



INTERNATIONAL  
COMMISSION  
OF JURISTS



Human Rights Advocates

R E D R E S S

MEDICAL FOUNDATION



E. A. A. F.



**"The Draft Basic Principles And Guidelines On The Right To A Remedy And  
Reparation For Victims Of Violations Of International Human Rights And  
Humanitarian Law"**

Our organisations wish to:

- *Welcome* the Commission on Human Rights resolution 2003/44 requesting the United Nations High Commissioner for Human Rights to hold a second consultative meeting for all interested Member States, intergovernmental organizations and non-governmental organizations, and requesting the Chairperson-Rapporteur of the consultative meeting to prepare a revised version of the "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law", in consultation with the independent experts Theo van Boven and Cherif M. Bassiouni, and taking into account the opinions and commentaries of States and of intergovernmental organizations and non-governmental organizations, and the results of the first consultative meeting.
- *Congratulate* the United Nations High Commissioner for Human Rights and the Chairperson-Rapporteur of the Consultative Meeting, for the successful session and for the excellent conclusions and report of the first consultative meeting;
- *Call on* the United Nations High Commissioner for Human Rights to give priority to holding the second consultative meeting requested by resolution 2003/44 for all interested Member States, intergovernmental organizations and non-governmental organizations, with a view to finalizing the "Basic principles and Guidelines", having as a basis for its work the revised draft prepared by the Chairperson-Rapporteur of the first consultative meeting, and, if appropriate, to consider options for its adoption.

Amnesty International (AI); Asian Human Rights Commission; Human Rights Advocates; The Association for the Prevention of Torture (APT); The Argentine Forensic Anthropology Team (EAAF); The ICAR Foundation; The International Centre for Criminal Law Reform and Criminal Justice Policy; The International Commission of Jurists (ICJ); The International Federation for Human Rights (FIDH); The International Rehabilitation Council for Torture Victims (IRCT); The International Service for Human Rights (ISHR); The International Society for Traumatic Stress Studies (ISTSS); The Redress Trust; The World Organization Against Torture (OMCT); The Medical Foundation for the Care of Victims of Torture .

## **"Reparation for violations of human rights and humanitarian law: the Right to a Remedy and Reparations under International Law"**

- Under international law, there is a well-established right entitling victims of human rights abuses to a remedy and reparations for their loss and suffering. The corpus of law regulating this principle, however, is dispersed and not systematized. It is necessary therefore, to adopt a universal instrument that systematises and codifies these norms, and to ensure that the victims' perspective is reflected in the substance and structure of such instrument—that the measure of damages correlates to the gravity of the harm suffered and that full reparations are provided to victims.
- For this purpose, the *Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law* (Draft Principles) represent a necessary and invaluable reference. The adoption of this instrument by the Commission on Human Rights would be a significant contribution to the full and adequate recognition of the right to an effective remedy and reparation. Furthermore, such an instrument would be a valuable tool for States to adequately fulfil their obligations to guarantee an effective remedy, to provide reparation for violations of international human rights and humanitarian law and to contribute to the prevention of such violations.

### **1. The Right to Reparation under international law:**

The right to reparation is a fundamental right of general international law. The principle established by the Permanent Court of International Justice and since upheld by international jurisprudence, provides that the breach of an international obligation entails the duty to afford reparation.<sup>1</sup> The International Law Commission recently reaffirmed this principle in its 53<sup>rd</sup> Session when it adopted its "Draft Articles on the Responsibility of States for International Wrongful Acts."<sup>2</sup> The responsibility of States to provide reparation arises when there is a breach of an international obligation—whatever its origin—including a breach of an obligation under international human rights law. As highlighted by Professor Theo van Boven, then Special Rapporteur on the right to restitution, compensation and rehabilitation for the victims of gross violations of human rights and fundamental freedoms: "the issue of State responsibility comes into play when a State is in breach of the obligation to respect internationally recognised human rights. Such obligation has its legal basis in international agreements, in particular international human rights treaties, and/or in customary international law, in particular those norms of customary international law which have a peremptory character (*jus cogens*)"<sup>3</sup> Similarly, the violation of the norms of international humanitarian law gives rise to a duty to make reparations.<sup>4</sup>

