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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

Question of the impunity of perpetrators of human rights violations (civil and political)

Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119

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INTRODUCTION

A. Origins of the campaign against impunity

1. At its forty-third session (August 1991), the Sub-Commission requested the author of this report to undertake a study on the impunity of perpetrators of human rights violations. Over the years, that study has revealed that the process by which the international community has become aware of the imperative need to combat impunity has passed through four stages.

First stage

2. During the 1970s, non-governmental organizations, human rights advocates and legal experts and, in some countries, the democratic opposition - when able to state its views - mobilized to argue for an amnesty for political prisoners. This was typical in Latin American countries then under dictatorial regimes. Among the pioneers were the Amnesty Committees in Brazil, the International Secretariat of Jurists for Amnesty in Uruguay (SIJAU) and the Secretariat for Amnesty and Democracy in Paraguay (SIJADEP). Amnesty, as a symbol of freedom, would prove to be a topic that could mobilize large sectors of public opinion, thus gradually making it easier to amalgamate the many moves made during the period to offer peaceful resistance to or resist dictatorial regimes.

Second stage

3. This stage occurred in the 1980s. Amnesty, the symbol of freedom, was more and more seen as a kind of “insurance on impunity” with the emergence, then proliferation, of “self-amnesty” laws proclaimed by declining military dictatorships anxious to arrange their own impunity while there was still time. This provoked a strong reaction from victims, who built up their organizational capacity to ensure that “justice was done”, as would be shown in Latin America by the increasing prominence of the Mothers of the Plaza de Mayo, followed by the Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM), which later fanned out onto other continents.

Third stage

4. With the end of the cold war symbolized by the fall of the Berlin Wall, this period was marked by many processes of democratization or return to democracy along with peace agreements putting an end to internal armed conflicts. Whether in the course of national dialogue or peace negotiations, the question of impunity constantly cropped up between parties seeking to strike an unattainable balance between the former oppressors' desire for everything to be forgotten and the victims' quest for justice.

Fourth stage

5. This was when the international community realized the importance of combating impunity. The Inter-American Court of Human Rights, for example, in a ground-breaking ruling, found that amnesty for the perpetrators of serious human rights violations was incompatible with the right of every individual to

a fair hearing before an impartial and independent court. The World Conference on Human Rights (June 1993) supported that line of thinking in its final document, entitled “Vienna Declaration and Programme of Action” (A/CONF.157/24, Part II, para. 91).

6. This report therefore comes under the general heading of the Vienna Programme of Action. It recommends adoption by the United Nations General Assembly of a set of principles for the protection and promotion of human rights through action to combat impunity.

B. Background of the study

7. For a better understanding of the final stage of the study, this report needs to be seen in the context of the Sub-Commission's work as a whole.

8. Thirty-eighth session (August 1985). Presentation by Mr. Joinet, in his capacity as Special Rapporteur on amnesty, of a final report entitled “Study on amnesty laws and their role in the safeguard and promotion of human rights” (E/CN.4/Sub.2/1985/16/Rev.1). The present report draws in part on chapter III of that study.

9. Forty-third session (August 1991). In its decision 1991/110, the Sub-Commission asked two of its members, Mr. El Hadji Guissé and Mr. Louis Joinet, to draft a working paper on the guidelines that a study on impunity might follow.

10. Forty-fourth session (August 1992). Following the submission of the working paper (E/CN.4/Sub.2/1992/18), the Sub-Commission decided, by its resolution 1992/23, to request the co-authors to draft a study on the impunity of perpetrators of violations of human rights. The Commission on Human Rights (in resolution 1993/43) and the Economic and Social Council (in decision 1993/266) approved this action.

11. Forty-fifth session (August 1993). Upon presentation of the preliminary report - and not the “progress” report as erroneously indicated earlier - (E/CN.4/Sub.2/1993/6), the Sub-Commission requested the co-authors to extend their study to serious violations of economic, social and cultural rights.

12. Forty-sixth session (August 1994). After welcoming the preliminary report on the impunity of perpetrators of human rights violations (economic, social and cultural rights) (E/CN.4/Sub.2/1994/11 and Corr.1), the Sub-Commission decided (resolution 1994/34) to split the study in two, entrusting Mr. Joinet with the aspect of civil and political rights and Mr. El Hadji Guissé with that of economic, social and cultural rights.

13. Forty-seventh session (August 1995). In its resolution 1995/35, the Sub-Commission welcomed with satisfaction the progress report by Mr. Joinet (E/CN.4/Sub.2/1995/18), which contained a summary of comments on certain matters of principle, and requested him to submit his final report in August 1996, at its forty-eighth session.

14. Forty-eighth session (August 1996). Lacking the time to consider the report, the Sub-Commission requested the Special Rapporteur (decision 1996/119) to continue consultations and to submit to it at its forty-ninth session a final version, revised and extended, incorporating a revised version of the set of principles for the protection and promotion of human rights through action to combat impunity.

15. Forty-ninth session (August 1997). This final report is submitted to the Sub-Commission at its present session in accordance with the above-mentioned decision and, in the light of comments, may be submitted to the Commission on Human Rights for consideration in its revised version.

I. OVERALL PRESENTATION OF THE SET OF PRINCIPLES

16. The following three sections summarize the overall presentation of the set of principles and their justification in reference to victims' legal rights:

(a) The victims' right to know;

(b) The victims' right to justice; and

(c) The victims' right to reparations.

In addition, on a preventive basis, a series of measures aimed at guaranteeing the non-recurrence of violations.

A. The right to know

17. This is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a “duty to remember”, which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right.

