, para. 9 (2000), in which the Committee recommended that Argentina take measures “to ensure that persons involved in gross human rights violations are removed from military or public service” after noting its concern “that many persons whose actions were covered by [amnesty] laws continue to serve in the military or in public office, with some having enjoyed promotions in the ensuing years” and “at the atmosphere of impunity for those responsible for gross human rights violations under military rule”.

¹⁰¹ S/2004/616, para. 52.

¹⁰² See, e.g., Human Rights Committee, concluding observations: Brazil, CCPR/C/79/Add.66, para. 20 (1996) (“The State party should ensure that members of the security forces convicted of serious offences be permanently removed from the forces and that those members of the forces against whom allegations of such offences are being investigated be suspended from their posts pending completion of the investigation”); concluding observations: Colombia, CCPR/C/79/Add.76, para. 32 (1997) (“The permanent removal of officials convicted of serious offences and the suspension of those against whom allegations of such offences are being investigated should be ensured.”) and para. 34 (“The Committee also urges that all necessary steps be taken to ensure that members of the armed forces and the police accused of human rights abuses are tried by independent civilian courts and suspended from active duty during the period of investigation”); report of the Special Rapporteur on the question of torture (E/CN.4/2003/68), para. 26 (k) (2002) (“When a detainee or relative or lawyer lodges a torture complaint, an inquiry should always take place and, unless the allegation is manifestly ill-founded, the public officials involved should be suspended from their duties pending the outcome of the investigation and any subsequent legal or disciplinary proceedings.”).

¹⁰³ See also Declaration on Enforced Disappearance, art. 16 (1); cf. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, art. 15; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, principle 3 (b).
