

BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

Third Consultative Meeting (Geneva, 29 September to 1 October 2004)

Background

The third consultative meeting represents the most recent step in a process that commenced in the early 1990s when Mr **Theo van Boven** was appointed Special Rapporteur to consider the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms and to prepare draft guidelines on the issue. Following that appointment, Mr van Boven prepared a final report (E/CN.4/Sub.2/1993/8) that provided a basis for the first draft 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*" (hereafter referred to as the "Principles and Guidelines"). Pursuant to Decision 1995/117 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Special Rapporteur revised the Principles and Guidelines and submitted this version on 24 May 1996 (E/CN.4/Sub.2/1996/17). Mr van Boven undertook further revision of the Principles and Guidelines, which were finalised on 16 January 1997 (E/CN.4/1997/104).

The Principles and Guidelines were then sent to the Commission on Human Rights and in Resolution 1998/43, the Commission requested the appointment of an independent expert to prepare a revised version of the Principles and Guidelines with a view to their adoption by the General Assembly. Mr **M. Cherif Bassiouni** was appointed to prepare this revised version and instructed to take into account the views and comments of States and intergovernmental organisations in this exercise. This report was submitted in 1999 (E/CN.4/1999/65). The Commission further requested in Resolution 1999/33 that "*the independent expert complete his work... taking into account the views and comments of States and of intergovernmental and non-governmental organisations*" and submit this product at the 56th session of the Commission. This report was duly submitted (E/CN.4/2000/62). At this session of the Commission it was requested, in Resolution 2000/41, that the Secretary-General circulate the Principles and Guidelines among member States and that the Commission organise a consultative meeting in Geneva on the Principles and Guidelines.

The momentum on dealing with the Principles and Guidelines slowed down dramatically between 2000 and 2002. This was due primarily to the advent of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) in 2001. Following the WCAR, fears concerning the notion of reparations for slavery stagnated the process until Commission Resolution 2002/44 requested the Office of the High Commissioner for Human Rights (OHCHR) to organise a consultative meeting to finalise the Principles and Guidelines. This first consultative meeting was held in Geneva from 30 September to 1 October 2002. Pursuant to Commission Resolution 2003/34, a second consultative meeting was held from 21 to 24 October 2003. The third consultative meeting was held pursuant to Commission Resolution 2004/34. The starting point for the consultations was the revised version of the Principles and Guidelines (5 August 2004) prepared by Mr Alejandro Salinas (Chile) (Chairperson-Rapporteur of the second consultative meeting), in consultation with Mr van Boven and Mr Bassiouni.

Participants

As with the previous consultative meetings, the meeting was open to all interested member States, intergovernmental organisations and NGOs in consultative status with the Economic and Social Council. Mr **Salinas** was again elected Chairperson-Rapporteur, and he was assisted in his responsibilities by Mr van Boven (Mr Bassiouni was unable to attend).

The **member States present** included: Argentina; Australia; Austria; Belgium; Bolivia; Brazil; Canada; Chile; Cuba; the Czech Republic; the Dominican Republic; Ecuador; Egypt;

Finland; France; Germany; Greece; Guatemala; India; Japan; Mexico; the Netherlands; Nigeria; Peru; the Russian Federation; Saudi Arabia; Slovenia; Spain; Sweden; Switzerland; the United Kingdom (UK); and the United States of America (USA). Of these States, the following played a **particularly active role**: Canada, the USA, Mexico, Germany and the Russian Federation, with the delegate from the Russian Federation adopting a notably combative and unproductive stance throughout the meeting. A number of the member States sent delegates to participate in the third consultative meeting who had not participated in the previous meetings. The Chairperson-Rapporteur suggested that these personnel changes meant that debates tended to repeat, rather than advance, those discussions that took place at the second consultative meeting.

Among the **intergovernmental organisations and NGOs** present were: *International Committee of the Red Cross (ICRC)*; *Consultative Council of Jewish Organisations (CCJO)*; *Amnesty International (AI)*; *International Rehabilitation Centre for Victims of Torture (IRCT)*; *International Commission of Jurists (ICJ)*; and *Redress*. All of these bodies played an active and productive role in the meeting, taking the floor regularly to both initiate and contribute to debates. In particular, the representative from the ICRC played a key role in explaining the context of a number of provisions in the Principles and Guidelines, and often clarifying for member States the relevant principles of international law.