18. Two series of measures are proposed for this purpose. The first is to establish, preferably as soon as possible, extrajudicial commissions of inquiry, on the grounds that, unless they are handing down summary justice, which has too often been the case in history, the courts cannot mete out swift punishment to torturers and their masters. The second is aimed at preserving archives relating to human rights violations.

1. Extrajudicial commissions of inquiry

19. These have two main aims: first, to dismantle the machinery which has allowed criminal behaviour to become almost routine administrative practice, in order to ensure that such behaviour does not recur; second, to preserve evidence for the courts, but also to establish that what oppressors often

denounced as lies as a means of discrediting human rights advocates all too often fell short of the truth, and thus to rehabilitate those advocates.

20. Experience shows that care must be taken not to allow such commissions to be diverted from their purpose and to furnish a pretext for not going before the courts. Hence the idea of proposing basic principles, derived from a comparative analysis of past and present commissions' experience, without which commissions risk losing their credibility. These principles relate to the following four main areas.

(a) Guaranteed independence and impartiality

21. Extrajudicial commissions of inquiry should be established by law. They may be established by an act of general application or treaty clause in the event that the restoration of or transition to democracy and/or peace has begun. Their members may not be subject to dismissal during their terms of office, and they must be protected by immunity. If necessary, a commission should be able to seek police assistance, to call for testimony and to visit places involved in their investigations. A wide range of opinions among commission members also makes for independence. The terms of reference must clearly state that the commissions are not intended to supplant the judicial system but at most to help safeguard memory and evidence. Their credibility should also be ensured by adequate financial and staffing resources.

(b) Safeguards for witnesses and victims

22. Testimony should be taken from victims and witnesses testifying on their behalf only on a voluntary basis. As a safety precaution, anonymity may be permitted subject to the following reservations: it must be exceptional (except in the case of sexual abuse); the chairman and a member of the commission must be entitled to examine the grounds for the request of anonymity and, confidentially, ascertain the witness' identity; and reference must be made in the report to the content of the testimony. Witnesses and victims must have psychological and social help available when they testify, especially if they have suffered torture or sexual abuse. They must be reimbursed the costs of giving testimony.

(c) Guarantees for persons implicated

23. If the commission is permitted to divulge their names, the persons implicated must either have been given a hearing or at least summoned to do so, or must be given the opportunity to exercise a right of reply in writing, the reply then being included in the file.

(d) Publicity for the commissions' reports

24. While there may be reasons to keep the commissions' proceedings confidential, in part to avoid pressure on witnesses and ensure their safety, the commissions' reports should be published and publicized as widely as possible. Commission members must enjoy immunity from prosecution for defamation.

2. Preserving archives relating to human rights violations

25. The right to know implies that archives must be preserved, especially during a period of transition. The steps required for this purpose are:

(a) Protective and punitive measures against the removal, destruction or misuse of archives;

(b) Establishment of an inventory of available archives, including those kept by third countries, in order to ensure that they may be transferred with those countries' consent and, where applicable, returned;

(c) Adaptation to the new situation of regulations governing access to and consultation of archives, in particular by allowing anyone they implicate to add a right of reply to the file.

B. The right to justice

1. The right to a fair and effective remedy

26. This implies that all victims shall have the opportunity to assert their rights and receive a fair and effective remedy, ensuring that their oppressors stand trial and that they obtain reparations. As pointed out in the preamble and in the set of principles, there can be no just and lasting reconciliation without an effective response to the need for justice; as a factor of reconciliation, forgiveness, insofar as it is a private act, implies that the victim must know the perpetrator of the violations and that the latter has been in a position to show repentance. For forgiveness to be granted, it must first have been sought.

27. The right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them. Although the decision to prosecute is initially a State responsibility, supplementary procedural rules should allow victims to be admitted as civil plaintiffs in criminal proceedings or, if the public authorities fail to do so, to institute proceedings themselves.

28. As a matter of principle, it should remain the rule that national courts have jurisdiction, because any lasting solution must come from the nation itself. But all too often national courts are not yet capable of handing down impartial justice or are physically unable to function. The delicate question then arises of the jurisdiction of an international court: should this be an ad hoc court, like those established to deal with violations in the former Yugoslavia or Rwanda, or a standing international court such as is proposed in a document currently before the United Nations General Assembly? Whichever solution is finally adopted, the rules of procedure must satisfy the criteria of the right to a fair trial. Those trying the perpetrators of violations must themselves respect human rights.

29. Lastly, international human rights treaties should include a “universal jurisdiction” clause requiring every State party either to try or to extradite perpetrators of violations. The necessary political will is still essential,

of course, to enforce such clauses. For example, humanitarian provisions in the 1949 Geneva Conventions or the United Nations Convention against Torture have scarcely ever been applied.

2. Restrictions justified by the desire to combat impunity

30. Restrictions may be applied to certain rules of law in order to support efforts to counter impunity. The aim is to prevent the rules concerned from being used to benefit impunity, thus obstructing the course of justice. The main restrictions are as follows.

(a) Prescription

31. Prescription is without effect in the case of serious crimes under international law, such as crimes against humanity. It cannot run in respect of any violation while no effective remedy is available. Similarly, prescription cannot be invoked against civil, administrative or disciplinary actions brought by victims.

(b) Amnesty

32. Amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy. It must have no legal effect on any proceedings brought by victims relating to the right to reparation.

(c) Right to asylum

33. Neither political refugee status nor territorial asylum, nor diplomatic asylum may be granted.

(d) Extradition

34. The political nature of an offence may not be advanced as an argument against extradition, nor the principle of non-extradition of nationals.

(e) Trial in absentia

35. Unlike most Roman law countries, common law countries do not acknowledge trial in absentia in their legal systems. The absence of such a procedure significantly benefits impunity, especially when the countries concerned refuse to cooperate with the courts (such as the International Criminal Tribunal in the Hague). As a compromise, might trial in absentia not be admitted only after it has been legally established that cooperation has been refused? If not, non-recognition of trial in absentia should be limited to the judgement phase alone.