<sup>1</sup> See: Permanent Court of Arbitration, Chorzow Factory Case (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits 1986 ICJ Report, 14, 114 (June 27); Corfu Channel Case; (UK v. Albania); Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184 ; *Interpretation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif*, C.I.J., Recueil, 1950, p. 228. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: "Every internationally wrongful act of a State entails the international responsibility of that State. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001" (ILC draft Articles on State Responsibility)).

<sup>2</sup> See Report of International Law Commission - 53<sup>rd</sup> session (23 April - 1<sup>st</sup> June, 1 June and 2<sup>nd</sup> July - 10 August 2002) Official document of the General Assembly, 56<sup>th</sup> Session, Addendum No 10 (A/56/10)

<sup>3</sup> United Nations document E/CN.4/Sub.2/1993/8; 2<sup>nd</sup> July 1993, par. 41

<sup>4</sup> Under international humanitarian law, the Hague Convention regarding the Laws and Customs of Land Warfare (article 3, 1907 Hague Convention IV) includes specific requirements to pay compensation. Likewise, the four Geneva Conventions of 12 August 1949 contain a provision of liability for grave breaches and the 1977 Additional

This duty to make reparations forms part of customary international law. It is enshrined in international human rights treaties and declarative instruments,<sup>5</sup> and has been recognised by an array of international tribunals.<sup>6</sup> The Inter-American Court of Human Rights has repeatedly held in its jurisprudence that the State's obligation to provide reparations and the corresponding victim's right to receive them, is "customary law and that it constitutes one of the fundamental principles of contemporary international law on State's responsibility. Therefore, when an unlawful act is attributable to the State, international responsibility emerges immediately from this act as a consequence of the violation of international law, and, attached to it, the duty to provide reparation and to cease the consequences of such violation"<sup>7</sup>

**The State's obligation to provide reparations and the corresponding victim's right to receive them is customary international law and constitutes one of the fundamental principles of contemporary international law on State's responsibility.**

## **2. The Right to an Effective Remedy— judicial nature:**

Human rights violations entail a duty of the wrongdoing State(s) to provide an effective remedy to afford redress to the victim(s). This principle is incorporated in every international human rights instrument<sup>8</sup>— the right to a remedy for a violation of a human right protected under any of the human rights instruments is itself a right expressly guaranteed by the same. As explained by the Human Rights Committee, "the obligation to provide a remedy for any violation of the Covenant, established in article 2(3) of the Covenant, constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of

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Protocol I (Art.91) specifically provides for liability to pay compensation. The Rome Statute of the International Criminal Court used the Draft Principles as a reference A/CONF.183/C.1/WGPM/L.2/Add.7, 13/07/1998, p.5, note5.

<sup>5</sup> At the Universal level it is possible to find among others: the Universal Declaration of Human Rights (Art. 8), the International Covenant on Civil and Political Rights (art.2(3); art 9(5) and 14(6)), the International Convention on the Elimination of All Forms of Racial Discrimination (art 6), the Convention of the Rights of the Child (art. 39), the Convention against Torture and other Cruel Inhuman and Degrading Treatment, (art. 14) and the Rome Statute for an International Criminal Court (art. 75). It is also established in the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (Rule 106), as well as in several regional instruments, e.g. the European Convention on Human Rights (art 5(5), 13 and 41), the Inter-American Convention on Human Rights (arts 25, 68 and 63(1)), the African Charter on Human and Peoples' Rights (art. 21(2)). Also important are the following international standards: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art 19), General Assembly resolution 47/133 of 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; and Declaration on the Elimination of Violence against Women. See also art 75 of the Rome Statute of the International Criminal Court (Idem).

