

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

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**1. Historical Context**

The Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted in 1989, by its resolution 1989/13 of 31 August 1989, a Special Rapporteur with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms with a view to exploring the possibility of developing basic principles and guidelines on the issue. The study originated at a time of political change on various continents with prospects of a higher degree of human rights advancement. It was also a time of the creation of transitional justice mechanisms in a series of countries. Restoring justice implied an increased focus on the criminal responsibility of perpetrators of gross human rights abuses and their accomplices. It also opened up the exposure of many wrongs inflicted on the victims of these abuses with a view to rendering retributive justice and reparative justice. It was fitting in the search for transitional justice and it responded to a climate of improved human rights awareness that the Sub-Commission embarked, under the auspices of its parent body the United Nations Commission on Human Rights, on the undertaking of studies aimed respectively at combating impunity and strengthening victims' rights to redress and reparation.

The impunity issue and the reparations issue are undoubtedly interrelated, certainly from the perspective of transitional justice in societies emerging from dark episodes of violence, persecution and repression. The work on both projects was only completed after some fifteen years of consultations and negotiations. The United Nations General Assembly adopted in 2005 by consensus the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter referred to as "the Principles and Guidelines") (reparation principles) and in the same year the then United Nations Commission on Human Rights (succeeded by the Human Rights Council in 2006) endorsed the Updated Set of principles for the protection and promotion of human rights through action to combat impunity (impunity principles) (E/CN.4/2005/102/Add.1). The present note will deal with the Principles and Guidelines and will first review some significant developments in the negotiating history of this international instrument.

**2. Significant Developments in the Negotiating History**

In this note, a selection is made of some of the main issues that came up in the process of discussions and negotiations.

(a) *State Responsibility*

From the outset the Principles and Guidelines were based on the law of State Responsibility as elaborated over the years by the International Law Commission in a

set of Articles on Responsibility of States for Internationally Wrongful Acts which were commended in 2001 to the attention of governments by the United Nations General Assembly (A/RES/56/83). It was argued, however, by some governments that the Articles on State Responsibility were drawn up with inter-State relations in mind and would not *per se* apply to relations between States and individuals. This argument was countered in that it ignored the historic evolution since the Second World War of human rights having become an integral and dynamic part of international law as endorsed by numerous widely ratified international human rights treaties. It was also said to ignore that the duty of affording remedies for governmental misconduct was so widely acknowledged that the right to an effective remedy for violations of human rights and *a fortiori* of gross human rights violations, may be regarded as forming part of customary international law.

(b) *Human Rights Law and International Humanitarian Law*

While in the early stages the Principles and Guidelines addressed the right to a remedy and reparation under international human rights law, later drafts also encompassed this right under international humanitarian law. Certain governments objected to widening the scope of the Principles and Guidelines so as to cover international humanitarian law because of the different evolution and the distinct nature of the two fields of international law entailing different sets of rights and obligations. These governments favoured two separate instruments. However, this view did not prevail. It was widely felt that insofar as the Principles and Guidelines are victim oriented and predicated on social and human solidarity, it must be understood that the Principles and Guidelines are not intended to reflect the legal differences between international human rights law violations and international humanitarian law violations. It was also considered that although the two fields of international law have developed along separate legal and historic tracks, they nevertheless overlap in some respects and provide complementary protections of victims, though not necessarily in the same manner or using the same terminology.

(c) *Gross Violations or All Violations*

The initial study carried out by the Special Rapporteur under the mandate of the Sub-Commission referred to victims of *gross* violations of human rights and fundamental freedoms. In this study it was noted that the word “gross” qualifies the term “violations” and indicates the serious character of the violations but that the term “gross” is also related to the type of human rights that is being violated. In the ensuing discussions and negotiations it was, however, argued that the Principles and Guidelines would be unduly restrictive since *all* violations of human rights entail the right to redress and reparation. On the other hand, with the evolving opinion that the Principles and Guidelines should also cover serious violations of international humanitarian law, the view prevailed that the focus of the document should be on the worst violations. The authors had in mind the violations constituting international crimes under the Rome Statute of the International Criminal Court. On this premise, a number of provisions were included in the Principles and Guidelines spelling out legal consequences that are contingent, according to the present state of international law, upon international crimes. Such provisions affirm the duty of States to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish (principle 4). They also include the duty to make appropriate provisions for universal jurisdiction (principle 5), as well as references to the non-applicability of statutes of limitations (principles 6-7). While the Principles and Guidelines focus on “gross” and “serious”

violations, it is generally acknowledged that in principle all violations of human rights and international humanitarian law entail legal consequences. Thus, in order to rule out any misunderstanding on this score, the following phrase was included in principle 26 on non-derogation:

“[I]t is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of *all* violations of international human rights and international humanitarian law” (italics added).