(f) Due obedience

36. Due obedience cannot exonerate a perpetrator from criminal responsibility; at most it may be taken into consideration as a mitigating circumstance. Similarly, the fact that violations may have been perpetrated by a subordinate may not exonerate his superiors if they did not use their

authority to prevent or stop the violation as soon as they knew - or were in a position to know - that a violation was being or was about to be committed.

(g) Legislation on repentance

37. In cases where legislation on repentance has been adopted as part of the restoration of or transition to democracy, such legislation may be advanced in mitigation of evidence but cannot completely exonerate repentant perpetrators; a distinction must be drawn, depending on what risks the perpetrators ran, between revelations made while grave violations were taking place and those made subsequently.

(h) Military courts

38. Because military courts do not have sufficient statutory independence, their jurisdiction must be limited to specifically military infractions committed by members of the military, to the exclusion of human rights violations, which must come within the jurisdiction of the ordinary courts.

(i) The principle of the irremovability of judges

39. Irremovability, though vital as a safeguard of the independence of judges, must not benefit impunity. Judges appointed in conformity with an earlier legal regime may be confirmed in their positions. Conversely, judges appointed unlawfully may be relieved of their functions in accordance with the principle of parallelism, subject to appropriate safeguards.

C. The right to reparation

40. The right to reparation entails both individual measures and general, collective measures.

41. On an individual basis, victims - including relatives and dependants - must have an effective remedy. The procedures applicable must be publicized as widely as possible. The right to reparation should cover all injuries suffered by victims. According to the Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, drawn up by Mr. Theo van Boven, Special Rapporteur for the Sub-Commission (E/CN.4/Sub.2/1996/17), this right embraces three kinds of action:

(a) Restitution (seeking to restore victims to their previous state);

(b) Compensation (for physical or mental injury, including lost opportunities, physical damage, defamation and legal aid costs); and

(c) Rehabilitation (medical care, including psychological and psychiatric treatment).

42. On a collective basis, symbolic measures intended to provide moral reparation, such as formal public recognition by the State of its responsibility, or official declarations aimed at restoring victims' dignity, commemorative ceremonies, naming of public thoroughfares or the erection of

monuments, help to discharge the duty of remembrance. In France, for example, it took more than 50 years for the Head of State formally to acknowledge, in 1996, the responsibility of the French State for the crimes against human rights committed by the Vichy regime between 1940 and 1944. Mention can be made of similar statements by President Cardoso concerning violations committed under the military dictatorship in Brazil, and more especially of the initiative of the Spanish Government, which recently conferred the status of ex-servicemen on the anti-Fascists and International Brigade members who fought on the Republican side during the Spanish civil war.

D. Guarantees of non-recurrence

43. Since the same causes produce the same effects, three measures need to be taken in order to avoid victims having to endure new violations affecting their dignity:

(a) Disbandment of parastatal armed groups: this is one of the hardest measures to enforce because, if it is not accompanied by action to reintegrate group members into society, the cure may be worse than the disease;

(b) Repeal of all emergency laws, abolition of emergency courts and recognition of the inviolability and non-derogability of habeas corpus; and

(c) Removal from office of senior officials implicated in serious violations. These should be administrative measures, of a preventive, not punitive, character, duly safeguarding the officials' rights.

II. PROPOSALS AND RECOMMENDATIONS

44. Even before the United Nations began to take action against impunity, non-governmental organizations, as was seen earlier, played a pioneering role and began to lay the foundations of a strategy for action. Among many initiatives, those mentioned below contributed particularly to the Special Rapporteur's reflections:

(a) The work of the “courts of opinion”, especially the Russell Tribunal, later the Standing People's Tribunal, which in the absence of an international tribunal - under study at the United Nations since 1946 - filled an institutional void in the face of rampant impunity (see Louis Joinet, “Les tribunaux d'opinion”, in Marxisme, démocratie et droit des peuples, Hommage à Lelìo Basso, (Milan, Editions Franco Angelis, 1979, p. 821);

(b) The international meeting concerning impunity for perpetrators of gross human rights violations, held at the Palais des Nations, Geneva, by the International Commission of Jurists (ICJ) and the National Advisory Committee on Human Rights (CNCDH-France) from 2 to 5 November 1992 (the records of the meeting were published by the ICJ under the title Non à l'impunité, oui à la justice, Geneva, 1993);

(c) The report by Mr. Theo van Boven on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (E/CN.4/Sub.2/1993/8);

(d) The international seminar on impunity and its effects on democratization processes, held in Santiago, Chile, from 13 to 15 December 1996 by the Chilean non-governmental organizations Committee for the Defence of the People's Rights (CODEPU), Social Assistance Foundation of the Christian Churches (FASIC), and Service, Peace and Justice in Latin America - Chile (SERPAJ).

45. These efforts have shown that non-governmental organizations are increasingly aware of the need to back up their campaign with reference to standards drawn from experience and recognized by the international community. This is one of the reasons why the Special Rapporteur proposes adopting this set of principles for the protection and promotion of human rights through action to combat impunity. But the set of principles is also intended to assist both the all too few States showing the political will to tackle impunity and the partners in national “dialogues” or “peace negotiations”, who are all faced with the problem.

46. It is against this background and in this spirit that the Special Rapporteur puts forward the following two proposals:

1. To recommend that the Commission on Human Rights and then the Economic and Social Council should propose that the General Assembly adopt the set of principles as a broad strategic framework for action against impunity, but also more technically as a decision-making aid to peace agreement negotiators and to Governments intending to take measures to combat impunity.