<sup>6</sup> See, e.g. ruling of the Inter-American Court of Human Rights on the Velásquez Rodríguez Case, Serial C, No 4 (1989), par. 174 -. See also Papamichalopoulos vs. Greece (Art. 50) E.C.H.R. Serial A, No 330-B (1995), Pg 36.

<sup>7</sup> Ruling of 29 August vs 2002, Case Caracazo vs. Venezuela. Paragraph 76. See also: Inter-American Court of Human Rights: Ruling Trujillo Oroza (Reparations) paragraph 60 and Ruling (Reparations) of 22 February 2002, Bámaca Velásquez vs. Guatemala, paragraph 38.

<sup>8</sup> At the Universal level it is possible to find among others: the Universal Declaration of Human Rights (Art. 8), the International Covenant on Civil and Political Rights (art. 2.), the International Convention on the Elimination of All Forms of Racial Discrimination (art 6), the Convention against Torture and other Cruel Inhuman and Degrading Treatment, (art. 13) Declaration on the Protection of all Persons from Enforced Disappearance (art 19), General Assembly resolution 47/133 of 18 December 1992 (Arts. 9 and 13), the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 4 and 16), at the regional level it is important to highlight. The European Convention on Human Rights (art 13) The Charter of Fundamental Rights of the European Union (art. 47); the Inter-American Convention on Human Rights (arts 24 and 25); American Declaration of the Rights and Duties of Man (art XVIII), Inter-American Convention on Forced Disappearance of persons (art X), Inter-American Convention to Prevent and Punish Torture (Art. 8) and the African Charter of Human and Peoples' Rights (art. 3 and 7) and the Arab Charter on Human Rights (Art. 9).

emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, (...)"<sup>9</sup>.

According to the International Covenant on Civil and Political Rights and the European Convention on Human Rights, the nature (judicial, administrative or other) of the remedy should be in accordance with the rights violated and the effectiveness of the remedy in granting appropriate relief for such violation.<sup>10</sup> The African Charter of Human and Peoples' Rights provides that remedies should be judicial.<sup>11</sup> The Charter of Fundamental Rights of the European Union refers to an effective remedy before a tribunal in the case of violations of rights and freedoms guaranteed by the law of the Union. The Court of Justice of the European Communities considered that a person's capacity, when his/her rights have been violated, to appeal to a judicial procedure to enforce his/her rights "is the expression of a general principle of law, which has its basis in the constitutional traditions of the member States".<sup>12</sup>

In the case of grave human rights violations, which implicitly constitute crimes, there is unanimity in the jurisprudence on the judicial nature of effective remedies. The Human Rights Committee has considered 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".<sup>13</sup> In the case of forced disappearances, extrajudicial executions or torture, the remedy must be of a judicial nature.<sup>14</sup> The Committee states that "It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights (...)."<sup>15</sup>

Article 27.2 of the American Convention explicitly states that "the judicial guarantees essential for the protection of such [non-derogable] rights" are non-derogable. The Inter-American Court of Human Rights explained "that the "essential" judicial guarantees which are not subject to suspension, include those judicial procedures, inherent to representative democracy as a form of government... and whose suppression or restriction entails the lack of protection of such [non-derogable] rights."<sup>16</sup> Furthermore, the European Court of Human

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<sup>9</sup> General Comment N° 29, CCPR/C/21/Rev.1/Add.11, 31 of August 2001, para. 14.

<sup>10</sup> Article 13 requires "the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief" although State have some discretion as to how to comply (para 69) *D v. United Kingdom*<sup>10</sup> App. No. 30240/96 Judgment of 2 May 1997 (referring to *Soering v. United Kingdom* App. No. 14038/88 Judgment of 7 July 1989 and *Vilvarajah v. United Kingdom* App. No. 13163/87 Judgment of 30 October 1991). The HRC commented on Finland's report (CCPR/C/95/Add.6) re the obligation under Art 2(b) of the ICCPR that "while noting that a recent reform of the Penal Code makes punishable the violation of several rights and freedoms, including those protected by articles 21 and 22 of the Covenant, the Committee is concerned that criminal law may not alone be appropriate to determine appropriate remedies for violations of certain rights and freedoms (Concluding Observations of the Human Rights Committee, Finland: 08/04/98)

<sup>11</sup> See Art. 7 of the African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

<sup>12</sup> Decision of 15 May 1986, *Case Johnston*, N° 222/84, quoted in Guy Braibant, *La Charte des droits fondamentaux de l'Union européenne*, Edition du Seuil, Paris, 2001, page. 236.