Outcome: revised content of Principles and Guidelines

The third consultative meeting followed the trend set in the second consultative meeting¹ and **further weakened the Principles and Guidelines**. In order to track this weakening of the text in more detail, this section compares and evaluates the relevant textual changes made between the revised version of the Principles and Guidelines dated 5 August 2004 (the document that provided the base for discussions at the third consultative meeting) ("the 5 August draft") and the revised version of the Principles and Guidelines dated 1 October 2004 ("the 1 October draft") produced at the third consultative meeting.

First, the 1 October draft places **more emphasis on the fact that the Principles and Guidelines reiterate existing international law rather than create new rules**. An example of this increased emphasis is in Principle 4, where the obligations of States to co-operate with one another and assist international judicial organs with investigation and prosecution of violations, is qualified to read "*States should, in accordance with international law, co-operate...*".

Second, Principle 5 has been amended so that in the 1 October draft, the "**right to a fair trial**" **no longer appears** in the list of "*international legal requirements*" to which a State is subject when making decisions concerning extradition or surrender of offenders to other States and international judicial bodies. This change was insisted upon by the Russian Federation, and supported by India (as a result of thinly disguised pressure from the Russian delegate).

Third, Principle 7 of the 1 October draft **does not contain** the very important sentence present in the 5 August draft, which read "*Moreover, **statutes of limitations** shall not be applied to periods during which no effective remedies exist for gross violations of international human rights law and serious violations of international humanitarian law*".

Fourth, Principle 12 has also been amended such that the statement that "**A victim's right of effective access to justice also extends to international proceedings as provided by international law**" **does not appear** in the 1 October draft.

Fifth, Principle 18 of the 5 August draft concerning **state succession** ("*In cases where the State or Government under whose authority the violation occurred is no longer in existence, the successor State or Government in title should provide reparation to the*

¹ As exemplified in the approach of the USA, which following a failed attempt to have international humanitarian law deleted entirely from the text, sought weakened language in respect of provisions pertaining to international humanitarian law.

victims") **was removed** at the third consultative meeting. The impetus for this change came from the Russian Federation, who refused to agree to the Principles and Guidelines without such a revision. Given that the Principles and Guidelines do not seek to alter existing international law, this change is without prejudice to existing rules concerning state succession. Further, due to the complicated and contested nature of the rules regarding successor States, this omission may facilitate the eventual adoption of the Principles and Guidelines.

Sixth, Principle 22(a) was modified to **reduce the content of the remedy of satisfaction**; whereas the 5 August draft read "*Satisfaction should include cessation of continuing violations*", the 1 October draft now reads "*Satisfaction should include effective measures aimed at the cessation of continuing violation*".

These outcomes and the time taken to conclude these discussions, make it apparent that that **further consultations on the Principles and Guidelines will be of little positive consequence**. The consultative meetings, taken as a whole, have resulted in a document imbued with political compromise rather than a detailed articulation of principles by experts.

Future steps

Despite the disappointing outcomes of the consultative meetings, the need for a systematic compilation of existing standards and norms on the right to remedy, reparation and rehabilitation as a tool for victims of violations of human rights and international humanitarian law, firmly remains. While the Principles and Guidelines do not exist to create new rules, they do offer guidance on an already existing normative framework for issues relating to remedies. Due to their unique victim-oriented approach, **it is of vital importance that these Principles and Guidelines find their way into accepted legal discourse and are adopted by the Commission at its 61st session**.

There are **two steps that will take place before the 61st session of the Commission**. First, pursuant to Commission Resolution 2004/34, the High Commissioner will transmit the outcome of the consultative process to the Commission. This report of the Chairperson-Rapporteur on the third consultative meeting is not available at the time of this writing. Second, pursuant to a proposal made during the third consultative meeting, an informal meeting will be held on 23 February 2005 to discuss follow-up to the third consultative process.

However, what these steps will mean for the status of the Principles and Guidelines remains unclear. The **potential options** include: adoption by consensus of the text in its present form at the Commission²; voting on the text in its present form at the Commission; convening of a further consultative meeting to revise the Principles and Guidelines; or establishment of a Working Group on the issue. Of these options, **adoption by consensus is the most desirable outcome**. However, if this proves to be untenable, the next best option would be for a vote to be held. The convening of a further consultative meeting would only result in further weakening of the text; and the establishment of a Working Group would only prolong a process that has been in existence for over a decade. Neither of these options bode well for the interests of victims, for whom the Principles and Guidelines are designed.

² As the Principles and Guidelines have emerged from a consultative meeting (as opposed to a Working Group), the participants in the meeting are unable to formally adopt the text.