2. To recommend that the Sub-Commission, in accordance with the wish expressed both by the General Assembly at its fifty-first session and by the Commission on Human Rights in its resolution 1996/42, make its contribution to the commemoration of the fiftieth anniversary of the Universal Declaration of Human Rights in the following manner. In the above-mentioned resolution, the Commission on Human Rights requested the United Nations High Commissioner for Human Rights to coordinate preparations for the commemoration, bearing in mind the follow-up to the Vienna Declaration and Programme of Action (A/CONF.157/23), paragraph 91 (Part II) of which refers to the issue of impunity. In a document dated 8 April 1997 entitled “1998. 50th Anniversary of the Universal Declaration of Human Rights”, [1] the High Commissioner appealed for practical suggestions and proposals concerning the commemoration. At a meeting held at the Palais des Nations on 13 December 1996 to prepare for the commemoration, the High Commissioner further stated that the event should be not only an occasion for celebration, but also an opportunity to undertake practical measures to continue strengthening human rights for all people. As a means of adding a practical note to commemoration activities, it is proposed that it be recommended that the High Commissioner for Human Rights, within the framework of the implementation of the Vienna Declaration and Programme of Action, take appropriate steps on the occasion of the commemoration of the fiftieth anniversary of the Universal Declaration of Human Rights, to change the date of 10 December, now Human Rights Day, into the “World Day for Human Rights and Action Against Impunity”.

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[1] Document available (in English only) on Internet at (http://www.unhchr.ch/html/50th/50anniv.htm).

47. As requested by the Sub-Commission in its decision 1996/119, annexed to this final report is the text of the set of principles revised in the light of comments received. Annex I gives a synoptical table of the set of principles, and the full text appears in annex II.

CONCLUSION

48. In concluding, the Special Rapporteur would like to draw attention to a number of particularly alarming situations, for which he must admit he has no solutions to propose, even though such situations - albeit for largely technical reasons - help to perpetuate impunity. How is it possible to combat impunity and therefore ensure a victim's right to justice when the number of persons imprisoned on suspicion of gross human rights violations is so large that it is technically impossible to try them in fair hearings within a reasonable period of time? Is it worth mentioning the case of Rwanda, where, according to the Special Rapporteur, Mr. René Degni-Segui (E/CN.4/1997/61, para. 69), over 90,000 people, most of them facing charges of genocide, are in prison while the judicial system, considerably disrupted by events, is unable as yet to cope with the situation? It is also vain to imagine that an international criminal tribunal offers a solution. Such courts by their nature can try only a small number of people each year - whence the importance in conducting prosecutions of setting priorities, and trying first, wherever possible, those perpetrators of crimes under international law who were at the top of the hierarchy.

AFTERWORD

49. To those who might be tempted to regard the set of principles proposed here as an obstacle to national reconciliation, I would answer this: these principles are not legal standards in the strict sense, but guiding principles intended not to thwart reconciliation but to avoid distortions in certain reconciliation policies so that, once beyond the first stage, which is more concerned with “conciliation” than reconciliation, the foundations of a “just and lasting reconciliation” may be laid.

50. Before a new leaf can be turned, the old leaf must be read! But the campaign against impunity is not just a legal and political issue: its ethical dimension is all too often forgotten.

51. “From the origins of mankind until the present day, the history of impunity is one of perpetual conflict and strange paradox: conflict between the oppressed and the oppressor, civil society and the State, the human conscience and barbarism; the paradox of the oppressed who, released from their shackles, in turn take over the responsibility of the State and find themselves caught in the mechanism of national reconciliation, which moderates their initial commitment against impunity.” This sentiment, which introduced the preliminary report submitted to the Sub-Commission in 1993 (E/CN.4/Sub.2/1993/6), is still valid and provides an appropriate afterword.

Annex I

SYNOPTICAL TABLE OF THE SET OF PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY

PREAMBLE

DEFINITIONS

“Impunity”, “serious crimes under international law”

I. THE RIGHT TO KNOW

A. General principles

Principle 1: The inalienable right to the truth

Principle 2: The duty to remember

Principle 3: The victims' right to know

Principle 4: Guarantees to give effect to the right to know

B. Extrajudicial commissions of inquiry

Principle 5: Role of the extrajudicial commissions of inquiry

Principle 6: Guarantees of independence and impartiality

Principle 7: Definition of the commissions' terms of reference

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Principle 12: Publicizing the commissions' reports

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

Principle 13: Measures for the preservation of archives

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Principle 15: Cooperation between archive departments and the courts and extrajudicial commissions of inquiry

III. RIGHT TO REPARATION

A. General principles

B. Guarantees of non-recurrence of violations

Annex II

SET OF PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY

PREAMBLE

The General Assembly,

Recalling the Preamble of the Universal Declaration of Human Rights, which states that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind,

Aware that there is always a risk that such acts may reoccur,

Reaffirming the commitment made by the Member States under Article 56 of the Charter of the United Nations to take joint and separate action, giving full importance to developing effective international cooperation for the achievement of the purposes set forth in Article 55 of the Charter concerning universal respect for, and observance of, human rights and fundamental freedoms for all,

Considering that the duty of every State under international law to respect and to secure respect for human rights requires that effective measures should be taken to combat impunity,

Aware that there can be no just and lasting reconciliation unless the need for justice is effectively satisfied,

Equally aware that forgiveness, which may be an important factor of reconciliation, implies, insofar as it is a private act, that the victim or the victim's beneficiaries know the perpetrator of the violations and that the latter has recognized the deeds and shown repentance,

Recalling the recommendation contained in paragraph 91 of Part II of the Vienna Declaration and Programme of Action, wherein the World Conference on Human Rights (June 1993) expressed its concern about the impunity of perpetrators of human rights violations and encouraged the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue,

Convinced, therefore, that national and international measures must be taken for that purpose with a view to securing jointly, in the interests of the victims of human rights violations, observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity,

Decides, pursuant to the Vienna Declaration and Programme of Action, solemnly to proclaim the following principles for the guidance of States engaged in combating impunity.