<sup>13</sup> Decision of 13 November 1995, Communication 563/1993, Case *Nydia Erika Bautista* (Colombia), United Nations document CCPR/C/55/D/563/1993, paragraph 8(2). Se also Decision of 29 July 1997, Communication 612/1995, *Case José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro* (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8(2).

<sup>14</sup> See Decision of admissibility of 13 de October de 2000, Communication N° 778/1997, Case Coronel *et al* (Colombia), United Nations document CCPR/C/70/D/778/1997, paragraph 6(4).

<sup>15</sup> General Comment N° 29, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 15.

<sup>16</sup> Advisory Opinion OC-9/87 of 6 October 1987. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 25(8) American Convention on Human Rights. Series A No. 9.

Rights has considered that the notion of effective remedy entails exhaustive and effective investigation aimed at the identification and punishment of those responsible and includes the effective access of the complainant to the investigative procedure.<sup>17</sup> In the same way, the European Court of Human Rights stated that the basic principle underlying Art. 6.1 of the Convention—regarding the individuals' right of access to court for the determination of his civil rights and obligations or of any criminal charge against him—is consistent with the rule of law in any democratic society.<sup>18</sup>

Finally, common Art 3 of the Geneva Conventions—enforceable as a matter of international customary law<sup>19</sup>—includes also the critically important due process protection: the prohibition of passing sentences without previous judgements pronounced by a regularly constituted court affording all indispensable *judicial guarantees*.<sup>20</sup>

**Human rights violations entail a duty of the wrongdoing State to provide an effective remedy to afford redress to the victim. In the case of grave human rights violations, which implicitly constitute crimes, there is unanimity in the jurisprudence on the judicial nature of effective remedies in all circumstances.**

### **3. A UN instrument on the right to a remedy and reparation—the corpus of law governing the right to a remedy and reparations needs systematization:**

It is clear that, under international law, there is a well-established right entitling victims of human rights abuses to a remedy and reparations for their loss and suffering. The corpus of law regulating this principle, however, is dispersed and not systematized. There is a multiplicity of interpretations and terms that carry the potential to obfuscate a clear rendering of the applicable international standards preventing victims from obtaining full reparations.

The sudden opening of avenues for redress after World War II created a mixture of international remedies. Today new mechanisms are being developed: various forms of international justice complement national justice in the fight against impunity—like the United Nations *ad hoc* Tribunals<sup>21</sup> and the International Criminal Court<sup>22</sup>—and to a greater extent, states are implementing legislation to allow extraterritorial civil suits and criminal prosecutions.<sup>23</sup> However, international instruments do not clarify what are to be considered “adequate” and “effective” remedies. Nor do they indicate what remedies should be available

<sup>17</sup> European Court of Human Rights, Sentence (preliminary) 18 December 1996, Case Aksoy vs. Turkey, quoted in Conseil de l'Europe, *Vade-mecum de la Convention Européenne des Droits de l'Homme*, Editions du Conseil de l'Europe, Strasbourg, 1999, 2<sup>nd</sup> edition, page. 134

<sup>18</sup> European Court of Human Rights, Judgment 21 December 2001, Case Al-Adsani v. the United Kingdom, para. 47, Application no. 35763/97.