(d) *The Notion of Victims*

In situations which are characterized by systematic and gross human rights abuses, large numbers of human beings are usually affected. In principle, they are all entitled to reparative justice. Problems do arise, however, because of the tension between the large number of persons involved and the limited capacity, in many situations, to afford reparations. In order to devise and apply fair and just criteria for the rendering of reparative justice in terms of personal and material entitlements, it was argued that there must be an objective test to determine who is a victim. A great variety of views were expressed in the consultations and deliberations on these issues. Views differed as to whether collectivities should be included in the notion of victims. Reservations were also expressed against legal or moral persons as possible victims. As a general compromise it was agreed to base the notion of victims, as reflected in principles 8 and 9 of the Principles and Guidelines, on the terms of the generally accepted Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted in 1985 by the United Nations General Assembly (A/RES/40/34). This definition notes that a person is a victim if he or she suffered physical or mental harm, economic loss, or impairment of his or her fundamental rights; that there can be both direct victims and indirect victims, such as family members or dependents of the direct victim; that persons can suffer harm individually or collectively.

(e) *Non-State Actors*

While the Principles and Guidelines are drawn up on the basis of State responsibility, the issue of responsibility of non-State actors was also raised in the discussions and negotiations, notably insofar as movements or groups exercise effective control over a certain territory and people in that territory, but also with regard to business enterprises exercising economic power. It was generally felt that non-State actors are to be held responsible for their policies and practices, allowing victims to seek redress and reparation on the basis of legal liability and human solidarity, and not on the basis of State responsibility. The Principles and Guidelines provide for equal and effective access to justice, “irrespective of who may ultimately be the bearer of responsibility for the violation” (principle 3 (c)). In this connection reference is also made to the following provision: “In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim” (principle 15, last sentence). It is a victim-oriented perspective that was kept in mind in extending, albeit in a modest and cautious way, the scope of the Principles and Guidelines to include the responsibility and liability of non-State actors.

### 3. Structure and Summary of Key Provisions

The Principles and Guidelines have a preamble setting out their purpose and object. They are subsequently divided into the following thirteen sections containing a total of twenty seven articles:

- Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law (Section I)
- Scope of the obligation (Section II)
- Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law (Section III)
- Statutes of limitations (Section IV)
- Victims of gross violations of international human rights law and serious violations of international humanitarian law (Section V)
- Treatment of victims (Section VI)
- Victims' right to remedies (Section VII)
- Access to justice (Section VIII)
- Reparation for harm suffered (Section IX)
- Access to relevant information concerning violations and reparation mechanisms (Section X)
- Non-discrimination (Section XI)
- Non-derogation (Section XII)
- Rights of others (Section XIII)

Broadly speaking, the first four sections, encompassing seven articles, affirm the obligations of States and legal implications in connection with gross violations of international human rights law and serious violations of international humanitarian law, notably the obligation to prevent violations, the obligation to investigate, prosecute and punish perpetrators, the obligation to provide effective access to justice to all persons alleging a violation, and the obligation to afford full reparation to victims (principles 1-4). The legal implications relate to and qualify universal jurisdiction, extradition, judicial assistance and cooperation as well as statutes of limitations (principles 5-7).

The larger part of the Principles and Guidelines, with strong domestic law implications, sets out the status and the rights of victims, and corresponds to the title of the document as it refers to the right of victims to a remedy and reparation (in particular principles 11-23). A core component of the Principles and Guidelines, denoting a broad range of material and symbolic means to afford reparation to victims, is laid out in the principles describing the various forms of reparation. They were formulated with the Articles on State Responsibility of the International Law Commission in mind. The various forms of reparation and their scope and content, covering both monetary and non-monetary reparations, may be summarized as follows:

- *Restitution* refers to measures which “restore the victim to the original situation before the gross violations of international human rights law and serious violations of international humanitarian law occurred” (principle 19). Examples of restitution include: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.
- *Compensation*: “should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of

- each case” (principle 20). The damage giving rise to compensation may result from physical or mental harm; lost opportunities, including employment, education and social benefits; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
- *Rehabilitation* includes medical and psychological care, as well as legal and social services (principle 21).
  - *Satisfaction* includes a broad range of measures, from those aiming at cessation of violations to truth seeking, the search for the disappeared, the recovery and the reburial of remains, public apologies, judicial and administrative sanctions, commemoration, and human rights training (principle 22).
  - *Guarantees of non-repetition* comprise broad structural measures of a policy nature such as institutional reforms aiming at civilian control over military and security forces, strengthening judicial independence, the protection of human rights defenders, the promotion of human rights standards in public service, law enforcement, the media, industry and psychological and social services (principle 23).