DEFINITIONS

A. Impunity

"Impunity" means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.

B. Serious crimes under international law

This term, as used in these principles, covers war crimes, crimes against humanity, including genocide, and grave breaches of international humanitarian law.

C. Restoration of or transition to democracy and/or peace

This expression, as used in these principles, refers to situations leading, within the framework of a national movement towards democracy or peace negotiations aimed at ending an armed conflict, to an agreement, in whatever form, by which the actors or parties concerned agree to take measures against impunity and the recurrence of human rights violations.

I. THE RIGHT TO KNOW

A. General principles

PRINCIPLE 1. THE INALIENABLE RIGHT TO THE TRUTH

Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through systematic, gross violations of human rights, to the perpetration of heinous crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of violations in the future.

PRINCIPLE 2. THE DUTY TO REMEMBER

A people's knowledge of the history of its oppression is part of its heritage and, as such, must be preserved by appropriate measures in fulfilment of the State's duty to remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

PRINCIPLE 3. THE VICTIMS' RIGHT TO KNOW

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

PRINCIPLE 4. GUARANTEES TO GIVE EFFECT TO THE RIGHT TO KNOW

States must take appropriate action to give effect to the right to know. If judicial institutions are wanting in that respect, priority should initially be given to establishing extrajudicial commissions of inquiry and to ensuring the preservation of, and access to, the archives concerned.

B. Extrajudicial Commissions of Inquiry

PRINCIPLE 5. ROLE OF THE EXTRAJUDICIAL COMMISSIONS OF INQUIRY

Extrajudicial commissions of inquiry shall have the task of establishing the facts so that the truth may be ascertained, and of preventing the disappearance of evidence.

In order to restore the dignity of victims, families and human rights advocates, these investigations shall be conducted with the object of securing recognition of such parts of the truth as were formerly constantly denied.

PRINCIPLE 6. GUARANTEES OF INDEPENDENCE AND IMPARTIALITY

In order to found their legitimacy upon incontestable guarantees of independence and impartiality, the terms of reference of the commissions, even when they are international in character, must respect the following principles:

(a) Commissions shall be established by law. If the process of the restoration of or transition to democracy and/or peace has begun, commissions may be established by an act of general application or treaty clause concluding a process of national dialogue or a peace accord;

(b) They shall be constituted in accordance with criteria making clear to the public the competence in the field of human rights and the impartiality of their members and on conditions ensuring their independence, in particular by the irremovability of their members for the duration of their terms of office;

(c) Their members shall enjoy whatever privileges and immunities are necessary for their safety, including in the period following their mission, especially in respect of any defamation proceedings or other civil or criminal action brought against them on the grounds of facts or opinions contained in the report.

PRINCIPLE 7. DEFINITION OF THE COMMISSIONS' TERMS OF REFERENCE

To avoid conflicts of jurisdiction, the commissions' terms of reference must be clearly defined. They shall incorporate at least the following stipulations and limitations:

(a) The commissions 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, with a view as appropriate to passing judgement and imposing a sentence;

(b) The conditions subject to which they may seek the assistance of law enforcement authorities, if required, including for the purpose, subject to the terms of principle 9 (a), of calling for testimonies, or inspect any places concerned in their investigations, or call for the delivery of relevant documents;

(c) If the commissions have reason to believe that the life, health or safety of a person concerned by their inquiry is threatened or that there is a risk of losing an element of proof, they may seek court action, under an emergency procedure, to end such threat or risk;

(d) Their investigations shall relate to all persons cited in allegations of human rights violations, whether they ordered them or actually committed them, acting as perpetrators or accomplices, and whether they are public officials or members of quasi-governmental or private armed groups with any kind of link to the State, or of non-governmental armed movements having the status of belligerents. Their investigations may also extend to crimes allegedly committed by any other organized, armed, non-governmental group;

(e) The Commissions shall have jurisdiction to consider all forms of human rights violations. Their investigations shall focus as a matter of priority on those violations which constitute serious crimes under international law, and shall pay particular attention to violations of the basic rights of women. They shall endeavour:

(i) To analyse and describe the State mechanisms of the violating system, and to identify the victims and the administrations, agencies and private entities implicated by retracing their roles;

(ii) To safeguard evidence for later use in the administration of justice.

PRINCIPLE 8. GUARANTEES FOR PERSONS IMPLICATED

Any persons implicated when the facts are established shall be entitled, especially if the commission is permitted under its terms of reference to divulge their names, to the following guarantees based on the adversarial principle:

(a) The commission must try to corroborate any information gathered by other sources;

(b) The person implicated shall, after being heard or having at least been convened to a hearing, have the opportunity to make a statement setting out his or her version of the facts or, within the time prescribed by the instrument establishing the commission, to submit a document equivalent to a right of reply for inclusion in the file. The rules of evidence provided for in principle 16 (c) shall apply.

PRINCIPLE 9. GUARANTEES FOR VICTIMS AND WITNESSES TESTIFYING ON THEIR BEHALF

Steps shall be taken to ensure the security and protection of victims and witnesses testifying on their behalf:

(a) They may be called upon to testify before the commission only on a strictly voluntary basis;

(b) If anonymity is deemed necessary in their interests, it may be allowed only on three conditions, namely:

(i) That it is an exceptional measure, except in the case of victims of aggression or sexual assault;

(ii) That the chairman and one member of the commission are entitled to verify that the request for anonymity is warranted and to ascertain, in confidence, the identity of the witness, so as to be able to give assurances to the other members of the Commission;

(iii) That the report will normally refer to the gist of the testimony if it is accepted by the commission;

(c) As far as possible, social workers and mental health-care practitioners shall be authorized to assist victims, preferably in their own language, both during and after their testimony, especially in cases of aggression or sexual assault;

(d) All expenses incurred by those giving testimony shall be borne by the State.