<sup>19</sup> The customary nature of common Article 3 of the Geneva Conventions has been affirmed by the International Court of Justice in the *Nicaragua* case (*ICJ Reports* 1986, at 218) and, more recently, by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case, para. 98 ff (ICTY, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, *Tadic*, para. 134). In its decision, the Appeals Chamber also held that many of the provisions of Protocol II can be regarded as customary law (*ibidem*, para. 117 ff.). See also ICTY, Judgment, 10 Dec. 1998, *Furundzija*, para. 153 (Torture); ICTR, Judgment, 2 Sept. 1998, *Akayesu*, paras. 495 (Genocide) and 608 (Common Art 3 Geneva Conventions); ICTR, Judgment, 21 May 1999, *Kayishema and Ruzindana*, para. 88 (Genocide).

<sup>20</sup> Art 3 I(d) Geneva Conventions (see footnote 4).

<sup>21</sup> Statute of the International Tribunal for Former Yugoslavia; UN Doc. S/25704, annex (19930 and the Statute of the International Tribunal for Rwanda; UN Doc. S/RES/995, annex (1994).

<sup>22</sup> Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9

<sup>23</sup> As established in Principle 3 of the 1973 UN Principles of International Co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity: “States shall co-operate with each other on bilateral and multilateral basis with a view to halting and preventing war crimes against humanity, and shall take the domestic and international measures necessary for that purpose.” (UN GA Res. 3074 (XXVIII) of 3 December 1973). As well, many Conventions specify the obligation for State Parties to implement universal jurisdiction legislation, e.g. the Convention against Torture and other Cruel Inhuman and Degrading Treatment (UN GA Res. 39/46 10, December 1984).

through international procedures in the event of the States' failure to afford the necessary redress. It is thus necessary to look at the theory and practice of international and domestic courts to determine what constitutes appropriate, effective and adequate remedies.

International instruments embrace the issue of reparation and the right to an effective remedy from the inevitable specificity derived from the rights they protect, and when referring to the right to reparation, the terms used in these instruments vary substantively ("reparation," "reparations," "remedy," "redress," "restitution," "compensation," "satisfaction" etc.). In the same way, international jurisprudence has approached the question of reparation from the perspective of the different rights protected under international law, reflecting the diverse terminology used in these instruments.<sup>24</sup> Additionally, at the national level, domestic laws and judicial decisions expose different standards and interpretations of the right to a remedy and reparation. In particular, the different national experiences of gross human rights violations (where institutions have been created to fulfil this international obligation) have taken different legal, judicial and administrative forms in which the scope of the right to reparation has been significantly diverse.

Nevertheless, the extensive corpus of law on the subject makes it possible to determine the definition, scope and nature of these rights. As described above, the United Nations treaty-based bodies and European, Inter-American and African human rights organs have dealt extensively with the right to reparation, including the adequate forms of reparations and the procedural right to an effective remedy. Additionally, thematic and country mechanisms of the Commission on Human Rights have also developed comprehensive doctrine on the question.<sup>25</sup> The right to reparation for victims of human rights violations—during peacetime or wartime—exists under international law. It is evident however, that further clarification on the scope and nature of this right is desirable, particularly from a universal standpoint and with specific focus on the right to reparation: not "as part of" or "accessory to" other rights.

The studies prepared by Professor van Boven on the subject are a valuable systematisation of this corpus of law. Furthermore, the *Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law* (Draft Principles)— drafted initially by Professor van Boven and subsequently elaborated by Professor M Cherif Bassiouni—constitute a significant contribution to the codification of these norms. These principles, even in draft form, are becoming a point of reference for international jurisprudence and national practice. The Inter-American Court of Human Rights, for example, has referred to the Draft Principles in several rulings,<sup>26</sup> and in general, since the drafting of these principles, the jurisprudence and doctrine from both universal and regional systems have echoed many of their provisions.<sup>27</sup>

<sup>24</sup> For example, the terminology used in art 41 of European Convention of Human Rights is very different to art. 63 (1) of the Inter-American Convention of Human Rights; this is also reflected in their jurisprudence.