#### **4. Influence on Subsequent Documents**

Since the beginning of their drafting, the Principles and Guidelines were meant to reflect the current state of international law on remedies and reparations. The preamble, in its seventh paragraph, emphasizes that “the Basic Principles and Guidelines [...] do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms”. Already in their draft form, the Principles and Guidelines have served as reference for governments and domestic, regional and international courts. Thus, several Latin American countries, in drawing up legislation on reparation for victims, took the draft Principles and Guidelines into account. Also the Inter-American Court of Human Rights referred several times to the (draft) Principles and Guidelines in its jurisprudence relating to various forms of collective and individual reparation it awarded. Further, the Statute of the International Criminal Court adopted by a diplomatic conference in Rome in 1998, notably in article 75 dealing with reparation to victims, bears in its intent and wording the imprint of the (then) draft Principles and Guidelines.

It should also be noted that in a decision of 18 January 2008 (Decision on victims’ participation in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06), the Trial Chamber of the International Criminal Court, in the absence of a definition of the concept of harm under its own rules, referred to this concept in principle 8 of the Principles and Guidelines as providing “appropriate guidance”. A highly notable impact of the Principles and Guidelines on the development of international human rights law can be found in the International Convention for the Protection of All Persons from Enforced Disappearances adopted by the General Assembly in December 2006 (A/RES/61/177). Article 24 of this Convention, following the various forms of reparation as set out in the Principles and Guidelines, is more elaborate and specific about the victims’ right to obtain reparation than any previous international human rights treaty.

## **Related Material**

### ***A. Legal Instruments***

Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, p. 3

International Convention for the Protection of All Persons from Enforced Disappearance, in: *Report of the Human Rights Council on its 7th session*, A/HRC/7/78, 14 July 2008, p. 74-75

### ***B. Jurisprudence***

International Criminal Court, Trial Chamber, Decision of 18 January 2008 on victims' participation in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06

### ***C. Documents***

#### ***1. Preparatory Documents***

Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its forty-first session, 7 August to 1 September 1989 (E/CN.4/Sub.2/1989/58 (E/CN.4/1990/2))

Preliminary report submitted by Theo van Boven, Special Rapporteur, "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms" (E/CN.4/Sub.2/1990/10, 26 July 1990)

Progress reports submitted by Theo van Boven, Special Rapporteur, "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms" (E/CN.4/Sub.2/1991/7, 25 July 1991, and E/CN.4/Sub.2/1992/8, 29 July 1992)

Final report submitted by Mr. Theo van Boven, Special Rapporteur, "Study concerning 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, 2 July 1993)

Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117 (second draft) (E/CN.4/Sub.2/1996/17, 24 May 1996)

Basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights and international humanitarian law prepared by Mr. van Boven (third revised draft) (E/CN.4/Sub.2/1997/104, 13 January 1997 (E/CN.4/1997/104, Annex))

Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Mr. M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights resolution 1998/43 (E/CN.4/1999/65, 8 February 1999)

Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, "The right to restitution, compensation and

rehabilitation for victims of gross violations of human rights and fundamental freedoms” (E/CN.4/2000/62, 18 January 2000)

Note by the High Commissioner for Human Rights on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law, transmitting the 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.4/2003/63, 27 December 2002)

Note by the High Commissioner for Human Rights on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law, transmitting the Report of the second consultative meeting on the Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights law and humanitarian law (E/CN.4/2004/57, 10 November 2003)

Note by the High Commissioner for Human Rights on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law, transmitting the Report the third consultative meeting on the “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.4/2005/59, 21 December 2004)

General Assembly, Summary records of meetings Nos. 22, 29, 37 and 39 held in the Third Committee from 24 October to 10 November 2005 (A/C.3/60/SR.22, 29, 37 and 39)

## ***2. Other Documents***

General Assembly resolution 40/34 of 29 November 1985 (Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power)

General Assembly resolution 56/83 of 12 December 2001 (Responsibility of States for internationally wrongful acts)

Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1)