PRINCIPLE 10. OPERATION OF THE COMMISSIONS

The commissions shall be provided with:

(a) Transparent funding to ensure that their independence is never in doubt;

(b) Sufficient material and human resources to ensure that their credibility is never in doubt.

PRINCIPLE 11. ADVISORY FUNCTIONS OF THE COMMISSIONS

The commissions' terms of reference shall include provisions calling for them to make recommendations on action to combat impunity in their final report.

These recommendations shall contain proposals aimed:

On the basis of the facts and responsibilities established, at encouraging the perpetrators of violations to admit their guilt;

At inviting the Government to accede to any relevant international instruments it has not yet ratified;

At setting out legislative or other measures to put this set of principles into effect and to prevent any recurrence of violations. These measures shall primarily concern the army, police and judicial system and the strengthening of democratic institutions, and, where applicable, reparation for violations of the fundamental rights of women and prevention of their recurrence.

PRINCIPLE 12. PUBLICIZING THE COMMISSIONS' REPORTS

For security reasons or in order to avoid pressure on witnesses and commission members, the commissions' terms of reference may stipulate that the inquiry shall be kept confidential. The final report, on the other hand, shall be made public in full and shall be disseminated as widely as possible.

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

PRINCIPLE 13. MEASURES FOR THE PRESERVATION OF ARCHIVES

The right to know implies that archives should be preserved. Technical measures and penalties shall be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of human rights violations.

PRINCIPLE 14. MEASURES FOR FACILITATING ACCESS TO ARCHIVES

Access to archives shall be facilitated in order to enable victims and persons related to claim their rights.

Access should also be facilitated, as necessary, for persons implicated, who request it for their defence.

When access is requested in the interest of historical research, authorization formalities shall normally be intended only to monitor access and may not be used for purposes of censorship.

PRINCIPLE 15. COOPERATION BETWEEN ARCHIVE DEPARTMENTS AND THE COURTS AND EXTRAJUDICIAL COMMISSIONS OF INQUIRY

The courts and extrajudicial commissions of inquiry, as well as the investigators reporting to them, must have free access to archives. Considerations of national security may not be invoked to prevent access. By virtue of their sovereign power of discretion, however, the courts and extrajudicial commissions of inquiry may decide, in exceptional circumstances, not to make certain information public if such publication might jeopardize the preservation or restoration of the rule of law.

PRINCIPLE 16. SPECIFIC MEASURES RELATING TO ARCHIVES CONTAINING NAMES

(a) For the purposes of this principle, archives containing names shall be understood to be those archives containing information that make it possible, in any way whatsoever, directly or indirectly, to identify the individuals to whom they relate, regardless of whether such archives are on paper or in computer files.

(b) All persons shall be entitled to know whether their name appears in the archives and, if it does, by virtue of their right of access, to challenge the validity of the information concerning them by exercising a right of reply. The document containing their own version shall be attached to the document challenged.

(c) Except where it relates to top officials and established staff of those services, information relating to individuals which appears in intelligence service archives shall not by itself constitute incriminating evidence, unless it is corroborated by several other reliable sources.

PRINCIPLE 17. SPECIFIC MEASURES RELATED TO THE RESTORATION OF OR TRANSITION TO DEMOCRACY AND/OR PEACE

(a) Measures shall be taken to place each archive centre under the responsibility of a specifically designated person. If that person was already in charge of the archive centre, he or she must be explicitly reappointed by special decision, subject to the modalities and guarantees provided in principle 41;

(b) Priority shall initially be given to inventorying stored archives and to ascertaining the reliability of existing inventories. Special attention shall be given to archives relating to places of detention, in particular when the existence of such places was not officially recognized;

(c) The inventory shall be extended to relevant archives held by third countries, who shall be expected to cooperate with a view to communicating or restituting archives for the purpose of establishing the truth.

II. RIGHT TO JUSTICE

A. General principles

PRINCIPLE 18. DUTIES OF STATES WITH REGARD TO THE ADMINISTRATION OF JUSTICE

Impunity arises from a failure by States to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations.

Although the decision to prosecute lies primarily within the competence of the State, supplementary procedural rules should be introduced to enable victims to institute proceedings, on either an individual or a collective

basis, where the authorities fail to do so, particularly as civil plaintiffs. This option should be extended to non-governmental organizations with recognized long-standing activities on behalf of the victims concerned.

B. Distribution of jurisdiction between national, foreign and international courts

PRINCIPLE 19. JURISDICTION OF INTERNATIONAL CRIMINAL COURTS

It shall remain the rule that national courts normally have jurisdiction. An international criminal court may have concurrent jurisdiction where national courts cannot yet offer satisfactory guarantees of independence and impartiality, or are physically unable to function.

In such an event, the international criminal court may at any point in the proceedings require the national court to relinquish a case to it.

PRINCIPLE 20. JURISDICTION OF FOREIGN COURTS

The jurisdiction of foreign courts may be exercised by virtue either of a universal jurisdiction clause contained in a treaty in force or of a provision of domestic law establishing a rule of extraterritorial jurisdiction for serious crimes under international law.

PRINCIPLE 21. MEASURES FOR STRENGTHENING THE EFFECTIVENESS OF TREATY CLAUSES CONCERNING UNIVERSAL JURISDICTION

(a) An appropriate clause concerning universal jurisdiction should be included in all relevant international human rights instruments.