<sup>25</sup> See for example, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by GA Res. 40/34, 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art. 19), GA Res. 47/133, 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by the Economic and Social Council resolution 1989/65, 24 May 1989 (principle 20); and, the Declaration on the Elimination of Violence against Women. See also: Visit to the Republic of Colombia - Joint Report of the Special Rapporteur on the question of torture, and the Special Rapporteur on extrajudicial, summary or arbitrary executions E/CN.4/1995/111, 16 January 1995.

<sup>26</sup> See Inter-American Court of Human Rights, *Bámaca Velásquez vs. Guatemala*, Reparations, judgement of 22 February 2002, para. 75. *Castillo Páez vs. Peru*, judgement of 27 November 1998, para. 48.

<sup>27</sup> In its General Comment No. 29 on States of Emergency, the Human Rights Committee recalled that even during States of Emergency the right to a remedy cannot be derogated. UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14. Furthermore, the limitation contained in the draft Basic Principles (principle 25.i–ii) that military tribunals may only have jurisdiction over offences closely related to military functions has been reiterated by the UN Human Rights Committee. See Concluding Observations and Recommendations for Cameroon CCPR/C/79/Add.116; Guatemala, CCPR/C/072/GTM; Kuwait, CCPR/CO/69/KWT; Peru, CCPR/CO/70/PER, Dominican Republic, CCPR/CO/71/DOM; Syria, CCPR/CO/71/SYR, Uzbekistan, CCPR/CO/71/UZB, and Chile, CCPR/C/79/Add. 104. See also the Committee Against Torture, Observations on Peru A/55/44, and Venezuela A/54/44. *Durand and Ugarte c Peru*, Int-Am. Ct HR, judgment of 16 August 2000, ser. C. no. 68, paras 117–18. *Ciraklar vs. Turkey*, ECHR, judgment of 28 October 1998, and *Gerger vs. Turkey*, judgment of 8 July 1999.

Furthermore, the draft Basic Principles have been used as the basis for new remedies in national and international fora, as well as a standard for governments when implementing administrative measures and programs for victims.<sup>28</sup>

The United Nations system would benefit from the adoption of a universal instrument that systematises the *corpus juris* on the right to a remedy and reparation. A body of norms containing the basic principles on the right to reparation for violations of human rights and humanitarian law should be coherent and universal in order to guarantee a clear rendering of the applicable international legal norms of the right to reparation for victims around the world. It is necessary to ensure that the victims' perspective is reflected in the substance and structure of such an instrument: that the measure of damages correlates to the gravity of the harm suffered and that full reparations are provided to victims.

For this purpose, the Draft Principles represent a necessary and invaluable reference. The adoption of this instrument would be a significant contribution to the full and adequate recognition of the right to an effective remedy and reparation. Furthermore, such an instrument would be a valuable tool for States to fulfil their obligations to guarantee an effective remedy, to provide reparation for violations of international human rights and humanitarian law and to contribute to the prevention of such violations.

**The right to reparation for victims of human rights violations—during peacetime or wartime—exists under international law. However, it is necessary to adopt a universal instrument that systematises the vast *corpus juris* on the subject. For this purpose, the Draft Principles represent a necessary and invaluable reference.**

#### **4. The Commission on Human Rights should give priority to the Draft Principles and implement an appropriate, effective and expeditious mechanism to guarantee the study and prompt adoption.**

It is essential that the Commission on Human Rights (CHR) gives priority to the Draft Principles and that an appropriate, effective and expeditious procedure is established to guarantee their adoption as soon as possible. The Consultative Meeting, convened by the Office of the High Commissioner for Human Rights on 30 September -1 October 2002 provided an excellent opportunity to analyse the Draft Principles. It is our belief, that a further meeting of such a kind but with a mandate to make those changes to the existing text that may be necessary, would be the most appropriate and effective means by which to move towards consensus and to make it possible for the Draft Principles to be submitted to the Commission on Human Rights for adoption at its 60<sup>th</sup> session in 2004.