(b) In ratifying such instruments, States shall undertake, by the effect of that clause, to seek out and prosecute persons against whom there are specific, consistent accusations of violations of human rights principles laid down in those instruments, with a view to bringing them to trial or extraditing them. They are consequently bound to take legislative or other measures under domestic law to ensure the implementation of the clause on universal jurisdiction.

PRINCIPLE 22. MEASURES FOR DETERMINING EXTRATERRITORIAL JURISDICTION IN DOMESTIC LAW

In the absence of ratification making it possible to apply a universal jurisdiction clause to the country where a violation was committed, States may take practical measures in their domestic legislation to establish extraterritorial jurisdiction over serious crimes under international law committed outside their territory, which by their nature fall within the scope not only of domestic criminal law but also of an international punitive system which disregards the concept of frontiers.

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

PRINCIPLE 23. NATURE OF RESTRICTIVE MEASURES

Safeguards must be introduced against any abuse for purposes of impunity of rules pertaining to prescription, amnesty, right to asylum, refusal to extradite, absence of *in absentia* procedure, due obedience, repentance, the jurisdiction of military courts and the irremovability of judges.

PRINCIPLE 24: RESTRICTIONS ON PRESCRIPTION

Prescription - of prosecution or penalty - in criminal cases shall not run for such period as no effective remedy is available.

Prescription shall not apply to serious crimes under international law, which are by their nature imprescriptible.

When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries.

PRINCIPLE 25. RESTRICTIONS AND OTHER MEASURES RELATING TO AMNESTY

Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds:

(a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations referred to in principle 18;

(b) They shall be without effect with respect to the victims' right to reparation, as referred to in principles 33 to 36;

(c) Insofar as it may be interpreted as an admission of guilt, amnesty cannot be imposed on individuals prosecuted or sentenced for acts connected with the peaceful exercise of their right to freedom of opinion and expression. When they have merely exercised this legitimate right, as guaranteed by articles 18 to 20 of the Universal Declaration of Human Rights and 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, the law shall consider any judicial or other decision concerning them to be null and void; their detention shall be ended unconditionally and without delay;

(d) Any individual convicted of offences other than those referred to in paragraph (c) of this principle who comes within the scope of an amnesty is entitled to refuse it and request a retrial, if he or she has been tried without benefit of the right to a fair hearing guaranteed by articles 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and 15 of the International Covenant on Civil and Political Rights, or if he or she has been subjected to inhuman or degrading interrogation, especially under torture.

PRINCIPLE 26. RESTRICTIONS ON THE RIGHT OF ASYLUM

Under article 1, paragraph 2, of the Declaration on Territorial Asylum, adopted by the General Assembly on 14 December 1967, and article 1 F of the Convention relating to the Status of Refugees of 28 July 1951, States may not extend such protective status, including diplomatic asylum, to persons with respect to whom there are serious reasons to believe that they have committed a serious crime under international law.

PRINCIPLE 27. RESTRICTIONS ON EXTRADITION

Persons who have committed serious crimes under international law may not, in order to avoid extradition, avail themselves of the favourable provisions generally relating to political offences or of the principle of non-extradition of nationals. Extradition should always be denied, however, especially by abolitionist countries, if the individual concerned risks the death penalty in the requesting country.

PRINCIPLE 28. RESTRICTIONS ON THE EXCLUSION OF IN ABSENTIA PROCEDURE

In order to avoid establishing a guarantee of impunity, non-recognition of in absentia procedure by a legal system should be limited to the judgement stage, so that the necessary investigations, including the hearing of witnesses and victims, may be carried out and charges may be preferred, followed by wanted notices and arrest warrants, if necessary international, executed according to the procedures laid down in the Constitution of the International Criminal Police Organization (ICPO - Interpol).

PRINCIPLE 29. RESTRICTIONS ON JUSTIFICATIONS RELATED TO DUE OBEDIENCE

(a) The fact that the perpetrator of violations acted on the orders of his Government or of a superior does not exempt him from criminal or other responsibility but may be regarded as grounds for reducing the sentence, if applicable.

(b) The fact that violations have been committed by a subordinate does not exempt that subordinate's superiors from criminal or other responsibility if they knew or had at the time reason to believe that the subordinate was committing or about to commit such a crime and they did not take all action within their power to prevent or punish the crime. The official status of the perpetrator of a crime under international law - even if acting as head of State or government - does not exempt him or her from criminal responsibility and is not grounds for a reduction of sentence.

PRINCIPLE 30. RESTRICTIONS ON THE EFFECTS OF LEGISLATION ON REPENTANCE RELATED TO THE RESTORATION OF OR TRANSITION TO DEMOCRACY AND/OR PEACE

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. The disclosure may only provide grounds for a reduction of sentence in order to encourage revelation of the truth.

When disclosures were made during the period of persecution, the reduction of sentence may be extended to absolute discharge on grounds of the risks the person ran at the time. In that case, principle 26 notwithstanding, the person making the disclosure may be granted asylum - not refugee status - in order to facilitate revelation of the truth.

PRINCIPLE 31. RESTRICTIONS ON THE JURISDICTION OF MILITARY COURTS

In order to avoid military courts, in those countries where they have not yet been abolished, helping to perpetuate impunity owing to a lack of independence resulting from the chain of command to which all or some of their members are subject, their jurisdiction must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, that of an international criminal court.

PRINCIPLE 32. RESTRICTIONS ON THE PRINCIPLE OF THE IRREMOVABILITY OF JUDGES

The principle of irremovability, as the basic guarantee of the independence of judges, must be observed in respect of judges who have been appointed in conformity with the rule of law. Conversely, judges unlawfully appointed or who derive their judicial power from an act of allegiance may be relieved of their functions by law in accordance with the principle of parallelism. They may ask to be afforded the guarantees laid down in principles 41 and 42, in particular with a view to seeking reinstatement, where applicable.

III. RIGHT TO REPARATION

A. General principles

PRINCIPLE 33. RIGHTS AND DUTIES ARISING OUT OF THE OBLIGATION TO MAKE REPARATION

Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.

PRINCIPLE 34. REPARATION PROCEDURES

All victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings subject to the restrictions on prescription set out in principle 24. In exercising this right, they shall be afforded protection against intimidation and reprisals.

Exercise of the right to reparation includes access to the applicable international procedures.

PRINCIPLE 35. PUBLICIZING REPARATION PROCEDURES

Ad hoc procedures enabling victims to exercise their right to reparation should be given the widest possible publicity by private as well as public communication media. Such dissemination should take place both within and outside the country, including through consular services, particularly in countries to which large numbers of victims have been forced into exile.

PRINCIPLE 36. SCOPE OF THE RIGHT TO REPARATION

The right to reparation shall cover all injuries suffered by the victim; it shall include individual measures concerning the right to restitution, compensation and rehabilitation, and general measures of satisfaction as provided by the set of basic principles and rules concerning the right to reparation (see paragraph 41 above).

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 and, in the event of decease, the person's body must be returned to the family as soon as it has been identified, whether the perpetrators have been identified, prosecuted or tried or not.

B. Guarantees of non-recurrence of violations

PRINCIPLE 37. AREAS AFFECTED BY GUARANTEES OF NON-RECURRENCE

The State shall take appropriate measures to ensure that the victims do not again have to endure violations which harm their dignity. Priority consideration shall be given to:

(a) Measures to disband parastatal armed groups;

(b) Measures repealing emergency provisions, legislative or otherwise, which are conducive to violations;

(c) Administrative or other measures against State officials implicated in gross human rights violations.

PRINCIPLE 38. DISBANDMENT OF UNOFFICIAL ARMED GROUPS DIRECTLY OR INDIRECTLY LINKED TO THE STATE AND OF PRIVATE GROUPS BENEFITING FROM THE STATE'S PASSIVITY

In order to ensure the effective disbandment of such groups, especially in the event of attempts to ensure the restoration of or transition to democracy and/or peace, measures shall be taken as a matter of priority to:

(a) Retrace organizational structures, by firstly identifying agents and showing their position, if any, in the administration, particularly in the army or police forces, and by secondly determining the covert links which they maintained with their active or passive masters, belonging particularly to intelligence and security services or, in the event, to pressure groups. The information thus acquired shall be made public;

(b) Thoroughly investigate intelligence and security services with a view to redirecting their activities;

(c) Secure the cooperation of third countries which might have contributed to the creation and development of such groups, particularly through financial or logistical support;

(d) Draw up a reconversion plan to ensure that members of such groups are not tempted to join the ranks of organized crime.

PRINCIPLE 39. REPEAL OF EMERGENCY LEGISLATION AND ABOLITION OF EMERGENCY COURTS

Emergency legislation and courts of any kind must be repealed or abolished insofar as they infringe the fundamental rights and freedoms guaranteed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Habeas corpus, whatever name it may be known by, must be considered a fundamental right of the individual and as such a non-derogable right.

PRINCIPLE 40. ADMINISTRATIVE AND OTHER MEASURES RELATING TO STATE OFFICIALS IMPLICATED IN GROSS HUMAN RIGHTS VIOLATIONS

Such measures should be of a preventive, not punitive character; they may therefore be taken by administrative decision, provided that appropriate implementation procedures are provided for by law. When a process has begun to ensure the restoration of or transition to democracy and/or peace, such measures may be taken under an act of general application or a treaty clause, with the intention of avoiding any administrative obstacle or challenge to the process.

These measures are invariably quite distinct from the punitive and judicial measures provided for in principles 18 et seq., which are to be applied by the courts to persons prosecuted and tried for human rights violations.

PRINCIPLE 41. IMPLEMENTATION OF ADMINISTRATIVE MEASURES

When a peace process has begun, the implementation of administrative measures should be preceded by a survey of positions of responsibility with influential decision-making powers and therefore an obligation of loyalty to the process. In that survey, priority consideration should be given to positions of responsibility in the army, the police and the judiciary.

In assessing the situation of serving officials, consideration will be given to:

(a) Their human rights records, particularly during the period of repression;

(b) Non-involvement in corruption;

(c) Professional competence;

(d) Willingness to promote the peace and/or democratization process, particularly with regard to the observance of constitutional guarantees and human rights.

Decisions shall be taken by the head of Government or, under his responsibility, by the minister under whom the official works, after the official concerned has been informed of the complaints against him and has been given a due hearing or summons for this purpose.

The official may appeal to the appropriate administrative court.

However, in view of the special circumstances inherent in any transition process, the appeal may be heard in that case by an ad hoc commission with exclusive jurisdiction, provided that it meets the criteria of independence, impartiality and procedure laid down in principles 6 (a) and (b), 7 (a), 8 and 10.

PRINCIPLE 42. NATURE OF MEASURES THAT CAN BE TAKEN AGAINST STATE OFFICIALS

Except where the official has been confirmed in his or her appointment, the official concerned may be:

(a) Suspended from certain duties;

(b) Suspended altogether pending his or her confirmation or appointment to another post;

(c) Transferred;

(d) Demoted;

(e) Given early retirement;

(f) Dismissed.

In relation to the irremovability of judges, the decision shall be taken in the light of the relevant guarantees set out in principle 32.