There are two types of mechanisms traditionally used by the CHR to adopt a normative text such as the Draft Principles and Guidelines on the Right to a Remedy and Reparation: a) Direct adoption of the text by the CHR and b) an Intersessional Working Group (IWG) first and then the adoption by the CHR.

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<sup>28</sup> The drafters of the ICC Statute, for instance, intended that the draft Basic Principles would have priority in the interpretation of the Statute. A/CONF.183/C.1/WGPM/L.2/Add.7. The draft Basic Principles have also been used as a point of reference by, for example, the US Secretary of State in requesting the Northern Ireland Human Rights Commission consult and advise the Secretary on the scope of a Bill of Rights for Northern Ireland. When dealing with victim's rights, the Commission relied on the standards in the draft Basic Principles. 'Making a Bill of Rights for Northern Ireland', consultation document by the Northern Ireland Human Rights Commission, September 2001.

In the case of the Draft Principles, both of these methods might be problematic. For budgetary reasons, the number of IWGs is limited; there are currently no possibilities to create a new IWG aimed at producing a new instrument. On the other hand, the direct adoption by the CHR requires prior consensus on the proposed draft norms. Although the existing text of the Draft Principles already has the broad support of many States, a significant number still have concerns about certain elements of the text.<sup>29</sup> It is thus fair to say that there is not, at present, sufficient support for the existing text to propose its adoption by the CHR.

However, notwithstanding the current lack of consensus on the precise wording of the text, it was made clear during the 2002 Consultative Meeting that there is agreement amongst all, or almost all, States on the following matters:

- a) The adoption of a UN normative instrument on the right to reparation for victims of human rights and humanitarian law violations is desirable.
- b) The Draft Basic Principles and Guidelines on the Right to a Remedy and Reparations drafted by initially by Prof Theo van Boven and subsequently by Prof M Cherif Bassiouni should be the basis of such an instrument
- c) The Consultative Meeting is a suitable forum in which to continue discussions of the existing Draft Principles with a view to achieving consensus on a final text to be submitted to the Commission on Human Rights for adoption.

In addition to the broad acknowledgment and recognition of the Consultative Meeting as an appropriate forum in which to seek to achieve the requisite consensus, there is no legal or procedural bar preventing its implementation. Even though the Consultative Meeting is an *ad hoc* mechanism and, as it can be inferred from the name: consultative in nature and therefore lacking the capacity to adopt the text of an instrument, it is still a valid procedure to reach consensus and finalise the Draft Principles. General Assembly Resolution 41/120 of 4 December 1986 regarding the “Establishment of International Norms on the subject of Human Rights” gives ample room to the CHR on procedural mechanisms to discuss new instruments. Furthermore, the CHR decision 2000/109 from 26 April 2000 does not list the IWG as the only valid mechanism through which norms can be adopted. The only recommendation made by decision 2000/109 on the establishment of new norms, is the prerequisite to ask the Sub-Commission to prepare a study on the subject. In this case, the prerequisite has already been satisfied and the instrument at hand is not creating new norms but merely reflecting principles and guidelines. Moreover, the CHR specifically validated the ‘Consultative Meeting Mechanism’ when it adopted resolutions 2000/41 and 2002/44, as well as decision 2001/105 on the subject.

The Consultative Meeting is not intended to be a new or substitute mechanism for adoption. Its objective is to create a discussion forum with a view to achieving consensus on the language of the text in order to bring closure to the process. If achieved, the Consultative Meeting could suggest to the CHR to adopt the text in the future, or otherwise—if the necessary consensus on the wording of text is not reached—propose an alternative mechanism to undertake further work on the existing Draft Principles.

**It is essential that the Commission on Human Rights gives priority to the Draft Principles and that an appropriate, effective and expeditious procedure is established to progress their further study and adoption as soon as possible. A further Consultative Meeting would be an appropriate and effective procedure with which to achieve widespread consensus on the existing text and to ensure the early adoption of the Principles by the Commission.**

<sup>29</sup> See “draft report of the consultative meeting on the draft Basic Principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law”. E/CN.4/3003/--8 Oct 2002.